

Decision No. 18178.

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

In the Matter of the Application of )  
FOOTHILL DITCH COMPANY )  
for permission to sell, and of )  
LINDSAY-STRATHMORE IRRIGATION DISTRICT )  
for permission to purchase the ditch, )  
right of way, water right and appurte- )  
nances formerly known as the Pogue, )  
Wallace and Crocker Ditch. )

Application No. 12557.

- D. E. Perkins, for Foothill Ditch Company.
- W. G. Irving, and Power & McFadzean by M. E. Power, for Lindsay-Strathmore Irrigation District.
- H. B. McClure, for Wallace Ranch Water Company.
- H. B. McClure and Karl A. Machetanz, for W. T. Dofflemeyer et al., consumers of Foothill Ditch Company.
- H. A. Savage, for Geo. C. Roeding Company and certain consumers of Foothill Ditch Company.
- W. R. Bailey and Farnsworth, Burke & Maddox, for U. D. Switzer as Receiver of Wutchumna Water Company et al. and for:  
Harry J. Ginner,  
J. E. Hester,  
Tulare Irrigation District,  
Lakeside Ditch Company,  
Consolidated Peoples Ditch Company,  
Packwood Canal Company,  
Tulare Irrigation Company,  
Visalia and Kaweah Water Company,  
Mathews Ditch Company,  
Jennings Ditch Water Company,  
Uphill Ditch Company,  
Modoc Ditch Company,  
Elk Bayou Ditch Company,  
Farmers Ditch Company,  
Fleming Ditch Company,  
Oaks Ditch Company,  
Evans Ditch Company,  
Watson Ditch Company,  
Persian Ditch Company,  
Mineral King Fruit Company.
- Lee M. Olds, for California Fertilizer Works.

BY THE COMMISSION:

O P I N I O N

The Foothill Ditch Company, a corporation, applicant in the above entitled matter, is engaged in the public utility

business of distributing water for irrigation purposes to certain water users near the town of Exeter, in Tulare County, and asks the Railroad Commission for authority to transfer its utility property to the Lindsay-Strathmore Irrigation District, which joins in the request.

The application alleges in effect that the owner of the entire stock of the Foothill Ditch Company is the Merryman Fruit, Land and Lumber Company, a corporation, which also owns lands receiving water for irrigation purposes from the Ditch Company; that it is the desire of both companies to sell this public utility property for a consideration of seventy-five thousand dollars; that the proposed purchaser is an irrigation district, duly organized and existing under the laws of the State of California, including within its exterior boundaries approximately 16,000 acres of land, of which 14,000 are irrigable; that about 9,000 acres of these lands are now planted to citrus orchards and require irrigation in order to produce crops; that the present water supply of the District, which is obtained by pumping from wells located in the Rancho de Kaweah, is inadequate and insufficient to irrigate all of the lands susceptible of irrigation within said District; and that in order to obtain an additional supply of water said District desires to acquire the Foothill Ditch Company's canal to carry to the District lands water the rights to which it has acquired in the Kaweah River through the purchase on its behalf of stock in various mutual water companies diverting water from the said Kaweah River. It is further alleged that at present the District is pumping water from the Rancho de Kaweah under a suspended injunction pending final decision of the Supreme Court of this state, and that should the District be permanently enjoined from pumping said waters, the only remaining possible source of water supply for the irrigation of the lands within the District would be through the diversion of water from the Kaweah River

at the intake of and through the canal belonging to the Foothill Ditch Company. The Commission therefore is requested to authorize the transfer of this ditch system to the Lindsay-Strathmore Irrigation District.

The water users of the Foothill Ditch Company filed a protest against the proposed sale, alleging that this is one of the oldest ditches along the Kaweah River, that its point of diversion with one exception is the highest on the river, and that the Foothill Ditch Company's right to divert 9 cubic feet of water per second from the river is second only to the prior right of the Wutchumna Ditch Company (Wutchumna Water Company), a mutual water company, to divert the first 63.4 cubic feet per second of water flowing in said river; that the flow of the river is sufficient to permit the diversion of the full 9 cubic feet per second during the greater portion of the year; that the Foothill Ditch is also entitled to divert surplus water from the river whenever the flow reaches a certain stage, and that this surplus water, amounting to six cubic feet per second, more or less, has been diverted and used by the consumers of said Foothill Ditch Company and when not so used has been spilled into a small water course flowing through the consumers' lands and known as Yokol Creek, from which it seeps into the ground and replenishes the underground water supply, which it is alleged is an important factor in maintaining the production of the wells necessary to supplement the ditch water; that the consumers have enjoyed an almost continuous irrigation service by reason of the fact that the Kaweah River during the fall months has not a sufficient stream flow to enable the Wutchumna Ditch Company to make practical use of its prior diversion rights enabling the Foothill Ditch Company to appropriate and use all of the water in the Kaweah River during such periods;

