

Decision No. 32422

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

S. J. Kitzmiller,
Complainant,

Vs

Geo. S. Gould and
Alfred H. Clark,

Defendants.

ORIGINAL

Case No. 4342.

Don M. Kitzmiller, for Complainant,

Bardin, Harrington & Bardin,
By John T. Harrington, for
Defendants.

BY THE COMMISSION:

O P I N I O N

Complainant alleges that he is the owner of a tract of land containing 20.25 acres situated near the town of Soledad in Monterey County, which tract has been irrigated at least once each year for thirty-eight years last past; that since the year 1910 to and including the year 1937 the water for irrigation purposes for the said parcel has been supplied from the wells and pumping plant on adjoining ranch properties formerly owned by A. M. Tash, and now owned by defendants, George S. Gould and Alfred H. Clark. It is further alleged that said defendants advised complainant in 1938 that they would no longer furnish him with water for irrigation purposes. The Commission is asked to direct defendants to continue the delivery of water for irrigation purposes to complainant upon demand, and is also requested to declare the defendants and each of them to be operating a

public utility under the jurisdiction and control of the Railroad Commission. In general it may be said that the answer denies upon information and belief the essential allegations of the complaint, and alleges that the Railroad Commission is without jurisdiction. Defendants allege that at the time of their purchase of the said Tash Ranch, consisting of 137.90 acres of land,* on the 15th day of March, 1937, from the Bank of America National Trust & Savings Association,** a national banking association, they had no knowledge or information as to the claims set up by complainant, but that they had purchased said properties in good faith and under an assurance that there were no liens or encumbrances against the properties. Defendants therefore pray for dismissal of the complaint.

A public hearing in this proceeding was held in Soledad before Examiner M. R. MacKall.

According to the evidence, for a period of over thirty-eight years last past, S. J. Kitzmiller has been the owner of certain farming lands located in the Ex-Mission Soledad Rancho, Mission Colony Tract near the town of Soledad in Monterey County. Although this particular proceeding involves but a single parcel of 20.25 acres of land, Mr. Kitzmiller at one time owned other ranch properties, of which 75 acres more or less were under irrigation at one time from water supplied by and from the Tash well. This present tract of 20.25 acres is an apple orchard and requires irrigation each year. Prior to 1910 this land received water from Soledad Land and Water Company, predecessors of the Mission Water Company. (See Franscioni vs Soledad Land and Water Company, 170 Cal. 221). Controversies having arisen over water deliveries between the former Company and certain of the consumers,

*Hereinafter referred to as the Tash Ranch.

**Hereinafter referred to as Bank of America.

including Kitzmiller, A. M. Tash, who owned a tract of 137.90 acres adjoining complainant's parcel, drilled four wells on his ranch, installed a pumping plant and verbally agreed to supply all irrigation water Kitzmiller wanted for his properties in lieu of the Soledad Land and Water Company supply. Continuously since the year 1910 water was served by Tash from his wells or by his tenants or by tenants of the Bank of America during its ownership and control of the Tash Ranch, from said wells to lands of Kitzmiller and others until 1938, at which time notice was served by George S. Gould upon complainant, as well as the other consumers receiving irrigation water from this source, that service was to be discontinued immediately. Water was supplied to complainant, however, during 1938 by defendants under an agreement accepted upon request by this Commission with the mutual understanding that such action would not prejudice the standing or rights of defendants pending decision of this case.

The evidence shows that in 1910, during the original understandings with A. M. Tash for water service which were verbal, Kitzmiller agreed to permit Tash to level off certain of the ditch banks running through the Tash Ranch and theretofore used by the said Soledad Land and Water Company to serve water to the Kitzmiller and other properties, thus making it impossible for complainant to obtain irrigation service from any source other than the Tash wells. Charges were made by Tash or his tenants for all water furnished to Kitzmiller and others similarly served at rates varying at different times from 75¢ per hour run of pump to \$2.25 per hour, the flow capacity varying also from 4,500 gallons per minute to 3,000 gallons per minute. There was no ownership by Kitzmiller or any of the other consumers in the wells or pumping plant or any part of them. The entire upkeep, repair

and operating costs were borne by Tash or his tenants. At one time the total irrigation bills paid by Kitzmiller amounted to \$450 per year and perhaps more as the maximum payment is not clear in the record. At one time Kitzmiller irrigated his 20.25 acre parcel and other lands owned by him to a total of about 80 acres. Since 1910, in addition to the Kitzmiller 20.25 acre parcel, water was supplied generally for irrigation purposes to Tash's own ranch, of which 130 acres were under irrigation at one time, lands of A. Scheckle and Julius Scheckle amounting to 20 acres, and lands of Martin Iverson, 125 acres in area, of which 40 acres were irrigated. The various owners of these lands other than the Tash property for years paid Tash or his tenants the effective rates for the irrigation water supplied to them. The total amount received by the Tashes from their various consumers amounted in some years to about \$500. Edward Gilbert Tash, son of A. M. Tash now deceased, and Mrs. Emma Tash, operated the plant for his parents before the ranch was leased for the first time in 1924. According to his testimony the four wells were interconnected and originally operated by a 12-inch pump, run by a steam engine, later converted to electrical operation, and produced large volumes of water sufficient for all neighboring lands under the gravity flow of the plant. The testimony of Mrs. Emma Tash is to the effect that from its construction and installation about 1910 the pumping plant has continuously supplied, upon demand, all neighboring ranches under its flow, without refusal, and for a compensation designed to pay not only the operating costs but to provide some margin of profit as well. Mrs. Tash further testified that subsequent to 1924, at which time she and her husband, A.M. Tash, leased the Tash Ranch and went to their mountain ranch to live; the lessees were required to operate the pumping plant and continue

