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Decision No. 88874 MAY 31 1978

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

WILLIAM J. KURTZ and THERESA KURTZ, Complainants, vs. LECIL E. COLE and MARY JEANETTE COLE, M. F. LAND AND WATER COMPANY, MICHAEL JEWETT, Partner, RANCHO SANTA PAULA, RANCHO EL DORADO, IRVIN WEINHAUS, Partner, and MR. and MRS. W. H. BROKAW, Defendants.	Case No. 10388 (Filed August 4, 1977)

William J. Kurtz, for himself and Theresa Kurtz, complainants.
Hathaway, Claybaugh, Perrett, and Webster, by Paul D. Powers, Attorney at Law, for defendants.
Robert M. Mann, for the Commission staff.

OPINION AND ORDER

On August 29, 1975 the complainants and the defendants Lecil E. and Mary Jeanette Cole (Coles) entered into an agreement (Exhibit 1) whereby the complainants sold a parcel of land, 30' x 30', to the Coles for a well site. In addition to other consideration, the Coles agreed to permit the complainants to install a six-inch pipe hookup to run from the well site to a 2.4-acre parcel of land owned by the complainants and contiguous to the well site. The Coles agreed to sell the complainants water sufficient to irrigate that acreage for agricultural purposes only and for the exclusive use of the 2.4 acres involved. The price of the water used was to be the average of the price for water of the water districts in Ventura County, California, at the time the water was used.

The Coles installed a well on the site, the well produced water, and thereafter the complainants received and are now receiving water for the 2.4 acres as provided by the contract. The water has been and is being provided without any cost to the complainants.

By their complaint, the complainants allege that the arrangement for water usage and such delivery of water to the complainants' property is contrary to the Public Utilities Code (Code) and inhibits the sale of their property. Their complaint seeks an order requiring the defendants to immediately cease and desist from delivering water to their property declaring that the sale of water as contemplated in the contract and as occurred was invalid and contrary to the Code, and ordering that the defendants be deemed a public utility and ordered to comply with the requirements of the Code.

In their answer, the defendants contend that the water system is not dedicated to public use; they are not subject to the jurisdiction, control, or regulation of the Commission because they are an exception under the provisions of Section 2704(a) of the Code in that they supply surplus water for irrigation to the complainants who are immediately adjoining landowners; and are a further exception under Section 2704(c) in that the water supplied was as a matter of accommodation to a neighbor to whom no other supply of water for irrigation purposes was equally available.

A hearing was held in Ventura on February 3, 1978 before Administrative Law Judge James D. Tante. The parties were authorized to provide briefs in the form of a letter to the presiding officer on or before February 17, 1978 and the case was submitted as of that later date.

The 30' x 30' parcel of land upon which the well is situated is in the southwest corner of a 2.2-acre parcel owned by the complainants. The 2.4-acre parcel owned by the complainants and for which the complainants are receiving water in accordance with the terms of Exhibit 1 is immediately to the south of the aforementioned 2.2-acre parcel. Immediately to the north and east of the 2.2-acre parcel upon which the well is situated is a parcel consisting of 16.67 acres owned by the complainants. The complainants do not nor have they ever contended that the defendants have supplied water to any parcel except the 2.4-acre parcel involved herein.

At the hearing, the complainant William J. Kurtz stated that he desired to modify the type of relief sought. He stated that the complainants sought an order of the Commission that the contract involved herein (Exhibit 1) is null and void, that the parties should be placed in the same position they were in prior to entering into the contract, and that the complainants should be declared the owners of the 30' x 30' parcel of land upon which the well is situated. If that relief is not available to the complainants, then they seek to have the defendants declared a public utility, ordered to comply with the laws, rules, and regulations pertaining to such a public utility, and ordered to serve not only the 2.4-acre parcel now being served but also the 2.2-acre parcel and the 16.67-acre parcel which has never been served with water by the defendants or any of them.

The defendant Lecil E. Cole installed a six-inch diameter pipeline and extended this pipeline northerly from the well over an easement adjacent to the complainants' 2.2-acre parcel for approximately 300 or 400 yards. The pipeline provides irrigation water from the well to a service area of approximately 700 acres all of which is owned by the various parties who are defendants in this case. Each of these parties owns a shareholder interest in the water system amounting to one share of stock for each acre of land owned by the shareholder.

William J. Kurtz testified for the complainants and Lecil E. Cole testified for the defendants.

Exhibit 1, a contract; Exhibit 6, a preincorporation agreement; Exhibit 7, a water well operating agreement; Exhibit 8, a preincorporation subscription agreement dated November 30, 1972; Exhibit 9, a water well operating agreement dated January 1977; and Exhibit 10, the Commission staff report, were received in evidence. Exhibit 2, a check; Exhibit 3, a bill; Exhibit 4, minutes of a meeting of the board of directors of the Community Mutual Water Company; and Exhibit 5, an agreement of sale were marked for identification only and not received in evidence.

After the complainants introduced their evidence, the defendants made a motion to dismiss the complaint, the motion was taken under submission and is denied.

