

ORIGINAL

Decision No. 5108

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BEFORE THE RAILROAD COMMISSION  
OF THE STATE OF CALIFORNIA.

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L. STEIN,

Complainant

-vs-

EXCELSIOR WATER & MINING  
COMPANY, a corporation, and  
THOMAS MULCAHEY,

Defendant.

Case No. 1108.

James Snell for Complainant,  
C. F. Metteer for Excelsior  
Water & Mining Company.  
Thos. Mulcahey. in propria  
persona.  
Hennessey & Peterson and J. E.  
Craig as amicus curiae.

BY THE COMMISSION.

O P I N I O N

Complainant herein is the owner of 120 acres of land situated in Nevada County, California. These lands are located at a distance of approximately one and one-half to two miles from the ditch of defendant corporation herein which is used to supply water for irrigation in the territory of which plaintiff's land is a part. Defendant Excelsior Water & Mining Company is a public utility owning and controlling a system of water works consisting of

lakes, reservoirs, flumes, canals and ditches, from which it supplies certain portions of the Counties of Nevada and Yuba in this State.

Hereinafter the term "defendant" will refer to Excelsior Water and Mining Company unless otherwise specified.

Complainant has made application to defendant for service and prays for an order of this Commission directing defendant to comply with said request and that this Commission fix just and reasonable rates to be paid for that service.

Thomas Mulcahey has been joined as defendant herein for reasons which will hereinafter appear. Defendant in its answer alleges that for a period of twenty-nine years last past, it has leased a portion of its ditch system which supplies territory herein involved, which ditch is known as the Newtown Ditch, together with all water therein flowing, to Mulcahey and his predecessors, receiving therefor a certain annual rental. Defendant further alleges that it has no control over the water flowing in the said Newtown Ditch and that an extension will be necessary to supply the territory herein involved.

Defendant herein, as has been hereinabove stated, is the owner of a system of irrigating ditches in Yuba and Nevada Counties. The portion of that system which is involved in this proceeding is known as the Newtown Ditch, which ditch extends from a certain mine known as Champion Mine in a meandering westerly direction to a point in the Southeast quarter of Section 7, Township 16 North, Range 8 East, or a distance of approximately six miles. At the

Champion Mine defendant delivers into this ditch a minimum of approximately 40 miner's inches to serve the lands contiguous and in the same general territory as the lands of complainant herein. In addition to the so-called Newtown Ditch there are systems of private ditches extending northerly from points on the Newtown Ditch a distance of from one to two miles and a half. The two main ditches now used for supplying that territory are the so-called Williams and Marshall Ditch and the Williams New Ditch. The lands of complainant are located in the Northeast quarter of Section 6, Township 16 North Range 8 East, and the Southwest quarter of Section 31, Township 17 North, Range 8 East, a distance of approximately two miles from the junction of those private ditches with the Newtown Ditch.

At present to supply this territory defendant herein has entered into a certain agreement or lease with defendant Mulcahey whereby the defendant leases to Mulcahey the Newtown Ditch together with the right to use all water passing the Champion Mine Tank in said ditch, excepting and reserving to the lessor the right to use the ditch from its head to the Champion Mine Tank and to supply the demand of the Champion Mine Company.

The rental of this water and ditch is the sum of \$200.00 per year and 42 days labor annually, said labor to be expended for the maintenance of the ditch. Mulcahey, in turn, delivers water to various consumers along the ditch and to other consumers at the junction points of the Newtown Ditch and the private ditches hereinabove

referred to. The consumers served by Mulcahey are ten in number and the lands irrigated aggregate approximately 70 acres. The area under cultivation by the complainant herein and for which irrigation is sought is approximately three acres. The rates which the consumers have been paying Mulcahey yield in the aggregate \$210.00 annually, ten dollars being retained by Mulcahey for overseeing the ditch. Through a community arrangement, the 42 days labor required to be performed is prorated among the consumers in accordance with the water used. According to the arrangement between Mulcahey and the defendant company and from the facts hereinabove set forth, it will be seen that Mulcahey in so far as his relation to the community or territory served by defendant is concerned is merely an agent for that community. As to his relations with the defendant company a different situation exists.

