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ORIGINAL

Decision No. 92662 FEB 4 1981

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

B AND B INVESTMENTS CORPORATION, a corporation, Complainant, v. LA PORTE PINES WATER COMPANY, a corporation; HAROLD T. THRASH, Defendants.	Case No. 10621 (Filed July 12, 1978)

Richard W. Osen, Attorney at Law, for B and B Investments Corporation, complainant.
Graves & Allen, by Jeffrey Allen and Denise Rogan, Attorneys at Law, for Harold T. Thrash and La Porte Pines Water Company, defendants.

O P I N I O N

This is a complaint by B and B Investments Corporation (B & B) against Harold T. Thrash, doing business as La Porte Pines Water Company (Thrash). The complaint seeks an order: (1) requiring Thrash to develop adequate water sources, storage, and distribution facilities for the entire La Porte subdivision; (2) directing the Commission staff (Staff) to investigate the transfer of nonutility real property from Thrash to Rachel Koehler (Koehler); and (3) assuming the outcome of the Staff investigation to be in accordance with B & B's contentions, having the Staff file an action in the Superior Court seeking to set aside the real property transaction or imposing a constructive trust on the property acquired by Koehler.

The complaint was filed on July 12, 1978. The Commission attempted to serve Thrash with the complaint and notice to answer. (Public Utilities Code Section 1704, Rules 12, 13.) While Thrash's employees or agents were aware of the complaint, proper service upon him was not made. The presiding Administrative Law Judge (ALJ) noted possible jurisdictional defects if an order were entered without appropriate service on Thrash. Thereafter, upon B & B's motion, the ALJ authorized service by publication. Service by publication was completed on March 2, 1979. B & B commenced discovery.

On March 29, 1979, B & B filed a "Motion For Protective Order Directing Commencement of Action For Injunctive Relief". The motion and supporting declaration alleged that Thrash was in the process of selling all of his nonutility property and unless he were restrained from selling it or disposing of the proceeds there would be no assets remaining to enable Thrash to carry out any order of the Commission in this proceeding. On May 25, 1979, the Commission secured a temporary restraining order in the Plumas County Superior Court.

A hearing had been calendared for June 7, 1979. On June 5, 1979, Thrash filed a "Declaration and Application for Continuance of Hearing...and Application for Extension of Time to Respond to Complaint". The ALJ granted the motion and recalendared the hearing.

A duly noticed public hearing was held in this matter before ALJ Donald B. Jarvis in Brownsville on August 30 and 31, 1979 and in San Francisco on October 25, 1979. The matter was submitted subject to the filing of briefs which were received by January 30, 1980.

The Commission makes the following findings (the discussion on the issues commences on page 16):

Findings of Fact

1. Thrash was the developer of the La Porte Pines Country Club subdivision in Plumas County. The subdivision consists of 73 acres divided into 204 lots.

2. In order to develop the subdivision and obtain a Final Subdivision Public Report from the Division of Real Estate it was necessary to have a water system to supply the subdivision.

3. On March 27, 1964, Thrash filed Application No. 46322 with the Commission. It sought authority to construct, operate, and maintain a public utility water company for the subdivision.

4. In Decision No. 67647, entered on August 4, 1964, the Commission granted Thrash the requested operating authority subject to certain conditions. The decision discussed water production facilities. Finding No. 5 stated:

> "5. Applicant's water supply will be adequate only upon his procuring the water permit for which he has filed his application with the State Water Rights Board."

Ordering Paragraph 1 provided:

> "1. A certificate of public convenience and necessity is granted to Harold T. Thrash, dba La Porte Pines Water Company, authorizing him to construct and operate a public utility water system to serve La Porte Country Club Subdivision, Plumas County, provided that within one hundred and eighty days after the effective date of this order applicant shall file with this Commission a written acceptance of the certificate herein granted accompanied by the permit applied for and to be issued by the State Water Rights Board."

5. On October 5, 1964, the Acting Secretary of the Commission sent a letter to the Division of Real Estate concerning the water

supply questionnaire completed by Thrash, in his utility status, relating to the subdivision. The letter stated in part that:

> "From the data provided by the water supply agency, it has been concluded by our staff that an adequate water supply is to be made available to meet the anticipated requirements.
>
> "We have no objection to the issuance of a final subdivision report."

