Decision No. 418

BEFORE THE RAILROAD COMMISSION
OF THE STATE OF CALIFORNIA.

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ORIGINAL

TYNDALE PALMER, OTAY WATER LEAGUE, et al., Complainants, - vs. - SOUTHERN CALIFORNIA MOUNTAIN WATER COMPANY, Defendant, CITY OF SAN DIEGO, Intervenor.	CASE NO. 261.

Tyndale Palmer, Esq., for complainants.
H. E. Doolittle, Esq., H. L. Titus, Esq., and R. G. Dilworth, Esq., for defendant.
W. R. Andrews, Esq., City Attorney, for intervenor.

ESHLEMAN, COMMISSIONER.

OPINION

On March 23, 1912, the complaint in this case was filed on behalf of certain residents and citizens of San Diego County residing and owning land in what is known as the Otay Valley. It is alleged in said complaint that the defendant is a public service water company, having appropriated water for sale, rental and distribution within the County of San Diego, and that the complainants are within the flow of the system of defendant and within the places of designated use as set out in the notice of appropriation of defendant. Relief is prayed on six grounds, set out in the complaint as follows:

"FIRST. That your Honorable Body, at the earliest possible date, make (1), an investigation and examination of defendant's water system, and order a hearing, to determine what part thereof is necessary for the service required by the complainants herein; (2), that you cause a physical valuation to be made of the entire plant, as provided by Sec. 47 and Sec. 70 of the Public Utilities Act, that you determine its cost, the cost of operation, and the depreciation thereof; (3), that you then fix rates to be charged and collected by the defendant for water for irrigation and other purposes which shall be in accordance with the requirements of the Public Utilities Act, commensurate

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with the value of the service to the complainants, and just and reasonable alike to the water users and to the company; as required by Sec. 13 of said Public Utilities Act, and by the Water Law of 1885.

"SECOND. That the defendant be ordered forthwith to cease discrimination in respect to charges for water supplied by it, and that defendant be ordered to supply water to all the complainants who make legal application and tender of rates therefor, and who belong to the classes or communities for whom the water was appropriated as stated in defendant's notice of appropriation of water, and that such water be sold to all such persons from this time forward at the lowest rate now charged therefor until such time as your Honorable Body has fixed other rates, or until other rates have been established in accordance with the Public Utilities Act.

"THIRD. That defendant be ordered forthwith to commence construction at its own cost and expense of a system of distributing pipe-lines, and to complete within four (4) months from date of this complaint, such a distribution system as will be adequate to supply complainants with water for irrigation and other uses upon their said lands, and to provide all pipe-lines, laterals, meters, gates, valves and appliances that may be necessary to deliver water to the property line of the lands of complainants at the proper point for gravity irrigation; and that your Honorable Body order water to be delivered, as above provided, at the earliest practicable date to all complainants who make proper application and tender therefor, whether the entire distribution system so ordered be completed or not.

"FOURTH. That defendant be ordered forthwith to discontinue making a charge for appliances or equipment necessary to deliver the water to the property line of the water user, or that may be required to measure said water.

"FIFTH. That defendant be prohibited forthwith from making any different rate or charge for water for domestic use where the same water is being supplied to the same lands for irrigation purposes.

"SIXTH. That your Honorable Body will give such other and further relief as is just and proper in the premises."

The defendant answered the complaint on April 25th, 1912, admitting many of the allegations of the complaint but setting up the fact that all of the appropriated water is now devoted to a public use mainly within the City of San Diego and Coronado for domestic uses, and that the defendant has no water in its possession which can be accorded to the complainants without injury to its present consumers.

On May 20, 1912, the City of San Diego asked leave to intervene, and on May 31st such leave was granted. Said intervenor sets out the facts that in 1905 a contract was entered into between the defendant company and the City of San Diego for an amount of water not exceeding 7,760,000 gallons per day for a period of ten years from

the 1st day of May, 1906, at an agreed price of four cents per thousand gallons; and further that the said City of San Diego was in the midst of negotiations for the purchase and lease of a greater part of the property of defendant for the purpose of utilizing the supply within the City of San Diego.

Meanwhile, Application No. 169 was filed by the defendant herein asking the approval of this Commission of the sale by said defendant to the City of San Diego of certain of its property, and the lease, with an option to sell at the expiration of said lease, of all of the remainder of the property of defendant except that portion of the pipe line of the defendant used to supply the City of Coronado. In this application the City of San Diego thereafter joined, and the complainants herein asked and were granted leave to intervene; so in application No. 169 the same parties were before this Commission as are before it in this case.

The hearing of the case before us was begun at San Diego on August 19th, and thereafter on August 30th application No. 169 was heard, and by agreement all of the evidence in both cases is to be considered in each. A decision was rendered in Application No. 169 on September 12th, 1912, wherein the application of the Southern California Mountain Water Company to sell and lease and the said City of San Diego to purchase and take by lease was granted on two conditions which are set out in the order in Application No. 169, the design of which was to maintain the status of the parties in case No. 261 and prevent the transfer of the property from affecting the issues of the case here pending. Such being the case it is proper to consider the matter now before us and to ascertain the rights of the parties on the basis of the ownership of the property devoted to the public use by a private corporation, it having been specifically stipulated by the City as a condition precedent

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to its acquiring the property "that the City takes the property of the company understanding that any legal claim for water which may be enforced against the company may likewise be enforced against the city. The intent of this condition is that the City shall not raise in any proceeding the point that the mere fact of this transfer has served to change the legal status of the property with reference to its public duties and charges; this stipulation not in anywise morally or legally to bind the City against contesting any claim against the system except on the one ground stated, namely, that the fact of transfer affects the status of the property to such a degree that valid claims against the system in the hands of the company become invalid by reason of the transfer to the city." As I have said, by reason of the parties agreeing to this stipulation we may now consider the issues independent of the fact that there has been a transfer of this property made by the defendant herein to the City of San Diego.

The main question to be decided being the right of the complainants to receive water from the system of the defendant, it is evident that it is advisable to determine this question before proceeding to fix the rates of defendant, because if it should be determined that the complainants are not entitled to water the fixing of rates becomes unnecessary in this proceeding, while if they are so entitled, rates may thereafter be fixed with no added labor, the two enquiries being independent and unrelated. Hence at the hearing heretofore held the questions of rates and conditions of service were not considered, but their determination postponed until the main question shall have been decided.

