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ORIGINAL

Decision No. 43038

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

LAWRENCE A. THOMSON, Complainant vs. CALIFORNIA WATER AND TELEPHONE COMPANY, a corporation, Defendant.	Case No. 4977

SWING, SCHARNIKOW & STANIFORTH, by Phil D. Swing, for Complainant;

BACIGALUPI, ELKUS & SALINGER, by Claude N. Rosenberg, for Defendant;

MEREDITH L. CAMPBELL, City Attorney, National City; and

ALBERT C. BOYER, City Attorney, Chula Vista.

OPINION

Complainant Thomson is the owner of property bordering on the Sweetwater Reservoir, San Diego County. That reservoir is owned and operated by the defendant company for supplying water service as a public utility in portions of said county, primarily within and adjacent to the cities of Chula Vista and National City. Complainant alleges that his land has been supplied with water by the defendant and its predecessor companies for more than thirty-five years, and that defendant has declared its intention to discontinue the service. He asks the Commission to order defendant to continue to supply water in the manner it and its predecessors have done in the past by permitting him to take water from the reservoir through his own facilities and at his own expense, and he offers to compensate defendant for water taken at the rates set forth in its regularly established service schedules.

In answer to the complaint, defendant alleges that neither it nor any of

its predecessors have ever rendered a public utility water service to complainant's land, and that there has never been a dedication of its water or facilities to such a service.

A hearing was held on this complaint in San Diego on December 14, 1948, before Examiner Warner. The record does not disclose any material dispute as to the essential facts involved. Because complainant asserts the right to continue to take water from the reservoir as in the past, and traces the history of past service from 1908 when one of the defendant's predecessor companies made a contract with one Dean, who then owned the land in question, permitting him to take water from the reservoir under prescribed conditions, it appears necessary first to examine in some detail the circumstances surrounding the making of that contract.

A dam on the Sweetwater River was constructed by the San Diego Land and Town Company about 1888, that company then undertaking to supply a public utility water service to the extent hereinafter described. The height of the dam as it existed prior to 1908 was not sufficient to cause the flooding of any of the Dean property, but it appears that the Sweetwater Water Company, the utility then owning the reservoir, proposed the raising of the dam by 15 feet, and such new construction was completed by 1911. On September 14, 1908, a contract was executed between Dean and Sweetwater Water Company whereby the utility was conveyed a perpetual right to overflow a described triangular portion of the Dean property, a parcel consisting of about two acres, and Dean was accorded a perpetual right to "* * * take and use water from the above granted premises whenever water from said reservoir shall overflow and stand and be upon the same or any part thereof; * * *." The agreement further provided that the amount of water so taken by Dean should not be in excess of 750,000 gallons a month and should be used only on another described parcel comprising about 6½ acres.

The evidence indicates that at the time such agreement was executed, Dean was obtaining his supply of water from springs and from a well located on or near the two-acre parcel to which he conveyed overflow rights to the utility. There is in evidence a chart indicating the water levels of the reservoir during each succeeding year, and this reveals the periods when water must have stood upon

the overflow segment of the Dean land. However, there appears to have been no overflow during his ownership up to 1910. From 1910 to 1917, when the land was owned by Bryant, there were only occasional periods of overflow. Under the ownership of Williams from 1917 to 1946, there were alternate periods when the reservoir was above and below the level that would cause a flooding of this part of his land, and during some periods it was covered for two or more years' duration. Between 1937 and 1944 inclusive, it was flooded almost continuously, but no overflow has occurred since the fore part of 1945. Complainant Thomson obtained title in September 1946. He alleges that because of the erection by defendant of another dam on the upper sources of the river, it is not probable that the level of the Sweetwater Reservoir will again rise to a height permitting the flooding of the two-acre segment of his land.

It appears from the evidence that complainant Thomson has been pumping water from the reservoir by means of a pipe extended beyond the limits of his land by a distance sufficient to reach the actual water level of the reservoir when falling below the point at which it covers his own land. Evidence was presented to show that his predecessors had followed a similar practice. Complainant's demand that defendant be ordered to continue the practice rests upon the claim that the taking of water from the reservoir by his predecessors over a period of many years establishes the existence of a utility-customer relationship that may not lawfully be discontinued.

Defendant acknowledges its obligation to permit the taking of water in accordance with the terms of the Dean agreement, but not otherwise. Although complainant asks the Commission to order defendant to permit him to take water as in the past, the effect of his demand, as we understand it, is that the Commission abrogate or reform the Dean contract so as to permit him to pump water from the reservoir at all times, whether or not his land is flooded. Seemingly, he seeks the privilege of taking only the amount of water specified in the Dean agreement, although his pleading is not entirely clear on this point. He is willing to pay for this privilege, although the Dean agreement does not provide for payment.

The issue presented for decision is thus limited to the single question

whether defendant is under any public utility obligation to permit Thomson, as a utility customer, to take water from Sweetwater Reservoir. The Commission is not called upon to determine any question as to the rights of the parties under the Dean contract, for that has been the subject of litigation in the Superior Court of San Diego County, and judgment has been rendered by that Court holding that the contract itself does not give complainant the right to take water from the reservoir except when the two-acre parcel of his land is flooded.

In seeking to establish defendant's public utility obligation to permit his withdrawal of water from the reservoir, complainant first refers to various notices of appropriation which were filed by the San Diego Land and Town Company on waters of the Sweetwater River and argues that they show an intent to dedicate all appropriated water for supplying customers within the area where his land is located. In each of such appropriation notices there is a declaration that the place of intended use and sale of water will be on the Rancho de la Nacion. In some there is specific mention also of intended use in National City, Ex Mission, and Otay. But in each there is added to the specifically mentioned places of intended use, such general clauses as "and all other points in San Diego County, California, as may be practical and expedient," or, "as practical and convenient."

