

ORIGINAL

Decision No. 91488 APR 2 1980

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

T.C.E., INC.,

Complainant,

vs.

SIERRA HIGHLANDS WATER CO.,

Defendant.

Case No. 10721
(Filed February 23, 1979)

Stark, Stewart & Simon, by Fonda Karelitz,
Attorney at Law, for T.C.E., Inc.,
complainant.

Robert M. Desky, Attorney at Law, and
Kronick, Moskovitz, Tiedemann & Girard,
by James E. Thompson, Attorney at Law,
for Sierra Highlands Water Company,
defendant.

OPINION AND ORDER

T.C.E., Inc. (TCE) brought this complaint against Sierra Highlands Water Co. (Sierra)^{1/} because of a dispute in the interpretation of a water supply agreement (contract), see Appendix A, which was approved by this Commission. TCE's complaint claims that Sierra has violated the contract in two ways. First, Sierra has refused to deliver certain amounts of water requested to be delivered by TCE and, second, Sierra has billed TCE on a monthly basis in violation of an agreement to bill quarterly. Sierra denies each of the allegations.

1/ T.C.E., Inc. is the corporate name for Tobin Clark Estates, a corporation engaged in real estate and recreation ventures such as the one at Lake Don Pedro in the western foothills of the Sierra Nevada mountain range in Tuolumne and Mariposa Counties, California. Sierra Highlands Water Co. serves the Lake Don Pedro area.

The contract in question was executed on October 9, 1969 between Sierra and Boise Cascade Properties, Inc. of Delaware (Boise), a Delaware corporation. It provides, among other things, that Sierra shall deliver raw water (i.e., water not fit for human consumption) to the Lake Don Pedro Golf Course and that TCE shall pay \$45 per acre foot for such water. The primary dispute between the parties involves the following paragraph of the contract. Sierra contends that it limits delivery of water to the golf course and TCE contends it does not.

"2. WATER PURCHASE - QUANTITY: Supplier agrees to deliver and Purchaser agrees to purchase the following quantities of water for the period indicated and thereafter the quantity of water necessary for irrigation of the Lake Don Pedro Golf Course: From 1972 through 1975, inclusive - 750 acre feet per annum; 1976 - 700 acre feet; 1977 - 650 acre feet; 1978 - 600 acre feet; 1979 - 550 acre feet; 1980 - 500 acre feet; and 1981 - 450 acre feet."

The amount of water specified in the above paragraph was not used for the years 1972 through 1978. The following tabulation shows the detail of usage for that period.

<u>Year</u>	<u>Acre Feet</u>			<u>Unused x \$45</u>
	<u>Contract</u>	<u>Used</u>	<u>Unused</u>	
1972	750	-Not Available-		
1973	750	484.9	265.1	\$11,929.50
1974	750	464.46	285.54	12,849.30
1975	750	439.55	360.45	13,970.25
1976	700	490.58	209.42	9,423.90
1977	650	437.45	212.55	9,564.75
1978	600	382.26	217.74	9,798.30

Payment for the unused (deficiency) portions of the contract quantities is required by Paragraph 7 of the contract:

- "7. DEFICIENCY PAYMENTS: In the event that Purchaser shall not require and purchase the annual quantity of water specified in Paragraph 2 of this Agreement, prior to December 15 of each such period, Supplier shall prepare an invoice on or after the 15th day of December indicating the total quantity of water delivered during the year and the deficiency amount, if any, due Supplier for water not delivered during said period, which amount shall be paid by Purchaser in accordance with the provisions of Article 6 of this Agreement."

