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Robert L. McMullin et al v. Public Service Comm. Of Utah et al : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

ROBERT L. McMULLIN, PHYLLIS
B. McMULLIN, and McMULLIN
CONSTRUCTION COMPANY, INC.,

Petitioners,

—vs.—

PUBLIC SERVICE COMMISSION
OF UTAH, HAL S. BENNETT,
DONALD HACKING and JESSE R.
S. BUDGE, Its Commissioners; and
UNION AND JORDAN IRRIGA-
TION COMPANY, a corporation,

Respondents.

RESPONDENTS' BRIEF

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UNION AND JORDAN IRRIGA-
TION COMPANY, a corporation,

Respondents.

Case No. 8660

RESPONDENTS' BRIEF

This is a review of proceedings before the Public Service Commission of Utah. The petitioners requested Union and Jordan Irrigation Company to serve certain property with culinary water. The petition was denied by the Public Service Commission. Petitioners request this court to reverse that decision.

Petitioners set forth their statement of facts on pages 4, 5 and 6 of their brief. There are essential facts

omitted. Other facts stated were disputed. Under all of the circumstances respondents deem it advisable to make a full statement herein. The findings of the Commission are found on pages 22 to 29 of the transcript. Reference will be made in this statement to both the findings of the Commission and the record where such facts are established.

STATEMENT OF FACTS

Union and Jordan Irrigation Company was incorporated in 1895 as "a mutual water company for the purpose of distributing irrigation water to its stockholders" (Tr. 22, 330-331). There was no amendment of its articles except to extend the life of the corporation to 100 years (Tr. 22, 330). Such corporation is not authorized to act as a public utility and cannot under its articles of incorporation pay dividends. Until 1916 it functioned only as a mutual water company. In 1916 the company constructed a pipeline system for the serving of culinary water (Tr. 22, 330-331). Culinary service was rendered to stockholders and nonstockholders alike (Tr. 22, 331). At that time it dedicated 1.5 c.f.s. of the flow of Little Cottonwood Creek to such culinary system (Tr. 22, 331, 479). The company did in fact assign 2.5 c.f.s. to the pipeline system, but it sold 1 c.f.s. of this to Sandy City, using the proceeds from such sale for construction of the culinary system. *The company has never dedicated more than 1.5 c.f.s. to such system and the remainder of the water has been used for irrigation purposes as in the case of other mutual companies.* Since 1916 the company has submitted itself to the jurisdiction of the Public Utilities Commission, subsequently desig-

nated as Public Service Commission as to the 1.5 c.f.s. by the filing of financial reports and filing of rates (Tr. 22, 332). No formal certificate of convenience and necessity was ever issued to the company (Tr. 22, 333). In 1946 at the request of the Public Service Commission the company filed a map showing its pipeline system and the area which it purported to serve with culinary water (Tr. 23, 334). A copy of the map so filed is a part of this record as Exhibit 1.

Should the area designated on the map, Exhibit 1, as the service area of the company become fully developed as a residential and commercial area the company will be called upon to serve upward of 6,000 water connections (Tr. 331). At the time of the hearing the company had in excess of 1,000 customers (Tr. 23, 452). These connections use substantially the entire 1.5 c.f.s. in hot weather (Tr. 471, 472). There was testimony that there might be 100 more connections on the 1.5 c.f.s. (Tr. 500) but it also appeared that at times more than 1.5 c.f.s. were being used, taking it from Sandy City (Tr. 501).

The company has never served culinary water outside of the area designated on Exhibit 1, except that in May 1952, Kenneth A. Brady and Donald B. Milne filed a petition with the Public Service Commission to require culinary service in a subdivision lying north of the designated area. The entire file in that case was made a part of this record (Tr. 215-300). The area involved was called the Bonneville Terrace and is shown as that colored purple on the map designated page 234 of the record. The petition of Brady and Milne was resisted by

Union and Jordan Irrigation Company, but after a hearing the Public Service Commission ordered the company to furnish water in this subdivision. The case was never appealed to this court, though after the time for rehearing had expired a petition to reopen the case was filed by Union and Jordan Irrigation Company and denied by the Public Service Commission (Tr. 235, 239).

In July of 1955 a petition was filed by Clifton C. Nowlan, Roland Parker and Kermit Eskelson to require culinary service in another area lying on the easterly side of the area designated on Exhibit 1. The entire proceeding in that case was made a part of this record. (Tr. 125 to 214). The Public Service Commission denied the petition, finding, among other things,

“The life blood of a water system is the water and a satisfactory supply of culinary water cannot be manufactured. Even though it may be within the powers of this Commission to order the company to extend its water service to the properties of petitioners which are outside the area which the company professes to serve and is now serving we feel the circumstances in this case would not warrant such action. If such action were taken by the Commission other property owners adjacent to the area served by the company could with good justification demand that service be extended to them and there would be no place to stop. The company under such circumstances would be compelled to expand its system far beyond what was ever contemplated and outside the sphere of its duty and responsibility. Such expansion could very well impair or destroy further expansion of service within the service area of the company as set forth in Exhibit 1.” (Tr. 207).

