

Decision No. 31792

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of
CALIFORNIA WATER & TELEPHONE COMPANY
for an order abolishing the preferential
and discriminatory rates for water and
service furnished W. C. Lamb.

ORIGINAL

Application No. 21453

Bacigalupi, Elkus & Salinger
and P. S. Thacher, for applicant.

Lowell Howe and Charles C. Loosli,
for W. C. Lamb.

BY THE COMMISSION:

O P I N I O N

By this application the California Water & Telephone Company asks the Commission to set aside a contract made in the year 1888 by one of its predecessor utilities, the San Diego Land & Town Company, for the furnishing of water perpetually to a fifteen-acre tract of land near Chula Vista, a tract now owned by W. C. Lamb.

It is alleged in the petition, and it seems to be an admitted fact, that were Mr. Lamb to be charged at the utility's applicable tariff rates for the quantity of water commonly used by him for crop irrigation and dairy purposes, his total payment would approximate one thousand dollars annually, whereas the amount actually collected in accordance with the terms of the contract above referred to has averaged but three dollars and fifty cents per acre served, or about forty dollars per year.

It appears that shortly prior to the filing of this petition in September, 1937, the utility advised Mr. Lamb of its intention thereafter to disregard the preferential contract for water service to his lands and to assess its regular scheduled rates. Thereupon Mr. Lamb began an action in the Superior Court of the County of San Diego for the purpose of establishing his claim to the possession of a private water right attached to his land, and to enforce observance by the utility of the asserted covenant contained in that contract of 1888 binding the utility to deliver by means of its pipe line located along the border of his property the quantity of water to which he claims to be entitled and at the rate set forth in that agreement.

It does not appear that such court action has been brought to trial. Nor does it appear that the applicant utility has as yet actually assessed its regular tariff rates. It having urged the Commission to proceed with the hearing of its petition for relief, this was done, and thereafter the matter submitted, upon written briefs. Mr. Lamb appeared in protest, he having filed and pressed a motion to dismiss upon the ground that the Commission was without jurisdiction to grant the utility's petition. In order to fully develop the real questions in issue, it is necessary to recount in some detail the circumstances surrounding the execution of that agreement between the predecessors of the parties herein involved.

The utility water service now conducted by California Water & Telephone Company in the vicinity of National City and Chula Vista was begun at least as early as the spring of 1888. The date is marked by the completion of storage works on the Sweetwater River and of a pipe line conveying the stored waters

to the agricultural and residential areas along the Bay of San Diego. Such facilities were constructed by the San Diego Land & Town Company. It is possible that even prior to that time a utility water service was rendered by Kimball Brothers Water Company, a corporation to whose rights the San Diego Land & Town Company has succeeded. The extent to which these companies had devoted their waters to public use may best be determined by tracing the chain of title to the lands lying in the Sweetwater River valley appurtenant to the river, for it was these riparian water rights which seemingly became the nucleus of the utility rights devoted to public use.

Originally, the entire lower Sweetwater valley, together with the coastal lands in the areas now occupied by the cities of National City and Chula Vista, was a Mexican land grant of more than twenty-six thousand acres, known as the Rancho de la Nacion. This ranch came into the hands of one Pioche on June 18, 1868. On the same day Pioche entered into a contract to sell the entire property to Frank Kimball and Warren Kimball. The Kimballs evidently intended a subdivision of the lands, for their contract of purchase provided that they were privileged to resell at stipulated prices per acre even before the completion of their installment payments to Pioche, and the latter agreed, when called upon by the Kimballs, to execute deeds to such prospective purchasers. On June 9, 1869, before Frank and Warren Kimball had completed the payments due to Pioche under their contract of purchase and before they had received a deed to the ranch, they purported to convey all the waters of the Sweetwater River to a corporation which they organized under the name of Kimball Brothers Water Company. This instrument was recorded on October 9, 1869. The

water rights thus severed from the land were devoted to public use, either by that corporation or its successor San Diego Land & Town Company.

Just prior to the recordation of the above mentioned conveyance by Frank and Warren Kimball of the waters of the river, namely, on October 6, 1869, Pioche deeded a tract of land of about 169 acres situated along the river to one Norman Watkins, and both Frank and Warren Kimball joined in that deed. The fifteen acres now owned by Mr. Lamb is a part of that tract, this part having been transferred in 1882 by Watkins to Eratus Lake, and by him later deeded to Mr. Lamb.

Thus it may be seen that the fifteen-acre tract here involved, held successively by Watkins, Lake and Lamb, being riparian land, would or would not have continued to possess such riparian water right depending upon whether the deed from Pioche to Watkins was subject to the earlier grant by Frank and Warren Kimball purporting to transfer all water rights in the river to the Kimball Brothers corporation. And although we accept the contention of Lamb that the Watkins' purchase was with riparian rights attached, the important question still remains as to what meaning and effect should be accorded the written agreement thereafter executed on June 4, 1888, between Eratus Lake and the San Diego Land & Town Company.