Through the purchase of properties at Lake Don Pedro, including the golf course, TCE became the successor to Boise in the contract and assumed all of the contract obligations beginning with the calendar year 1974. TCE's primary claim is that since it did not use nor need all of the water contracted for to irrigate the golf course that it requested Sierra, under TCE's understanding of the contract terms (see Paragraph 4, Appendix A), to deliver the unused water elsewhere, which Sierra refused to do, thus violating the contract terms. TCE asserts that the refusal by Sierra effectively began in calendar year 1976 and, therefore, requests relief from paying for unused water from that year on. The specific relief requested by TCE is that the Commission should order:

1. Sierra to refund to TCE monies paid for unused water for 1976 and 1977, \$18,988.65, plus interest,
2. Disbursal to TCE of \$9,798.30 plus interest on the \$27,000.00 deposited with the Commission for the 600-acre feet billed for 1978,
3. Disbursal to TCE of the monies plus interest representing the charges for unused water that are on deposit with the Commission for the first three quarters of 1979,
4. Sierra to bill TCE in the future only for water used, and
5. Sierra to bill TCE on a quarterly basis.

TCE's claims are grounded on the premise that it requested Sierra to deliver the unused water to locations other than the golf course and Sierra refused, thereby causing TCE to pay large amounts for water never used and restraining TCE from engaging in profitable ventures by using the water for purposes other than irrigating the golf course. Sierra interprets Paragraph 2 of the contract as limiting delivery of water to the golf course and TCE claims that it does not. However, as will be seen from the following discussion, the record is clear that TCE never formally requested Sierra to deliver water under the contract to any location but the golf course.

Vito Mazzone, president of TCE, was the only witness called by complainant. His testimony on the first issue of this case centered on whether or not TCE had on two occasions, involving two separate locations, requested Sierra to deliver water to other than the golf course. These two locations are both within the service area of Sierra, and the Sierra water system would be capable of serving them with certain additional capital expenditures to expand facilities. The first location is at the intersection of Hidalgo Street and Banderilla Drive (Hidalgo) in the Lake Don Pedro development. This location is a little over two miles from the raw water line that Sierra uses to serve the golf course. The second location is an area called Kassabon Flats (Kassabon) and is contiguous to the raw water line. The raw water line referred to is the only one in the Sierra system. Besides serving the golf course, it is the source of water for the domestic water system at Lake Don Pedro serving the main reservoir which contains the filter and treatment plant for the domestic water system.

Taking first the Hidalgo location, it is contiguous only to the treated water system of Sierra. If raw water were to be delivered to that location, a new line extending more than two

miles would have to be constructed. (It should be kept in mind that the contract provides for only raw water to be furnished.) Mr. Mazzone testified that he first considered some kind of development in the Hidalgo area as early as 1974-75 but did not give it serious thought until early 1976 when he realized that excess water might be available under the contract (Tr. 60-63). Mr. Mazzone or his representatives discussed the possibility of delivering water to Hidalgo with Sierra representatives at that time. The record shows, however, that these preliminary discussions on Hidalgo involved the delivery of treated water through the domestic system and not the raw water covered by the contract; also, it would have been at a different cost than the \$45 contained in the contract. Mr. Mazzone testified that he understood that any service to Hidalgo would be from the domestic system, possibly from the service lines to fire hydrants in the vicinity, and not from the raw water line (Tr. 67 and 68). The nearest thing to a request for service to Hidalgo was a letter from TCE to Sierra dated June 6, 1977 (Exhibit No. 3) requesting a cost estimate on delivery of surplus contract water to Hidalgo. Sierra responded to that by letter dated June 22, 1977 (Exhibit No. 3) stating that it would not consider making such an estimate until TCE, which was delinquent in water payments at that time, brought its accounts current. TCE did not follow up on that exchange. At any rate, TCE never made a formal request of Sierra to serve Hidalgo in any way because TCE, as Mr. Mazzone testified, "...got too involved in land sales at the time" (Tr. 70).

Kassabon, the second possible location that was considered for delivery of raw water under the contract, is contiguous to the raw water line and could be serviced with very little in the way of physical improvements. Discussions between TCE and Sierra about the possibilities of serving Kassabon were carried on contemporaneously with the discussions on Hidalgo. However, according to the testimony of Mr. Mazzone, TCE made no formal request for service

at that location either. Mr. Mazzone stated that "...things beyond our control" ruled out the development of an irrigation system for Kassabon, although "...once it's straightened out, we'll get back to it" (Tr. 83).