that while the company has the right to divert the water from the river the water so diverted actually belongs to the consumers, and that therefore the sole function of the Foothill Ditch Company is to divert, transport and distribute the water for the consumers. It is further alleged that under the jurisdiction of the Railroad Commission the consumers are assured continued good service at reasonable rates, together with a proper safeguarding of their interests, but in case the transfer as proposed herein is authorized, future service will be upon a contractual basis, subject to the will of the District, and in cases of disagreement final settlement will probably be dependent upon court action; that the interests of the District are now and will be to acquire all water possible for use upon the lands within its boundaries, which will result in the loss to the consumers of the surplus waters and the waters of the Kaweah River during periods of low flow, as well as the loss of the waters formerly spilled into Yokol Creek, all of which rights and advantages heretofore enjoyed are of great value and a necessity to the consumers. It is further alleged that this transfer will plunge the consumers into the bitter and costly litigation which has been in progress between the District and the Kaweah Delta water users for ten years last past and is still in progress and may involve the consumers in future interruption and interference of service and serious loss and damage through acts of violence several of which it is alleged have already occurred.

This protest further sets out that the District has been enjoined by superior court order from diverting any water whatsoever from the Kaweah River, which includes the waters of the Foothill Ditch Company, and therefore at this time would be unable to operate this system and deliver water to the consumers except in violation of law. Wherefore the Commission is request-

ed to deny this application at least until such time as the Lindsay-Strathmore Irrigation District has finally established its rights to divert water from the Kaweah River.

Protest was also filed by U. D. Switzer as Receiver of the Watchumna Water Company and twenty other protestants including Tulare Irrigation District, and certain ditch companies, private individuals and corporations diverting water from and/or claiming certain rights in or dependent upon the stream flow of the Kaweah River. In addition to certain matters also set forth in the above protest filed by the Foothill Ditch Company water users, these protestants allege that the proposed sale of this utility would be contrary to the interest of the protestants; that the purchase of the Foothill Ditch by the Lindsay-Strathmore Irrigation District will be ultra vires and not within the powers of an irrigation district; that any diversion of water by the District into the Foothill Ditch from the Kaweah River will be illegal and in contempt of the judgments and the orders of the Superior Court of the County of Tulare; that any attempted diversion by the District will tend to bring about interminable confusion and litigation over the administration and distribution of water from the Kaweah River and its lower branches; that the claimed rights of the District are in conflict and opposition to the adjudicated rights of the Foothill Ditch Company and its consumers and will tend to bring about strife and dissension over the administration of the Foothill Ditch if controlled or operated by the District. These protestants set forth certain facts taken from the Findings of Fact of the Superior Court of the County of Tulare in an action entitled Tulare Irrigation District et al., plaintiffs, vs. Lindsay-Strathmore Irrigation District, wherein it is adjudged and decreed that the District has not acquired any water rights as

against the plaintiffs and intervenors therein, certain of which are also protestants in this proceeding, and that the District is not entitled to pump or divert any water from the Kaweah River or any of its branches, or from the Rancho de Kaweah, except for riparian uses upon its riparian lands of the Rancho de Kaweah, subject to the prior rights of each plaintiff to said action.

It is further alleged that although the District has been enjoined by temporary restraining order issued by the Superior Court of Tulare County from diverting any waters whatsoever from the Kaweah River through and by means of the Foothill Ditch, nevertheless the District now desires to convey through this ditch waters the only right to which it holds as lessee of stock owned by one E. R. Huebert in the Watchumna Water Company and other mutual ditch companies, which it is alleged in effect is contrary to the articles of incorporation of the Watchumna Water Company and in violation of the rights of the stockholders of said ditch companies and is now and will be resisted by them to the full extent of the law. Protestants therefore pray that this application be denied.

Wallace Ranch Water Company, a corporation, also filed a protest alleging that it is the owner of and has the right to divert three cubic feet of water per second from the Kaweah River, and also has a right to have this water conveyed free of charge through the Foothill Ditch to certain lands served by protestant, upon which lands said water has been put to beneficial use for more than twenty years last past; that by reason of the litigation between the District and the owners of the ditches taking water from the Kaweah River, any attempt on the part of the District to conduct water through the Foothill Ditch will involve protestant's rights and make it a party to the litigation and will interfere with and prevent said pro-

testant Wallace Ranch Water Company from furnishing the amount of water which the lands it serves are entitled to; that the District's interest will be to deliver water to its own lands, rather than to protestant; and that in case the District is permitted to divert Wutchumna water through the Foothill Ditch, said District will claim a prior right to said water by reason of the priority of said Wutchumna's water rights and the protestant would thereby be deprived of the water which it has heretofore received during the period of low flow of the Kaweah River. The Commission therefore is asked to deny this application.

