Decision 02-05-014 May 7, 2002

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Steve and Alice Marshall; Rick and Sabrina Finn; Hank and Judy Von Detchen; Zella Shoulders and Carol Jahnke; and Robin and Christina Finn, Complainants, vs. Warner Springs Estates/Sunshine Waterworks II, Defendant.	Case 01-12-028 (Filed December 18, 2001)

OPINION ON COMPLAINT TO HAVE PRIVATE WATER SYSTEM DECLARED A PUBLIC UTILITY

Summary

Steve and Alice Marshall, Rick and Sabrina Finn, Hank and Judy Von Detchen, Zella Shoulders, Carol Jahnke, and Robin and Christina Finn (Complainants) are the present owners of three (out of five) parcels of land through which Warner Springs Estates/Sunshine Waterworks II (Defendant) has a right of way for a pipeline to transport water, from a well site to Defendant's mobile home park. In 1972, in exchange for a right of way for the pipeline, Defendant agreed to provide the original owners of the five parcels with 9,000 gallons of water per month for domestic use. Recently, Defendant gave notice to the owners of two parcels (owned by some of the

Complainants in this case) that their service would be terminated for excessive use above the 9,000 gallons per month limitation. Complainants request the Commission to declare the water system a public utility and to set rates for all water used.

We deny the complaint for the reason that there has been no "holding out" or dedication of the system for public use, as is required to override the exemption for such systems from our jurisdiction.

Background

Defendant is a resident-owned mobile home park for seniors in Warner Springs. The park is served by a water distribution system which was conveyed to the Homeowners Association on conversion of the park from a rental park to a resident-owned community in 1996. The park is now a non-profit mutual benefit corporation. The entire revenue necessary to maintain and operate the park comes from Homeowners Association dues. The cost of water to residents is included in dues and there are no water meters within the park.

The first phase of the park was constructed in the early 1970's. A well within the park initially supplied the needs of the residents. That well, in addition to having a high iron content, soon proved insufficient and Defendant secured a new well site adjacent to Complainants' land about 1 mile away from the park. Needing a right of way for a pipeline to bring water to the park, Defendant requested Caltrans for a permit to use its easement on the west side of Highway 79, through five parcels of land abutting the highway. Complainants own three of these parcels in fee. Caltrans informed Defendant that it required "an element of public service" to allow a private water line in a public right of way. To satisfy the Caltrans requirement, Defendant offered the original owners of the five parcels 9,000 gallons of water per month at no cost for domestic use. Accepting the offer, these owners signed Water Use Agreements with Defendant,

Caltrans issued the permit, and Defendant has provided water to the owners in accordance with the agreements since 1972.

Difficulties began when some of the parcels were sold to new owners. Caltrans requires Defendant to provide Water Use Agreements signed by the new owners. The new owners object to the terms of the agreements. They refuse to sign the agreements and have filed this complaint with the Commission.

A public hearing on the complaint, attended by approximately 30 persons (mostly residents of the park), was held in Temecula on February 27, 2002.

The Complaint

Complainants contend that they are wholly dependant on the supply from the park's water line. They allege that the Defendant is overpumping the aquifer to supply several large fishing ponds and has depleted the ground water level to the point where their pumps for non-potable water have failed. They consider the 9,000 gallons per month allowance from Defendant's pipeline to be insufficient and cannot afford to drill new wells on their properties to meet their non-domestic water requirements. Complainants state that they have offered payment for all water used; however, Defendant refuses to accept payment. Complainants request the Commission to declare the system to be a public utility and set rates for water.

The Answer

Defendant states that it intends to comply with the original intent of the Water Use Agreements and will supply each property owner affected by the pipeline with 9,000 gallons of water per month at no cost for domestic use only, so long as the park utilizes the pipeline.

According to Defendant, with the availability of water from its pipeline at no cost, the property owners have allowed their wells to go dormant with the exception of one well belonging to the Shoulders (not a party to this complaint).