It is clear from the record that TCE never made a bona fide request to Sierra for delivery of the raw water covered by the contract; and although Sierra contends that the contract does not provide for the delivery of water to locations other than the golf course and informed TCE of this by letter on June 5, 1978 (Exhibit No. 5), it does not appear that that contention affected TCE's decisions not to make a formal request to Sierra. Since Sierra could not refuse a request that was never made, there is nothing further to consider on TCE's first claim, and we will find for defendant, Sierra.

Concerning TCE's second claim that Sierra should bill quarterly instead of monthly, the contract provides for only one facet of billing and that is that bills rendered are due and payable 30 days from date of receipt. The contract is totally silent concerning billing periods. However, when Boise was a party to the contract preceding the assumption on January 1, 1974 by TCE, the record shows that billings were paid quarterly by Boise. Mr. Mazzone testified that a representative of Sierra informed him prior to January 1974 that Sierra would bill TCE once a month under the contract but, as in the past, payment would be due quarterly. TCE should enjoy the precedent established for Boise, and we will find for TCE on the matter of billing payments.

Findings of Fact

1. Sierra Highlands Water Co. (Sierra) is a public utility under the jurisdiction of this Commission.
2. T.C.E., Inc. (TCE) is a customer of Sierra.
3. Sierra serves TCE under a contract approved by this Commission.

4. TCE complains that Sierra has not fulfilled its obligations under the contract.

5. TCE asks that the Commission order Sierra to (a) make certain refunds, (b) bill only for water delivered under the contract, and (c) bill on a quarterly basis.

6. A properly noticed public hearing was held at which complainant and defendant appeared and were heard.

7. TCE's primary action arises from its claim that Sierra has refused to deliver to TCE water that has been paid for under the minimum contract amounts but not used by TCE.

8. Sierra has never delivered water under the contract to any location other than the Lake Don Pedro Golf Course.

9. TCE and Sierra representatives discussed the possibilities of delivery of water to two locations other than the golf course.

10. TCE has never requested Sierra to deliver water under the contract to any location but the golf course.

11. As to delivery of water to TCE, Sierra has not violated the contract provisions.

12. The contract contains no references to or provisions for billing periods by Sierra to TCE.

13. Prior to TCE's assumption of the contract from its predecessor, Boise Cascade Properties, Inc. of Delaware (Boise), in January 1974, Sierra billed monthly but allowed Boise to pay its bills quarterly.

14. TCE should be afforded the same billing terms under the contract that were afforded Boise.

15. Pending disposition of this complaint by the Commission, TCE has deposited certain amounts with the Commission in accordance with the Public Utilities Code and rules and regulations established by the Commission.

16. All deposits referred to in Finding No. 15 should be disbursed to Sierra.

Conclusions of Law

1. All funds on deposit with the Commission by TCE in connection with this case should be disbursed to Sierra.

2. Sierra should be ordered to bill TCE on a monthly basis with payment due on a quarterly basis within 30 days of the receipt of bills by TCE.

3. In all other respects the complaint should be denied.

IT IS ORDERED that:

1. The Executive Director shall disburse to Sierra Highlands Water Co. all funds deposited with this Commission by T.C.E., Inc. in connection with this case.

2. Sierra Highlands Water Co. shall bill T.C.E., Inc. on a monthly basis for water delivered under the contract involved herein and accept payment from T.C.E., Inc. on a quarterly basis thirty days from receipt of billings by T.C.E., Inc.

3. In all other respects the complaint filed herein is denied.

4. Case No. 10721 is concluded.

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

Dated APR 2 1980, at San Francisco, California.

John E. Snyer
President

Vernon L. Stinson

Richard D. Howell

Lawrence J. Davis
Commissioners

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

C O P Y

APPENDIX A
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WATER SUPPLY AGREEMENT

THIS AGREEMENT, made this 9th day of October, 1969, by and between SIERRA HIGHLANDS WATER COMPANY, a duly certified public utility corporation of the State of California ("Supplier") and BOISE CASCADE PROPERTIES, INC. OF DELAWARE, a Delaware corporation ("Purchaser").