It seems that the following are the pertinent facts involved herein:

The defendant is a corporation, organized under and by virtue of the laws of the State of California for the purposes of selling, renting and distributing water to the public within cer-

tain specified territory within the County of San Diego for the purposes of irrigation, mining, manufacture, mechanical and domestic uses. The places of intended use, as set out in the notices of appropriation are as follows:

"Scheckler's Mesa, Scheckler's Valley, Dulzura, Jamul Rancho, Jamul Mesa, San Miguel Mesa, Janal Rancho, National Rancho, Otay Rancho, Otay Mesa, Otay Valley, Tia Juana Valley, Head of the Bay Region, Jamacha Rancho, Spring Valley, El Cajon, El Cajon Rancho, Ex Mission Rancho, Pueblo Lands of San Diego, and all the neighboring and adjacent lands and all the lands that can be irrigated from the water of said stream, also the City of San Diego, National City, Coronado, Otay, Tia Juana, and any and all neighboring and adjacent lands, cities, towns, villages, hamlets or places; also all towns, cities, hamlets, villages, manufacturing centers, mining camps, or any other source of lawful and useful demands for said water that may hereafter arise upon the territory herein described, or adjacent therein, or adjacent thereto."

It is actually supplying water to the City of San Diego, and the City of Coronado, and is under contract to furnish an amount approximating fourteen million (14,000,000) gallons per month to parties outside these cities. The evidence is conflicting with reference to the exact amount and it also is not established just how much is being furnished under the several contracts, but it clearly appears that comparatively speaking, little water is now, or ever has been, delivered by this company to any users outside the City of Coronado and the City of San Diego and suburban territory, which although not within the city limits, is for all practical purposes a part of the City of San Diego.

It is also clearly established that, except in the City of San Diego itself, only a very small quantity of water is being devoted to uses other than domestic. It certainly has been the policy of this company for some years to attempt to conserve its supply of water for the cities within its places of intended use to the exclusion of the country districts. The contracts which are in evidence, however, do not limit the use of the water to domestic purposes, but the evidence shows that the main uses to which the water of this system has been applied are domestic uses.

The defendant's water system consists of four dams and reservoirs, known as the Moreno Dam and Reservoir, the Upper Otay Dam and Reservoir, the Lower Otay Dam and Reservoir and the Highland Reservoir, together with conduits connecting these reservoirs. There is also a pipe line from the Lower Otay Reservoir to the City of San Diego and a filtering plant and other appurtenances in connection with this pipe line and a small reservoir known as the Chollas Heights Reservoir, near the City of San Diego, used mainly as a regulating agency. The total storage capacity of these reservoirs is about twenty-nine billion, one hundred and eighty million (29,180,000,000) gallons. On the first day of July, 1912, the total amount of water impounded in the company's system was nine billion, three hundred and eight million four hundred and two thousand (9,308,402,000) gallons. The average daily consumption of water in the City of San Diego for the period ending the first day of July was about six million five hundred thousand (6,500,000) gallons, while the average amount for the same time furnished to the other users, including the City of Coronado, was about seven hundred thousand (700,000) gallons, making the total

average daily consumption about seven million two hundred thousand (7,200,000) gallons. The present supply would be sufficient for about 3½ years for the present consumers without taking into consideration seepage or evaporation. These losses, however, play an important part in any system which is at all dependent upon storage. The percentage of loss by evaporation of course varies in accordance with the depth of the reservoir as compared with its surface area and the height of the water in such reservoir. The evaporation loss is a loss from the surface of the reservoir, and the surface of such reservoir will be lowered a certain distance by evaporation losses, regardless of its depth or size. An inch evaporation loss from a reservoir one foot in depth would, of course, represent at least 1/12th the capacity of the reservoir, while if a reservoir be two feet in depth the same quantum of loss will occur, but it will represent only 1/24th the storage capacity of the reservoir.

Hence to determine evaporation losses we must know the character of the reservoir. The testimony of the witnesses in this case shows that there is at least an evaporation loss of 1/7th from its water system annually under the present conditions. Should we have a period of drought which yearly lowered the surface of the reservoir it would be seen that the percentage of loss would increase annually during such drought.

This water system is at the present time the only available source of supply for the City of San Diego.

The Morena watershed of the company is 135 square miles in extent, the Upper and Lower Otay Water sheds approximately 100 square miles in extent, the Barrett watershed 115 square miles

in extent, making a total watershed of 350 square miles. Evidence has been introduced showing the run off of the adjoining Sweetwater watershed during all of the years from 1887 to 1907, inclusive. During the years in question the run off from this watershed, which is 186 square miles in extent, fluctuated between nothing for the years 1889-00. 1901-02, 1902-03, 1903-04, to 23,983,700,400 in 1894-95. The only other time in these twenty years when the amount exceeded 10,000,000,000 of gallons was in 1905-06 when the amount was 11,434,500,000 gallons. Comparing the Sweetwater watershed with the watersheds connected with this system for the same years, as shown in defendant's exhibit 9 just referred to, on the direct ratio of area, it will appear that a repetition of conditions which are a matter of history in San Diego County would seriously impair the supply even for the most limited domestic purposes of the cities now receiving from this system. When we take into consideration the further fact that the Barrett Dam and Reservoir Site is below the Morena Dam and Reservoir and at the beginning of the Dulzura Conduit, and that no dam has been constructed at this point, and that in times of flood when most catchment occurs, this 115 square miles of catchment area contributes no more to the system of defendant than it is possible for the Dulzura Conduit to carry, we are impressed with the fact that until this dam is constructed that it does not need nearly the drought which has heretofore occurred in the County of San Diego to render this system utterly inadequate to the needs of the inhabitants of these cities.

During the seven years of drought referred to in the testimony the Sweetwater water system only impounded 351,855,900 gallons of water, or sufficient to last the city of San Diego at its present daily consumption a little less than forty-seven

days. And if we assume like conditions of the Southern California Mountain Water Company's system during these seven years, only sufficient water would have been impounded to have supplied the City of San Diego for less than a year. In fact it is not seriously contended by any one that there is sufficient water in this system without further development to meet what may be the needs of the inhabitants of urban territory for domestic purposes alone.

The City of San Diego in the year 1900 had a population of 17,700; in 1910, 39,578; in 1912 a population in the neighborhood of 60,000, according to the estimates presented, and that it is rapidly increasing in population is admitted. It is in evidence that from the years 1897 to 1904, there was a seven years' drought in the county of San Diego. On the basis of this drought during which there was practically no cachement in any reservoir in San Diego County, engineer witnesses for defendant testify that safety for the City of San Diego requires a storage of water sufficient to last for seven years. On the basis of the present population and the present rate of increase and the theory that there should always be seven years storage on hand, Witness O'Shaughnessy, engineer for defendant, testified that to make the City of San Diego safe, there should be on hand about twenty-eight billion gallons of water instead of 9,308,402,000 gallons that was on hand July 1, 1912.