Petitioners in about January 1955, were negotiating for the purchase of separate properties from Selma Olson Malmstrom and James Olson (Tr. 23). These were separate properties (Exhibit 3, Tr. 92). The Selma Olson Malmstrom property lies substantially within the service area as designated in Exhibit 1. The James Olson property lies wholly outside of the designated area (Tr. 92). For the convenience of the court there is included as an appendix of this brief a map of the area and property in question. This is substantially the same as Exhibit 3 (Tr. 92). The portion of the property shaded in blue is that portion in question designated as within the service area in 1946 and is in accordance with the map filed with the Public Service Commission, Exhibit 1. That portion of the property outlined in red is that portion of the property purchased from Selma Olson Malmstrom. That portion of the property outlined in green is the property purchased by petitioners from James F. and Mary P. Olson, referred to as the James Olson property (Exhibit 3. Tr. 92, 342, 386). The line running east and west, designated as "B" is the north line of the property designated on the map as within the service area (Exhibit 3. Tr. 92, 343). Such line bisects the southeast quarter of Section 19, one-half of the quarter section lying north and one-half lying south (Tr. 343). The line designated as "A" is a line on which there was a ditch and a row of trees, which has been assumed by certain parties to be the north line of the charted area, but which in fact was not (Tr. 342).

The Union and Jordan Irrigation Company is serving the Selma subdivision and there is no question with

regard to that area. It has refused to serve the James Olson property, which has not yet been subdivided, but is nevertheless designated as Selma No. 2. It is the "Selma 2" area that is now in question.

While negotiating for the purchase of these properties Robert L. McMullin contacted Frank Pierson, Secretary and Treasurer of the company, asking for a letter to the State Board of Health to the effect that the company would serve the Olson property. It is disputed as to whether Mr. McMullin mentioned both the Selma Olson property and the James Olson property or only the Selma Olson property. Frank Pierson testified that it was only the Selma Olson property (Tr. 506). Mr. McMullin testified that it was both properties (Tr. 389). The letter which was sent to the State Board of Health, quoted on page 5 of brief of petitioners, states that the proposed subdivision was "located east of Third East and approximately 6900 South." Sixty-ninth South is entirely south of both properties, being south of the Selma subdivision and located as shown on line "C" on the map attached as an appendix to this brief (Tr. 430). When the designated area is fully developed for residential use it is estimated that there will be approximately 6,000 connections. This fact was stipulated (Tr. 331).

In answer to plaintiff's petition, defendant denied that it was subject to the orders of the Public Service Commission so far as such orders require serving the area in question (Tr. 10).

A number of the stockholders appeared at the hearing and objected to the petition on the ground that the defendant Union and Jordan Irrigation Company was

not authorized to act as a public utility by its articles of incorporation and as to the area in question it had never offered to serve as a public utility and the commission therefore had no authority to order service therein (Tr. 305, 306).

On page 4 of their brief as a part of the statement of facts, petitioners state, "*However because of the uncertainty as to the boundaries of the service area to the informality of the authority of the respondent company to serve, Mr. McMullin was not aware of the location of the service area of the respondent company.*" (Italics ours.) We do not admit there was any uncertainty as to the service area. On the contrary it is clearly outlined on Exhibit 1, which since 1946 has been on file with the Public Service Commission.

On page 5 of petitioners' brief it is stated that, "He (McMullin), therefore, contacted the Secretary-Treasurer of the respondent company and requested that the company furnish him with culinary water in the property which he proposed to buy and develop into a subdivision." We disagree with this statement there being a definite dispute as to whether Mr. McMullin mentioned only the Selma Olson Malmstrom property or both the Selma and James Olson properties.

STATEMENT OF POINTS

POINT I

THE PUBLIC SERVICE COMMISSION OF UTAH DID NOT ERR IN REFUSING TO EXTEND SERVICE TO THE PROPERTY IN QUESTION.

POINT II

THERE IS NO ESTOPPEL WHICH CAN BE APPLIED IN THIS CASE.

- (a) THE FACTS DO NOT WARRANT A FINDING OF A MISREPRESENTATION.
- (b) IF A MISREPRESENTATION WAS MADE THERE WAS NO RELIANCE THEREON TO THE DETRIMENT OF THE PETITIONERS.
- (c) ESTOPPEL MAY NOT BE INVOKED IN A PROCEEDING BEFORE THE PUBLIC SERVICE COMMISSION AS THE BASIS FOR AN ORDER TO SERVE.

POINT III

THE UNION AND JORDAN IRRIGATION COMPANY HAS NO OBLIGATION TO SERVE PETITIONERS IN THE AREA REQUESTED.

POINT IV

AS TO SERVICE OUTSIDE OF THE AREA DESIGNATED ON THE MAP FILED IN 1946, EXHIBIT 1, RESPONDENT IS NOT A PUBLIC UTILITY.

POINT V

THE ORDER IN THE CASE OF NOWLAN, PARKER AND ESKELSON v. UNION AND JORDAN IRRIGATION COMPANY PREVENTS FURTHER EXTENSION OF SERVICE AREA.