The letter did not mention that Thrash's operating authority was conditioned on securing a permit for water rights from the State Water Rights Board.

6. On October 14, 1964, the Division of Real Estate issued a Final Subdivision Public Report for the La Porte Pines Country Club subdivision. The report contained the following language:

> "WATER: Water will be supplied by the La Porte Water Company. This company operates under the supervision of the Public Utilities Commission.
>
> "Lot purchasers will be required to pay costs for extension of the water service from curb stop to house."

7. Thrash never filed with the Commission a permit from the State Water Rights Board because none was granted. The La Porte Water District filed a protest to Thrash's application to appropriate unappropriated water. The Board, in Decision No. D.1253, entered on July 27, 1966, denied Thrash's application.

8. On September 6, 1968, October 8, 1968, February 23, 1971, and February 1, 1974 the Commission directed inquiries to Thrash or his agents about the status of the State Water Rights Board Permit.

9. Thrash filed his tariff with the Commission on September 30, 1964. It became effective on October 4, 1964. He has operated as a public utility water corporation from that time until now.

10. Thrash did not install a water system which is connected to and capable of serving all 204 lots in the subdivision.

11. The water system is located in mountainous terrain. It has two parts: (1) A lower pressure zone which contains 109 lots and (2) An upper pressure zone which contains 95 lots. At the time of this hearing the system served 25 lots. Three houses were under construction and service connections were to be made to them. The 28 service connections are not contiguous and there is no evidence to show in which pressure zone they are located.

12. The system consists of three subsurface sources of water and three enclosed storage tanks. The capacity of the tanks are 10,000, 30,000, and 60,000 gallons. The 60,000-gallon tank is not usable because it is located below the other tanks. When all the tanks are full the rate of flow from the 60,000-gallon tank is greater than the rate of flow into it. It drains water from the other tanks and the rest of the system. The 60,000-gallon tank is presently disconnected from the system. If an altitude valve or other suitable controls were installed on the 60,000-gallon tank it would provide an additional reservoir for the system, but it would not increase the total amount of water supply.

13. In 1973, B & B and Peggy Vera Bradley entered into a transaction with Thrash and others which was subsequently litigated in the Plumas County Superior Court. The Court's judgment and findings are res judicata between B & B and Thrash. In this proceeding, B & B and Thrash are bound under the doctrine of collateral estoppel by the Superior Court's determination of the issues and facts in the prior case. (Estate of Cates (1971) 16 CA 3d 1, 20-21; Beverly Hills Nat. Bank v Glynn (1971) 16 CA 3d 274, 283-84; Wood v Herson (1974) 39 CA 3d 738, 746-7.)

14. The findings and conclusions of the Plumas County Superior Court entered on August 23, 1977 in Action No. 8614 are as follows:

"FINDINGS OF FACT

"1. Plaintiff B and B Investments Corporation is, and at all times relevant hereto was, a Florida corporation authorized to do business in the State of California. Archie Brafford is, and at all times relevant hereto was, the President of B and B Investments Corporation.

"2. Plaintiff Peggy Vera Bradley (hereinafter "Bradley") and Archie Brafford (hereinafter "Brafford") are, and at all times relevant hereto have been, residents of the State of Florida.

"3. Defendants Harold T. Thrash and Dallas Thrash (hereinafter sometimes called "the Thrashes") are, and at all times relevant hereto have been, husband and wife. At the time of the events referred to herein, the Thrashes were residents of the State of California.

"4. Bradley had certain beneficial interests in a family trust which owned property in the LaPorte area of Plumas County, California.

"5. LaPorte is an old mining community of approximately 30 registered voters located at an elevation of about 6,000 feet in the Sierra-Nevada mountains. It is situated in an extremely heavy snow belt.

"6. In August of 1973, Bradley and Brafford traveled from Florida to the LaPorte area to look at the family trust property and also to examine any other property that appeared promising.

"7. When Bradley and Brafford arrived, they observed a 'Lots for Sale' sign posted on the side of the ancient LaPorte Hotel. The hotel was, at that time, in a rundown condition.

"8. Upon inquiring, plaintiffs were told that the lots for sale belonged to Harold T. Thrash and that they were located within a subdivision in LaPorte known as the LaPorte Pines Country Club subdivision.