It is admitted that the lands of complainants were within the places of designated use set out in the notices of appropriation of the defendant, but that no water has ever been delivered to them for purposes of irrigation. It is further admitted that while the lands represented by complainants are only 355 acres in extent yet there are more than 9,000 acres in the Otay Valley, and approximately 40,000 acres in the aggregate as much entitled to water

on the theory of the complainants as are the complainants, when their rights are asserted. In fact Mr. Palmer, attorney for the complainants, states, at page 138 of the transcript, that it is his position that all of the owners of land within the places of designated use are equally entitled to the water with the complainants.

Evidence was introduced tending to show that these complainants and other inhabitants of the Otay Valley are pumping water upon their lands, and hence, on the theory of the defendant, not entitled to receive water from this system. I stated at the time of the hearing, and I am still of the same opinion after a very careful perusal of the authorities cited by the attorneys for the defendant, that this question is wholly immaterial to the issues here involved on the theory advanced by the complainants. I shall have more to say with reference to this when I consider the law of the case. It is also in evidence that the complainants and their predecessors in the Otay Valley parted with their riparian rights either by gift or sale to the defendant, Southern California Mountain Water Company, and the attorney for the complainants states (transcript page 364) "That these complainants are not claiming the water on the ground of riparian rights, but solely on the ground of the appropriation of the water." It is asserted (transcript Application 169, page 52 et xeq.) that the owners of land in the Otay Valley were induced to part with their riparian rights below these dams on a promise that they might receive water when it was impounded. The Lower Otay dam was constructed practically fifteen years ago, and any rights that were parted with became divested at or near that time. Furthermore, only four or five of the owners of land who were owners at the time the dam was constructed are now owners of land below this dam. (transcript Application No. 169, page 65). What the effect is of a fraud such as is alleged to have been worked by this company.

in getting riparian lands on the promise of delivery of water thereto, and then refusing to deliver the water after the title had passed will be discussed when I am considering the law of the case.

It is also in evidence that the company has secured all of the riparian rights on the two stream systems from which it takes water except the lands on the Tia Juana River below the Mexican line.

On the 12th day of September, 1911, the Board of Supervisors of San Diego County passed an ordinance fixing the water rates for the Southern California Mountain Water Company, defendant herein, and in that ordinance it is provided that "for irrigating acre property the rate shall be twenty cents per thousand gallons."

On September 16, 1911, complainant Palmer in writing demanded water upon 2½ acres on the east 10 acres of the Northwest quarter of the Northwest quarter of Section 22, Township 18. On October 5th the Company, through its Secretary, A. H. Keyser, responded to Palmer returning his check and asking for a $5.00 deposit to cover meter, and also that Palmer arrange for the putting in of the pipe necessary to take the water to his land; and further stating that when Palmer was ready to make a "deposit sufficient to cover these expenses that the company would cheerfully give you the necessary connection." On November 14, 1911, General Superintendent B. M. Warner of the defendant wrote Palmer to the effect that it would cost approximately $2,200 for a four inch pipe or $3,800 for a six inch pipe to his land. On November 18, 1911, Mr. Palmer again wrote the company protesting against their demand that he pay for the extension, and thereafter on December 18, 1911, H. L. Titus, attorney for the company, replied to Mr. Palmer to the effect that the company would require the payment by him for the extension. In these letters the company does not make the same objection against the delivery of water which is now made, namely, that it

already has devoted its water to beneficial purposes elsewhere. It is also in evidence, however, that the company in response to an application of the Otay Water League for water upon lands owned by its members denied the application on the ground that "it had no water for irrigation and never expected to have any."

With this preliminary view of the facts we can now define the issues and the position of the respective parties. The complainants urge that the notices of appropriation setting out the places of designated use of appropriated water are controlling as to the rights of the parties to water and give a vested right to owners of land and residents within the places of designated use to water and that, as between those within the places of designated use, there is no priority. In short, the position of the complainants is that the word "class" as used in the decisions when referring to the beneficiaries of a public use is territorial, and when used in connection with a water company in this state refers to those within the limits prescribed in the places of designated use in the notices of appropriation. The position of the defendant and intervenor is that even between the patrons of a public utility water company there may be priorities dependant upon the character of the use and the purposes to which the water is devoted. Their position is that, inasmuch as the water appropriated is appropriated both for domestic use and irrigation, that the consumers under these two uses constitute separate classes and those within the domestic use class have preference and priority over those within the irrigation class. There is also an implied assertion that the rule "First in time, first in right" applies as between the patrons of a public utility water company. There are several minor questions such as the effect upon any right which the complainants may have of alternative source of supply, such as wells upon their own land. But the main

questions raised by the parties herein are:

First: Does the same preference as between the users of water for domestic purposes and users of water for other purposes exist where both classes are within the places of designated use of a public service water company as admittedly exists between owners of riparian lands who desire to use water for these different purposes?

Second: Do the places of designated use set out in the notices of appropriation give a vested right to all parties within such limits to the use of water, regardless of the character of the use or the order of the taking?

So far as my research goes, the exact questions in issue here have never been decided in any state. It is well established that where riparian proprietors are involved, domestic uses of water are preferred to uses for irrigation.

Alta Land Co. vs. Hancock, 85 Cal. 220
Smith vs. Corbett, 116 Cal. 587
Lux vs. Haggin, 69 Cal. 255
Duckworth vs. Watsonville, 150 Cal. 520

It is also well established in this state, contrary to the doctrine in most of the other western states, that in the case of a public service water company at least as between consumers of the same class there is no priority and in times of shortage, the supply of water must be rateably apportioned.

Leavitt vs. Lassen Irrigation Co., 157 Cal. 82
Crow vs. San Joaquin Irrigation Company, 130 Cal. 309

This narrows the scope of the main inquiry to two questions:

First: Does the same rule or priority between uses which applies to riparian owners apply to consumers of water from the system of a public service company?

Second: What establishes one's status as a consumer under the system of a public service water company; how does he enter the class for whose benefit the public trust has been

created? (Price vs. Riverside L & I Co. 56 Cal. 431).

The questions then to determine are:

First: On the state of facts existing in this case, are the complainants now in the class for whose benefit the public trust has been created?

