

Decision No. ✓

ORIGINAL

Decision No. 3297

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

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M. V. STIREWALT, et al.,

Complainants,

-vs-

CONSOLIDATED CANAL COMPANY,

Defendant.

CASE NO. 916.

M. V. Stirewalt, R. A. Engelbreck, and
Adolph Anderson, for complainants.

Short & Sutherland, by W. A. Sutherland,
for defendant.

BY THE COMMISSION:

O P I N I O N.

Complainants are sixteen ranchers in the vicinity of Kingsburg, Fresno County, located along the Lobre ditch, a private irrigating canal leading from defendant's Grant Canal. Lobre ditch, including its three branches, is about four and one-quarter miles long and was constructed by ranchers of the vicinity prior to 1904.

The complaint alleges that defendant refuses to operate the ditch because some users have not paid their water assessments; that it has failed to construct and maintain the ditch and structures in suitable condition to give adequate service; and that it wasted water needed by irrigators. The answer denies most of the allegations, admits re-

fusal to operate the ditch but expresses willingness to do so if assured in advance the amount of its expenditures.

Some 23 irrigators signed a proposition dated October 21, 1914, which was transmitted to defendant by the Commission. It reads as follows:

"We, the undersigned water users on the Lobre ditch, hereby request that the Consolidated Canal Company take over, maintain and operate the Lobre ditch forthwith:-

From the end of the Company's present jurisdiction to the southwest corner of Section Nine (9) being three miles more or less, including all the structures thereon.

And we agree to pay in advance ten cents (10¢) per acre to cover necessary repairs for fall of 1914.

And we agree to pay thirty-five cents (35¢) per acre for season of 1915.

And we agree to pay twenty-five cents per acre annually thereafter on October 1st.

Any part of these amounts which is remaining after the seasons work is done is to apply on the next years water assessment.

On demand of water users, Canal Co. to furnish itemized statement of actual cost. If unsatisfactory, water users may cancel this agreement by unanimous consent at end of three years.

All the above in accordance with Rule 1 of the rules and regulations ordered by Railroad Commission and with the estimate of the Commission's Engineer June 1st, 1914."

Defendant accepted the offer and in January and February, 1915, reconstructed the ditch where needed, throughout its entire length, remodeling portions, scraping out portions, previously plowed by land owners in most places; practically rebuilding two sections aggregating about 1200 feet, putting in some 44 new structures, repairing flumes and other

structures, and putting the ditch into a condition which it claims is adequate for the service of all of the lands tributary to the ditch, much of which, however, is not irrigated. The capacity of the ditch after being reconstructed/^{was sufficient} to carry about 20 second feet of water in that portion above the Emigrant Canal and about 12 second feet in the portions south of Emigrant Canal.

In doing the work defendant claims to have made the following expenditures:

Superintendence, labor and teams in reconstruction	\$596.75
Lumber, roofing and nails.....	153.59
For labor, tending ditch and flume, 1915, and repairs 1915.....	216.75
Total.....	\$967.09

It levied assessments of 10¢ and 35¢ respectively per acre upon the 1096.5 acres served by the Lobre ditch amounting to \$493.05, of which it has collected \$259.60, leaving unpaid a balance of \$233.45, as more fully shown in the following tabulation:

<u>Assessments not paid.</u>				
<u>Acres</u>	<u>% not paid</u>	<u>10¢ A 1914</u>	<u>35¢ A. 1915</u>	<u>Total</u>
406	-37	\$40.60	\$142.10	\$182.70
145	-13½		50.75	<u>50.75</u>
				\$233.45

Of the 1096.5 acres assessed, owners of 525.5 acres signed the petition or agreement; owners of 265 acres not signing paid the assessment of 10¢ per acre, and owners of 205 acres paid the assessment of 35¢ per acre, thus ratifying the agreement. The total of 790 acres represented by those signing or ratifying through payment, is over 72% of the 1096.5 acres assessed. Owners of nearly 37% of the acreage did not pay either assessment and the second assessment was not paid on over 13% of the acreage.

Defendant diverts water from Kings River which it serves for irrigating large areas through an extensive system of canals. Water users on Lobre ditch have contracts with defendant for service of not exceeding two cubic feet of water per second per quarter section of land delivered on defendant's main canals at a contract rate of 75¢ per acre per year. The respective payments of 10¢, 25¢ and 35¢ per acre referred to in the agreement are in addition to the regular contract rate of 75¢, and are for additional service to the extent of maintenance and operation of the Lobre laterals.

From the testimony at the hearing it appears that during 1915 there were many breaks in the ditch, that some users most of the time could not get water, that water was turned out of the ditch at times when irrigators needed water, and that there was no regulation by defendant of the use of water by irrigators on the Lobre ditch. When breaks occurred it was necessary to turn the water out of the ditch and dry it up sufficiently to make repairs. At one time the water was out for six days, and on other occasions for shorter periods, while repairs were being made. One portion of the ditch was repaired seven times. Defendant regularly turned the water out of the ditch at night up to July 6th when water became low in the river, and on other occasions when water was not being sufficiently used by irrigators and the banks were endangered by the stage of the water. The ditch tender made practically daily trips ^{over} the ditch or parts of it, receiving requests for water and turning in water for the aggregate needs of users, but not attempting to regulate the use as between irrigators. Almost no complaints were made to him concerning service, and very few to defendant. It appears that all causes of complaint can be removed by now strengthening the ditch in places and by observance of proper operating methods which will be the subject of rules and regulations provided.