"9. Thereafter, Bradley and Brafford dealt exclusively with Mr. Thrash, who informed them that he had developed the subdivision and was interested in selling all of the remaining unsold lots. Mr. Thrash also informed Bradley and Brafford that he had other holdings in the LaPorte area which included 77 undeveloped acres adjacent to the subdivision, the LaPorte Hotel and the LaPorte Pines Water Company. He told Bradley and Brafford that although he wanted to sell it separately, i.e., he would sell the hotel alone, one or more lots, the whole subdivision, the undeveloped acreage, or any combination thereof.

"10. Mr. Thrash represented to Bradley and Brafford, both orally and in writing, that the LaPorte Pines Water Company and water supply were approved and adequate for the subdivision as developed and that there was more than enough water available to supply the adjacent 77 acres, if they too were subdivided.

"11. In December of 1973, plaintiffs purchased all of the remaining unsold lots in the subdivision, the undeveloped 77 acres, the LaPorte Hotel, the LaPorte Pines Water Company, 10 undeveloped acres in Sierra County, California, certain liquor licenses and miscellaneous personal property. All of the property was owned by the Thrashes except those portions which were owned by Dr. Merle P. Brooks.

"12. Subsequently, defendants wrongfully conveyed to third parties four additional lots in the LaPorte Pines Country Club Subdivision (two of which had cabins on them) which plaintiffs had purchased from defendants under contracts of sale.

"13. In purchasing the property referred to in paragraphs 11 and 12, plaintiffs relied on the representations referred to in paragraph 10.

"14. In view of the number of governmental agencies that had previously given approval to the subdivision and at least tentative approval to the water system, plaintiffs' conduct in relying on the representations was justifiable and rational. Plaintiffs were not required to go behind investigations of the governmental agencies.

"15. The representations were false and misleading in that the LaPorte Pines Water Company and water supply had neither been approved nor were adequate for the subdivision as developed and there was not more than enough water available to supply the adjacent 77 acres if subdivided.

"16. Although it is not certain whether Harold T. Thrash knew that the representations made by him were false, he did nonetheless make those representations without reasonable grounds for believing that they were true.

"17. No misrepresentations as to the hotel or its potential for successful operation were proved.

"18. Prior to the purchase, plaintiffs did a great deal of research on renovating the LaPorte Hotel.

"19. Prior to the purchase, plaintiffs did not make a diligent effort to determine the potential for the successful operation of a hotel in the LaPorte area and were mistakenly enthusiastic over the potential of a gold rush hotel in an historically romantic area.

"20. In reliance on Harold T. Thrash's representations, plaintiffs spent considerable amounts of time and money renovating the LaPorte Hotel before the California Department of Real Estate issued on September 4, 1975, a Desist and Refrain Order which prohibited the further sale of subdivision lots until the availability of an adequate water system and supply were demonstrated.

"21. Plaintiffs' alleged damages are detailed in plaintiffs' Exhibit 90. Plaintiffs' recovery of those claimed damages is limited to the following as part of the Court's power to adjust the equities:

"a.	Binder to Littlejohn	$35,000.00
b.	Down payment	20,801.00
c.	Propane to Thrash	257.00
d.	Fee for renewal of liquor license	360.00
e.	Fire insurance premium	932.00
f.	Liquor license	10,000.00
g.	Licenses and permits	2,963.00
h.	Timber cruise costs	4,034.00
i.	Costs of construction materials for hotel, first and second halves of 1974	62,738.01
j.	Payments for individual lots and cabins	3,240.00
k.	Principal and interest payment to Littlejohn	1,384.22
l.	Cost of improvements to individual cabins	489.29
	TOTAL	$142,198.52

"22. Plaintiffs received $49,000 from the operation of the LaPorte Hotel, which will not be offset against the damages awarded to plaintiffs.

"CONCLUSIONS OF LAW

"1. Plaintiffs are entitled to rescission based on deceit.

"2. In exercising its power to adjust the equities, the Court must limit the amount of damages it awards.

"3. Plaintiffs are entitled to the following as restitution:

"a.	Binder to Littlejohn	$35,000.00
b.	Down payment	20,801.00
c.	Propane to Thrash	257.00
d.	Payments for individual lots and cabins	3,240.00
e.	Liquor license	10,000.00
	TOTAL	$69,298.00

"4. Plaintiffs are entitled to the following as consequential damages:

"a.	Fee for renewal of liquor license ..	$ 360.00
b.	Fire insurance premium	932.00
c.	Licenses and permits	2,963.00
d.	Timber cruise costs	4,034.00
e.	Costs of construction materials for hotel, first and second halves of 1974	62,738.01
f.	Principal and interest payment to Littlejohn	1,384.22
g.	Cost of improvements to individual cabins	489.29
	TOTAL	$72,900.52

"5. Plaintiffs are entitled to recover their costs of suit as against the Thrashes.

