

Decision No. _____.

ORIGINAL

Decision No. 3149

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

JAMES S. NAISMITH,

Complainant,

vs.

Case No. 904.

BROOKDALE LAND COMPANY, MOUNTAIN
LIGHT AND WATER COMPANY and the
COUNTY OF SANTA CRUZ,

Defendants.

P. L. Benjamin for complainant.
George T. Wright for defendant,
Brookdale Land Company.
John C. Hughes for defendant,
Mountain Light and Water
Company.
George W. Smith, District Attor-
ney, for defendant, County
of Santa Cruz.
Robert Duke for State Fish and
Game Commission.

BY THE COMMISSION.

O P I N I O N.

This is a complaint brought by James S. Naismith, a householder in the village of Brookdale, Santa Cruz County, against Brookdale Land Company, the County of Santa Cruz and Mountain Light and Water Company, for the purpose of having a certain agreement between the defendants Brookdale Land Company and the County of Santa Cruz declared null and void and for a further order prohibiting the defendants Brookdale Land Company and Mountain Light and Water Company from using any

of the waters of the stream known as Clear Creek for any other purposes than those of supplying the inhabitants and property owners of Brookdale with water for domestic and other necessary purposes and of generating electricity from the surplus water of said creek for supplying said inhabitants and property owners with electric light and power and prohibiting defendant County of Santa Cruz from taking, receiving, or demanding for the purpose of said fish hatchery all or any portion whatever of said water except such portion as after having been properly employed for the purpose of generating electricity would go to waste if not used by said County of Santa Cruz for the purposes of said fish hatchery.

A public hearing was held in San Francisco on February 23, 1916. From the evidence it appears that defendant Brookdale Land Company was incorporated several years ago for the purposes, among others, of acquiring, owning, holding, dealing in, selling and disposing of real estate and supplying water and electric light and power to the residents and property owners of the village of Brookdale and its immediate vicinity. Directly after its incorporation Brookdale Land Company acquired all the water rights upon Clear Creek, Santa Cruz County, which are the subject of this controversy, and also all the land comprising the village of Brookdale with the exception of a few lots which had been sold by its predecessor.

On May 7, 1912, said Brookdale Land Company executed a deed which purported to transfer and convey to the County of Santa Cruz a certain parcel of land, certain easements and all of the waters of the west branch of Clear Creek, for use by said County in the operation and maintenance of a fish hatchery. The County of Santa Cruz gave merely nominal consideration for said property and the deed contains a provision that if the

County of Santa Cruz or its successors "cease without any good or valid reason to use said waters for said purposes and to maintain said hatchery to its reasonable capacity for hatching trout for a period of one year then all of the lands or premises together with the rights of way, water rights and appurtenances hereby conveyed shall revert to the party of the first part (the County of Santa Cruz) * * * * ."

This deed was executed shortly after the passage of the Public Utilities Act but without the authority of this Commission and as the grantor was a water corporation and as the water rights transferred were a part of the grantor's system "necessary or useful in the performance of its duties to the public", the transfer of the water rights is void although there is no question but that all of the parties acted in good faith.

The novel point was raised by the defendant County of Santa Cruz that that portion of the Public Utilities Act prohibiting the sale, lease, assignment, mortgage, disposal or incumbrance of all or any part of the utility's property necessary or useful in the performance of its duties to the public, without first obtaining an order from this Commission authorizing the same, does not apply to a transfer to or an incumbrance in favor of a political subdivision of the State of California. We have been unable to find anything in either the language or the spirit of the Public Utilities Act, however, which would in our opinion justify such a contention.

Since its organization the Brookdale Land Company has been disposing of portions of its land in Brookdale and it has thus far sold over one hundred parcels of this land for residence purposes. Moreover, the evidence shows that Brookdale has a fairly large summer population, one witness having testified

that its summer residents number approximately 2,000.

There appears to be no doubt but that the inhabitants of Brookdale have been, from time to time, subjected to more or less serious shortages of water and if the County of Santa Cruz or its lessee, the State Fish and Game Commission, had been inclined and able to enforce the terms of the deed above mentioned the great majority of the residents of Brookdale would have been deprived of water during the dry months as the evidence shows that 185 out of the 220 consumers receive water which, if the deed were valid, would belong to the County of Santa Cruz and which the water company would have no right to furnish to its private consumers.

After supplying the residents of Brookdale with water defendant Brookdale Land Company has used the surplus water for the purpose of operating its hydro-electric plant which is situated considerably below all of its consumers; so that after the water has passed through its power plant it has no further use for it and the subsequent use by the County of Santa Cruz in its fish hatchery cannot interfere with the rights or services of any other consumers.

Toward the close of the hearing and after considerable discussion the parties agreed to a settlement of the case and they thereafter filed a written stipulation, which seems to us absolutely fair to the conflicting rights and interests of the various parties. We shall embody the terms of the stipulation so far as we can properly do so in the following Order. As to the remaining points covered by the stipulation, the Commission expressed its opinion at the hearing that it would be necessary for Brookdale Land Company and Mountain Light and Water Company to execute a new conveyance to the County of

Santa Cruz. This conveyance has been prepared and a formal application has been filed (Application No. 2112) asking this Commission to authorize the applicants (who are the defendants in this case) to execute the same.

There was some question raised at the hearing as to whether the fact that the deed of May 7, 1912, was executed without the authority of this Commission would render the entire deed void or render void only that portion which purported to convey the grantor's water rights, leaving the conveyance of the land unaffected. In view of the terms of the stipulation, however, it is not necessary for us to decide this point, and the following Order is not ^{to be} regarded as passing upon this point in any way.

O R D E R.

A public hearing having been held in the above entitled case and the matter having been duly submitted and the parties thereto having thereafter filed a written stipulation regarding the settlement of said case,

IT IS HEREBY ORDERED by the Railroad Commission of the State of California that as the alleged conveyance of water rights by the defendant Brookdale Land Company to the defendant County of Santa Cruz on May 7, 1912, which conveyance is recorded in the office of the County Recorder of the County of Santa Cruz in Volume 241 of Deeds, p. 272, is null and void in so far, at least, as it attempts to convey all or any part of the waters

or water rights mentioned in said conveyance, the defendants Brookdale Land Company and Mountain Light and Water Company are hereby ordered and required to use all of said waters and water rights that may be necessary for the purpose of supplying the inhabitants of the village of Brookdale, Santa Cruz County, and its vicinity with water for municipal, business and household purposes, including the irrigation of gardens, and

IT IS HEREBY FURTHER ORDERED that the defendants Brookdale Land Company and Mountain Light and Water Company use as much of the remaining water subject to their control or the control of either of them as may be necessary for the purpose of generating electric energy for supplying said inhabitants of Brookdale and its vicinity with electricity, and

IT IS HEREBY FURTHER ORDERED that all of said water that may not be necessary for said municipal, business or household purposes be allowed, after having passed through the generating plant, to flow down to the fish hatchery of the County of Santa Cruz.

Dated at San Francisco, California, this 11th day of March, 1916.

Max Thelen
H. H. Loveland
Alvin Gordon
Edwin O. Edgerton
Stanley D. Decker
Commissioners.