ARGUMENT

POINT I

THE PUBLIC SERVICE COMMISSION OF UTAH DID NOT ERR IN REFUSING TO EXTEND SERVICE TO THE PROPERTY IN QUESTION.

This point is in answer to first point of petitioners, which is stated as follows:

“The Public Service Commission of Utah erred in holding that for Union and Jordan Irri-

gation Company to extend service to the property herein involved would imperil service to its *existing* customers.” (Italics ours.)

We have not directly contradicted petitioners’ first point for the reason that it does not accurately state the holding of the commission. It will be noticed that the order of the commission never mentioned imperiling service only to *existing* customers. It may be that service could not be extended without imperiling service to existing customers. This is true as there was testimony that on hot days the entire 1.5 c.f.s. “assigned” or dedicated to public use was being consumed. However, the commission based its order upon the fact that it was the future needs of the area designated which would be imperiled. The order states (after disposing of the claim of estoppel):

“This leaves two questions for consideration:
 (1) Can the Public Service Commission require a public utility to provide service outside its prescribed service area? (2) Does the company in fact have sufficient water to provide the service requested by petitioners? The cases are divided as to whether the Commission has the right to require a public utility to provide service outside its prescribed area. This Commission, however, would certainly hesitate about ordering service outside a prescribed area if the evidence showed that it could not be done and at the same time take care of present *and future* needs of the customers within the area. The most recent case involving the question of the company’s supplying a petitioner outside its service area was the Nowlan case. While the Commission did not decide the specific question as to whether the company could

be required to provide service outside its service area, it did conclude that the company did not have sufficient water to provide for present *and future* needs of customers within the area if it commenced supplying petitioners outside of the area. There is no evidence of these conditions having changed since the time of the determination of the Nowlan case and for the same reason it is the conclusion of this Commission that the company should not be required to furnish water to the petitioners in the instant case." (Tr. 30, 85). (Italics ours.)

Petitioners in their brief under Point I have ignored three very important facts. First, that at the request of the Public Service Commission in 1946 the company filed a map of the area it was willing to serve. Second, that it never assigned more than 1.5 c.f.s. of water to such service. Third, that it was stipulated that the areas designated might require as many as 6,000 connections (Tr. 331).

With regard to the 1.5 c.f.s. of water available for culinary distribution petitioners simply state that the limitation of 1.5 c.f.s. "is contrary to the evidence in this case." They then proceed to show that Union and Jordan Irrigation Company owns additional water and proceed as if the Union and Jordan Irrigation Company can be ordered to make this water available to anyone who happened to petition for water service. As will be more specifically hereinafter pointed out it is not all of the assets of Union and Jordan Irrigation Company which are subject to the order of the Commission. The corporation was never formed for the purpose of serving gen-

erally as a public service corporation. For the purpose of arguing this point we will assume that Union and Jordan Irrigation Company and its stockholders may not now deny that it is subject to the orders of the Public Service Commission as to assets which it has dedicated to public use. Let us say that as to such assets it is a public utility by estoppel. The principle of estoppel can go no further than the representations which have been made. Petitioners have ignored the stipulation on this matter. The stipulation was (Tr. 330-331) :

“The company was originally incorporated in 1895 as a mutual water company for the purpose of distributing irrigation water to its stockholders. There has been no amendment to the original Articles of Incorporation except to extend the life of the corporation to 100 years. In about the year 1916 the company constructed a pipeline system for the purpose of serving culinary water and thereafter commenced serving culinary water to stockholders and non-stockholders alike. Subsequent to the enactment of the Utah public utilities laws the company submitted itself to the jurisdiction of the Public Utilities Commission of Utah and its successor, the Public Service Commission of Utah, and during all of the time since about 1916 the company has served its area with culinary water as a public utility. *Originally the company assigned 2½ cubic feet per second of its water from Little Cottonwood Creek to its culinary pipeline system. One cubic foot per second of this 2½ cubic feet per second however, was sold to Sandy City Corporation to raise funds for the construction of the company's pipeline system.* The company through the years has maintained on file with this Commission its rates, rules and

regulations, has sought permission to make changes and adjustments in its rates, rules and regulations and continuously since 1936 has filed a financial report with the Public Service Commission of Utah on the Commission's forms and in accordance with the Commission's rules and regulations." (Italics ours.)

Petitioners' first point depends entirely upon the power of the Public Service Commission to order the Union and Jordan Irrigation Company to dedicate to public use water which never has been so dedicated. The water over and above 1.5 c.f.s. has remained in the irrigation ditches and has been distributed to the shareholders for irrigation purposes. There is no more reason to require the company to transfer the use of this water to the petitioners than water which may be owned by the stockholders individually in their own right or any other water regardless of its use or ownership. We stand on the proposition that property which has not been dedicated to public use cannot be controlled by the Public Service Commission.