"6. Plaintiffs are not entitled to an award of prejudgment interest on any of the restitution or consequential damages."

15. The Superior Court granted a judgment for $152,198.52 as restitution and consequential damages, $5,342.81 in costs, and rescinded certain of the real property transactions.

16. After the judgment was implemented, B & B wound up owning 54 lots which are located throughout the subdivision. Thrash received 26 lots in the subdivision, the hotel, liquor license, and an undivided one-half interest in the adjacent 77 acres.

17. No valid Final Public Report is presently in effect with respect to the subdivision.

18. After the 1973 transaction, B & B sought to obtain a Final Public Report for the lots within the subdivision. The Division of Real Estate did not grant the request and on September 4, 1975 issued an "Order to Cease, Desist and Refrain" to B & B. The order provided in part that:

> "NOW, THEREFORE, YOU, AS OWNER, AGENT OF THE OWNER OR AS SUBDIVIDER OF THE SUBDIVISION IDENTIFIED IN PARAGRAPH I HEREOF ARE ORDERED TO DESIST AND REFRAIN from selling or leasing, offering for sale or lease, accepting deposits on, exchanging, trading or negotiating for the sale or exchange of lots or parcels in said subdivision until such time as you have furnished proof to the Commissioner that there is an adequate water system including sufficient source capacity and effective storage facilities to supply the subdivision."

The cease and desist order was the primary factor which engendered the Superior Court action.

19. At the present time no subdivider (owner of 5 or more lots or an undivided interest in the subdivision) may sell any lots to the public. A subdivider may sell land, as raw land with full disclosure, only to another subdivider.

20. B & B levied a writ of execution on the hotel, 26 lots and adjacent 77 acres to collect the damages it was awarded under the 1977 Superior Court judgment. The sheriff sold the property on March 31, 1978, subject to redemption as provided by law.

21. Koehler is a licensed real estate broker. Her office is in Contra Costa County. She is not related to Thrash.

22. In March 1979, Koehler was driving around in the mountains near La Porte. She was looking for a cabin or other property to purchase. She came upon the La Porte Hotel. Thrash and his wife were there at the time. Thrash told Koehler that the hotel was for sale but it was involved in litigation. She inquired about the asking price. Thrash gave her a total price for the hotel, liquor license, 26 lots within the subdivision, and his interest in the 77 adjacent acres. Koehler was aware that the litigation encompassed all the property.

23. Koehler returned to Contra Costa County. Thereafter, she arranged for a three-way tax deferred exchange for the La Porte properties. The transaction was generally as follows:

a. Koehler would loan Thrash the money to redeem the property sold by the sheriff at the execution sale and to pay off all taxes and liens on it. Koehler's account would eventually be credited with this amount.

b. Koehler would exchange property she owned in Lafayette, California, with Thrash for the La Porte properties.

c. Thrash would sell the Lafayette property to the third contracting party for $329,000. If the transaction had been consummated Thrash would have received approximately $118,000.

24. On March 29, 1979, while the three-way exchange was in escrow, B & B filed a "Motion For Protective Order Directing Commencement of Action For Injunctive Relief". The motion and supporting declaration alleged that Thrash was in the process of selling his nonutility property and unless he were restrained from selling it or disposing of the proceeds there would be no assets remaining to enable Thrash to carry out any order of the Commission in this proceeding. The Commission secured a temporary restraining order from the Plumas County Superior Court which restrained Thrash from transferring the property. The Commission's action was based on:

a. The motion and supporting declaration.

b. The fact that no answer to the complaint had been filed.

c. The fact that Thrash had not been amenable to service of process and that an order for publication of service had been made.

25. Because of the temporary restraining order the three-way exchange did not take place.

26. On June 13, 1979, the Superior Court, acting upon a stipulation of the parties entered a temporary injunction against Thrash continuing the terms of the temporary restraining order until September 17, 1979. Thrash filed an answer on July 5, 1979. Two days of public hearing in this matter were held on August 30 and 31, 1979. Thereafter, the Commission advised the Superior Court that it did not seek to continue the temporary injunction which lapsed on September 17, 1979.