Second: If they are not in such class, is it possible for them to enter it?

Third: If the complainants are found to be in the class for whose benefit the public trust has been created and it be found that all of the water which this defendant has in its control is now being devoted to a beneficial use either of the same or a different class than the one for which the complainants desire the water, will the company be required (a) to enforce a division of the water between these complainants and consumers of another class, and (b) to enforce a division of the water between all other users, regardless of class, and these complainants?

Before taking up these difficult questions, it may be well to dispose of some of the minor points raised.

Defendant urges strenuously that the fact that the complainants may have another source of supply available to them is material to the issues here involved. It was sought to be shown, and the evidence does show, that irrigation from pumped water is resorted to by the complainants and others in the Otay Valley to a considerable extent. I gave it as my opinion at the time of the taking of the testimony, and I am still of the opinion, that this question under the complainants' theory of the case is absolutely immaterial. If the complainants, as they urge, have a vested right to the use of this water of which they can only be divested by condemnation proceedings, then the fact that they

may be able to get water elsewhere certainly could not divest this vested right. The possibility of acquiring other property certainly does not divest the right to property already secured. Defendant cites several cases in support of its position, none of which are at all applicable. In the case of St. Louis I. M. & S. Railway Company vs. State (111 Pacific 396) it was merely held that the need for added facilities had not been shown, and the same may be said of the other cases cited by the counsel for defendant. If the position of the complainants here is correct, we do not have to consider the question of their being denied adequate facilities, but their being denied any facilities at all. In other words, in the depot case cited the patrons of the railroad already had service, and the court held that it had not been shown that this service needed improvement, but certainly when an utter failure to furnish service or accord a privilege to which one is entitled is shown, that showing is sufficient, and that is the admitted state of facts in this case. If the shippers in Oklahoma desiring to have their goods transported or desiring to go on a journey upon the railroad in question had shown that the railroad gave them no opportunity either to ship freight or to ride upon their trains it would not be necessary in addition thereto to show that there was need for s such service. The utter denial of a right to which one is entitled certainly is a sufficient showing to justify any tribunal in exerting whatsoever authority it has to restore the injured party to the right of which he has been deprived. Therefore, on the theory of the complainants that they have a vested right to the use of this water it certainly is only necessary for them to show that they are not being accorded an opportunity to use it in order to entitle them to relief.

Before applying ourselves to the specific propositions of law applicable to this case it will be well to consider some of the general principles involved in the delivery of water by a corporation such as the defendant herein, that has appropriated water for sale, rental or distribution.

Much of the confusion which is found in the irrigation law of this state is due, in my opinion, to a failure on the part of those interpreting the law to understand certain fundamental distinctions between water devoted to private purposes and water devoted to public uses. Article XIV, Sections 1 and 2, of the Constitution deal not with the appropriation of water but with the power of the state to regulate agencies impressed with a public use. Those sections of the constitution deal entirely and solely with water, or more properly the use of water appropriated at the time the Constitution was adopted or thereafter appropriated "for sale, rental or distribution", and it has been held and is the settled doctrine of this state, that the power of the state to regulate such companies is entirely independent of the method of acquisition by them of water. Merrill vs. Southside Irrigation Company. 112 Cal. 427. It matters not whether the person or corporation selling water to the public appropriates it (and here I use 'appropriates' in an entirely different sense from that in which it is used in the case just cited) from the public waters of the state, or the United States; bores wells on private lands and pumps the water into ditches; purchases all the riparian rights in a stream and diverts the water by reason of riparian ownership of lands and the lack of any one who has the legal right to complain; or takes it from the sewers of a city. In every case the constitutional provision applies and the devotion of the water to the public purposes of sale, rental or distribution impresses the agency with the character which subjects it to regulation by

the State. Sections 1410 to 1422, inclusive, of the Civil Code deal with another aspect of the water question, namely, the method of acquiring rights to unappropriated water. The agency desiring to take water, the right to the use of which has not yet been acquired by other agencies, has prescribed for it in these sections one method of acquiring the right, and this method is the same whether the agency desires to divert the water and put it upon private lands owned by itself or devote it to the public uses of sale, rental or distribution to the public or some part thereof. It has always been difficult for me to understand how such almost hopeless confusion could have been the result of these plain provisions of the Constitution and the statutes, provisions so utterly unrelated; but we find law writers and courts saying that the waters of the state belong to the public (as they do by the constitutional provisions in some other western states) by reason of the two sections of Article XIV of the Constitution, which do not remotely bear upon the subject and only make the agency which has by any means lawfully acquired the right to be in control of a quantity of water subject to regulation when such agency sells, rents or distributes such water to the public or a portion thereof. The reasons for the sections of the Civil Code referred to, and the need therefor, can be readily seen. An agency desiring to supply water to non-riparian lands not owned by such agency could do so even as far back as when mining was the principal industry of this state, by getting the water devoted to the use for which it was desired ahead of anybody else. But when agriculture became largely dependent upon irrigation and large enterprises began to be conceived, it was taking too great a risk for any one to make large outlays of money when the right to use the water was dependent upon the first actual application of the same to a useful

purpose. Hence the sections of the Code which establish the doctrine of relation, but do not at all change the rule which had theretofore existed and which now exists that the validity of the appropriation does not depend upon following the statute, but the actual application of the water to a beneficial use.

> Cardoza vs. Calkins, 117 Cal. 106.
> Wells vs. Mantes, 99 Cal. 583.
> Burrows vs. Burrows, 82 Cal. 564.
> Nocochea vs. Curtis, 80 Cal. 397.

Article XIV. of the Constitution merely makes certain agencies subject to regulation. The manner of regulation is that which shall be prescribed by law. The legislature thereafter passed certain statutes prescribing the method and extent of regulation. (Stat. 1885, p 95. Public Utilities Act Stat 1911 p 18 Extra Session.) Except as restricted by the constitution the legislature may prescribe whatever regulation it sees fit, but legislation pursuant to said constitutional provision could not properly deal with the method of acquisition of the water by the agencies therein made subject to regulation, the public use and the power to regulate attaching as a result of the devotion of the water to purposes of sale, rental and distribution, and having no reference whatsoever to anything else. The sections of the Civil Code on the other hand (1410 to 1422) dealing, as they do, entirely with methods of <u>acquisition</u> of water and not its <u>distribution</u>, are founded on entirely different fundamental powers of the state and have no more effect upon the agencies dealt with in article XIV of the Constitution than they do upon railroads or gas corporations, except as they may or may not be involved in the acquisition of a supply of water which may or may not be used in a way which subjects the possessor to regulation prescribed in the Article of the Constitution. In short the law dealing with acquiring rights to water by indi-

viduals or corporation is not concerned in the least with what such persons or corporations do with such water, while the law dealing with the public distribution of water and the agencies engaged therein is equally disinterested in and oblivious to the subject of acquisition of water.