as in the past to supply the consumers with water as demanded, which was done by all such lessees up to the time her ranch was lost, about the year 1936, through foreclosure proceedings and acquired by the Bank of America.

In March of 1937 George S. Gould and Alfred H. Clark, defendants herein, purchased the Tash Ranch from the Bank of America for a consideration of \$32,000. Defendants thereafter entered into a contract to sell the ranch to Galardi who took immediate possession and continued to supply water to Kitzmiller and certain other consumers during the remainder of the year 1937. However, defendants repossessed the ranch and on January 21, 1938 complainant was notified by letter signed by George S. Gould to the effect that the Tash Ranch had been leased for three years, that the tenant was requested to supply no water to adjoining property owners without written permission, and informing Mr. Kitzmiller to get water from some other source. The other landowners were similarly notified and all except complainant installed their own wells and pumps. Kitzmiller has refused to put in his own well and pumping plant and now claims that the service was public utility in character, has been so impressed with a public servitude from its inception, and that discontinuance has been unwarranted without his consent and without authority of the Railroad Commission.

The evidence clearly shows that the waters from the Tash Wells were dedicated to the public use as soon as placed in operation, and were in fact drilled and equipped for that very purpose. Defendants claim the service to Kitzmiller was under a private contract. While it is true the latter agreed to take water from Tash before the wells were drilled, it is plain that Tash necessarily had to know how many landowners would take

water from him before he would be warranted in installing so many wells and such a large pumping plant. Furthermore, no evidence of private contracts with Tash and the other consumers governing water service was produced. The entire scale of construction and the operating methods adopted and continued in effect throughout the entire ownership of the wells and pumps by Tash unquestionably indicated a dedication of the plant and equipment to the service of the public, which service was continued even during ownership by the Bank of America up to the notice of discontinuance by defendants.

The question of surplus water cannot enter into this case for the output of the wells has always been far in excess of the demands and sufficient for a far greater acreage than ever demanded service. Defendants rely mainly upon the contention that they were not advised nor acquainted with the nature of the use of water from the wells at the time of acquisition of the Tash Ranch from the Bank of America. Obviously this is no defense. The law is well settled that public utility obligations and liabilities cannot be extinguished by such simple procedure. Not only is this true but it is further clear that lack of approval of the sale of this property by the Railroad Commission to defendants places a serious cloud upon the title so obtained.

In conclusion it should be pointed out that the mere fact that certain other consumers formerly supplied from the Tash plant installed their own wells does not thereby relieve defendants of their public utility obligations to complainant without reasonable explanation and without authority of this Commission. Complainant was notified of discontinuance of further irrigation deliveries to his properties, a service enjoyed without interruption or refusal for over a quarter of a century.

Relief from unfair or unreasonable public utility servitude may be had under proceedings provided by law. Such steps were not taken by defendants. Under the circumstances it appears proper that defendants be directed to resume service to complainant S. J. Kitzmiller until otherwise relieved through orderly processes of the law.

O R D E R

It is hereby found as a fact that the wells, pumping plant, and all other water-producing and distribution facilities of the agricultural water system on the said A. M. Tash Ranch now owned by defendants George S. Gould and Alfred H. Clark and heretofore used to supply water to adjoining properties for irrigation purposes, be and it is hereby found to be dedicated to the public use and subject to the jurisdiction and control of the Railroad Commission of the State of California.

Basing this Order upon the foregoing findings of fact and upon the further statements of fact contained in the Opinion which precedes this Order,

IT IS HEREBY ORDERED as follows:

1. That service be resumed upon demand to S. J. Kitzmiller and all other consumers from said Tash Plant.
2. That Geo. S. Gould and Alfred H. Clark be and they are hereby directed to file with this Commission within thirty (30) days from the date of this Order the rates that were in effect at the time the service was discontinued.
3. That Geo. S. Gould and Alfred H. Clark submit within thirty (30) days from the date of this Order to this Commission for its approval rules and regulations governing relations with their consumers.

For all other purposes the effective date of this Order shall be twenty (20) days from and after the date hereof.

Dated at Los Angeles, California, this 3rd day of October, 1939.

Ralph W. Bunker
General Manager
U. P. A. S.
Commissioners