27. After the issuance of the temporary restraining order Koehler and Thrash entered into the following agreement:

> "Due to the injunction prohibiting transfer of title which was placed on the property on May 29, 1979 in the county of Plumas at Quincy, the original agreements to purchase have required modification. Due to the tax liability incurred by Rachel Koehler as a result of the injunction in connection with her proposed tax-deferred exchange, the terms of the purchase and subsequent transfer of title have been altered to the following:
>
> "1. The title to the hotel, hereafter identified as Exhibit B will be transferred from Harold T. Thrash and Dallas H. Thrash to Rachel E. Koehler in exchange for the paid notice and reconveyance of the note and Deed of Trust executed by Harold T. Thrash and Dallas H. Thrash in favor of Rachel E. Koehler on May 30, 1979 in the amount of $150,000, without requiring any interest payment thereof.
>
> "2. Transfer of title to 1/2 undivided interest in 77 acres in Plumas County, hereinafter described as Exhibit C, in exchange for the payment of the redemption of the judgment on that property which was paid on August 30, 1979 by Rachel Koehler for Harold Thrash in the amount of $31,227.27 at the office of the Sheriff, Plumas County, Quincy.

"3. Transfer of title of 26 lots in the La Porte Pines Country Club, hereinafter described in Exhibit A, in exchange for the payment of the balance of judgments outstanding on the property, including the personal property judgment in the amount of $24,668.00, including accrued interest on August 15, 1979 by Rachel Koehler for Harold T. Thrash.

"4. Transfer of title from Harold T. Thrash to Rachel E. Koehler of 1/2 undivided interest in a ten acre parcel of land located in Sierra County, hereafter described as Exhibit D, as attached, in exchange for the payment of delinquent taxes in the amount of $607.32 by Rachel Koehler for Harold T. Thrash on June 29, 1979, one-half of which was repaid by a credit for payment of money due to B & B Investments, owner of the other 1/2 undivided interest.

"Rachel E. Koehler is to receive title to all of the above described property and agrees to pay all attorney's and engineer's fees required to settle the dispute now pending in a continued action before the Public Utilities Commission to be heard on October 25, 1979, regarding the matter of the adequacy of the water in the La Porte Pines Subdivision."

When the temporary injunction expired Koehler and Thrash consummated the transaction.

28. Koehler paid $216,502.59 in cash to acquire the property set forth in Finding 27. The sum of $30,000 is a reasonable estimate of the fees Koehler will be required to expend for engineering and legal services under the agreement set forth in Finding 27. When Koehler received possession of the hotel, $100,000 worth of personal property had been removed as a result of a levy by B & B on that property. Thrash was forgiven that amount on the transaction.

29. Thrash is 73 years old. He is hard of hearing and is under medical care for diabetes, high-blood pressure, and arthritis. He resides in Mexico and lives on social security benefits. Thrash has no known assets.

30. From its inception, Thrash operated the water system using employees or agents. For a period in 1974, B & B operated the system as his agent. The Commission notes that on February 21, 1979, the manager of the water system purporting to act under a power of attorney from Thrash, notified the Commission's Hydraulic Branch that he was abandoning the system. He was advised he could not do so without the consent of the Commission and he did not do it. Since May 1, 1979, Thrash has permitted the La Porte Pines Country Club (Homeowners Association) to operate the system.

31. Thrash has offered to sell the water system to the Homeowners Association or the general public for $1, if the Commission approves the sale and transfer.

32. The Homeowners Association is willing to acquire the water system only if it can acquire additional water rights and deeded access to the adjacent 77 acres to maintain water tanks and lines. On August 24, 1979 the Homeowners Association filed, with the Division of Water Rights, an application to appropriate 54.75 feet of unappropriated water. The application is still pending.

33. The water utility has gross annual revenues of approximately $1,400.

34. If certain water rights and easements could be obtained, the best present estimate is that it would cost $75,000 to construct the facilities that would enable the system to serve all 204 lots. The estimate does not include the costs of obtaining water rights, easements, and legal fees.

35. The record contains no evidence which would support a finding that the utility can or will acquire additional water rights and appropriate easements.