The sections of the Civil Code are only applicable and only effective for the purposes of applying the doctrine of relation, and only relate to those persons and corporations who are reducing unappropriated water to possession and those who desire to reduce unappropriated water to possession, may do so as lawfully and with equal effect, as has already been pointed out, without following the statutes as by doing so. It is, therefore, apparent that every public utility water company in this State subject to regulation under the provisions of Article XIV of the Constitution could have acquired its water without following the sections of the Civil Code and so without having designated any place of intended use, but as to each of these there must be a "class " for which the public use is created, which class is certainly not created by prescribing the places of designated use, for none have been prescribed, and to "class" as applied to such corporations the decisions of the Supreme Court are equally applicable. We evidently then must look elsewhere for a definition of "class" than the territorial one herein urged by complainants.

The provisions of the Constitution and the sections of the Code here considered being rightly understood and read in connection with the decisions to which I have already given a reference, which hold that a compliance with the statute is not necessary to secure the right, it readily appears that there may be many public service water companies with water lawfully in their possession for sale, rental and distribution that do not, and are not required, to state any places of

intended use. Take the water company which develops water from underground sources upon its own land. It may, of course, use this water upon its own land or it may lawfully take it to the land of another and sell it, but so soon as it sells it, it becomes, as to such sale, subject to the "regulation and control of the state in the manner to be prescribed by law". So long as such a water company serves merely itself there is no need nor authority for regulation because there can be no conflict but as soon as there are two involved--and always where two are involved--there will arise cases where the authority of government must determine disputes. Hence the provision of the constitution wisely imposes upon water companies the necessity of governmental restraint where such water companies perform services for others for compensation. A water company may also purchase all the riparian rights to a stream and hence, by reason of the fact that there are no riparian owners with legal ability to restrain the diversion of the water of such stream except the water company itself that has purchased the riparian rights, the protection of the doctrine of relation is not necessary because, under the decisions as they now stand, such a company as a riparian owner could restrain the diversion of the water by any one other than itself and by such means protect itself until it shall have taken the water to the place where it is desired to use it. While the established rule is that as between riparian proprietors one may not take the water to non-riparian land, yet, where there is but one riparian proprietor to an entire stream, the rule becomes inapplicable.

I am plainly of the opinion that the designation by the appropriator of places of designated use in compliance with the statute is only necessary in the case of the taker of water to which there are no rights except those of the public and that, even

when such taker of water designates places of intended use, such designation confers no vested rights upon anyone. If it did, the failure on the part of this agency diligently to prosecute its enterprise would divest rights of the owners of the land within the places of designated use without any fault whatsoever on the part of such owners, and we would have the peculiar situation wherein the self-constituted agent not appointed by the person whose rights are now vested under this theory could divest such rights without the fault of the owner thereof, by failing to prosecute his enterprise with diligence. The mere fact that this point has never been decided in this state would seem to indicate that it has not heretofore been deemed very important. If the mere description in the notice of appropriation of a man's land gives virtue to a vested right upon that land, then the man owning land entirely without the flow of the system, thousands of feet up the mountainside, would, by the mere inclusion, either through mistake or design, of such land in the notice of appropriation, become vested with a right to water where water can not be placed. Or, as in this case, if this rule is good, the mere description of lands much in excess of the ability of the system to serve would make it necessary, as is urged here, that the water be spread over the entire tract to the benefit of none, thus

completely destroying the beneficial use which, if the water be taken from unappropriated waters, alone gives validity to the right to it. Under this doctrine, if the Southern California Mountain Water Company, in its notices of appropriation, had designated the entire State of California - both cities and agricultural districts - then it would be necessary, on demand, to spread out the water over the entire state. Such a doctrine I consider intolerable and certainly would not advise this Commission to accept the same except in the face of absolutely controlling decisions of the courts, and, as I have said, no such decisions exist and, therefore I certainly recommend the rejection of any such doctrine. The complainants have strenuously and at length, and very ably and plausibly, sought to apply this doctrine from decisions in this state. In order to do justice to the very able brief filed by the complainants, I shall review the decisions brought to our attention therein on this point. Price vs. Riverside (56 Cal. 430) is not authority for this doctrine. The inclusion of the language "If water it has" indicates plainly that there are cases wherein, even under the old incorporation act, there considered, the places set out in the articles of incorporation may not, under all circumstances, be accorded water. Hildreth vs. Montecito Creek Water Company (139 Cal. 22) was a case decided on a question of pleading but the court took occasion there to discuss certain principles but no question of places of intended use was involved. In that case, in passing, it is well to remark, that there the court held that "in cases of a public use the beneficiaries do not possess rights that are in the nature of private property." I am aware that it was therein held that "the right of an individual to the public use of water is xxx in the nature of

a public right possessed by reason of his status as a person of the class for whose benefit the water is appropriated or dedicated. All who enter the class may demand the use of water, regardless of whether they have previously enjoyed it or not." But, as I have said, this case did not assume to determine what fixed the status and entitled a person to the right and to say that the notices of appropriation establish this status is begging the question. In this Hildreth case no question of the notices of appropriation was involved and, as a matter of fact, it can be gathered from a reading of the case that somebody wanted the water but had not theretofore received it and on the facts stated therein the court held this person was not entitled thereto. The case of Leavitt vs. Lassen Irrigation Company (157 Cal. 82) likewise has no application to the facts considered here. That case is authority for the principle that there is no priority between users of water entitled to the use, but here again there is no determination of <u>who</u> is entitled to the use. As a matter of fact, I have always thought, from a considerable amount of puzzling, over the question of priority between consumers of water under a public service water company and the necessity of limiting the users to those who may be beneficially served under ordinary circumstances, that in the Leavitt case the Supreme Court had this same trouble in mind when it said (page 92) "The foregoing statement that a water company or person in charge of water devoted to public use cannot confer a preferential right upon one consumer over another is not to be understood as denying the right of such company or person in possession of a <u>limited amount</u> of water to devote that amount to the irrigation

of a given area of land. We are not to be understood as saying that the company may not fix the limits of this territory and lawfully agree to supply its waters first to the lands within that territory and to supply to outsiders only such surplus as there may be after the needs of the original territory for which the water was procured are satisfied. This would not be in derogation of the public trust but would be a mere regulation of use in the performance of the trust."

