

Decision 98-07-023 July 2, 1998

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Carl Brandstetter,

Complainant,

vs.

Holiday Retreats, et al, Paul Derebery, Surinder S.  
Dang, Gurinder Singh,

Defendants.

ORIGINAL

Case 97-08-054  
(Filed August 21, 1997)

Carl Brandstetter, in pro per, complainant.  
Thomas E. Bandy, Attorney at Law, for Holiday Retreats; and  
Daniel P. Derebery and Gurinder Singh, defendants.  
Daniel R. Paige, for the Large Water Branch.

O P I N I O N

**Summary**

Holiday Retreats, Inc. (Holiday Retreats), Daniel "Paul" Derebery (Derebery), Surinder S. Dang (Dang), and Gurinder Singh (Singh) (collectively, Defendants) are found not to be a public utility subject to the jurisdiction, control, and regulation of the Commission. The complaint is dismissed.

**Background**

***Holiday Retreats***

Holiday Retreats is a California corporation operating two recreational resorts, Fisherman's Retreat and Oak Glen Retreat, in Riverside County. Fisherman's Retreat provides 183 recreational vehicle and camping

sites, and has a two-bathroom central restroom and shower facility, a swimming pool and spa, central laundry room, cafe, store, and corporate offices. Singh is the sole shareholder of Holiday Retreats. Derebery is the president of Holiday Retreats and, as an individual, owns the land on which Fisherman's Retreat is set, plus a number of surrounding parcels. Two water wells have been developed on Derebery's property.

Fisherman's Retreat and its three lakes were first developed as a fishing club in the latter half of the 1920's by landowner Daniel Gerster (Gerster). After Gerster passed away, his estate's administrator, Ralph Hammer, sold the property to one Mr. Gustafson in the late 1950's, and Gustafson ran the retreat with limited public day camping, supported by a \$1 per day admission fee. In about 1979, the Garcias bought the property and continued to operate it as before until, in about 1983, Dr. Ralph Graham bought into the Garcia's partnership. At that point, the owners decided to change Fisherman's Retreat from a public park to a private membership campground. To do that, they formed and incorporated Holiday Retreats to administer and manage the facilities and thereafter sold memberships. Dr. Graham subsequently bought out the Garcias' share of Holiday Retreats and, in 1989, Derebery was hired by Holiday Retreats. In about 1991, Dang bought out Dr. Graham, including all of Holiday Retreats' stock and the real property, which by this time may have been placed under the umbrella of Oak Glen, Limited.

Derebery continued as the operation's manager and in 1996 bought the real property (whether from Holiday Retreats or from Oak Glen, Limited, both of which were owned by Dang, is not clear). Derebery's purchase included the land on which Fisherman's Retreat operates and some 15 to 20 additional parcels in the adjoining Chain Lakes Cabin Sites (Chain Lakes). At some

unspecified time, Singh bought Holiday Retreats from Dang and Dang is today no longer an owner of the real property or a shareholder in Holiday Retreats.

***Chain Lakes Cabin Sites***

Chain Lakes is a 60-unit subdivision recorded in 1926 on land owned by Gerster adjoining the Fisherman's Retreat property. Only lots #1 through #26 have been developed. Cabins have been built on 11 parcels by individuals over the years, and one was built by the former owners of Holiday Retreats. Holiday Retreats provides water for these cabins from the same two wells located on Derebery's property that serve as the water sources for Fisherman's Retreat.

Although Chain Lakes clearly was subdivided in 1926, apparently as part of an agreement between Gerster and F.C. Hendrix (also shown as T.C. Hendrix) (Hendrix) that also involved Gerster's establishment of Fisherman's Retreat, the subsequent history of Chain Lakes is completely undefined, in contrast to that of Fisherman's Retreat. According to a recorded contract between the two individuals, Gerster was to plat the land into 2000 or more cabin sites in minimum 100-unit tracts and bring in domestic water. At the same time, Gerster was to create and maintain 3 or more fish-stocked lakes and other facilities to provide fishing and country club memberships in what later became Fisherman's Retreat. Hendrix, for his part, was to sell lots. There is nothing available to indicate whether Gerster and Hendrix actually sold individual lots directly to the public, and if so, to whom, when, or under what obligations to supply water. What is clear is that the Gerster and Hendrix subdivision plan was never realized beyond 12 cabins on the first 26 of 60 lots. Some 15 to 20 of those lots are owned by Derebery, having been part of the Fisherman's Retreat real property purchase described earlier.