Defendant points out that the Shoulders maintain their well, use it for non-domestic needs, and do not exceed the 9,000 gallons per month limitation on water from Defendant's pipeline. Defendant believes that Complainants should do likewise.

Defendant also states that the original well located within the park supplied water for its ponds until the summer of 2000 when the pump failed. Defendant has now replaced it with another well which produces 350 gallons per minute, to furnish non-potable water to its ponds. Defendant contends Complainants should likewise refurbish or replace their wells to meet their non-potable water needs.

Defendant states that at no time did it hold an interest in the five parcels at issue or offer water to anyone as part of a property sale. Defendant acknowledges that it has furnished water to two additional properties located adjacent to the park, on the east side of Highway 79. In exchange for a utility easement and an access road easement, water is delivered to these properties from within the park pursuant to Water Use Agreements. These properties are not affected by the Caltrans easement, nor are the owners a party to this complaint. The owner of one of these properties has drilled a well in preparation for the property being sold. In cooperation with that property owner, the park discontinued service as of December, 2001. Defendant contends that it has not, now or ever, held itself out as supplying water to the general public, only to the few property owners discussed above and the park residents.

Further, Defendant states that the dollar amounts the off-site water users have been billed in the past were for water usage for non-domestic purposes over the 9,000 gallons per month limitation. According to Defendant, it billed the Finns (among the Complainant's in this case) in 1994 and 1995 for excessive use of water for the non-domestic purpose of watering their commercial nursery.

Since 1996, Defendant has not charged off-site users at all for water, although it does believe that charging for amounts over 9,000 gallons per month or for non-domestic use would provide an incentive for compliance with the Water Use Agreements and long-term conservation of a limited resource.

The Issue

The issue to be decided in whether Defendant is operating a water system subject to the Commission's jurisdiction under Pub. Util. Code § 2701.

Discussion

Section 2701, in relevant part, states that "Any person, firm . . . owning . . . any water system . . . who sells, leases, rents or delivers water to any person, . . . is a public utility, and is subject . . . to the jurisdiction, control, and regulation of the Commission." Defendant does not deny that it would fall within § 2701 but for the exemption provided in § 2704 (c), which in relevant part states:

> Section 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 . . . (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. (Emphasis added.)

To qualify for the § 2704 exemption, 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 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)

The evidence in this case is that Defendant, needing a new water supply for the park, offered the owners of five parcels of land some water in exchange for a right-of-way for a pipeline through their property. Such an exchange hardly qualifies as "holding out or an indication of willingness to provide service on equal terms to all who might apply" (Calif. Wtr. and Tel., *supra*.). Rather, as the facts indicate, the provision of water to the original owners of the five parcels was "a matter of accommodation or for other reasons peculiar and particular to them." (Van Hoosear, *supra*.)

On the question of dedication, we are also guided by the Commission's holding in Consumers of Robert A. Stanley Water System v. Robert A. Stanley, (1949):

> "[1] 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. [2] Devotion of water facilities to public use, moreover, must be of such character that the public generally, or that part of which has been served and which has accepted the service, including every individual member thereof, has the legal right to demand that the service shall be conducted, so long as it is continued, with reasonable efficiency under reasonable charges." (D.43560, 49 CPUC 238 and 239.)

In this case, the Water Use Agreements signed by the original owners of the five parcels provide clear evidence on whether or not there was a holding out by Defendant to serve all owners:

> "California Rancho Mobile Village[1] is preparing to install a pipeline for service of domestic water to the Mobile Village, which pipeline will be located in Highway 79 in front of your property. As a community service California Rancho offers to provide domestic water to your property on the following conditions:
>
> 1. You will construct, at your expense, all connections necessary to provide service from California Rancho's line to your residence, and will provide a metering device approved by California Rancho, for the purpose of measuring your water use.
> 2. Your use will be restricted to domestic use, in an amount not to exceed 9,000 gallons per month.
> 3. This agreement will be personal to you, and is not assignable by you and will not transfer to a new owner

[1] Predecessor to Defendant.

should you sell your property, without prior written approval of California Rancho.