Complainants urge that this limitation here discussed applies to the time of filing the notices of appropriation. I do not believe it is necessary to construe it so, since the very need which caused the court to make this reservation is brought about by the fact that usually water companies map out territory larger than their supply can possibly serve. The use of the language "limited amount of water" indicates that this must have been in the mind of the court. I believe there is greater reason for construing this language the way I do than in accordance with the contention of complainants, and if the court means what I believe it does, it has suggested a way of remedying what may otherwise be a very great evil. I am aware that there is some force in the objection of complainants' attorney that this gives room for favoritism on the part of the company, but the same favoritism could be indulged in prescribing the places of intended use in the notices of appropriation. These companies, however, are subject to control by the state, and so long as such is the case I believe the matter can be controlled in another way, and I shall discuss this method in another portion of this decision. Furthermore, what has already been said concerning the different functions of Article XIV of the Constitution and Sections 1410 to 1422 of the Civil Code is equally applicable to the language of the court in this case. Here the court was dealing with the "class" and was not concerned with what fixed one's status as a member of the class. From our conclusion as to the lack of relation between

the laws of <u>acquisition</u> and <u>disposition</u> of water it follows that we must look elsewhere than the places of designated use to determine what constitutes one a member of the class for which the use is created which is being here discussed by the court and hence the Leavitt case, and the reasoning therein, appears inapplicable to the question before us.

It is unfortunate for complainants' contention that they have cited Thayer vs. California Development Company. To begin with the court did not have before it many of the material facts which tend to fix the status of the California Development Company, and I most thoroughly believe and ardently hope that when all the facts are presented to the court it will find that with these added facts it must determine the California Development Company a public utility. The only justification for regulation of water companies is that they occupy a relationship to their patrons which makes it necessary for the state to intervene between such patrons and such water companies. All of the cases to which the court there refers were cases where there was but one party, namely, the user of the water. To be sure there were two aspects of this party, one in its corporate capacity where it diverted the water, and the other where in its component parts its stockholders and masters of the corporation used the water. Every case cited by the Supreme Court in the Thayer case as authority for its decision on this point was a case where water was delivered by the users organized as a corporation to the users as stockholders, and there is no necessity for intermediation between a man and himself; but in the California Development Company there are two parties, the California Development Company, which delivers the water for compensation to the users in their corporate capacity as a mutual company, which in turn distributes it to its stockholders. I am aware that certain matters in the Thayer

case are not related to the matters before us, but the complainants have so strongly relied upon this case that I deemed a brief outline necessary. Unfortunately, however, for the contention here raised by the complainants that the notices of appropriation give a vested right to the water, the facts in the Thayer case were that the lady who was seeking the water upon her land and who was denied it under this decision had land which was covered in the notices of appropriation of the California Development Company on every side of which there were others receiving water. In other words, the Thayer case with which, I am frank to say, presumptuous as it may seem, I do not agree, but which of course I have to accept on the facts therein presented until the law is changed, directly decides against the contention of the complainants herein.

The case of Miller vs. Bay Cities Water Company, 157 Cal. 256, in my opinion does not have any bearing upon the questions here in issue. There, contrary to the contention of complainant, the court specifically said (at page 283), "It is insisted too that the right of this complainant to the waters percolating through his land is a vested right and that the right to have the flow of the flood waters contribute to this percolating supply is equally a vested right which the court has no authority to permit to be disturbed or of which the complainant may be deprived except under condemnation proceedings and upon payment therefor." The court specifically declined to pass upon this point, and I submit that the quotation from complainants' brief assuming to state what the decision of the court was must have been inserted through error for it has left off the beginning of the sentence, "It is insisted too that", and reads as follows:

> "The right is a vested right which the court has no authority to permit to be disturbed or of which the plaintiff may be deprived except under condemnation proceedings and upon payment therefor."

To begin with the court in this connection was dealing with percolating waters, and secondly, as will be seen from a reading of the case and the quotation which I have given, specifically declined to pass upon

the question.

I have no desire to criticize either the attorney for the complainants or the attorney for the defendant, but they have in several instances cited cases as authority for a proposition which it seems to me a careful perusal of the case in question would have caused them to see are not authority for the proposition advanced. The City Attorney has been much more careful in his citations. If greater care were exercised by attorneys in citing cases the work of those who are required to review the cases cited would be much lighter.

I am now prepared to answer the first question and to say that the places of designated use required to be set out in the notices of appropriation do not vest rights to anyone included within the territory described and only apply to the doctrine of relation. It may be asked why the legislature enacted a section requiring the setting out in notices of appropriation of places of intended use. The reason which impels the legislature to pass a statute is not always plain, but a very good reason for such provision as to a private appropriator would be to show that he had a place to put the water and he was not merely trying to tie it up and as to a public appropriator, that the amount of water which he was trying to reserve was not in excess of the needs of the people whom he could serve. I merely give this as my opinion as to the general reason for enacting in Section 1415 of the Civil Code the provision which requires that the notice of appropriation shall state "the place of intended use".

A like reason would seem to be responsible for requiring in the same section a statement as to the purposes for which the water is claimed, the amount of the water claimed and the means of diversion. In short, the section seems merely to be designed to show the bona fides of the prospective appropriator.

The second question we desired to determine was if the complainants are not in the class for which the public use is created, is it possible for them to enter this class. What qualifications are necessary to constitute one a member of the class for which a public use of water is created has never been determined by the courts of our

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state, nor is it yet the subject of specific statutory treatment. That it may be dealt with by the legislature seems undoubted. These agencies distributing water for compensation are subject to "regulation and control of the state in the manner to be prescribed by law".

This regulation certainly can be adequate for the purposes which caused its enactment. It is only the peculiar nature of any business which subjects it to regulation and that regulation should go just as far, but no further, than the needs which justify it. Having this principle in mind, we realize that the character of the agency to be regulated determines the character and extent of the regulation necessary. A charge of bird-shot, or a stick in the hand of a small boy, may put a striking rattle snake out of business, while only the most efficient high power rifle can stop the charge of the lion. Yet, the necessity in one case may be no greater than in the other.