***Brandstetter's Complaint***

When Derebery purchased Holiday Retreats' real property in July, 1996, he was unaware that the one Chain Lakes parcel with a cabin on it thought to be included by Holiday Retreats in the sale (or perhaps by Oak Glen, Limited) had already been sold for delinquent property taxes by Riverside County in March, 1996. Complainant Carl Brandstetter (Brandstetter, or Complainant), the owner of adjacent, undeveloped Lot 6, purchased Lot 7 and the cabin on it from the county for \$3,964. Brandstetter silently waited out the one-year redemption period, recorded his new deed in April, and then on May 1, 1997 announced his ownership to Petronella Whitehead (Whitehead), the tenant who had been renting Lot 7's cabin from Derebery. Brandstetter and Whitehead executed a new rental agreement the same day.

Whitehead is the vice president of operations of Fisherman's Retreat and Oak Glen Retreat. The cabin on Lot 7 had been developed by Holiday Retreats for on-site employee housing, and she had been renting the cabin and receiving water service without charge from the Fisherman's Retreat system. At or about the end of May, 1997, Derebery assisted Whitehead and her children to move to other housing and disconnected the water.

There followed a series of exchanges between Brandstetter and Derebery during which the latter declined to reconnect water service. On August 21, 1997, Brandstetter filed formal complaint C.97-08-054.

Brandstetter's complaint requests that Holiday Retreats, Inc. be declared a public utility subject to the Commission's jurisdiction, and ordered to serve water to his property.

An evidentiary hearing was held in Riverside on January 7, 1998. Holiday Retreats, Derebery, and Singh (Defendants) were jointly represented by counsel. Ratepayer Representation Branch (RRB) of the Commission's Water

Division also participated. Surinder Dang did not appear and was not represented. The case was submitted upon receipt of briefs on February 11, 1998.

### **Discussion**

Brandstetter relies almost entirely on Public Utilities (PU) Code §§ 216(c) [sic], 240, and 241 which variously bring Holiday Retreats within the PU Code's definitions of "public utility subject to the jurisdiction, control and regulation of the commission" (§ 216(b)),<sup>1</sup> "water system" (§ 240), and "water corporation" (§ 241). Defendants do not dispute that they fall within these cited sections in Division 1, Part 1, Chapter 1, General Provisions and Definitions. Instead, they appropriately point to Part 2, Chapter 2, Water Companies, and more specifically §§ 2701 and 2704 as being the applicable sections.

**§ 2701.** Any person, firm, or corporation, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating, or managing any water system within this State, who sells, leases, rents, or delivers water to any person, firm, corporation, municipality, or any other political subdivision of the State, whether under contract or otherwise, is a public utility, and is subject to the provisions of Part 1 of Division 1 and to the jurisdiction, control, and regulation of the commission, except as otherwise provided in this chapter.

Defendants acknowledge that they would fall within § 2701 but for the exception provided in § 2704(a) and § 2704(c):

**§ 2704.** Any owner of a water supply not otherwise dedicated to public use and primarily used for domestic or industrial purposes by him or for the irrigation of his lands, who (a) sells or delivers the surplus of such water for domestic or school district purposes or for the irrigation of adjoining lands, or (b) in an emergency water shortage sells or delivers water from such supply to others for a

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<sup>1</sup> All section references cited are to the PU Code.

limited period not to exceed one irrigation season, or (c) sells or delivers a portion of such water supply as a matter of accommodation to neighbors to whom no other supply of water for domestic or irrigation purposes is equally available, is not subject to the jurisdiction, control, and regulation of the commission.

So the issue to be decided is whether Defendants are operating a water system subject to the Commission's jurisdiction under § 2701, or are they exempted under § 2704. We will examine the Defendants' relationship to the requirements of § 2704(a) and § 2704(c).

***Not Otherwise Dedicated to Public Use***

The first requirement to qualify for the § 2704 exemption is that the owner of the water supply must not have dedicated it to public use. The Commission has examined the question of water system dedication many times over the decades, and the following two citations are among those most appropriate and frequently referenced:

As stated in *Allen v. Railroad Com.* (1918) [cites], "To hold that property has been dedicated to a public use is 'not a trivial thing' [citation], and such dedication is never presumed 'without evidence of unequivocal intention'" [cites].