4. It is understood that California Rancho may discontinue water service to you <u>without notice</u>, at such time as your monthly limit of 9,000 gallons has been reached.
5. This agreement is a courtesy service, and may be discontinued by California Rancho if in its sole judgment the water supply is inadequate, upon giving you thirty days written notice of intention to cancel.
6. California Rancho expressly makes no guarantee as to water pressure, or as to the volume of water available to you at any time. Since a similar free service is being offered to others in situations similar to yours there can be no such guarantee.
7. Water will be supplied you without charge within the limit and subject to the conditions set forth alone, upon your executing and returning a copy of this letter . . . ." (Exhibit 1B, emphasis in original.)

As set forth above, the agreement confers no water right or right to continuous service upon property owners. Instead, the original property owners, for example the Shoulders, were given to understand and did understand that they had to abide by the 9,000 gallons per month limitation, their water service was not assignable to new owners, and their water service was revocable at any time. None of the conditions for receiving water from Defendant's system comport with a public utility's obligations. In short, we find no evidence that Defendant's water system had been dedicated, either expressly or impliedly, to a public use. Because we find that defendant has not dedicated its water facilities, we do not need to reach the question as to whether defendant meets the exemption requirements of Section 2704 (c). The complaint should be dismissed.

Findings of Fact

1. Needing a more plentiful supply of potable water, Defendant mobile home park secured a new well site about 1 mile from the park.

2. To transport water from the well site to the park, Defendant needed a pipeline right of way in a Caltrans easement along the west side of Highway 79 through five parcels of land abutting the highway.

3. As a condition to granting a permit to use its easement, Caltrans required that there be a public interest to allow a private pipeline in a public right of way.

4. To satisfy the Caltrans requirement, Defendant offered the original owners of the five parcels 9,000 gallons of water per month at no cost for domestic use only.

5. The property owners accepted the offer, Water Use Agreements were signed, and Caltrans granted Defendant a permit to use its easement for the pipeline.

6. Since 1972, Defendant has supplied water to the owners of the five parcels in accordance with the Water Use Agreements.

7. Three of the parcels were sold and Caltrans now requires Water Use Agreements signed by the new owners. These owners are the Complainants in this case.

8. Complainants dispute the terms of the original Water Use Agreements and refuse to renew the agreements.

9. Defendant has given notice to the owners of two parcels that service will be terminated for exceeding the 9,000 gallons per month limitation.

10. Complainants claim that they are totally dependant on the Defendant's pipeline for water because excessive pumping of the ground water aquifer by Defendant has caused their pumps for non-domestic water to fail.

11. Complainants have offered payment but Defendant has refused to accept payment for all water used.

12. Complainants request that Defendant's water system be declared a public utility and rates for water be set.

13. In addition to supplying water to the owners of the five parcels, Defendant supplied water to the owners of two other parcels in exchange for easements for utilities and an access road to the park.

14. The Water Use Agreements, which are the same for all off-site users, clearly state that: supply is restricted to 9,000 gallons per month; the agreement cannot be assigned to a new property owner; service may be discontinued without notice; and water would be supplied without charge subject to the conditions set forth in the agreement. Such conditions for supplying water are not characteristic of a water utility offering to serve the public.

15. All water provided to off-site users was provided in accordance with individual Water Use Agreements.

16. Defendant has never presented itself as a water company, solicited customers, provided water service on request, charged hookup fees to water lessees, 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.

17. Defendant's actions and dealings with respect to water service to the off-site users do not reveal any intent to dedicate its water supply to public use.

Conclusions of Law

1. Defendant's water supply and its water facilities have not been dedicated to public use.

2. This is a complaint case not challenging the reasonableness of rates or charges, and so this decision is issued in an "adjudicatory proceeding" defined in Section 1757.1.

O R D E R

IT IS ORDERED that:

1. The complaint in Case 01-12-028 is dismissed.
2. Case 01-12-028 is closed.

This order is effective today.

Dated May 7, 2002, at San Francisco, California.