

Decision No. 43569

ORIGINAL

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Consumers of Robert A. Stanley Water
System of South Felton, Complainants,
vs. Robert A. Stanley, Defendant

Case No. 5079

Investigation into the operations of
Robert A. Stanley and Kaspar Bauer in
connection with a water system at
South Felton, Santa Cruz County.

Case No. 5100

Frances M. Wright, for complainants;
Robert A. Stanley and Kaspar Bauer,
in pro. per.; George A. Atwood and
T. N. Toft, interested parties.

O P I N I O N

These cases are the outgrowth of a series of informal complaints in connection with a water system located near Felton, Santa Cruz County, serving about forty residents. The complaint (Case No. 5079) alleges that water was sold to the public for more than 15 years by the original owner, Kaspar Bauer (who is an attorney at law), that the supply is limited due to lack of storage facilities and the system needs repairs, that these conditions are continuing under a new owner, Robert A. Stanley, and that persons who have constructed, or who are about to construct, dwellings have no other source of water. Complainants ask that the system be declared to be a public utility and that rates be "stabilized" at \$1.50 per month. They also request that the water works be repaired, that storage tanks be installed, and that Stanley be required to have some one in charge of the properties during his absence.

Subsequent to the filing of the complaint the Commission instituted an investigation on its own motion (Case No. 5100) for the purpose of determining the nature of the water service provided by

Bauer or Stanley, the adequacy of the facilities, and the reasonableness of rates, contracts and practices. We now turn to the facts disclosed by the record.⁽¹⁾

In 1905, Kaspar Bauer acquired 40 acres in the Rancho Canada del Rincon, lying in Section 27, T. 10 S., R. 2 W., M.D.A., Santa Cruz County, near the Felton - Santa Cruz Highway (State Highway No. 9) south of Felton. The San Lorenzo River flows southeasterly through the northeast quadrant of Section 27 and is paralleled some 700' to the west by the highway, which makes a sharp horseshoe bend westerly at Toll House Gulch, a tributary of the San Lorenzo. Directly west of the bend, in the approximate center of the section, lies Big Tree Park Subdivision No. 1 (filed Oct. 5, 1909). About 170' west of the westerly boundary of the subdivision Boulder Brook flows northerly through Forest Lakes Subdivision No. 1 and enters Gold Gulch (a tributary of the San Lorenzo) in the northwest quadrant of the section. Lying across the northern boundary of Section 27, between the highway and the river, is Gold Gulch River Park (filed June 14, 1938). River Lane links the highway and San Lorenzo River just south of Gold Gulch River Park and is paralleled about 800' to the southeast by Arrow Lane. The area formerly called Hihn's Flat bounded by the highway, River Lane, the San Lorenzo and Arrow Lane, is roughly rectangular and contains about 16 acres. Bauer bought this 16 acres about 1921 from the Estate of August C. Hihn, built two cabins and developed water from a spring on the place. It does not appear that Bauer had anything to do with subdividing Big Tree Park or Gold Gulch River Park, nor did he record the 16-acre piece purchased from the Hihn Estate, but from time to time sold lots from the latter by metes and bounds descriptions, as will appear later.

(1) The cases were heard on a consolidated record at Felton, July 15, 1949, before Commissioner Potter and Examiner Gregory.

Bauer intended to build more cottages and, with a view to securing an adequate water supply, in 1923 purchased from Fred D. Hihn a right to one-fourth the flow of Boulder Brook together with a right-of-way for a flume or pipe line across the Hihn property, "the said water route /sic/ and right-of-way . . . to be by the terms of this deed made appurtenant to such land as Kaspar Bauer may designate." The deed also gave Bauer, his heirs and assigns, the right "to enter upon the lands of Fred D. Hihn for the purpose of constructing, using, repairing, renewing and maintaining suitable works for the taking of such water from said brook and convey the same to the border line of property of the said Fred D. Hihn."

In 1924 Bauer purchased from Alan R. I. Hiley (a grantee of F. A. Hihn Company) a plot of land 25' square adjacent to the south boundary of Lot 46, Big Tree Park Subdivision No. 1 and distant about 500' east of the diversion point in Boulder Brook, for use as a tank site for a water system. Bauer, however, did not build a tank on this site.

In 1925, Bauer acquired from Charles C. Tyler, as a continuation of the right of way previously granted to him by Fred D. Hihn, a perpetual right of way for a pipe line across Tyler's lands for the purpose of conveying the waters of Boulder Brook to Bauer's property, together with a right to enter upon Tyler's land to construct, maintain and repair the pipe line. An additional right of way for a pipe line was obtained by Bauer in 1938 from Nathan L. Griest.