However, such unequivocal intention need not be expressly stated; it may be inferred from the acts of the owner and his dealings and relations to the property. [cite] Dedication is normally evidenced by some act which is reasonably interpreted and relied upon by the public as a "holding out" or indication of willingness to provide service on equal terms to all who might apply. [cites] (*California Water and Telephone v. CPUC* (1959), 151 C.2d 478)

And,

[In determining whether one engaged in the business of supplying water is engaged in a public utility business...], [t]he test to be applied is whether or not the petitioner held himself out, expressly or impliedly, as engaged in the business of supplying water to the public as a class, not necessarily to all

of the public, but to any limited portion of it, such portion, for example, as could be served by his system, as contradistinguished from his holding himself out as serving or ready to serve only particular individuals, either as a matter of accommodation or for other reasons peculiar and particular to them. (*Van Hoosear v. Railroad Commission* (1920) 184 C. 553)

In his showing, Brandstetter makes several observations that he believes indicate dedication. He maintains that the contract between Gerster and Hendrix (Exhibit J) "...shows the predecessors of Holiday Retreats promised to supply water to the property now owned by Complainant." And Complainant's Lot 7 "has been receiving water service from the retreat for over 70 years." "Defendant currently delivers water for compensation to other private homeowners that are not part of Fisherman's Retreat nor are they holders of stock of Holiday Retreats, Inc." And lastly, "The delivery of water has never been an issue to the private residents or to the previous owners of Fisherman's Retreat."

Brandstetter's Exhibit J is a photocopy of the contract between landowner Gerster and sales agent Hendrix recorded in 1925. The relevant portions of the Gerster contract show that Gerster was to create and maintain the lakes, buildings, etc. that eventually became Fisherman's Retreat, and

...[Gerster w]ill also plat the adjacent lands into tracts or cabin sites of approximately 40x80 feet in dimensions, and will bring domestic water to the tracts selected for same in units of 100 units or more and when all payments are completed by the purchasers, will furnish to each buyer a good and sufficient deed conveying the property sold to the buyer free and clear of ... material encumbrances.

Hendrix was to sell the parcels.

It is estimated that 2000 or more cabin sites can be created on the lands to be sold... [with] \$5 per site to go to [Gerster] for water extensions or such other purchases as he desires.

Exhibit L is a copy of the Chain Lakes subdivision map Gerster and Hendrix had recorded in 1926. It shows the record of survey for a 60-unit subdivision in one of the locations specified in the Gerster contract, but has no reference to water service.

The Gerster contract indicates that Gerster and Hendrix intended to create and maintain facilities to provide fishing and country club memberships in connection with Chain Lakes, and Derebery was able to trace on the record the evolution of their enterprise to the entity Holiday Retreats before us today. Holiday Retreats is the successor several times removed of the Gerster and Hendrix fishing and country club endeavor. It is likewise established that Gerster and Hendrix intended to bring domestic water to their tracts as part of an effort to sell lots. From here the evidence necessary to prove dedication weakens and ultimately fails.

It is clear that, while Gerster's and Hendrix's vision of creating a fishing retreat was carried through to the Fisherman's Retreat we see today, the Chain Lakes development was not similarly successful. Of the "2000 or more cabin sites to be created," it appears that 60 parcels were actually platted (although Brandstetter testified without elaboration that a second tract was created years later and then abandoned), 26 of those were developed, and there are dwellings on only 12 lots today. Some 15 to 20 Chain Lakes lots were included in Derebery's real property purchase and thus likely remained with the original developers. Bluntly stated, there is no evidence that any lot was ever sold with a promise to provide water, and in fact no evidence as to when, to whom, or under what circumstances any of the lots were sold. Brandstetter acknowledged that neither of the deeds for his two parcels refers to water rights and that despite extensive research in the Riverside County Recorder's Office, he has turned up nothing further on the topic. There are today no written



agreements concerning water service between Holiday Retreats and Chain Lakes property owners. And there is no indication that Gerster ever charged for water; indeed, it appears that up until 1979 when the Garcias came in, water was provided without charge.

It is also clear that Brandstetter's Lot 7, which is at the heart of his complaint, was itself not provided water for compensation. Lot 7 was purchased from Riverside County at tax sale while Whitehead was both a tenant on the property and the local operations manager who rendered water bills on behalf of Holiday Retreats. When asked about Holiday Retreats' billings to her home on Lot 7, she testified, "There was no billing of water service for that property. That property belonged to Holiday Retreats. Why would we bill ourselves...?" Thus Brandstetter purchased at tax sale a parcel to which water was being provided by its former owners. Those former owners did not sell it to him using the promise of water service as an inducement.

Brandstetter submitted standardized form affidavits from four of the eleven other current cabin residents who have lived in Chain Lakes for varying periods of time from 1 to 24 years. Other than stating their observations that the availability of water and their service connection to Fisherman's Retreat's system have never been in question, they add little to the record that was not already known and acknowledged. No current Chain Lakes water users appeared at the evidentiary hearings.