All public utilities may be regulated and they should be regulated in those respects wherein they need regulation. Rates, service and securities of all utilities may be certainly regulated, but none of these need be regulated in the same way as to different classes of utilities. Particularly is this true of service. Certainly different rules should apply to the regulation of the service of a railroad than are properly applicable to the regulation of the service of a water company. As to each, the governmental authority empowers the regulation which prevents acts which will tend to impair the service. The taking on of additional consumers by a water company when it has all of the water in its possession already put to a beneficial use most surely would impair its service and could and should be prevented. This principle can be readily perceived if we have in mind the distinction between a public utility that performs a service-such as a railroad-and one that distributes a commodity-such as a gas or water company. Particularly is this distinction marked in a water company in an arid or semi-arid region. Such agencies are necessarily in possession of a limited supply of their commodity and when the supply is exhausted no more may be had.

Mr. Weil, in his work on Water Rights in the Western States -- Third Edition, paragraph 1281-- takes this view of the Leavitt Case. He says "Reasonable classification of the public may be made. One instance of this is where the natural situation of the facilities demands that service be limited to specific classes of the public. Where a portion of the company's supply is consumed within a fixed area and affords adequate facilities for that only it may restrict that portion of its supply to lands so situated."

I do not think that I would be stating a revolutionary or an unsound principle if I should say that under certain circumstances the state may deny a man the permanent use of water, from a particular supply even for domestic purposes. When San Diego County develops all the water possible and users are on hand for this supply and are using it, San Diego County has reached the limit of its development and no more permanent residents may be permitted to come into San Diego County and to say that the government cannot control such a situation is an admission that government may not be adequate to the needs for government and I am not prepared to admit this. The man who would be denied water for domestic purposes under the circumstances imagined would not be denied the equal right which the California rule gives to all consumers from a public service water company without regard to priority in the beginning of the use. He would only be denied the right to enter the class to whose uses all of the water in San Diego County had theretofore been devoted.

On this principle we settle also the question of priorities when applied to a public water agency. We may still retain the principle prevailing in this state which I have just announced that as between consumers of such public utilities there are no priorities or preferences -- Leavitt

vs. Lassen supra--by the simple and rational method of restricting the class to which the water is to be delivered within the limits of the reasonable ability of the company to serve.

There remains to be determined wherein the power to admit into the class up to the limit of the supply resides. The Supreme Court in the Leavitt case has said that the company may restrict its boundaries and even if the position of the complainants were correct, the limitations at the time of the appropriation would be a recognition of this power. This power of limitation given to the company that does not exist with reference to common carriers is warranted only by the public necessity therefor and in confining the agencies entitled so to limit their consumers to water companies having a limited amount of water, the court certainly recognizes that the public necessity should require this limitation. If the public necessity requires it, then, on the failure of the company to respond to this public necessity, the state certainly can require such response through governmental restraint or compulsion.

I believe that we cannot escape the conclusion that the state has the power to put in the hand of some governmental agent the power to determine the "class" which has been discussed in the decisions we have been considering.

Admitting that the state has this power, has the legislature imposed it upon any public authority, and how shall it be exercised? Section 12-b of the Public Utilities Act provides, "Every public utility shall furnish, provide and maintain such service, instrumentalities, equipment and facilities as shall promote the safety, health, comfort and convenience of its patrons, employes and the public, and as shall be in all respects adequate, effecient, just and reasonable." Here there is imposed upon all public utilities, and this company is one, substantive duties which in my view comprehend the limitation of the supply of water and the right to take on more consumers after a company has reached the limit of its supply. In performing these substantive duties what should be the attitude of a water company when applications are made to it on behalf of proposed consumers to extend

its facilities and afford a supply of water to such applicants, that is, to admit the applicant into the class of a consumer which would thereafter entitle him to an equal treatment with all the other consumers regardless of the order of their becoming such? Evidently the interest of those who are already consumers and are already within the class should be considered. That should lead the utility to determine what is the average reasonable requirement of its present consumers and how large a factor of safety should be maintained in their interest. If the interest of the present consumers would not prevent the granting of the application then considerations affecting the company should be indulged. Is the prospective consumer in such a condition, with reference to the company's facilities, to make it reasonable to extend such facilities to such consumer? Evidently if the applicant is not within the flow of the system his request could not be granted, or if he is within the flow of the system and situated remotely from the facilities of the utility so that the expense attendant upon his admission to the class is too large to warrant the expenditure therefor, there might be cases when the prospective consumer could be required to bring his land into connection with the facilities of the company, and this doctrine is so well established that I do not deem it necessary to cite cases, but if it is reasonable to extend the facilities to the applicant, and the other consumers do not suffer, then the utility should do so, and the Public Utilities Act makes it its duty to do so. If the utility has a supply which the lawful needs of its present consumers and their "safety, health, comfort and convenience" requires and water in excess thereof, and it is reasonable to extend the facilities to the applicant, it should be done in every instance because it is the settled policy of the state that water should be put to use and not unreasonably held in reserve.

If the water company does not perform its substantive duty here imposed, and in every case where there is a dispute as to whether or not it is performing such duty, it becomes the duty of the public authority to intervene and determine the disputed question and

require, if it is found that the duty is not already being performed, that the company take steps to perform the duty imposed by law. Section 30 of the Public Utilities Act provides that every public utility shall comply with any order made by the Commission in the exercise of its jurisdiction. Sections 31, 32, 33, 34 and particularly 35 of the Public Utilities Act give the Commission ample authority to require the taking on of new consumers or prevent such action by a water company if the public convenience and necessity will be served by such action on the part of the Commission.

Therefore, it would appear that the test for admission to the class which will thereafter be protected even to the ratable apportionment of the supply in times of scarcity, is the reasonableness of the request to be admitted based upon the facts in each particular case, and in the admission of new consumers by a water company it would be just as unjust, and just as much in conflict with the Public Utilities Act for it to discriminate by admitting one applicant and refuse to admit another similarly situated as it would be to violate any other of its substantive duties.

