

ORIGINAL

Decision No. 85952

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORPHA BOOTH,

Complainant,

vs.

RICHARD F. BOYON, and DOES 1
through 10, Inclusive,

Defendants.

Case No. 10007
(Filed November 19, 1975)

Wayne Lemieux, Attorney at Law,
for complainant.

Reid, Babbage & Coil, by Richard A.
Brown, Attorney at Law, for
defendants.

Joel H. Lubin, for the Commission
staff.

O P I N I O N

This is a complaint by Orpha Booth (Booth) of Yucca Valley, California based on the purchase of property by Booth from defendants' predecessors-in-interest. This purchase included certain water rights from a well on adjoining property. Booth maintains she is not receiving this water and has requested the Commission to declare that the defendant is a public utility and has improperly ceased providing water service. Defendant (Boyon) has denied that there is any further obligation to provide water to Booth. A prehearing

conference was held on March 17, 1976 before Examiner Phillip E. Blecher in Los Angeles at which time this matter was submitted for decision on stipulated facts with briefs to be filed after the receipt of the transcript.

The stipulated facts are as follows:

1. The subject water rights were created by a grant deed dated August 15, 1957 and recorded in Book 4319, page 172, San Bernardino County Recorder's office. This grant deed is between the predecessors-in-title for both Booth and Boyon and was introduced as Exhibit A. It provided the right to water from a well located on property adjacent to that subsequently purchased by Booth. In addition to the granting language, it set forth:

"It is understood, however, that in the event of a sale by Grantors of their said property and water well they shall have the option upon sixty days written notice to Grantees to pay Grantees the sum of one thousand dollars (\$1,000) and thereby terminate all right, title, and interest of Grantees in Grantors' property above described."

2. Booth purchased her property through a grant deed (Exhibit B) dated April 6, 1959 recorded in Book 1852, page 28, from the grantees of Exhibit A. This property is a portion of the property described in Exhibit A.

3. Booth handled this purchase through a title insurance escrow company and obtained a title record which indicated the existence of the water rights and option in Exhibit A, of which Booth had actual knowledge at the time of her purchase.

4. The waterwell described in Exhibit A is not on the property Booth purchased.

5. The well discussed in Exhibit A supplied water to Booth for about nine months after Booth purchased the property, at which time this well ran dry. Thereafter Booth did not receive water for about 13 months, at which time the grantors in Exhibit A dug a second well in another location and continued to supply water to Booth until about April 1972.^{1/}

6. Booth did not pay any direct consideration for the water rights that she alleges she has obtained; that any consideration for the water rights was contained in the consideration for the purchase of the property.

7. That in February 1972 Booth and the owners of several other parcels served by this second well had a meeting to attempt to work out some payment arrangement for the water received from this well.

8. During the period that Booth was furnished water from either the original or the subsequent well there was no direct consideration paid for the water on a regular basis, although there were some services performed and perhaps some cash paid intermittently for the water received.

9. On February 19, 1972 Booth indicated that she would be willing to pay \$10 a month for water from the second well. If this payment was unsatisfactory she would accept the \$1,000 and sixty-day notice to cut off her water rights in accordance with the option in Exhibit A.

^{1/} Booth represents, though it is not stipulated, that her grantors orally represented that they would supply water to her.

10. Booth paid the \$10 a month for about three months at which time her water was cut off without notice and without payment of any monies.

11. About July 1973 Boyon forwarded a letter to Booth's attorney indicating that the original well on the property had run dry and that Boyon was exercising the option contained in Exhibit A, and was providing sixty-day notice of the cessation of water service. A check in the amount of \$1,300 (which includes \$300 for her attorney's fees) was also enclosed.

12. This \$1,300 check was retained by Booth's attorney until April 1975, at which time a different check in the sum of \$1,300 was returned to Boyon's attorney.

Discussion

Booth maintains that since Section 216 of the Public Utilities Code (Code) provides that whenever any water corporation delivers water to the public, or any portion thereof, for which any compensation or payment is received, such water corporation is a public utility subject to the jurisdiction of this Commission. Since there was such a sale of water to neighboring property owners for compensation (because Booth was promised that if she purchased the property, water would be provided), there was sufficient dedication of water service to public use to create a public utility. Further, a second dedication occurred when the second well was placed into service, because Booth paid \$10 a month for three months^{2/} and irregularly provided other consideration. Since a public utility was created by dedication of the first well (now dry) this is indicative of an intention to create a public utility in the presently used

^{2/} This occurred over ten years after the second well began furnishing water.

second well, which intention is evidenced by the meeting of several property owners in the area to determine an apportionment of the costs thereof which resulted in Booth's paying \$10 a month for three months before being cut off. Booth's actual notice of Exhibit A limiting the water rights to the first well does not affect Booth's rights here because her current right to water stems from the dedication of the second well to public use and the limitations placed upon the first well are therefore irrelevant. Booth agrees that the Commission cannot order the defendant to operate at a loss but is only seeking the Commission's declaration of the creation of a public utility. Booth also agrees that the Commission should be reluctant in establishing a one-customer utility, but is compelled to do so when the facts warrant it.