In the citations noted earlier, it was said that dedication may be inferred from the acts of the water supply's owner and his dealings and relations to the property, and whether the owner held himself out expressly or impliedly as willing to supply or being in the business of supplying water to the public. The record here shows numerous ways in which Holiday Retreats did otherwise. Holiday Retreats never sold property to the public with the promise to supply

water, nor is it established that its predecessors did so. It never represented itself as a water company or solicited customers. Inquiries about water availability could not be answered at the level of the local manager, but had to be referred to Holiday Retreats' corporate office. It charged no hookup fees and had no meters on customers' connections. Most tellingly, it didn't pursue water users when they were delinquent, and never turned off the service of those who did not pay. It would be very difficult from its acts and its dealings with respect to Chain Lakes' water users to conclude that it has dedicated its water supply to the public use and is therefore foreclosed from claiming the exemption otherwise potentially available under § 2704.

***An Owner Whose Water Supply Is Primarily Used for Domestic Purposes by Him and Who Sells or Delivers the Surplus for Domestic Purposes***

Under § 2704(a), the exemption from Commission regulation in § 2704 may be available to the owner of a water supply primarily used by him and who sells or delivers the surplus for domestic purposes.

Defendants' two wells supply the water for their three lakes, landscaping, 183 recreational vehicle and camping sites, a two-bathroom central restroom and shower facility, a swimming pool and spa, central laundry room, cafe, store, and corporate offices. Fisherman's Retreat has an average occupancy of 80% to 85% year around. The RRB witness stated his belief that those activities use much more water than the twelve small cabins in the Chain Lakes tract. The two wells do serve primarily the domestic water needs of Defendants' operations at Fisherman's Retreat.

Derebery testified that there has never been a water shortage since he became involved in 1989, and he therefore saw no damage in supplying water to the cabin sites so long as there was water available. Water delivered to the cabin sites has thus been surplus to Defendants' needs.

Defendants meet the qualification in § 2704(a).

***Sale Or Delivery As An Accommodation to Others to Whom No Other Supply Is Equally Available***

The exemption from Commission regulation in § 2704 may also be available to the owner of a water supply primarily used by him and who "sells or delivers a portion of such water supply as a matter of accommodation to neighbors to whom no other supply of water for domestic or irrigation purposes is equally available" (§ 2704(c)).

The parties agree that there is no other supply of water equally available. The nearest public water system is many miles away. Brandstetter maintains that the county's minimum requirement for separation between water supply wells and sewage disposal facilities, coupled with the dimensions of his lots, prevents him from drilling a well; and Derebery knows of nobody who has in fact attempted to drill a well in the Chain Lakes area.

Defendants maintain that their provision of water is an accommodation, and they point to other, similar actions they have taken with respect to Chain Lakes residents to illustrate the point. When Brandstetter requested permission of Holiday Retreats to move some dirt on his Lot 6 property, Derebery agreed. When Brandstetter needed Derebery to approve waivers from county setback requirements on Lot 6, Derebery agreed. As he testified, "Well, I didn't see where it would hurt anything and I just thought it was neighborly to remove some of those restrictions." And when asked about providing water, his response was similar, "As long as we have water available, I can't see any problem with giving them water."

Brandstetter never does directly address Defendants' claims of exemption under either § 2704(a) or (c), other than citing Decision 93585,

(October 6, 1981), *Montgomery v. James Water Company*, which involved that section. Rather, he continues to rely on §§ 216, 240 and 241.

In citing *Montgomery v. James*, both Brandstetter and RRB state in identical words that, "the Commission issued Decision 93585 finding that an offer to sell property and supply water was an act of dedication, making the seller a public utility." We have reviewed that decision and note that although there was such an element involved, *Montgomery v. James* does not make that finding, nor does it rely for the greatest part on that principle to carry its conclusions. James Water Company claimed exemption from Commission jurisdiction by reason of "accommodation," but the Commission nonetheless found it to be a public utility. Among the major differences between this case and *Montgomery v. James* are that James Water Company had provided water to lots its owner sold for development, had incorporated under and done business under the James Water Company name, received water payments in that name, filed federal and state taxes under that name, kept separate water company accounts, was selling water that was not surplus, and there was another potential source of water available from an adjoining system. None of those elements apply here.