Although the designation by an appropriator of water of the place of its intended use and sale is not controlling in determining the extent of his actual dedication to public use, the recitals contained in the appropriation notices of defendant's predecessors may not reasonably be interpreted as an offer to supply water to the land now owned by complainant. The uppermost boundary of the Rancho de la Nacion is located below the Sweetwater Dam, and is 6500 feet distant from the lands of complainant. But complainant contends that those appropriation notices, when coupled with an actual taking of water by previous owners of his land, with the knowledge and with either the express or implied consent of defendant and its predecessors, are sufficient to establish a holding out to provide him with water as a public utility service. Therefore, it is necessary to examine the evidence of record relative to the actual taking and use of water from the reservoir by complainant's predecessors, and the circumstances under which defend-

ant and its predecessors may have permitted such taking.

There is no substantial evidence to indicate that prior to the time that Williams took possession of the land in question some time in 1919, there had been any withdrawal of water from the reservoir except to the extent permitted by the Dean agreement. During the latter part of that year the water level of the reservoir fell below the point where it would overflow the two-acre parcel, but prior thereto it had been flooded continuously for about two and one-half years. It remained unflooded during the winter of 1919-1920, and was again without water during the latter part of 1921. The record shows that Williams then extended a pipe line down to the lower water level. Improvements he then made on his property apparently increased the amount of water used. Yet he not only had constructive notice of the terms of the Dean contract, it being a recorded document, but it appears that he received actual notice from the utility that it would enforce the Dean contract, such notice prompting him to consult a lawyer concerning his rights. An agreement is in evidence made in 1919, but not showing the specific date executed, under which the utility accorded him a license or privilege to take water from the reservoir at levels below the point his land would be flooded, but the amount to be so taken was limited to not more than 500,000 gallons a year. It recited also that the license was personal to him and revocable at will, and that it was not to be urged by him as a basis for a claim of right to the continued furnishing of water.

During subsequent years of the Williams ownership, the two-acre parcel was flooded during most of 1927 and 1928, and again during parts of the years 1931 and 1932, but beginning with the year 1937 it was flooded continuously until near the end of 1945, excepting only the latter part of 1940. In 1941 the utility gave him notice that said license agreement was revoked.

It appears that in 1945, after Williams' land was no longer flooded by reservoir water, further disputes arose between him and the defendant utility respecting his use of water. Complainant Thomson purchased the land from Williams in 1946, his deed being recorded in November of that year. On December 20, 1946, the defendant brought suit to restrain Thomson from taking water in violation of

the Dean agreement.

It is upon the facts thus disclosed that complainant rests his contention that defendant and its predecessors have acknowledged the right of the owner of this land to take water from the reservoir under circumstances not permitted by the Dean contract. It is claimed that this is a right which he possesses as a utility customer. He states in his brief that he relies on the Dean contract itself, not on the Williams license agreement. But the Commission cannot view any of the acts of defendant or its predecessors as an acknowledgment of a public utility obligation to provide the land with water. On the contrary, all the acts of the utility indicate a continuing intent not to assume any obligation to supply water as a utility service.

It is argued by complainant that the Dean contract must be taken as an acknowledgment that a public utility obligation then existed to supply water to all lands within the compass of the early appropriation notices, for otherwise, it is contended, the contract it then executed would have amounted to nothing more than an unlawful attempt to carve out a private use from waters that already had been entirely dedicated to public use. The argument is not sound. In the first place, the right accorded under the Dean contract was to take water only when it stood upon Dean's own land, but the utility did not incur any obligation to place water there, or to leave it there when it had to be withdrawn from the reservoir for utility uses in accordance with its prior dedication. As the scope of its prior dedication cannot be construed to have included uses in the area in question, the Dean contract cannot be taken as an acknowledgment that such a utility service obligation toward him then existed. And the acts of Dean's successors in taking water from the reservoir in violation of the terms of that contract cannot well be urged to establish a right any larger than that which Dean thereby obtained.

Complainant advances certain equitable considerations which are said to justify an order commanding defendant to accord him the status of a utility customer. He says that he has made improvements on the premises and has begun the operation of a dairy business in reliance upon the belief that water from the

reservoir could be utilized, and asserts that it may be impossible for him to obtain an adequate supply from wells on his premises. If the Commission were permitted to consider such equitable circumstances in determining the single question of his legal right to utility service, it would be compelled to accord equal consideration to the rights of others who wish to obtain service from this same utility, for since 1921 this utility has been restricted by order of the Commission from attaching any new customers except for domestic service, even in the areas to which utility service clearly has been dedicated. Representatives from the cities of Chula Vista and National City appeared in this proceeding to object to any extension of its service area to include the lands in question.

It is the conclusion of the Commission that complainant Thomson has not shown that defendant is under any public utility obligation to supply water, or permit him the use of water, as alleged in his complaint. Accordingly, it will be ordered that his complaint be dismissed.

O R D E R

Complaint having been filed by Lawrence A. Thomson against California Water and Telephone Company, the matter having been heard and the evidence fully considered by the Commission, and basing its order upon the findings and conclusions set forth in the foregoing opinion,

IT IS ORDERED that said complaint be and hereby is dismissed.

The effective date of this order shall be twenty (20) days from the date hereof.

Dated at San Francisco, California, this 6th day of July, 1949.

R. E. Mittelstaedt

Ira H. Rowell

Harold P. Huls

Kenneth Potter

Commissioners.