36. The utility presently has a supply of water sufficient to supply 28 service connections.

Discussion

The material issues presented in this proceeding are: 1. Has Thrash violated any provision of law, any rule or order of the Commission, or any provision of his tariff? 2. If so, what relief should be afforded B & B?

In considering the contentions of the parties, we observe that: "The rights of individual litigants are important, but so are the rights of the general public, and the Commission, in taking action, must keep in mind the impact of such action on the general public as well as the litigants in a particular matter. (Sale v. Railroad Commission, 15 Cal. 2d 612, 617-18; Petition of the City of Los Angeles, 56 Cal. P.U.C. 113, 135-36.)" (Golconda Utilities Company (1968) 68 CPUC 296, 300.)
In addition, the California Supreme Court has clearly stated that the "Commission is not a body charged with the enforcement of private contracts." (See Hanlon v Eshelman, 169 Cal 200, [146 Pac. 656].) Its function, like that of the Interstate Commerce Commission, is to regulate public utilities and compel the enforcement of their duties to the public...not to compel them to carry out their contract obligations to individuals." (Atchison, T.&S.F. Ry. Co. v Railroad Commission (1916) 173 Cal 577, 582.)
When the Commission acts pursuant to Division 1 of the Public Utilities Code, it is acting under the police power of the state and is not bound by private contracts in the exercise of that power.

(San Bernardino v Railroad Commission (1923) 190 Cal 562; Miller v Railroad Commission (1937) 9 C 2d 190, 195-96; Truck Owners, etc., Inc. v Superior Court (1924) 194 Cal 146, 156; People v Superior Court of Sacramento County (1965) 62 C 2d 515, certiorari denied, 85 S. Ct. 1341; People v Ryerson (1966) 241 CA 2d 115; Pratt v Coast Trucking, Inc. (1964) 228 CA 2d 139; Vallejo Bus Co. v Superior Court (1937) 19 CA 2d 201, 205.)

Clearly, Thrash did not comply with Ordering Paragraph 1 of Decision No. 67647. He never obtained water rights sufficient to serve all 204 lots in the subdivision. Thrash, as a subdivider, continued to sell lots even though there was not a sufficient supply of water. However, any damages suffered as a result of Thrash's land sales misrepresentations are not within the jurisdiction of the Commission. In fact, B & B pursued its remedy in the Superior Court action. While B & B believes that the Superior Court judgment did not adequately compensate it for all losses suffered, that question is not cognizable in this proceeding.

B & B's status herein is that of a subdivider which owns 54 lots in a subdivision that is within the dedicated service area of the water utility owned by Thrash. It seeks to compel completion of the water system so that all 204 lots will be served. This would enable it to secure a Final Public Report, thereby enabling B & B to sell its lots.

Thrash's certificated service area includes all 204 lots. The system presently has 28 service connections. The utility does not have sufficient sources of water to serve all 204 lots. A registered civil engineer called as a witness by B & B testified that the present sources of water owned by the utility are sufficient to serve only 33 lots. A registered

civil engineer who testified on behalf of Thrash stated that the present sources of water owned by the utility would serve 49 lots. The system does not presently have the capacity to serve all 204 lots.

In considering what relief may be granted to B & B, we rule out the entry of an order which is unenforceable. Such an order would be meaningless, create false hopes, and engender further litigation.

There is water in the area which could supply all 204 lots if appropriate water rights were obtained. Thrash, however, does not possess these water rights. Part of the present predicament stems from Thrash's Certificate of Public Convenience and Necessity which was conditioned on securing anticipated water rights which were not obtained. We will not compound that error. The Commission will enter no order involving this utility which is dependent on the acquisition of additional sources of water unless the utility has secured adjudicated rights to the water.

If water rights could be obtained the best present estimate is that it would cost $75,000 to construct the facilities to enable the system to serve all 204 lots. This amount does not include the costs of obtaining water rights, easements, and legal fees. Thrash has limited assets. Assuming water rights could be obtained Thrash does not have the financial ability to complete the system.

B & B contends, however, that if the Commission, through a Superior Court action has the transaction between Koehler and Thrash set aside, or a constructive trust imposed on the property acquired by Koehler, there would be sufficient assets available to sustain a Commission Order requiring completion of the system. B & B asserts that Koehler received "in excess of $525,000 worth of property for $204,000 plus legal and engineering fees". Thrash vehemently denies this and contends that Koehler paid more than full value for the property.