However, assuming that for some reason the Public Service Commission were given power to order water owned by a mutual water company be subjected to distribution by a public utility, it should not be done on an application for service by private individuals. This would at best have to be a condemnation proceeding by the public service corporation in which issues of value, right to condemn and other questions would be put in issue and tried according to due process of law. There is no law which has yet said that property which is not dedi-

cated to public use can be ordered into public use in such proceedings as these. If and when this can be done it must be by condemnation proceedings and this is not a condemnation proceeding.

If we assume that granting the petition in question may not jeopardize present service, it will unquestionably jeopardize future service in the service area.

Further discussion of the available water will be made under Point IV.

POINT II

THERE IS NO ESTOPPEL WHICH CAN BE APPLIED IN THIS CASE.

- (a) THE FACTS DO NOT WARRANT A FINDING OF A MISREPRESENTATION.
- (b) IF A MISREPRESENTATION WAS MADE THERE WAS NO RELIANCE THEREON TO THE DETRIMENT OF THE PETITIONERS.
- (c) ESTOPPEL MAY NOT BE INVOKED IN A PROCEEDING BEFORE THE PUBLIC SERVICE COMMISSION AS THE BASIS FOR AN ORDER TO SERVE.
- (a) The facts do not warrant a finding of a misrepresentation.

The misrepresentation relied upon is the letter to the State Board of Health to the effect that Robert McMullin had applied for culinary water for a proposed subdivision located "east of Third East at approximately 6900 South."

It is beyond dispute that 6900 South is within the area served by the company. It is in fact approximately

one-half city block south of the Selma No. 1 subdivision, being the property purchased from Selma Olson Malmstrom and which is now being served. It is a long way south of the property in question. *There was no misrepresentation.* The letter itself is strong evidence that when Mr. McMullin told Mr. Pierson that he had bought the Olson property, he told Mr. Pierson that it was the Selma Olson Malmstrom property. In any event the representation made was true.

- (b) If a misrepresentation was made there was no reliance thereon to the detriment of the petitioners.

Petitioners, at pages 12 and 13 of their brief, quote from 19 American Jurisprudence as to the elements of estoppel. The last element is "(3) Action based thereon of such a character as to change his position prejudicially."

There is no evidence that petitioners have been prejudiced. On this question it is interesting to note the allegations of the petition. In paragraph 6 it is alleged (Tr. 2) that the petitioners have incurred large obligations and expended large sums of money to develop Selma No. 2 subdivision and have purchased pipe necessary for the connections in Selma No. 2 subdivision. It is further alleged that unless petitioners are supplied with culinary water they will be unable to complete their plans for this subdivision for 31 homes "to be constructed" and that the loss will be "approximately \$50,000."

It should be borne in mind that while Frank Pierson

denied having been told that McMullin was purchasing the James Olson property, as soon as he heard this was the case, he phoned Mr. McMullin and told him that the James Olson property was outside the area served by the company. Mr. McMullin stated that a short time after he had completed the contracts to purchase the ground on March 8, 1955, that he was called by Frank Pierson and told that the property was north of the north boundary of the area (Tr. 392). The purchase price of the property was \$2,000.00 per acre (Tr. 408). He made no attempt to sell the property and recover the cost (Tr. 409, 411). While Mr. McMullin testified he thought the land was not worth \$2,000.00 per acre without water, he also testified that he was not familiar with sales of similar land without culinary water. The questions and answers on the matter of sale and his qualification to determine values were as follows:

“Q. But you have never tried to sell it, as I understand?

A. No, sir.

Q. Never offered it for sale?

A. No, sir.

Q. Are you familiar with the sales of similar land in the area? Purchase — or other sales of similar land in the area that do not presently have any culinary water system?

A. No, sir.” (Tr. 425).

No work was done on the proposed Selma No. 2 subdivision except on a house that faces Third East which has water (Tr. 406). While he had purchased

3,000 feet of pipe for the subdivision the market prices had gone up 10 cents per foot since the purchase and it was contemplated that it would all be sold to Union and Jordan Irrigation Company (Tr. 412). The McMullins were therefore in a position to make a profit on the water pipe.

There was some testimony that there had been engineering fees paid of "9 hundred and some odd dollars" (Tr. 396). There was no testimony that this money would eventually be lost. Since there had been no attempt to sell the property and there would actually be a profit on the sale of the pipe, there was a chance that the McMullins would come out better than even. At least there was no proof that his position had been changed prejudicially. This is one of the necessary elements of estoppel according to all of the authorities including that quoted by petitioners.

The supposed damages which were alleged to be \$50,000.00 were the possible profits in building houses on the subdivisions (Tr. 395). The following is the question and answer as to losses other than the cost of the ground and cost of the pipe:

"Q. Now, will there be any other losses that you will suffer as a result if you are not able to obtain culinary water for this ground?

A. Well, that being my business, naturally I would suffer any loss—the loss of any profit I might have contemplated." (Tr. 395).

The claim that loss of profits on houses never built is prejudicial is fallacious.

Estoppel as a principle is only invoked to prevent a loss. It cannot be used to make a profit. Nor can it be used against the state when it interferes with the police power. See Estoppel, 19 Am. Jur., 639, 818, sections 40, 41 and 166.