W I T N E S S E T H:

WHEREAS, Supplier is the owner of certain rights to surplus water pursuant to an agreement dated March 26, 1968, between Merced Irrigation District and Pacific Cascade Land Company, Inc. (predecessor in interest to Purchaser); and

WHEREAS, by virtue of the rights under the said agreement and by virtue of authority granted to Supplier by the Public Utilities Commission of the State of California, Supplier furnishes and will continue to furnish water for domestic consumption to the Lake Don Pedro Subdivision being developed by Purchaser; and

WHEREAS, in connection with the said subdivision Purchaser is developing an eighteen-hole golf course to be located proximate to the boundaries of Unit 3-M of the said subdivision which will require water for irrigation purposes;

NOW, THEREFORE, the parties agree:

1. REQUIRED APPROVAL: This Agreement shall not become effective until approved by the Public Utilities Commission of the State of California and shall be further subject to the terms and conditions of that certain agreement between the Merced Irrigation District and Pacific Cascade Land Company, Inc., dated March 26, 1968, for the sale and purchase of surplus water to Supplier.

2. WATER PURCHASE - QUANTITY: Supplier agrees to deliver and Purchaser agrees to purchase the following quantities of water for the period indicated and thereafter the quantity of water necessary for irrigation of the Lake Don Pedro Golf Course: From 1972 through 1975, inclusive - 750 acre feet per annum; 1976 - 700 acre feet; 1977 - 650 acre feet; 1978 - 600 acre feet; 1979 - 550 acre feet; 1980 - 500 acre feet; and 1981 - 450 acre feet.

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3. PURCHASE PRICE: Purchaser agrees to pay the price of forty-five dollars (\$45.00) per acre foot for raw water delivered to the Lake Don Pedro Golf Course, or such other amount as is subsequently agreed upon by the parties if the cost per acre foot to Supplier shall escalate and/or the cost of pumping and transmission of raw water shall increase so as to justify an increase in cost and if the said price increase be further approved by the Public Utilities Commission of the State of California.

4. ENLARGEMENT OF FACILITIES: Supplier agrees to enlarge the pumping and transmission facilities necessary to accommodate the requirements of Purchaser all at the sole expense of Purchaser. Such costs and expenses will be advanced by Purchaser based on verified periodic billings by Supplier to Purchaser or by such other method as shall be mutually agreed upon by the parties to provide that the cost of enlarging the said facilities shall be accomplished at the sole expense of Purchaser.

5. TITLE TO ENLARGED FACILITIES: Notwithstanding the fact that Purchaser shall pay for the cost of enlarging the size of the required facilities, title to all facilities shall remain in Supplier.

6. PAYMENT FOR PURCHASED WATER: Purchaser agrees to pay the cost of water supplied within thirty (30) days from date of receipt of billings from Supplier. Each such billing shall identify the quantity of water delivered during the current billing period and shall additionally show the cumulative quantity of water delivered at year to date.

7. DEFICIENCY PAYMENTS: In the event that Purchaser shall not require and purchase the annual quantity of water specified in Paragraph 2 of this Agreement prior to December 15 of each such period, Supplier shall prepare an invoice on or after the 15th day of December indicating the total quantity of water delivered during the year and the deficiency amount, if any, due Supplier for water not delivered during said period, which amount shall be paid by Purchaser in accordance with the provisions of Article 6 of this Agreement.

8. ASSIGNMENTS: This Agreement shall be binding upon the successors in interest of Supplier and Purchaser, whether said successors take by way of assignment, reorganization, merger, or any other means of transferring the respective interests.

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IN WITNESS WHEREOF, the parties have executed this Agreement
on the day and year first above written.

SIERRA HIGHLANDS WATER COMPANY

By /s/ T. C. BINKLEY
T. C. Binkley, President

BOISE CASCADE PROPERTIES, INC.
OF DELAWARE

By /s/ R. C. ONORATO
R. C. Onorato, Vice President