The property in question is nonutility operating property. The Commission had no jurisdiction over the transfer of this property. Section 851 of the Public Utilities Code provides, in part, that:

> "Nothing in this section shall prevent the sale, lease, encumbrance or other disposition by any public utility of property which is not necessary or useful in the performance of its duties to the public, and any disposition of property by a public utility shall be conclusively presumed to be of property which is not useful or necessary in the performance of its duties to the public, as to any purchaser, lessee or encumbrancer dealing with such property in good faith for value..."

Commercial Communications Inc. v Public Utilities Commission (1958) 58 C 2d 512, appeal dismissed 359 US 119 and Investigation of Miraflores Water Co. (1963) 60 CPUC 462, cited by B & B are not in point. They do not support the contention that the Commission has jurisdiction over the disposition by a utility of property not used or useful in utility operations since the proceeds might be applied to those operations.

The Commission has standing to bring an equitable action in the Superior Court to prevent collusion to circumvent its jurisdiction. (People ex rel Public Utilities Com. v Ryerson (1966) 241 CA 2d 115.) The question is do the facts presented justify instituting such an action? We conclude they do not.

In determining whether an equitable action should be filed we look to the effect of the transactions between Thrash and Koehler on the Commission, not on B & B.

In September, 1976, prior to the Plumas County Superior Court judgment, Thrash had assets of $375,308. Among those assets were a note from B & B for $148,500 and contract of sale receivables from the La Porte transaction totaling $95,945. The judgment rescinding the transaction canceled the note and receivables. Thus at that time Thrash had receivables of

approximately $187,000, the hotel, 26 lots in the subdivision, a one-half interest in the 77 acres and the undivided interest in 10 acres in Sierra County. He was also subject to a judgment in favor of B & B which, including costs, totaled $157,541.33. Thrash was indebted for legal fees in connection with the litigation. He had to pay taxes on the reacquired property. B & B levied execution on the hotel, 26 lots, and Thrash's interest in the 77 acres.

Thrash sold the remaining receivables for fifty cents on the dollar to William Burke. This transaction was not unusual for a person seeking to extricate himself from the situation in which Thrash was. Whether astute bargaining would have engendered more money for the receivables is not the issue. Nothing in that transaction suggests that it was done for the purpose of evading the Commission's jurisdiction over the water system.

The discounted sale of the accounts receivable did not produce sufficient revenue to extricate Thrash from his financial situation. The sheriff sold the hotel, 26 lots, and interest in the 77 acres to B & B for the amount of the judgment; the sale was subject to redemption. At this juncture, Koehler came upon the scene.

Thrash and Koehler were not acquainted prior to March, 1979.

There was animosity between Thrash and B & B, his self-made nemesis. He did not want B & B to get the property. When Koehler decided to buy the hotel, subdivision lots, and interest in the 77 acres she tried to get the best possible bargain. The net result of the transaction which eventually occurred was that Thrash was relieved of all his debts and

Koehler wound up with the property. There is no direct evidence that the parties intended the transaction to circumvent the Commission's jurisdiction over the water utility. Unless this can be inferred from the transaction itself, the Commission would not be warranted in filing the Superior Court action sought by B & B.

Koehler paid approximately $350,000 to acquire the property.[1/] B & B contends it was worth $525,000. B & B called as a witness an appraiser who testified to that amount. The appraisal was seriously weakened by cross-examination. The appraiser valued the hotel at $300,000 if it were used for the highest and best use. He made no market study of the possible success of the hotel. The record shows that the hotel has been operated intermittently in recent years without a profit. The appraiser in valuing the 26 lots did not take into consideration the present unavailability of water and the absence of a Final Subdivision Report.[2/] His valuation of the 77 acres was based on subdivision use. This is conjectural.

1/ When Koehler entered into the agreement to purchase the property the hotel was completely furnished. Thereafter B & B executed on the furnishings in the hotel and they were removed. B & B's valuation of the furnishings was $100,000. Koehler correctly contends that Thrash was obligated to transfer the hotel with furnishings. He was obligated to her for their value. Her subsequent forgiveness of the debt is included as part of the purchase price.

2/ Koehler is in the same position as B & B with respect to the 26 lots. She cannot sell them to the general public without a Formal Subdivision Report, which will not be issued unless there is adequate water for the entire subdivision.