The Commission has no jurisdiction and it is not its function to declare the contract involved herein null and void or to restore the parties to their original positions as requested by the complainants under the circumstances involved in this case. (Cal Water & Tel. Co. v Public Utilities Commission (1959) 51 C 2nd 478.)

There is no contention nor is there any evidence that the defendants have ever served or intended to serve the complainants' 2.2-acre parcel or 16.67-acre parcel with water or that there was any intention to dedicate their facilities to serve either of these areas. The only question remaining is whether or not the defendants should be declared a public utility for the purpose of serving the complainants' 2.4-acre parcel which is now and has been receiving water from the defendants.

Since January 1976 the complainants have been taking water from a spigot located approximately ten feet from the well for the purpose of irrigating their 2.4-acre parcel. The complainants have had free access to the well, the extent of their use of water has not been metered, and the proprietors of the well have not enforced the collection provisions of the agreement.

The defendants, who are the present owners of the well, operate the well under a well operating agreement and preincorporation subscription agreement which defines their rights (Exhibits 7 and 8).

The owners of the system are prohibited from transferring shares in any manner which would preclude the formation of a mutual water company. It has been the intention of the holders of the water system that when the system is in full operation a conversion would be made to a mutual water company. At one point the complainants were included in an earlier consideration for a mutual water company (see Exhibit 5), the formation of which did not take place. The document under which such formation was contemplated has been voided by the parties.

Attached to the preincorporation subscription agreement is a map of an area contemplated as a service area. The purpose of this map is to delineate those areas to which the mutual water company will be limited. Additionally, all of those persons who presently own the system are located within that service area.

The Maltby property which was contemplated to be served under certain conditions by the provisions of Exhibit 1 no longer belongs to Mr. Maltby but is owned by Mr. and Mrs. W. H. Brokaw, two of the defendants in this action.

The Question of Public Utility Status

Except for the fact that the defendants provided water for the 2.4-acre parcel of the complainants pursuant to a contract entered into prior to the time that the well was developed and prior to the time that water was available to the defendants or any of them, there was no evidence to indicate that the defendants intended to dedicate or devote any of their water or their facilities to public use. The defendant Lecil E. Cole testified that neither he nor any of the other defendants ever intended to dedicate their water or facilities to a public use.

Section 2701 of the Code provides in part:

"Any person, firm, or corporation, ...who sells, ...or delivers water to any person, ...is a public utility, and is subject...to the jurisdiction, control, and regulation of the Commission, except as otherwise provided in this chapter."

A test to be applied in determining whether the defendants constitute a public utility as defined by Section 2701 of the Code is whether or not those offering the service have expressly or impliedly held themselves out as engaging in a business of supplying water to the public as a class, not necessarily all of the public, but to any limited portion of it as destinguished from holding themselves out as serving or ready to serve only particular individuals, either as a matter of accommodation or for reasons peculiar or particular to them. (Yucaipa Water Company No. 1 v The Public Utilities Commission (1960) 54 C 2d 823, 827.)

The operations conducted by the defendants can best be described as a cooperative undertaking to distribute water to a service area of approximately 700 acres. The defendants are all owners of land within that area and all have a share in the cooperative water system. When the defendants purchased the well site from Kurtz, contractual rights or servitudes were vested with respect to Kurtz' remaining parcel adjoining the well site. That adjoining parcel is entitled to water pursuant to the contract. Just because the defendants contracted to provide water to the 2.4-acre parcel of Kurtz as a condition for the purchase of a well site does not mean or imply that the defendants were holding themselves out to serve the public or a portion thereof.

The service received by the complainants was entered into by private contract prior to the existence of the well and the supply of water and therefore providing water to the

complainants was private in character and not within the jurisdiction of the Commission. (Calwa Waterworks (1930) 34 CRC 178.) We cannot conclude from the evidence presented that the defendants are operating as a public utility.

It is not necessary, therefore, to determine whether the defendants are within the exceptions set forth in Section 2704(a) or Section 2704(c) of the Code.

Findings

1. The complainants and the Coles entered into an agreement August 29, 1975 which provided, among other things, that the complainants would sell and the Coles would buy a 30' x 30' parcel of land for the purpose of a well site, and part of the consideration for the sale was that the Coles would sell water for agricultural purposes to the complainants at a price of the average of the price for water of the water districts in Ventura County, California, at the time the water is used.

2. The Coles established a water well on the site, provided water to the land of the complainants as they had agreed to do, sold an interest in the well to the other defendants, and provided water for their land and the land of the other defendants, all of whom have a cooperative proprietary interest in the well.

3. The defendants have not held themselves out to serve the public generally or any part thereof with water other than pursuant to the agreement with the complainants, and have not dedicated their water or facilities to a public use. The defendants are not, and should not be declared to be, a public utility.

4. The Commission is without jurisdiction to declare null and void the contract entered into between the complainants and the Coles.

The Commission concludes that the defendants are not operating as a public utility and the relief requested by the complainants should be denied.

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

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

Dated at San Francisco, California, this 31st day of MAY, 1978.

Robert Batinovich
President

Vernon L. Sturgeon

Richard D. Gravelle

Commissioner William Symons, Jr.

Present but not participating.
Commissioner Claire T. Dedrick, being necessarily absent, did not participate in the disposition of this proceeding.