Under the terms of the lease hereinabove referred to between himself and the defendant, the defendant company, a public utility, has undertaken to lease a portion of its property. Under the terms of <sup>Section 51 of</sup> the Public Utilities Act the consent of this Commission is <sup>of utility property.</sup> necessary in order to perfect a valid lease. The testimony in this proceeding shows that no such permission has ever been sought by the utility. Therefore, the lease undertaken to have been entered into between the defendant and Mulcahey is void. This being so, the defendant Excelsior Water and Mining Company, is responsible for the operation of that property. The activities of Mulcahey have, therefore, been nothing more than that of an agent of defendant.

as well as agent for the consumers. It must be held, therefore that the allegations of defendant's answer that the Newtown Ditch and the waters flowing therein are not under its control are in legal effect controverted. The evidence clearly shows that since the Public Utilities Act became effective the lessees of the Newtown Ditch which as hereinabove set forth, were only the agencies of the defendant having supplied water to the lands now owned by the complainant herein.

Complainant stated that he did not expect delivery to his lands by the defendant herein, but only desired the right to take from the Newtown Ditch water sufficient to irrigate that portion of his premises heretofore irrigated by such waters. Owing to the distance of complainant's property and the mountainous character of the land lying between his property and the Newtown Ditch, the Commission could not order an extension of the defendant's facilities to the property of complainant at the expense of the utility. However, since defendant is serving the general territory in which complainant's lands are situated and since it has heretofore served these lands now owned by complainant, we believe that upon the demand of complainant for delivery at a point to be designated by him along the Newtown Ditch of sufficient water to irrigate the lands belonging to him, as hereinabove set forth, that defendant should be required to render service to him and at the rates on file with the Railroad Commission for similar service by defendant herein to its other consumers.

While the question of rates is somewhat outside the issue raised by the pleadings in this case the

facts at the hearing indicate that under the existing arrangement a discrimination favoring the users of the Newtown Ditch had been brought about. The rate that defendant corporation is now charging is ten cents per minor's inch for every 24 hours. From the testimony before the Commission it appears that at least 40 inches as an average have been delivered into this ditch for a period annually of 120 days or 4800 inch days per season, which at the established rate would produce a revenue of \$480.00.

The payment made by the agent or lessee, Mulcahey, is \$200.00 per annum and giving a value of approximately \$3.00 per day to the 42 day's work supplied, would result in making a total cost to the water users of \$320.00 for water which under the schedule filed, should produce an income of \$480.00. We believe, that there is sufficient latitude between these two figures to provide for adequate maintenance of the ditch and such other sums as may be occasioned by increased operation expenses.

#### O R D E R

Complaint having been made by L. STEIN against Excelsior Water and Mining Company, a corporation, and Thomas Mulcahey, a public hearing having been held and the Commission being fully apprised in the premises,

IT IS HEREBY ORDERED that defendant Excelsior Water and Mining Company be, and it is hereby ordered to serve water to L. Stein for irrigation on the following

described property, to-wit:-

"All those lots, pieces, or parcels of land situate, lying and being in the County of Nevada, State of California, and bounded and particularly described as follows, to-wit:

"The East  $\frac{1}{4}$  of the North East  $\frac{1}{4}$  of Section 6, Township 16, N. R. 8 East, M.D.B. & M. and the South West  $\frac{1}{4}$  of the South East  $\frac{1}{4}$  of Section 31, Township 17, N. R. 8 East, M. D. B. & M.

at the rates and under the rules of said Excelsior Water and Mining Company on file with the Railroad Commission of the State of California. Said water to be used on said premises hereinabove described and measured and delivered by defendant Excelsior Water and Mining Company to said L. Stein at the point on the so-called Newtown Ditch to be designated by the said Stein.

IT IS HEREBY FURTHER ORDERED that the complaint in so far as it is directed to Thomas Mulcahey be, and the same is hereby dismissed.

Dated at San Francisco, California, this 4th day of February, 1918.

Max Thelen  
H. Howard  
Alfred Gordon  
Commissioners.