As we have noted earlier, there is no evidence that any lot in Chain Lakes was ever sold with a promise to provide water, and in fact no evidence as to when, to whom, or under what circumstances any of the lots were sold. And neither did the original subdivider nor his successors charge for water until 1979. However, even had the circumstances been otherwise, it is far from certain that the water supply owner would be declared subject to our jurisdiction. In *Consumers of Stanley Water System v. Robert A. Stanley*, Decision 43560 (November 29, 1949), we concluded that Stanley Water System had not been dedicated to the public and was not subject to Commission regulation as a public

utility, this despite the fact that some of Stanley's water users had purchased their lots from his predecessor pursuant to grants containing an agreement to furnish water for a monthly charge. The Commission's observation in *Stanley* is, we think, particularly appropriate to this case:

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.

It is acknowledged that Defendants provide water to Chain Lakes. Defendants have demonstrated that the water sold and delivered is primarily used for their own domestic purposes, surplus to their needs, and provided as an accommodation to neighbors to whom no other supply is equally available. Complainant Brandstetter has failed effectively to counter these conclusions, and has not demonstrated that Defendants have made the public dedication required to override the exemption from our jurisdiction available in § 2704(a) and (c).

This is a complaint case *not* challenging the reasonableness of rates or charges, and so this decision is issued in an "adjudicatory proceeding" as defined in PU Code § 1757.1.

#### **Findings of Fact**

1. Holiday Retreats is a California Corporation whose sole shareholder is Singh. Derebery is its president.
2. Holiday Retreats operates Fisherman's Retreat, including the Fisherman's Retreat water system, on land owned by Derebery as an individual.

3. Dang was formerly Holiday Retreats' sole shareholder, but is no longer a shareholder of Holiday Retreats nor an owner of real property involved in this complaint.

4. Gerster first developed a fishing club in the 1920's that eventually became Fisherman's Retreat. Holiday Retreats and/or Derebery are Gerster's successors in interest in that endeavor.

5. Gerster and Hendrix entered into a contract to subdivide Chain Lakes land into tracts or cabin sites, bring domestic water to the tracts in units of 100 or more, and sell Chain Lakes lots in conjunction with the fishing club. The record does not support a finding as to when, to whom, or under what circumstances Gerster and/or Hendrix actually sold lots.

6. Holiday Retreats has never sold property to the public with the promise to supply water, nor is it established that its predecessors have done so.

7. The Fisherman's Retreat water supply is used primarily by Fisherman's Retreat for its domestic purposes.

8. Holiday Retreats sells and delivers water from the Fisherman's Retreat system to residents of 11 cabins in Chain Lakes to whom no other supply is equally available.

9. The water Holiday Retreats provides to Chain Lakes from the Fisherman's Retreat system is surplus to Fisherman's Retreat's needs.

10. At the time Brandstetter purchased Lot 7, it was being furnished water by Holiday Retreats from the Fisherman's Retreat system without charge. There is no indication that water service to Lot 7 has ever been provided for a charge.

11. Derebery, acting on behalf of Holiday Retreats, caused water service to Lot 7 to be disconnected shortly after learning he was not its owner and at or about the time he arranged for Holiday Retreats' employee Whitehead to move out.

12. Holiday Retreats has never represented itself as a water company, solicited water customers, provided water service automatically on request, charged hookup fees to water users, metered individuals' water usage, pursued water users when they were delinquent in paying their water bills, or turned off the service of those who did not pay.

13. Holiday Retreats' actions and dealings with respect to water service provided to Chain Lakes do not reveal an intent to dedicate the Fisherman's Retreat water supply to public use.

### **Conclusions of Law**

1. The Fisherman's Retreat water supply has not been dedicated to public use.

2. By operation of § 2704(a), Holiday Retreats, Dang, Singh, and Derebery are not subject to the jurisdiction, control and regulation of the Commission.

3. By operation of § 2704(c), Holiday Retreats, Dang, Singh, and Derebery are not subject to the jurisdiction, control and regulation of the Commission.

4. This is a complaint case *not* challenging the reasonableness of rates or charges, and so this decision is issued in an "adjudicatory proceeding" as defined in PU Code § 1757.1.

### **O R D E R**

**IT IS ORDERED that:**

1. The complaint in Case 97-08-054 is dismissed for lack of jurisdiction.

C.97-08-054 ALJ/JCM/avs \*

2. This proceeding is closed.

This order is effective today.

Dated July 2, 1998, at San Francisco, California.

RICHARD A. BILAS

President

P. GREGORY CONLON

JESSIE J. KNIGHT, JR.

HENRY M. DUQUE

JOSIAH L. NEEPER

Commissioners