

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

D. E. BROWN, et al,  
Plaintiffs,  
vs.  
CONSOLIDATED CANAL COMPANY,  
Defendant.

ORIGINAL

Case No. 390.

J. L. C. Irwin for plaintiffs,  
E. P. Brown and Short & Sutherland for defendants.

THELEN, Commissioner.

OPINION.

This is an action by water users against a public utility water company, based partly on an alleged failure to deliver water. The plaintiffs are land owners in Township 16 South, Range 22 East, Township 16 South, Range 23 East and Township 17 South, Range 22 East, M. D. B. & M., in Fresno, Tulare and Kings counties. Nearly all the complainants reside on what is known as the East Island, in Township 17 South, Range 22 East, M. D. B. & M. The plaintiffs allege that the defendant has failed to deliver water to them under certain contracts which are annexed to and made a part of the complaint. These contracts are the contract, dated December 15, 1900, between the Centerville and Kingsburg Irrigation Ditch Company and The Fresno Canal and Irrigation Company, the contract dated June 18, 1902, between Centerville and Kingsburg Ditch Company and The Fresno Canal and Irrigation Company and the Consolidated Canal Company, and the deed dated October 11, 1902, between The Fresno Canal and Irrigation Company, the California Safe Deposit and Trust Company, L. A. Nares, Charles Laton and Laguna Lands, Limited. The plaintiffs allege that the waters in the defendant company's ditches are not

ratably distributed by the company and that the users of water near the source or head of the ditch are permitted to use such quantities as they desire without regard to whether or not the users of water at the lower end of the ditch are given their pro rata of the water. The contract between the Centerville and Kingsburg Irrigation Ditch Company and The Fresno Canal and Irrigation Company, dated December 15, 1900, specifies certain lands to which the Centerville and Kingsburg Ditch Company agrees to deliver water at not to exceed two cubic feet of water per second for each quarter section of land, including all the lands owned by the plaintiffs, and then provides that said Centerville and Kingsburg/Irrigation Ditch Company may sell a total of 300 water rights of two cubic feet each and that "if at any time the aggregate quantity of water in the canals or ditches of said corporation shall be less than or fall short of 600 cubic feet per second flowing, then each contract or water right of this issue, tenor and effect shall represent the proportionate part of said aggregate quantity and the party of the second part shall be entitled to receive water in that proportion."

The answer denies the material allegations of the complaint and alleges that defendant has fully performed its contracts. The answer also alleges that the defendant has tried to induce the plaintiffs to organize for the purpose of co-operating with the defendant in the distribution of the water and that the plaintiffs have not complied with the suggestion.

The testimony shows that the plaintiffs are served by the Centerville and Kingsburg ditch, which is one of the ditches of the defendant company. The defendant secures its water from a dam located in Section 35, Township 13 South, Range 23 East, M.D.B. & M., and constructed across the Kings river. The same dam serves also to divert the water which flows through the Fresno canal belonging to The Fresno Canal and Irrigation Company. A little over a mile below the point of diversion the waters flowing through the Centerville and Kingsburg ditch are divided, part of them being diverted to what is

known as the Fowler Switch canal and the remaining waters continuing down the Centerville and Kingsburg canal. The defendant claims the right to take 1500 second feet of water from the Kings river when there is water there for its use. There is no claim in this case that the defendant has failed to take the waters which it could take. The plaintiffs base their case mainly on the proposition that the amount of water which is actually diverted from the Kings river by the defendant company is not fairly or ratably distributed, with the result that they have not secured their fair proportion of the water. The plaintiffs are supposed to receive water from what is known as the Cole Slough ditch, this being one of the laterals of the Centerville and Kingsburg canal. The Cole Slough ditch, according to the defendant, is entitled to one third of the water which the defendant company diverts from the Kings river.

