

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

In the matter of the application)	
of the Santa Clara Water and)	Application No. 136
Irrigating Company for an order)	
authorizing increase in rates.)	

Hiatt and Selby for applicant.
 Don G. Bowker for users and consumers of water.
 Geo. E. Farrand for Thermal Belt Company--

EDGERTON, Commissioner.

O P I N I O N

This is an application by Santa Clara Water and Irrigating Company for an order authorizing an increase in rates for water distributed in Ventura County, California.

Applicant is distributing 200 miners inches of water under a contract of lease for the sum of \$800 per annum, and 200 inches of water free, under a reservation contained in a deed, and water free to irrigate 100 acres of land. The remaining water of applicant is distributed to consumers at schedule rates, the said rates being higher than the \$800 per annum charged for the 200 inches of water above mentioned.

As applicant has been distributing free, or at rates very much below its schedule charged regular consumers over 400 inches of water, which is a very considerable portion of its total supply, and as the reason given by applicant for raising rates is that the total income from the sale of water is not sufficient to pay operating expenses, and if all of the water distributed by applicant were subjected to the schedule rates now in force its income would be considerably increased, it becomes necessary to first determine whether all or a part of the water now being distributed free, or at a low rate by applicant, should be subjected to the schedule rates charged

other consumers.

An agreement, called a lease, was executed, dated September 1, 1903, under which the Farmers' Ditch Irrigating Company, (the predecessor of applicant) agreed to deliver to Thermal Belt Water Company at the pumps of the latter in the irrigating system of the former, a continuous flow of 200 miners inches of water during the irrigating season of each year, commencing the 1st day of November, 1903, and ending the 31st day of October, 1942, for the yearly rental of \$800, payable in November for the year just expired.

Applicant has been furnishing water under said contract since its execution, and now is furnishing water at the rate therein specified, to-wit: \$800 per annum for 200 miners inches of water. This price is very much lower than the price charged other consumers under the schedule of rates now in effect.

This contract falls squarely within the rule laid down in the case of the application of James A. Murray and Ed Fletcher for an order authorizing and permitting an increase in the rentals etc., for furnishing water, decision No. 536, wherein, after an exhaustive review of the authorities, it was held that contracts made prior to the amendment of the Constitution in 1911 and the subsequent passage of the Public Utilities Act, which contracts fixed the price or rate at which a utility service should be sold, were subject to the power of the Railroad Commission to fix rates for such utility service, regardless of the terms of such contracts. Therefore, the 200 inches mentioned in this contract should be subject to the rates fixed for other consumers.

By conveyances on November 10, 1871, and August 10, 1881, Antonio Schiappa Pietra conveyed to the Santa Clara Water and Irrigating Company rights of way over his property for ditches now a part of the distributing system owned by

applicant. It was stipulated in said conveyances that Antonio Schiappa Pietra should have free use of water for his stock and cattle and for 100 acres of land to be thereafter selected. This land was afterward selected and since said time applicant has been furnishing water for irrigating said land free. As in the case of the 200 inches of water just above mentioned, it is to be determined whether this water must be charged for at schedule rates or whether there shall be a perpetual free use of it to the owners of the 100 acres of land. The free use of this water was a part of the consideration given for the granting of the rights of way and easements over land. Hence it is in the same situation as other contracts which provide the price for the delivery of water, although the price here was not stated in money. This agreement falls within decision No. 536 above mentioned, and, therefore, the water heretofore furnished the 100 acres free should be subjected to the rates fixed for other consumers.

On the 21st day of September, 1904, the Farmers' Ditch Irrigating Company conveyed to Leopolda Schiappa Pietra all of its irrigating system, including water and water rights, but there was excepted from this conveyance 200 inches of water and the right to divert that amount of water from the Santa Clara River and a right of way over the flumes, ditches, dams, etc., to divert said quantity of water and convert the same to the pumping station of said Farmers' Ditch Irrigating Company. This 200 inches of water is to be delivered free of cost. Said water, it was agreed, should only be used on certain lands designated in said conveyance.

The property thus conveyed to Leopolda Schiappa Pietra was thereafter transferred by him to applicant and applicant has ever since and now is furnishing said 200 inches of water free through its system to the pumping plant of the successors in interest of the Farmers' Ditch Irrigating Company.

This raises the question, whether by the reservation aforesaid, the beneficiaries thereof may forever obtain 200 inches of water free or be subject to the rates specified for other consumers.

In the case of *Leavitt vs. Lassen Irrigation Company*, 157 Cal. 82, it was held that a private use could not be carved out of a public use of water. That if water was appropriated for a public use and thereafter a part of such water should be reserved for a private use, that such reservation was void. As was said in that case:

"Treating Leavitt's appropriation as being wholly and entirely for public use he, the owner of the system, was but an instrumentality for the distribution of the waters which he gathered to such members of the public as might apply for them and pay to him the legal charge for the service that he rendered. As the agent of such a public use, he had no power whatsoever to reserve to himself for his private purposes any part of this water. If he could reserve a part, he could reserve all, and thus, by his ipse dixit, convert public use into private ownership, or, if he could reserve a part for himself, he could with equal authority give away parts of the supply to others, and by this method destroy what the constitution itself has declared shall forever remain a public use."

In order to apply the rule laid down in this decision, it is necessary to determine what the status of the use of water was at the time of the reservation. If the water belonging to the Farmers' Ditch Irrigating Company had been dedicated to a public use then the attempt by reservation to devote 200 inches of water to a private use would be abortive. On the other hand, if the water of the Farmers' Ditch Irrigating Company was, at the time of such reservation legally devoted to a private use, then the reservation of 200 inches of such water might be effective, notwithstanding that thereafter the balance of the water became dedicated to a public use.

No evidence was introduced as to the status of this

water at the time of said reservation, and it is impossible to determine from the record this very important question. Hence, I see no alternative but to re-open this case for the introduction of evidence to establish the matters above referred to. Therefore, I recommend that the submission of this case be set aside and that the same be set down for further hearing.

I submit the following form of order:

O R D E R

For the reasons set out in the foregoing opinion, the submission of the application herein is hereby set aside and a further hearing therein is hereby ordered.

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 18th day of June, 1913.

John W. Buchanan
W. L. Loveland
W. H. Gordon
Max Thelen
Edwin O. Edgerton
Commissioners.