When Bauer first built his two cabins about 1921 the neighborhood was sparsely settled. Other persons soon began to build in the locality and came to Bauer for water. One of these had a Delco system from which he supplied Bauer with electricity in exchange for water. There was a dry spell about 1926 during which neighbors came

from all around to get water. Some were close to the pipe line and some carried water from Bauer's place to their own. As time went on, however, the supply became short and Bauer told several of his neighbors to find their own water, which they did. Some paid for water while others did not. As Bauer put it, "The thing grew up like Topsy. There isn't much system to the whole thing. Anybody who wanted water cut across lots and put out the pipe and the other guy had water."

Although Bauer's early arrangements with his neighbors are not entirely clear, the evidence indicates that, as time passed and more cabins and homes came to be built in the locality, the basis of water service gradually assumed a rather distinct pattern, dependent, to some extent, upon the location of the premises of the various users with reference to the layout of the system.

In general, there are two main groups of users, aside from those (or their successors) who initially received water under the arrangements described above. The first group, which comprises a majority of the complainants, is located at the end of the main transmission line from Boulder Brook, in the area bounded roughly by the highway, River Lane, Arrow Lane and the San Lorenzo River. A number of these people purchased their lots from Bauer, in the period from about 1925 to 1947, pursuant to grants describing their premises by metes and bounds and usually containing an agreement by Bauer to furnish water at the rate of \$1.00 per month. In some cases, the deed or agreement for sale of the real property recites in much detail the obligations of the parties with respect to water service; in others there is merely a simple statement that seller agrees to provide buyers with water for domestic use only. Some of the documents specify a rate of \$1.00 per month, \$6.00 semi-annually, or \$12.00 per year. In still other cases, the water service arrangements are described in an independent agreement executed at about the same time as the deed.

(2)
Five such deeds and agreements are in evidence. A few users stated they had deeds at home but did not bring them to the hearing.

The second group, composed of approximately 15 users, is located in Big Tree Park Subdivision between the highway and Boulder Brook. Water reaches this group from a 5000 gallon storage tank on the main line, located about 800' northeast of the point of diversion, by means of a one-inch pipe connection, installed, according to Bauer, by Alan Hiley, from whom a number of the people in that area, or their predecessors, purchased their lots.

Aside from the tank site acquired from Hiley in 1924, it appears that Bauer owned no land in Big Tree Park and had nothing to do with the installation of the distribution and service lines located in that area. He testified, moreover, that he did not maintain any of these lines during the time he operated the system but only his own supply lines. There were no water service agreements, it seems, with the residents of Big Tree Park; instead, according to Bauer, water was supplied to these people by way of accommodation only, at the same rate, however, as that generally charged other users on the lower end of the system. There are three letters in evidence tending to substantiate Bauer's testimony as to the character of service rendered the users in Big Tree Park, -- two, signed by persons now deceased, dated in 1945 and 1946, and one, signed by a present user the day before the hearing and in anticipation thereof. The letters are all of the same tenor.

(2) Thompson (1925); Climie (1940); Lopes (1943); Attwood (1945); Diodati (1947 - by mesne conveyance). All of the five persons named above, except Thompson, testified at the hearing.

The one dated October 13, 1945, bears Bauer's signature and that of A. L. Gambo, since deceased, and appears to be in Bauer's handwriting. It reads as follows:

"It is agreed that K. Bauer will furnish water for domestic purposes to Mr. A. L. Gambo at his property on the Glengarry Road -- Santa Cruz County at the rate of \$1.00 per month. Said water service -- it is understood is an accommodation service and may be terminated at the option of either party."

There are a few users who, due to special circumstances, cannot readily be placed in either one or the other of the main groups. One of these, a resort owner named Griffin, whose premises are located just northwest of Gold Gulch River Park about 2000' northwest of the point where the main transmission line crosses the highway opposite Arrow Lane, in 1929 laid pipe along the highway from the transmission main to a point in front of his property, at his own expense, and commenced paying Bauer for water at the rate of \$12.00 per year, later raised to \$18.00. This arrangement was subsequently modified to provide for the payment of \$4.50 per year per cabin, of which nine were eventually constructed at the resort. According to Griffin, Bauer was reluctant to supply water indefinitely, due to recurring shortages, and an understanding seems to have been reached between the two providing for discontinuance of service on one year's notice. In 1946 Griffin developed his own water supply and has since paid \$15.00 per year to Bauer and his successor, Stanley, for standby water service.

Another user, residing across the highway from Gold Gulch River Park some 300' northwest of River Lane, appears to have laid pipe from Bauer's main to his home about 20 years ago, while Bauer was in San Jose. This user paid Bauer \$12.00 per year for water until 1939, when he became a permanent resident, and since has paid \$18.00 per year.