The testimony shows that prior to the first day of the hearing, on June 24, 1913, the plaintiffs had received only a partial irrigation, this having been had in the early part of May. Some of the plaintiffs had received no water at all. The others were able to irrigate a portion of their lands, but in no case the entire land. On June 24th water again appeared on the Island, but on the last day of the hearing, which was June 26, 1913, the company had diverted all the water flowing through its canal into the Fowler Switch canal. The plaintiffs contended that the cause for their failure to receive additional water was the action of the defendant in permitting consumers of water living higher up on the ditch to take about as much water as they desired, even though such water was considerably in excess of the amount to which these people were <sup>ratably</sup> entitled. The evidence sustains this position of the plaintiffs. It shows that higher up on the canal the farmers have been permitted to use considerably more water than that which has been distributed to plaintiffs.

The defendant admitted that the plaintiffs had not received the amount of water to which they were ratably entitled, but relied on two main defenses, one being the scarcity of water and the other

the unauthorized diversion of water by farmers living higher up on the canal. With reference to the first point, the testimony shows that 1912 and 1913 have been unusually dry years. Nevertheless, the defendant's ditch at the point of diversion from the Kings river, has been running practically to full capacity, so that the ditch has been taking all the water to which it was entitled, notwithstanding the diminished flow of the Kings river during this year and the preceding year. The defendant insists that its canal is large enough during a normal year to supply all the water which defendant has contracted to sell, but contends that by reason of the dryness of the present year, a larger amount of water <sup>than usual</sup> is lost by seepage, so that it has been difficult to furnish water to the farmers at the lower end of the canal. Entirely irrespective of the truth of this contention, the fact remains, that the plaintiffs have not received their ratable distribution of water. It is undoubtedly true that the increased seepage of this year has made it more difficult to supply to the farmers along the canal the amount of water which they need, but this is no excuse for the failure to distribute ratably such water as there is.

With reference to the people higher up on the canal, it appears clearly that they have been taking more than their ratable proportion of the water. It also appears that the defendant has permitted these people to take practically all the water they desired, without any sustained effort on the part of the defendant to confine these persons to the water to which they were entitled. The testimony shows that while The Fresno Canal and Irrigation Company has instituted several prosecutions within the last few years against persons who are alleged to have tampered with gates and taken more water than they were entitled to, it also appears that the defendant in this case has never instituted any such prosecutions. While it is undoubtedly difficult to secure a conviction in a case of this kind if a public utility corporation is the <sup>complainant</sup> ~~defendant~~, it also appears that the defendant has made very little or no effort at all to procure

a ratable distribution of water. The testimony shows that the defendant has failed in its contract obligation to distribute the water ratably.

The defendant's engineer, Mr. I. Tielman, testified that the only way to remedy this situation is to place locks on the gates and to permit the company employees alone to open and close the locks. It appears that there are some 280/~~ft~~<sup>head</sup> gates on the Centerville and Kingsburg ditch south of the Fowler Switch. Mr. Tielman testified that if locks were placed on the head gates and on the check gates, it will be necessary to rebuild the same and that it will cost \$15 for each small gate and \$20 for each check gate, and these estimates are liberal. He testified also that defendant would have to employ three additional ditch tenders at a salary of \$70 to \$75 per month, and one assistant engineer to divide the water, at a salary of \$125 per month. He testified that he had installed a system of locks on a canal of The Fresno Canal and Irrigation Company west from Fresno, in order to stop the stealing of water on that canal, and that the system is working satisfactorily. The plaintiffs also contended that the only permanent solution of the difficulty is a system of locks. It is evident that such system can not be installed during the present irrigating season, which will last only a few weeks longer. The Commission will not at the present time order the defendant to install locks but will leave this matter for consideration in connection with the framing of rules and regulations as to which reference will hereafter be made in this opinion and in the order.