The question of the needs of a growing city is a very difficult one to handle and in my mind needs additional legislation. The matter is not of serious consequence in this case because of the fact that I am of the opinion and I shall find that the present supply of the Southern California Mountain Water Company is reasonably taxed, and that it should not admit these prospective consumers at the present time on the showing which has been made in this case. But whether or not the future needs of a growing city to which a water company is obligated to furnish water may justify it in keeping a supply in reserve, by reason of the anticipated growth of such city to the exclusion of other proposed users, otherwise qualified to be admitted to the class which the utility may be required to serve, is not clear. It would seem that here the discretion of those who have authority to decide should be wisely exercised, but whether under this state of facts any discretion exists is a matter upon which I am not

decided. Section 549 of the Civil Code provides: "All corporations formed to supply water to cities or towns must furnish pure fresh water to the inhabitants thereof for family use so long as the supply remains, at reasonable rates and without discrimination of persons, upon proper demand therefor; and must furnish water to the extent of their means in case of fire or other great necessity free of charge." As I have already said, the policy of the state being against the reservation for the use of those not now ready to avail themselves of the supply, it would seem that the only warrant for storage beyond actual present needs is in the fact that in reality there is a need for a reserve for contingencies that may reasonably be expected to occur. It is plain that the fact that there is enough water in the reservoirs of the company furnishing a city to last for a week may not justify the conclusion that there is enough for the needs of the city, although before the week passes the reservoir may be refilled. The minimum, of course, must be from season of rainfall to season of rainfall in a semi-arid section such as the County of San Diego, but considering the history of that section I believe any reasonable man will say that one year's storage alone is absolutely inadequate. I believe every one will admit this. What the exact amount of water stored should be I am not prepared to say. The engineers for the defendant contend for seven years; I believe this is excessive, but I am equally clear that the amount which is now stored is not in excess of the reasonable needs which presently exist, and such being the case I believe that the complainants cannot be admitted into the class at the present time, nor can any other consumers outside the cities in question for domestic purposes purely be admitted without jeopardy and injury to the present consumers under this system. By saying this I do not hold that there may not be a time when all of these lands may be watered. This will largely be determined, however, by the growth of the cities now receiving water and the judicial or legislative determination of the question as to the right of a private corporation or the city, itself, that has purchased the property of such private corporation, to reserve a supply to the exclusion of

those now ready and willing to use it for the use of future inhabitants of a growing city, and the further determination of the maximum amount of water which may be developed from this system.

In answering the second question and determining how one may become a member of the class for which a public use of water is created and discussing the condition of the supply we necessarily reach the conclusion that the complainants cannot at the present be admitted to this class. This makes the answer to the third question unnecessary, and we have been required to deal with enough difficult questions in this case without attempting to determine whether or not there should be priority between different kinds of classes of consumers unless there is necessity therefor. I have carefully gone over the decisions submitted on this question in the briefs but do not believe they settle the question, and I do not consider it necessary to review them here. It is sufficient to say that substantially the entire class now receiving water under this system is a domestic use class and that any extensions that are made to new users should be limited to domestic users, and those only within the immediate territory now being served. It does not become necessary to pass upon this question, however, because it is not before the Commission except as raised by the parties, and as between the parties the case can be decided without determining this question.

Incidentally my view of the case makes the complainants' admission that 40,000 other acres of land are in the same condition as the land of these complainants of no force because I do not think such is the case by reason of the fact that we have rejected the places of designated use as imposing the obligation upon the utility. Likewise, under my theory of the case the fact that a prospective consumer has another supply does become material and is one of the facts which could and should be taken into consideration in determining the reasonableness of the application to be served by the public utility company.

It is likewise unnecessary to consider the question of fraud raised by complainants. This is certainly a question that

under the facts of this case could only be determined by a court, and it is unnecessary for me to call to the attention of the very able attorney for the complainants the fact that his right to raise such a question must be asserted within a reasonable time after the discovery of such fraud.

The most serious showing against the company made by the complainants is that which results from the correspondence between Mr. Palmer and the officers of the company, and if it were not for the fact, as I have already determined, that the rights of the present consumers who are the members of the class to whose uses the water is dedicated, are more important than the rights of the company, I believe that this transaction would give Mr. Palmer individually legal right to prevail against the company. Neither this nor any other agency has a right to play fast and loose with members of the public or public authority. The great concern of the company then seemed to have been to get payment for its investment in extensions which, as I have said, may or may not have been a reasonable position. Its desire herein, as urged upon this Commission, is to protect its present consumers. My consideration, and the consideration of this Commission, is for the present consumers. I do not mean to be understood as saying that the company should not be dealt with justly, but we would have a right to assume that the company's position in 1911 was the position upon which it would be willing to be judged, and were it not for the rights of the consumers it would be my disposition, as far as this instance is concerned, to the extent of whatever authority this Commission may have in the premises, to accord this individual complainant relief.

I have no hesitancy in saying that it is with much regret that I find that under my view of the facts and the law it is impossible for any relief to be accorded to these complainants, but just as City Attorney Andrews says, the applicants in asserting their own rights have forgotten the rights of the City of San Diego. I would xxxxx say rather of the users of water within the City of San

Diego. I believe that Mr. Palmer, the attorney for the complainants, deserves great praise for the tremenduous amount of industry which he has devoted to his clients, and while it is of course outside the case, I do not believe it is just or proper for him to be criticized or abused for the position which he has taken. But I am not interested in the assertion on the part of either the complainants or the defendant herein that the other side is selfish and unreasonable. Indulging in such pastime may be pleasant for those engaged therein, but I believe it is hardly proper before any tribunal. Of course, it is the duty of this Commission, as well as every one in authority, to protect the weak against the strong, but it may be that sometimes the strong is in the right. But in this case I do not consider that the issues are between the weak and the strong. The issues as I have considered them are between present users in the cities of San Diego and Coronado, both large and small, both important and unimportant, and prospective users in the Otay Valley. Of course it is the subject of sincere regret to all that there should be any lack of supply of water to make all of the valleys of this state productive, but we of course must limit ourselves to the facts, and the facts are that the water supply of a large section of this state is not adequate to irrigate and supply all the lands and necessarily some must be dry.

The suggestion, however, that the City of San Diego go to the San Diego River for its water is a suggestion for which I have absolutely no sympathy. This, as every one knows, would deprive whole communities of necessary water for irrigation and domestic use, and the doctrine that the City of San Diego now owns the water to the rim of the valley and may deprive the present users of water which they have been devoting to beneficial uses for years and their only available source of supply, is, I believe, unsound ethically, and I hope legally.

I submit the following order:

ORDER.

The complainants herein having filed their complaint against the defendant and the defendant having answered said complaint and the City of San Diego having asked and having been given leave to intervene against said complainants, and a hearing having been held and the Commission being fully apprised in the premises and basing its findings and conclusions upon the findings and matters set out in the opinion hereto,

THE COMMISSION HEREBY FINDS AS A FACT that the public convenience and necessity would not be served by the granting of the application of the complainants;

AND IT IS HEREBY ORDERED that the complaint be and the same is ordered dismissed.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 21 day of January, 1913.

John M Eshleman
H D Loveland
Alex Gordon
Max Thelen
Edwin O. Edgerton

Commissioners.