Unfortunately, the recitals contained in that contract of 1888 cast little light upon the circumstances which prompted its execution. Nor does such parol evidence as was developed in the record aid materially in ascertaining the intent of the parties thereto. Briefly, the circumstances seem to have been as follows.

At the time San Diego Land & Town Company completed its

storage works and pipe line during the forepart of 1888, Eratus Lake was obtaining such water as he needed for garden and domestic uses from a well or sump located near the river. His son, Alfred V. Lake, recalled that the utility's pipe line had been located along the outer edge of his land, apparently without objection. Soon thereafter, however, the pipe was uncovered by flood waters, and when the utility entered to make repairs, Lake demanded and received payment of twenty dollars in damages. It appears also that with the completion of the storage dam on the river the supply of water from the well on Lake's property was exhausted. With only these meager facts before us as to what differences may have then existed between Lake and the utility, we turn to the contract which they entered into on June 4, 1888, and recorded soon thereafter. The substance of the writing may be quoted as follows:

"That the party of the first part for and in consideration of a perpetual right to him and his assigns, said right to be appurtenant to and to run with the land, to use all the water necessary for the irrigation at all times of a tract of land, now owned by said Lake, * * * at a rate not to exceed \$3.50 per acre per annum, grants to the second party the right to enter upon said land at all times, for the purpose of inspecting and repairing its water pipe and taps now upon said land, by agreement of the parties hereto, as the result of an arbitration of their differences, made at National City on the 17th day of April, 1888.

* * * * *

"IT BEING UNDERSTOOD that this agreement is in confirmation an enlargement of the aforesaid agreement, under the arbitration of April 17, whereby the party of the first part in consideration of a perpetual right to the free use of water for the irrigation of seven acres of said tract of land, * * * granted to said second party, the right to lay and maintain its main water pipe and necessary taps over and upon said tract of land forever * * * the said first party hereby acknowledging satisfaction of, and expressly waiving all claims for other or

further compensation or damage, which said tract of land or said first party as the owner thereof, may have already sustained, or which may hereafter be sustained, by said tract of land or said first party, by reason of the diversion of the waters of said river by the party of the second part, or the construction and maintenance of said line of pipe, or the entry upon said lands for the inspection and repair of said pipe and taps under this agreement."

As has already been indicated, the contention now advanced by Mr. Lamb is that this agreement of 1888 was clearly intended as a confirmation of Lake's right to the continued delivery of the riparian water to which he was entitled before the diversion of the river flow. The theory urged is that Lake thereby accepted in lieu of damages for such stream diversion, as well as the physical trespass upon his property, the covenant of the utility to continue perpetually the delivery of that water he himself owned by means of the pipe line which traversed his land. This being the situation, it is argued, the contract must be construed not as an attempt to carve out a private right to water which had already been devoted to public use, but as one confirming the existence of a private water right, and one which this Commission is without power now to modify or set aside.

The applicant utility, on the other hand, contends that the presence or absence of a water right riparian to the land is wholly immaterial to the Commission's decision in this controversy. The fact having been established that its predecessor company had actually undertaken the public utility service at the time the contract was executed, it claims that any such agreement entered into by a public utility respecting the rates to be charged for service rendered must be subject at all times to revision by public authority.

Were it clear to this Commission that the contract of 1888 had no other purpose and meaning than to fix the rates of San Diego Land & Town Company thereafter to be charged for water delivered as a utility service to the lands described, we would have no hesitation in declaring the rate named in that agreement unreasonable and preferential under present-day conditions. We would reach this conclusion although the agreement were clearly based upon an additional consideration in the way of damages occasioned by the utility's physical invasion of Lake's lands, for the evidence would indicate that the damage resulting from the presence of the pipe line along the rim of his property was not extensive and, in fact, the line today is not actually located upon his premises.

But we cannot conclude from the facts developed in this proceeding that there actually were no considerations other than these inducing the parties to enter into that agreement. Mr. Lamb has earnestly asserted claim to the existence of a private right secured by the Lake contract, and he has sought the aid of a court of law to obtain a judgment establishing such a right. Such an issue being within the cognizance of courts of law, we believe it to be our duty to defer to the judgment of the court to which this issue has been presented and to dismiss without prejudice the petition herein pending determination of the fundamental question involved before passing upon the reasonableness of the contract rates, as applicant prays.

O R D E R

A public hearing having been had upon the above entitled

application of California Water & Telephone Company, the matter submitted, and having been fully considered by the Commission; good cause appearing,

IT IS HEREBY ORDERED that said application be and hereby is dismissed.

Dated at San Francisco, California, this 24th day of October, 1938.

Raymond
Leon
Frank
Ray
Commissioners.