The petitioners did not show that there was not other ground which could be purchased, subdivided and built on. Obviously there are thousands of acres of such ground in Salt Lake Valley. Profits are never a certainty. Respondent can just as well urge that the McMullins may have lost money on the speculative building and thereby saved money by not getting the water. In fact, considering the location of this property in a good location between Murray and Midvale this court might well take judicial notice that the petitioners have made a good deal. Without culinary water immediately available the land still has a very substantial value which may well be in excess of \$2,000.00 an acre. Furthermore, Union and Jordan Irrigation Company is not the only source of water for this or any other land. Supposedly the price was a fair one without the water. There was no evidence to the contrary by a qualified expert and the parties did not purport to buy and sell any water rights. There was testimony as follows:

“Q. Did you or did you not ever ask James Olson if his land was within the area that was being served by Union and Jordan Irrigation Company?

A. No.

Q. Now, with regard to the water stock which you have in the Union and Jordan Irrigation

Company, is that—that is stock that you purchased in connection with these two pieces of land, is it not?

- A. Right.
- Q. And which one did you get it from or was it both, James Olson, or Selma?
- A. The Union and Jordan water company shares came with the Selma Malmstrom property.
- Q. Now, you stated—and, of course, you didn't get any Union and Jordan stock from James Olson then?
- A. That's true." (Tr. 403).
- (c) Estoppel may not be invoked in a proceeding before the Public Service Commission as the basis for an order to serve.

Under this heading we should take a clear look at the relationship of the parties. This is not an action involving merely the Union and Jordan Irrigation Company and the petitioners. Public utilities are regulated by the Public Service Commission for the good of the public generally. A public utility may not serve, agree to serve, or become bound to serve without the approval, consent and order of the Public Service Commission itself. Estoppel to be valid must therefore necessarily apply against the Public Service Commission. There is a long line of cases by this court which hold that all contracts by a public utility are subject to approval and orders of the Public Service Commission. See:

Utah Hotel Company v. Public Utilities Commission of Utah, 59 Utah 389, 204 Pac. 511;

Salt Lake City v. Utah Light & Traction Company, 52 Utah 210, 173 Pac. 556, 3 A.L.R. 715;

Union Portland Cement Co. v. Public Utilities Commission of Utah, 56 Utah 175, 189 Pac. 593;

Murray City v. Utah Light & Traction Co., 56 Utah 437, 191 Pac. 421;

U. S. Smelting Refining and Mining Company v. Utah Power & Light Co., 58 Utah 168, 197 Pac. 902;

Utah Copper Co. v. Public Utilities Commission, 59 Utah 191, 203 Pac. 627.

The position of petitioners with regard to this estoppel and the legal answer thereto is well set forth in the order of the commission itself in the following statement:

“6. It is the main contention of the petitioners in this case that the company promised through its Secretary-Treasurer to serve the property of petitioners and that as a result of such promise the company is now estopped from denying service and that petitioners have the same right to require the company to serve their property as any person requesting new service to property within the service area of the company as shown on Exhibit 1.

* * *

By virtue of the broad powers bestowed on the Public Service Commission for the regulation of public utilities it follows that all contracts relative to service must be subject to approval or disapproval by the Commission. It does not follow, however, that because one of the parties to the agreement is estopped from evading its obliga-

tions that this Commission must require performance. The Commission is as free to ignore the terms of any such agreement with a public utility as it is to enforce or deny it. In other words, jurisdiction cannot arbitrarily be forced upon the Commission to enforce the terms of the contract in question if such exists, even though at law the company might be estopped from evading performance. If jurisdiction could thus be forced arbitrarily upon the Commission the execution of its terms might be found to be against the public interest and indirectly undermine the very authority granted the Commission in regulating the affairs of a public utility. (See *U.S. Smelting Refining and Mining Co. v. Utah Power & Light Company*, 58 *Ut.* 168, 197 *Pac.* 902). This Commission is not aware of the principle of estoppel having been evoked in any such case. However, there are numerous cases holding that the authority given the Commission to regulate public utilities puts all parties on notice that any agreement entered into is with those statutory provisions in mind. (See *North Salt Lake v. St. Joseph Water & Irrigation Company*, 118 *Utah* 600, 223 *Pac.* 2d 577). If the Commission is right in this conclusion then the petitioners in the instant case do not have, as claimed, the same status as prospective customers within the service area of the company." (Tr. 29).

Certainly the orderly regulation of public utilities by the Public Service Commission cannot be interfered with by the promise of an officer of the public utility when it is well established that a valid contract is not binding on the commission. In many of the cases above cited there was action taken in reliance on the contract.

In such cases the elements of estoppel existed plus a valid contract.

To summarize the main points on the estoppel question: First, the letter cannot be interpreted as referring to the property in question. Second, there is no prejudice shown since it was not shown that the land could not be resold for the price paid. There was no showing that the pipe purchased could not be used elsewhere, but on the contrary it could be sold for a profit. Third, the Public Service Commission cannot be controlled in its duty to the public by any representation of an official of the company.