At the close of the hearing it was agreed that Mr. R. W. Hawley, hydraulic engineer of the Commission, would inspect the ditch and investigate the work done by defendant upon it and check the cost of the work as nearly as possible from such inspection and investigation, and submit his estimate of cost thereof. His estimate of the highest reasonable cost of the work to defendant, accepting defendant's statement of cost of repairing breaks, is as follows:

New ditch	\$ 90.
Clearing canal	120.
Building turn-outs	170.
Building checks, etc.	250.
Time of ditch tender	62.
Repairing breaks, etc.	<u>49.</u>

Total - \$741.

Referring to defendant's statement of cost, the men at the camp paid their board, so that the item camp cook, \$40.50, should, be eliminated, ditch tender's time reduced \$106.25, according to testimony, to one-third of his time for the $2\frac{1}{2}$ months the ditch was operated, and superintendent's time should be reduced \$67.50, being about half, for time evidently devoted by him to other work, making total deductions of \$214.25, reducing defendant's statement to \$753. The time book for the construction period shows rough segregation of time between this and other work, but not in sufficient detail to become the basis for exact figures. However the two estimates of cost, using these different methods, are very close. We find defendant should receive \$810. 00 to reimburse it for the actual cost of work done with interest upon investment until time of its probable repayment, of which sum \$259.60 has been paid. That it was to receive actual cost was understood at the preliminary conference and evidently intended by the written agreement.

Defendant evidently did not understand that a branch of the ditch leading to the property of Adolph Anderson and others

sometimes called the West Branch was included in the terms of the agreement and comparatively little work was done upon it and evidently poor service resulted. We shall provide in the order that defendant repair, maintain and operate this portion of the ditch also, expecting it to be reimbursed for any necessary additional outlay on account thereof.

The 1914 agreement resulted from suggestions made by the engineers of the Commission. The Commission naturally anticipated that those who sought its aid would promptly pay the amounts agreed upon. Those obligated to pay and those benefited should have paid the assessments and reported promptly to the Commission if they did not receive proper service. The Commission has ample power to enforce such service and is willing to use its power if it becomes necessary and conditions justify. Instead of taking the course indicated, however, irrigators seem to have taken the matter into their own hands, many of them readily breaking their part of the agreement to pay, apparently in the belief that defendant would not do what it agreed in repairing and operating the ditch. Defendant did not seek to discriminate in service between those who paid and those who did not pay. The 1914 agreement did not obligate it to deliver water along Lobre ditch to those who did not pay as agreed. All irrigators on the ditch were entitled to receive water on the main canals if they paid their original contract rate of 75¢ per acre for water delivered there, and get it to their lands by whatever means they chose. Those bound by the 1914 agreement were not entitled to use the structures, facilities or increased efficiency provided along the Lobre ditch by defendant, without special payment therefor; and other irrigators were not morally entitled to such use. We expect irrigators to promptly pay the assessments not already paid and we expect defendant to at once collect unpaid assessments for 1914 and 1915 and to collect

succeeding assessments on the 1st of May of each year. It is evident that payment should be made before service is rendered, and that payments must be increased to return to defendant cost of this special service.

O R D E R.

M. V. STIRWALT, et al. having complained of defendant that it has failed to adequately reconstruct, maintain and operate the Lobre ditch leading from defendant's Grant Canal, and defendant having answered denying that it assumed any obligation in reference thereto beyond the irrigating season of 1915 and that it has refused to manage and operate the ditch because of the failure of certain water users to pay therefor as agreed, and a public hearing having been held thereon, testimony taken and the matter having been submitted and being now ready for decision.

IT IS HEREBY ORDERED by the Railroad Commission of the State of California that defendant repair, maintain and operate until the further order of the Commission all of said Lobre ditch, including what is known as the west branch thereof, in accordance with the rules and regulations for Consolidated Canal Company and its water users, set forth in supplemental order in the case of D. E. Brown et al. v. Consolidated Canal Company, decision No. 1390, (Vol. 4, Opinions and Orders of the Railroad Commission of California, p. 592) as fully and completely as though said ditch were part of defendant's system; and that it deliver water through said ditch and its structures only to those irrigators who pay for such service at the rates hereinafter provided.

All irrigators served through said ditch who have not heretofore paid both the assessment of 10¢ per acre and 35¢ per acre respectively levied by defendant on account of the reconstruction, repair, operation and maintenance of said ditch during the irrigating season of 1915, shall on or before May 15, 1916 pay the amount of said two assessments now remaining

unpaid. All irrigators served through said ditch shall also pay on or before May 15th, 1916 and on or before May 1st, 1917 the sum of 35¢ per acre per year respectively on account of reconstruction, repair, maintenance and operation of said ditch for the irrigating season of 1916 and 1917 respectively, and shall thereafter pay on said account annually or before the 1st day of May in each year the sum of 25¢ per acre per year until the further order of the Commission.

Defendant is authorized to refuse to deliver water through said Lobre ditch or the structures thereon to any irrigator thereon until said irrigator has paid the rates hereinabove set forth.

Dated at San Francisco, California, this 29th day of April, 1916.

Max Helen

H. S. Loveland

Frank R. DeWine
Commissioners.