One resident, whose premises are located on the northeast side of the highway between River Lane and Gold Gulch River Park, appears to have connections for water both from the Bauer system and

from the local supply in Gold Gulch River Park. The record does not indicate whether this individual ever paid Bauer for water (he was not one of those who signed the complaint), but it seems that he was able to make use of one or the other sources of supply, depending upon the availability of water at the time.

The foregoing discussion denotes generally the type of water service provided by Bauer over the years until 1947, when he sold his land and water system to Stanley, an event that will be treated more fully later. The layout of the system itself, only briefly mentioned from time to time in what has gone before, might be more fully described at this point. As Bauer had no diagram of the works, and kept virtually no records, the location of the various facilities has had to be pieced together from testimony given by Bauer himself, by the Commission's engineer who inspected the properties, and by some of the users, aided by two maps of the locality introduced in evidence.

Water is conducted from the diversion point in Boulder Brook in a northeasterly direction through a one and one-half inch pipe line down a ridge and under the highway, a distance of approximately 2500 feet, from which point the line branches to serve residents in the vicinity of Arrow and River Lanes as well as those located along the highway northwest of River Lane in the direction of Felton. About 800' from the diversion point, on the ridge overlooking Big Tree Park a few hundred feet to the south, there is a 5000-gallon storage tank containing two outlets. From one of these outlets water flows on down to the lower part of the system. From the other, a one-inch pipe line carries the water to Big Tree Park and the users in the vicinity of Glengarry Road, which runs through the subdivision. About half way between the 5000-gallon tank and the highway there is a 15,000-gallon storage tank which is no longer in serviceable condition. According to Bauer, the

flow amounts to some 60,000 gallons per day in the early spring and considerably less later on in the year. He once built a small dam in the stream, but this later filled up with gravel. He stated that a substantial dam would have to be built to assure an adequate year round supply for present and potential users.

The complaints voiced at the hearing were concerned chiefly with failure of the water supply during the dry summer months and with lack of supervision and maintenance since the sale to Stanley in the summer of 1947. One of the residents of Big Tree Park had expended \$114.28 for repairs to that part of the system early this year. Another user, on the lower end, also had made repairs and had considered the time and effort thus spent to be in lieu of payment for water. The evidence clearly indicates a need for major rehabilitation of the system if the needs of those now living in the area and of prospective buyers of property there are to be met.

In June, 1947, Bauer and his wife, through a local real estate agent, sold the auto camp and water system to Robert A. Stanley and his wife, of Berkeley, for the sum of \$30,000. The transaction was evidenced by a deed in joint tenancy from the Bauers to the Stanleys and by a deed of trust, with power of sale, given to the California Pacific Title Company by the Stanleys to secure payment of their promissory note to the Bauers for \$25,000, payable in monthly installments of \$150 commencing August 1, 1947. The joint tenancy deed conveys, by metes and bounds, the remaining lands of the Bauers in Hihn Flat, except their own home, together with the water right in Boulder Brook, the tank site in Big Tree Park and the rights of way for a pipe line acquired by Bauer from the Tylers in 1925 and from the Griests in 1938. This deed reserved to the grantors sufficient water for domestic use on their remaining lands on the northeastern line of the Santa Cruz-Felton Highway. The grant also was made subject to the express

understanding that the grantees, their heirs and assigns, would assume any and all agreements theretofore made by the grantors with owners of various parcels of land adjacent to the Hihn Flat property, described in the deed as "Parcel One," regarding the furnishing of water to such parcels, and further released grantors from any and all liabilities incurred thereby.

The events surrounding the sale were described by Bauer and his wife and by Stanley. Mrs. Bauer, it appears from her testimony, was somewhat reluctant to part with the property for less than \$35,000, but finally agreed to the price of \$30,000. Stanley testified that he was looking for an opportunity to go into the auto camp business and did not realize that a water right went with the property until he discussed the deed with his attorney, who told him he was obliged to serve water. Furthermore, he did not know that a water system was being operated in connection with the property and made no inquiry about it. (3) He talked with Bauer at about the time of the sale, and was given a list of some 36 customers. He did not remember, however, having discussed the question of water service with the users at that time, but he did inspect portions of the system with Bauer. Since taking possession he has received payments for water, either directly or by checks endorsed over to him by Bauer. In 1948 he gave permission to one Escalle, in Gold Gulch River Park, to connect with the line installed by Griffin in that locality some years ago, and also gave P. G. Wright permission to use water. Wright is the individual previously mentioned who seems to be connected both with Griffin's line and with the source of supply in Gold Gulch River Park. Both

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- (3) "Q. Did you make any inquiries about water to that property?
A. No.
Q. How did you expect water to be furnished there?
A. I don't know. At the time I went into a cabin and run the faucet and there was water there. I figure it's being supplied." (Tr. p. 190)

these users pay Stanley for water at the rate of \$15.00 per year. Stanley's position at the hearing was that he was serving water to about 50 persons who either had agreements with Bauer or who were being supplied as an accommodation. He has made no repairs to the system since taking possession.