POINT III

THE UNION AND JORDAN IRRIGATION COMPANY
HAS NO OBLIGATION TO SERVE PETITIONERS IN THE
AREA REQUESTED.

This point is intended as a direct answer to Point III in petitioners' brief. Point III as stated by petitioners is:

“The Union and Jordan Irrigation Company as a public utility has an obligation to furnish service to users reasonably within its service area.”

There is no such thing as property being “reasonably” within the area. It is either in or it is out. If the owner of adjacent and contiguous property could get service by claiming to be “reasonably” within the area, the area would be expanded by degrees and there would be no stopping place. It is true that in the Brady-Milne

case the Public Service Commission used this language. The position of Union and Jordan Irrigation Company with regard to the Brady-Milne case is simply that it was erroneous. The commission refused to follow it in the Nowlan case even though the territory there involved was also contiguous. The commission did not, in the Nowlan case admit that it had erred in the Brady-Milne case. It did not have to. The Brady-Milne case was not appealed to this court and no question therein decided has been sanctioned by this court. There is nothing uncertain about the service area which is shown on Exhibit 1.

Commencing on page 15 of their brief, petitioners assert:

“A public utility cannot resist on the ground that its facilities are inadequate. It has the obligation to construct adequate facilities. It cannot defend upon the ground that its finances are inadequate as it has the obligation to secure adequate finances. Even where the service rendered by the company entails the servicing of a natural commodity such as gas or water, the company cannot defend upon the grounds that its source of supply is being exhausted if it is within the power of the company to secure additional supply by purchase, condemnation, or by development of natural resources.”

No authority is cited for the proposition that a public water company must acquire additional water. If a public utility is ordered to acquire more water just what is it going to do? It cannot command the forces of nature. Water can be purchased only from those who

wish to sell. Even if the public service corporations could condemn water owned by private individuals there would be no public benefit as it would simply be a means of changing ownership. All water must be used beneficially or lost. If a public service corporation is permitted or required to condemn rights, think what would happen. A farmer with a section of land with inadequate culinary water for development into building lots could form a corporation, transferring some small water right to such corporation. This corporation would then apply for a certificate of convenience and necessity as to some area for which there was water. Then with the power of eminent domain it would proceed to condemn any supply, however used, for development of the land of this particular owner. There are many reasons why the Public Service Commission should not and could not effectively require a public water company to extend service beyond its ability to supply. The quotation from American Jurisprudence does not support petitioners' contention. In that quotation it is said:

“Accordingly, a public utility, at the suit of a consumer, may be required to extend its *service to any part of the district wherein it has received a franchise and has undertaken to operate*, if the extension is a reasonable one, and a public service commission may, where its action is not unlawful, arbitrary or capricious, order such an extension of service for the inhabitants in such territory.”
43 Am. Jur. P. 602.

The quotation definitely does not support the proposition that a water company, in a state which has the law

of appropriation, has to acquire water to serve *additional* territory.

The question of requiring a power company to extend its territory was considered though not decided by this court in the case of *Utah Power & Light Company v. Public Service Commission*, 1952, Utah, 249 Pac. 2nd 951 (not reported in official Utah reports). This court held that Utah Power & Light Company had offered to serve a certain area and based its order upon that finding of fact. However, that the decision might have been otherwise if such offer to serve had not been made, is shown by the following quotation from the opinion of this court:

“The Utah Power & Light Company attacks the lawfulness of the order of the Commission that it sell such power to Nephi City at the nearest point on its interconnected system where there are facilities of adequate capacity, on the grounds that it violates the Utah State Constitution and the United States Constitution because the order requires it to render service in an area it has never professed to serve with one exception (The Thermoid Rubber Co.) and such requirement constitutes a taking of property without due process of law. In support of this contention it cites *Northern Pac. Ry. v. North Dakota*, 236 U.S. 585, 35 S. Ct. 429, 59 L. Ed. 735; *Interstate Commerce Commission v. Oregon-Washington R. R. & Navigation Co.*, 288 U.S. 14, 53 S. Ct. 266, 77 L. Ed. 588; *Hollywood Chamber of Commerce v. Railroad Commission of Calif.*, 192 Cal. 307, 219 P. 983, 30 A.L.R. 68; *Oklahoma Natural Gas Co. v. Corp. Comm.*, 88 Okl. 51, 211 P. 401, 31 A.L.R. 330, P.U.R. 1923B, 823; *Oklahoma Natural Gas Co. v.*

Scott, 115 Okl. 8, 241 P. 164, P.U.R. 1926B, 67; Atchison, T. & S. F. R. Co. v. Railroad Comm., 173 Cal. 577, 160 P. 828, 2 A.L.R. 975, P.U.R. 1917B, 336. Conceding that these cases are authorities for the proposition that it is beyond the powers of a public service commission to compel a public utility without its consent to extend lines into or serve areas it has not professed or agreed to serve the question yet remains: Will the Utah Power & Light Company in selling power to Nephi City be performing a service it had not professed to give? This is a question of fact and not of law."