Boyon's position is that he did not operate a public utility because there was no dedication to public use. There was no such dedication because a grant of water rights from one well with a condition which would allow the cessation of water service is not a dedication to public use. Therefore, Boyon's operation is not subject to regulation by the Commission. Further, even if there was a public utility involved, the contractual rights of the parties are established by Exhibit A and since they were properly exercised, Booth's rights to any further water supply were effectively terminated by the exercise of the option in July 1973. Additionally the granted water supply was for only one dwelling from the one well which was then in existence, and not from any subsequent wells.

The staff position is that it is impracticable and uneconomical to establish a single-customer public utility water company because the required compensatory rates might exceed the cost of obtaining water from alternate sources, and all costs for such service would be borne by the single customer.

Whether a public utility exists is primarily determined by the dedication of private property to a public use. (Allen v Railroad Commission (1919) 179 C 68.) The stipulated facts indicate that there was no dedication of the original water source to a public use. The condition contained in the deed granting the water rights (Exhibit A) clearly negates any intention to unequivocally dedicate the water for the benefit of even a portion of the public since it clearly gives the owner of the well the option to terminate any water rights at any time after a sale by grantors. Since there must be such an unequivocal intention to dedicate service to the public in order to achieve the status of a public utility water company (see Rogina v Mendocino State Hospital (1954) 53 CPUC 108; Allen v Railroad Commission, supra) no public utility was then created. This is particularly true where Booth purchased the property with actual notice of the limitation on the water rights. About 13 months after the first well ran dry a new well began furnishing water without any compensation, though there was some vague, intermittent, and undefined compensation (both as to amount and form). In early 1972 several of the property owners being served by the second well had a meeting to determine what to do about the water and its cost. At that meeting Booth said she would be willing to pay \$10 a month for water from that second well, or, if that was not satisfactory, she would accept the \$1,000 and sixty-day notice to cut off her water rights under the terms of the condition in Exhibit A. For about three months, she did pay this \$10 a month. Then her water was cut off without notice and without payment of the money. In July 1973 Boyon properly exercised the option in Exhibit A. It is clear from these facts that there was never any dedication to public use of the

water from the second well. It is our view that the water from the second well was primarily an accommodation to neighbors and therefore would be exempt under Section 2704(c) of the Code.^{3/} Whether the termination under the option in Exhibit A applied to the second well is immaterial since it was properly exercised as to the first well and the granted water that Booth was being furnished was limited to the first well. Since there was no unequivocal dedication of the water from the second well to a public use, and the water was being furnished as an accommodation, no public utility was created in the second well. The fact that Booth paid \$10 per month for three months as compensation does not sustain Booth's burden of showing an unequivocal intention to dedicate the second well for public use.

Because the facts do not indicate a dedication sufficient to require the imposition of public utility status on the defendant for either well, there is no need to consider the other contentions raised by the parties.

Findings of Fact

1. The grantors' option in Exhibit A to cease water service upon the performance of the conditions stated therein negates the necessary unequivocal intention to dedicate that water to public use.

2. Boyon's predecessors-in-interest did not unequivocally dedicate the well which furnished water to Booth to public use.

3. The furnishing of water from the second well, after the original well ran dry, without any fixed compensation, or definable method of determining compensation, negates the unequivocal intention to dedicate the water and service of the second well to a public use, and amounts to an accommodation within the meaning of Section 2704(c) of the Code.

4. Boyon did not unequivocally dedicate the second well to public use.

3/ Section 2704, as far as pertinent, reads as follows: "Any owner of a water supply not otherwise dedicated to public use...who (c) sells or delivers a portion...as a matter of accommodation to neighbors...is not subject to the jurisdiction, control and regulation of the commission."

5. There was no dedication of either well to public use.
6. Booth purchased the property with actual notice of the grantors' option to cease water service after sale by grantors and was aware of the lack of grantors' unequivocal intention to dedicate the water to public use.

Conclusions

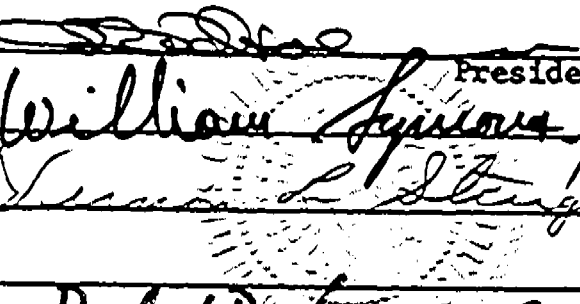
1. There was no unequivocal dedication to public use of either well.
2. No public utility water company was created by the defendants or their predecessors-in-interest.
3. The requested relief should be denied.

O R D E R

IT IS ORDERED that the relief requested by complainant is denied.

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

Dated at San Francisco, California, this 15th
day of JUNE, 1976.


William Seymour J. President
Leonard Ross
Robert Bateman Commissioners

Commissioner Leonard Ross, being necessarily absent, did not participate in the disposition of this proceeding.