Consideration of all the evidence leads us to the conclusion that the Commission would not be warranted in commencing the requested Superior Court action against Thrash and Koehler. We do not perceive the reasonable probability of successfully prosecuting such an action.

As the situation now exists Thrash owns the water utility but it is being operated by the Homeowners Association. It is willing to acquire the system if it can acquire adequate water rights and access to the adjacent 77 acres to maintain the tanks and water lines. Thrash is willing to sell the system to the Homeowners Association for $1. Koehler testified that prior to acquiring the property, she helped Thrash redeem his interest in the 77 acres to protect the water rights for the subdivision.[3/]

The utility serves 28 lots and has the water to serve no more than 49. We reject Thrash's contention that the service area be limited to 49 customers. To do so in this proceeding would violate the rights of the property owners in the subdivision who are not parties in this proceeding. In addition to the 28 lots with service connections, B & B owns 54 lots and Koehler, who is not a party in this proceeding, owns 26 lots. There are 96 additional lots in the subdivision. The Commission would consider the question of limiting the utility's service area only in a proceeding in which all 204 lot owners had notice and opportunity to participate. (Horn v County of Ventura (1979) 24 C 3d 605, 617.)

3/ Thrash's brief, without citation, states that: "Mrs. Koehler stated that she is willing to donate to Water Company all water rights on the 77 acres." (Defendant's Post Trial Brief, p. 18.) Review of the transcript fails to disclose testimony to this effect. If the statement is dehors the record it cannot be used as the basis for action herein. We hope it reflects intended action.

When the operating authority was granted Thrash in 1964, it was contemplated that 20 lots would be occupied in the first year, 160 lots by the sixth year and the remainder between seven and twenty-five years. This did not happen. In addition, there is evidence that there is a building moratorium in Plumas County. At the time of the hearing only 60 building permits a year were being issued. Under circumstances as they exist today it would be unreasonable for the Commission to order the utility to expend money to complete the system. (Northern Counties Utilities Co. (1958) 56 CPUC 306, 311.)

Assuming arguendo that sufficient water and money were available the Commission would not be disposed to order the utility to complete the remainder of the water system at this time. While such an order would benefit those who were deceived by Thrash acting as a subdivider, it would place an unreasonable burden on the utility's existing customers. A utility is entitled to a rate of return on the original cost of plant less depreciation. Requiring the utility to expend a minimum of $75,000 to complete the system would result in a substantial increase in rates for the present customers.

Denial of the requested relief does not preclude B & B, or other subdivider lot owners, from eventually selling their lots. It does shift the economic burden of paying for completing the system. Whatever the sordid history of this sytem may be, the equities at the present time favor the existing customers over B & B and other subdividers. (Golconda Utilities Co., supra; Public Util. Code Section 2708.)

If water rights can be obtained, the Homeowners Association is willing to acquire the system.[4/] The Commission would give

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4/ If water rights cannot be obtained the subdivision could never be fully occupied.

sympathetic consideration to such transaction. B & B, or any other subdividers alone or in concert, could obtain service by: (1) constructing and donating the facilities to the utility, or (2) advancing the cost of construction under the utility's main extension rule. (Tariff Rule 15.) In either event the present customers would not suffer any adverse rate consequences.[5/]

No other points require discussion.

Conclusions of Law

1. An order requiring Thrash to obtain sufficient water rights and complete the water system to serve all 204 lots in the subdivision should not be made because: (a) there is no certainty that water rights are available; (b) Thrash does not have the financial ability to carry out such an order; and (c) even if water rights were available and Thrash had the financial ability, it would place an undue burden on the existing customers of the system under present circumstances.

2. There is not a reasonable probability of success in the Commission's prosecuting in the Superior Court an action against Thrash and Koehler to set aside the transfer of the nonutility property or to impose a constructive trust thereon.

5/ If the property were donated to the utility it would not be included in rate base for ratemaking purposes. (Uniform System of Accounts for Class D Utilities, Account 265.) If additions were made under the main extension rule they would be included in rate base only after refunds were made. (Uniform System of Accounts for Class D Utilities, Account 241.)

3. B & B should be granted no relief in this proceeding.

O R D E R

IT IS ORDERED that the relief requested in this complaint is denied.

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

Dated FEB 4 1981, at San Francisco, California.

President

Commissioners