Furthermore an order to require a water company to extend its territory is very different than a power company. New *electric power* can be generated, new *water* cannot.

If petitioners or this court are wondering how the respondent is going to serve the area designated with the possibility of 6,000 connections on 1.5 c.f.s., we simply say that the predicament in which this mutual water company now finds itself should not be aggravated by an order to serve more territory.

POINT IV

AS TO SERVICE OUTSIDE OF THE AREA DESIGNATED ON THE MAP FILED IN 1946, EXHIBIT 1, RESPONDENT IS NOT A PUBLIC UTILITY.

For the purpose of this case and for this purpose only, we will assume that the corporation and its stockholders are estopped to deny before this Commission that Union and Jordan Irrigation Company is a public utility as to the one and one-half second feet of water

which it has dedicated to the culinary system. It may also be a public utility by estoppel as to the area designated on the map filed in 1946. But if it is a public utility by estoppel it can only be such to the extent it voluntarily served connections or represented to this Commission that it would serve. Estoppel can be imposed only to the extent that a representation has been made.

Possibly Union and Jordan Irrigation Company cannot now withdraw service which it has voluntarily and without objection of stockholders offered to give. However, the stockholders appeared in the Nowlan case and in this case and objected to the petition (Tr. 305). The Union and Jordan Irrigation Company itself has raised the defense that it is a mutual water company without corporate authority to act as a public utility. As to the right of stockholders generally to object to ultra vires transactions the following statement is made in 19 C.J.S. page 429, Sec. 973 of Corporations:

“As a general rule, ultra vires transactions, as long as they remain executory, are unenforceable and their completion may be enjoined at the instance of stockholders.”

In 19 C.J.S. at 457, Sec. 995, it is also stated:

“The powers of an officer or agent are necessarily limited to such acts or contracts as are within the purposes for which the corporation was organized and the powers conferred upon it.”

The situation as to new territory is identical with the situation as it would be if petitioners were requesting a mutual water company to serve the public for the first time.

That lack of authority in the articles of incorporation to act as a public utility is ground for denying or cancelling a certificate even though the corporation has been acting as a public utility is demonstrated in the cases of *Hough and Keenan Storage and Transfer Company v. Pennsylvania Public Utility Commission*, (Pa. 1938) 2 Atl. 2d 548 and *Mississippi-Gulf Port Compress and Warehouse Incorporated v. Public Service Commission*, (Miss. 1940) 196 So. Rep. 793. In the Pennsylvania case, the court said:

“The commission, in reviewing the scope of appellant’s activities, found that in transporting for the general public goods and personal property which did not go into, or come out of its warehouse, it was carrying on the business of a common carrier. The appellant does not dispute this finding, but claims the right to carry on such business as a common carrier as being merely incidental to its corporate business of general warehousing. We are of the opinion that transportation of goods as a common carrier cannot legally be made incidental to the carrying on of a general warehousing business, so as to permit a corporation organized for the latter purpose to carry on business as if under the former. No private corporation can carry on the business of a public utility except one that has been incorporated as a public utility. This will not interfere with the right of the appellant to transport goods and personal property to its warehouse to be stored or from its warehouse to its customers home or place of business—these are proper incidental powers—but it will prevent its transporting, for the general public, goods and personal property which neither go into nor come from its warehouse.”

"We are of the opinion that the Utility Commission properly refused the certificate applied for therein, because this corporation had no charter power to conduct the business of a carrier for hire either common or restricted, and if it had shown by its evidence the business it had theretofore done, the Commission could not by its certificate bless, forgive, or condone its past sins."

Two Utah cases point out that stockholders in a mutual water company have the right to their aliquot proportion of the water owned by the company. While this right may be lost through failure to take action as to past transactions the right cannot be interfered with where the matter is timely raised. In the case of *Big Cottonwood Tanner Ditch Co., Kay*, 108 Utah 110, 157 P.2d 795, the question was whether or not the company could sell its water for culinary purposes through water meters. The court held that the articles of incorporation were sufficiently broad for the corporation to do so. The court said:

"If this Company had been incorporated as some mutual irrigation companies are, with one purpose only set forth in the articles of incorporation, to-wit, the distribution of irrigation water from a definite source of supply, we would be compelled to admit that there is merit in appellant's contentions . . ."

In the case of *Genola Town v. Santaquin City*, 96 Utah 88, 80 Pac. 2d 930, the court said:

"**** Stock in a mutual company entails the right to demand such stockholder's aliquot share of the water in proportion as his stockholding bears to all the stock. Water rights are pooled in a mutual company for convenience of operation

and more efficient distribution, and perhaps for more convenient transfer. But the stock certificate is not like the stock certificate of a company operated for profit. It is really a certificate showing an undivided part ownership in a certain water supply."

POINT V

THE ORDER IN THE CASE OF NOWLAN, PARKER AND ESKELSON v. UNION AND JORDAN IRRIGATION COMPANY PREVENTS FURTHER EXTENSION OF SERVICE AREA.