The main issue in this proceeding is whether Bauer ever dedicated his water supply to the public and thereby assumed the status of a public utility. On the basis of the evidence at hand we have concluded that the water system is not a public utility and that, consequently, the complaint and investigation should be dismissed.

It would serve no useful purpose to review the well-established legal concepts by which a question of this kind is to be resolved. It is sufficient, we think, to say that our constitutional and statutory provisions dealing with water companies must be construed as applying only to such properties as have in fact been devoted to a public use, and not as an effort to impress with a public use properties which have not been devoted thereto. The right to hold and deal with one's property in private ownership, free from a servitude in favor of the general public, is an important and valuable right under our system of law. That right may not be impaired or destroyed, unless and until, by clear and unequivocal act, the owner of the right has indicated that he holds his property for the public benefit. Devotion of water facilities to public use, moreover, must be of such character that the public generally, or that part of it which has been served and which has accepted the service, including every individual member thereof, has the legal right to demand that the service shall be conducted, so long as it is continued, with reasonable efficiency under reasonable charges.

In the present case, we believe that the available evidence points clearly to the conclusion we have reached and to no other. When Bauer first acquired his water right in Boulder Brook and his rights of way for a pipe line to his cabins it was for the purpose of providing his own property with an adequate water supply. His early dealings with his immediate neighbors, who had no supply of their own at the time, or who came to him for water during periods of drought, appear to have been purely of a permissive nature so far as their use of water was concerned. When Bauer later told them to look for their own supply they did. And those who lived in Big Tree Park seem to have been in no better position to demand continuous service.

Bauer testified, and the deeds and agreements in evidence bear him out, that he did not extend his facilities, at his own expense, to anyone except those who purchased lots from him in the vicinity of Arrow and River Lanes. The deed under which he derived from Hihn the water right and right of way for a pipe line made those rights appurtenant to such lands as Bauer might designate. The Thompson agreement and the Diodati title policy (Exhibits 9 and 15) are the two instruments which present in greatest detail the terms and conditions under which water was to be supplied to the respective premises. According to those instruments, Bauer designated the land conveyed as land to which a part of the original water right and right of way for water transportation should be appurtenant, and agreed to lay a pipe line from the point of diversion in Boulder Brook to the boundary line of the lot conveyed and to maintain the line in proper condition to conduct water. The grantees agreed to furnish and lay a pipe line from their property line to the point of use, and Bauer agreed to furnish water through the pipe line from the point of diversion to the grantees perpetually, or as water might be available at the point of diversion. Grantees agreed to pay for the water so furnished at the rate of \$1.00 per month, semi-annually in advance.

The arrangements with residents of Big Tree Park, as indicated by the document quoted earlier, conferred no water right or right to continuous service upon the property owners in that area. Instead, the users in that locality were given to understand, and they did understand, that their water service was revocable at any time. Neither such arrangements, nor, for that matter, those with the users on the lower end of the system, comport with public utility obligations on the part of the owner of the water supply. Furthermore, and we believe the fact to be of significance, at no time during the long history of this water system did any user, prior to the sale to Stanley, ever question the arrangements under which water was furnished or claim that Bauer had dedicated the water to the public. Under such circumstances, to declare that the water had been dedicated to a public use would be to take property of the owner in the absence of intent, declaration, or act on his part to dedicate the same to such use.

The problem facing the water users and prospective buyers of property in this area, while a serious one, should not be insoluble. Like others in the vicinity, this system needs to be accommodated to the conditions of supply and use peculiar to the locality. Provision for storage will have to be made to assure adequate, year around service. Bauer stressed this in his testimony, and his long experience with the system should not be overlooked. As Bauer's successor, Stanley might be well advised to search out, in company with the users, some feasible method of financing needed improvements, of which several are open to consideration. In any event, steps will have to be taken quickly to avoid further deterioration of the situation with consequent loss in property values and inconvenience to all.

The complaint and investigation will be dismissed.

O R D E R

Public hearing having been had upon the complaint and investigation entitled above, evidence having been received and considered, the respective proceedings having been submitted for decision, the Commission now being fully advised and basing its order upon the findings and conclusions contained in the foregoing opinion,

IT IS ORDERED that said complaint and investigation be and they are hereby dismissed.

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

Dated at San Francisco, California this 29th day of November, 1949.

A. B. Zimmerman
Justice F. Casper
Harold S. Huler
James H. Dutton
Commissioners.