The plaintiffs claimed that the defendant is selling water rights in excess of the capacity of its system and that this fact is partly responsible for the shortage of water this year. The defendant submitted a summary of water right locations of the Consolidated Canal Company, which summary shows that during the year 1910, 19  $22/32$  feet of water were located by the defendant; in the year 1911, 4  $32/100$  second feet; and in the years 1912 and 1913, 4  $23/32$  cubic feet, thus making a total of 28  $1/2$  second feet, which were located on 4560 acres of land. During the same year, 4  $3/8$ /<sup>second</sup> feet

located on 700 ~~xxxxx~~ acres, were cancelled, leaving a net additional amount of water located in the years 1910 to 1913, inclusive, on the defendant's entire system of 24 1/8 second feet located on 3360 acres. Of the land so located not more than three second feet have been located on the Centerville and Kingsburg canal since January 1st, 1910. The defendant claims the right to sell 600 second feet and its officers testified that of this amount it had located 514 1/32 second feet. While it appears that a relatively small acreage has been located within the last three or four years, there is a serious question as to whether any additional water rights should be sold by reason of the apparent inability of the defendant to supply the water needed to irrigate the lands of the persons who now have water rights. I shall not go into this question in this case for the reason that it is not directly involved therein and that the subject will be gone into fully in other cases now pending before the Commission.

The testimony shows a marked lack of system in the conduct of the defendant's business. The defendant does not seem to have any definite rules and regulations. There is no accurate measurement<sup>and record</sup> of the amount of water which is distributed to individual consumers, nor of the amount of water which is distributed to the various laterals. Records should be kept in such a manner that an inspection will show promptly the amount of water which is going to each lateral and to the individual consumers day by day. Some of the employes also evidently do not understand their duty. The evidence shows a certain ditch tender who knew very little indeed concerning what was going on on his part of the beat. Apparently he had not been properly instructed by the defendant, either with reference to observing closely what is going on on his beat or in reporting to the defendant such complaints as might have been made to him. The plaintiffs also apparently did not understand what to do in order to bring their grievances to the attention of the defendant. The employes should be more carefully instructed in their duties and provision made so that the wants of the water users

can be promptly attended to in so far as possible and that they may know what to do in order to bring their grievances to the attention of the defendant.

It appeared also, incidentally, that the defendant had brought suit against certain of its water users for failure to pay the water rental of 75¢ per acre, and that in some of these cases suit was brought notwithstanding the fact that no water at all had been delivered to the land owner. It appeared further that such suits had been brought in cases in which the defendant had clearly failed in its duty to ratably distribute the water. While this is a matter over which this Commission does not have jurisdiction I feel that the defendant's attention should be drawn to the injustice of suing the land owners to recover rent in cases in which the defendant itself has failed in its duty to distribute to the water users their just proportion of the water.

It is clear that the welfare of large portions of the San Joaquin Valley is dependent upon a just and equitable distribution of the available water. In this matter the public utility and the public must act in harmony if the best results are to be secured. I have no doubt that the drought of the last two years has subjected the defendant company to unexpected difficulties and I realize fully the impossibility of giving every one a full head of water during a season such as the present one. At the same time this condition furnishes no excuse for a failure to distribute ratably such water as the defendant has under its control. While the defendant has in a way been unprepared to meet the exigencies of the last two years, I trust that the defendant will now take prompt steps to remedy the situation. The Commission will endeavor to assist both the public utility and the public to work out a more satisfactory condition and will direct its hydraulic department to consult both with the plaintiffs and with the defendant in the preparation of rules and regulations which shall govern the distribution of water during ensuing seasons. By reason of the fact that the present irrigating season has almost expired all the Com-

mission can do for this season is to give the temporary relief indicated in the order.

I submit herewith the following form of order:

ORDER

A public hearing having been held in the above entitled matter, and the matter having been submitted and the Commission being fully advised in the premises,

IT IS HEREBY ORDERED that the CONSOLIDATED CANAL COMPANY be and the same is hereby directed to make up the existing deficiency in water hitherto supplied to the plaintiffs and other users of water from ~~the~~ Cole Slough ditch by delivering to such persons forthwith their just proportion of this year's water in said Consolidated Canal Company's system and to continue such delivery until such persons have received their ratable proportion of this year's water or a sufficient quantity to irrigate their lands once in addition to such water as may have been delivered in the month of May or until the available supply from the Kings River becomes insufficient.

This case shall be held open for such further order as the Commission may after further investigation hereafter make in establishing rules and regulations for the future distribution of said Consolidated Canal Company's waters or in other respects.

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 27th day of June, 1913.

H. J. [Signature]  
[Signature]  
Max Thelin

Commissioners.