The Commission admitted in evidence the full order and report in the Nowlan case (Tr. 125-214). Admittedly the present petitioners were not a party to that proceeding. However, that proceeding and the order therein is nevertheless a fact. It is stated in that decision when referring to service to Nowlan, Parker and Eskleson that "such expansion could very well impair or destroy further expansion of service within the service area of the company as set forth in Exhibit 1." We suggest that it is logical as well as just to hold that when application for service outside of a designated area is refused on the ground that such service would prevent expansion within the service area, that no subsequent petitioner should receive water outside of the area. The action of the Commission in granting such service would be arbitrary and discriminatory against prior applicants. There are no facts in the present case not present in the Nowlan case except the letter to the State Board of Health. Disregarding such letter for the moment, the granting of the present petition would be a preference to the present appli-

cants and would mean money in ~~his~~^{THEIR} pockets and money out of pocket to Nowlan, Parker and Eskelson.

This situation makes clear the inadequacy of a letter as a basis for service to McMullin. Assuming that the letter specifically referred to the James Olson property, the public cannot be discriminated against by the ability of one person, by misunderstanding or otherwise, to secure a promise by an officer of a public utility. In the case of a public utility with limited resources as in the case of the water company, the water company should not be permitted to serve additional territory after it has refused to extend its area because of limited water supply.

CONCLUSION

Petitioners asserted three points as the basis of a reversal of the order of the Public Service Commission. These are set forth on page 7 of petitioners' brief. It might be said that these statements are insufficient on their face to justify petitioners' position. This is for the reason that in the first point there is nothing said as to future customers within the service area. The fact that it might not imperil existing customers is insufficient on its face as a grounds for reversal. The second point, estoppel, is insufficient for the reason that as a matter of law estoppel will not support an order of the Public Service Commission. Third, there is no such thing as an obligation to furnish service to users *reasonably* within its service area. The service may only be required *within* the service area. Actually this court should sustain a demurrer to petitioners' points if such were a proper attack.

The principal point relied upon by petitioners in the hearing before the Public Service Commission was estoppel (second point set forth in the brief). This is clearly untenable because in addition to the fact that estoppel may not be the basis of a petition requesting the Public Service Commission to order service, there was no representation that service would be given to this area and there was no change of position in reliance thereon which was prejudicial to the petitioners. As to petitioners' first point that the Commission erred in holding that to extend service would imperil service to existing customers, the Commission held that it would imperil service to existing *and future* customers. It was stipulated that the service area might ultimately require 6,000 connections and there was no dispute that the 1.5 c.f.s. dedicated to the culinary system was being substantially exhausted by the present connections of a little over 1,000. As to the third point, there is no dispute from the evidence that the property in question was outside of the service area.

Respondent further defends on the grounds that it has never offered to serve the area in question and the Public Service Commission cannot order a public utility to serve where it has never offered to serve. Furthermore, respondent is a mutual water company without authority in its articles of incorporation to act as a public utility. Assuming that it may not now deny service where it has offered to serve, it may not be ordered to extend itself as a public utility. This on the ground that it would be *ultra vires*. Objection has been made as to

this new service area by both the corporation and the stockholders.

The petition further should be denied for the reason that in the Nowlan case, being a similar previous request as to adjacent territory, the Commission found that there was insufficient water to serve a new area.

The order of the Public Service Commission should be sustained.

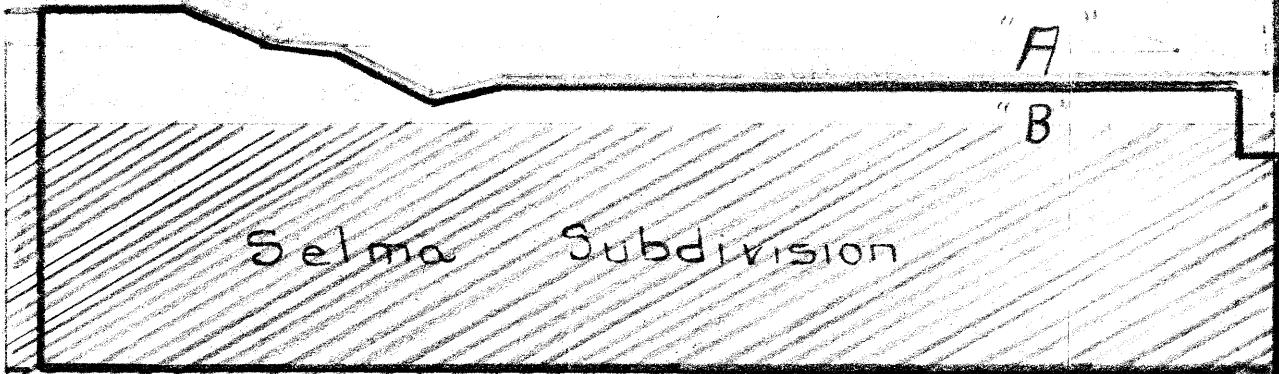
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200' EAST



Selma Subdivision

6900 S. 19. 25. 1E

SEE SW SE SEC 19. 25. 1E