Public hearings in this proceeding were held before Examiner Satterwhite at Visalia, after all interested parties had been duly notified and given an opportunity to appear and be heard.

The Foothill Ditch Company was incorporated April 23, 1914, by the Merryman Fruit Land and Lumber Company, both concerns being controlled by R. C. Merryman. Through authority of this Commission issued in its Decision No. 2308, dated April 20, 1915 (6 C.R.C. 678), the above Ditch Company acquired that certain ditch system known as the Pogue, Wallace and Crocker Ditch from Rosa S. Spaulding, who prior to this time had operated the property as an individual delivering water to various consumers under contracts. This ditch has an adjudicated right to 9 cubic feet of water per second of the waters of the Kaweah River diverted at a point called Terminus Beach, near Exeter in Tulare County, and supplies the water by gravity to consumers for agricultural, and to a limited extent for domestic purposes. This water right is claimed to be second only to the prior right of the Wutchumna Water Company to divert the first 63.4 cubic feet of water per second from the river. In addition to this the Foothill Ditch Company has the adjudicated right to

take certain amounts of surplus water when the river reaches certain established stages. Six of the above nine second feet is diverted for the Foothill Ditch consumers, the other three being an independent water right belonging to the Wallace Ranch Water Company, a mutual concern, which under agreement is diverted by the utility and conveyed through its ditch where it is delivered to the mutual company for use upon the lands of its stockholders. It is claimed that this three second feet of water, together with certain surplus waters, has been diverted through the Foothill Ditch and put to beneficial use upon the lands of the above stockholders for more than twenty years last past.

Rates were established on this system upon application of the Foothill Ditch Company in Decision No. 2309, dated April 20, 1915 (6 C.R.C. 680), and again in Decision No. 9759, decided November 17, 1921 (20 C.R.C. 835), at which time the estimated original cost of the properties was shown by the evidence to be approximately \$68,500. In Decision No. 3763, decided October 4, 1916 (11 C.R.C. 542), this Commission authorized the Foothill Ditch Company to sell to the Lindsay-Strathmore Irrigation District the lower section of its present canal and right of way for a consideration which among other things was sufficient to enable the company to replace the section of canal sold with a concrete pipe line by means of which service was continued to its consumers. A more detailed description of this water system, its history and methods of operation, may be found in the above decisions.

According to the evidence the Lindsay-Strathmore Irrigation District includes a total area of 15,262 acres, of which last irrigation season 9,692 acres were planted to citrus trees principally but included some vines and other crops as well. The present water supply has been obtained since 1918



by pumping from certain lands which have been acquired by the District in the Rancho de Kaweah. The amount of water secured from this source is claimed by the representatives of the District to be insufficient for the needs of the lands already under irrigation within its boundaries and wholly inadequate to permit extension of proper service to its remaining irrigable lands.

The majority of individuals, ditch companies and corporations appropriating water from the Kaweah River and generally referred to as the Kaweah Delta water users, have contended that by reason of the location of the District's well field in the Rancho de Kaweah, which is riparian to the above stream, the extraction therefrom of the large quantities of water by the District has seriously reduced the volume and flow of water in the river and depleted the available underground waters, and has seriously interfered with their rights heretofore enjoyed, to the great damage of their properties. This controversy, as well as others arising out of efforts on the part of the District to secure rights to appropriate water from the Kaweah River, has resulted in very bitter and extensive litigation. In an action recently brought by the Tulare Irrigation District jointly with sixteen ditch companies and certain other Delta water users, the Superior Court of Tulare County granted an injunction permanently enjoining the Lindsay-Strathmore Irrigation District from pumping any more water from the Rancho de Kaweah. However, by agreement this injunction was suspended pending appeal therein to the Supreme Court of this state.

In order to provide a water supply for its lands in case the above judgment is sustained, the District has caused to be purchased for and in its behalf certain shares of capital stock in some seventeen, more or less, mutual water companies diverting water at various places from the Kaweah River and the

St. Johns River and their tributaries. The St. Johns is a branch of and really a part of the Kaweah River. Although in most instances the shares of stock represent but a minority interest in the above mutual companies, it is the plan of the District to change the points of diversion of so much of the water as it may be entitled to by reason of the above stock, and to combine all such diversions at the intake of the Foothill Ditch, by means of which water may be conveyed by gravity to its own lands through its low level canal. This canal was at one time a continuation of the present Foothill Ditch and is the section formerly acquired from the Foothill Ditch Company.

To this end an agreement was entered into by and between the Foothill Ditch Company and the District, under date of January 20, 1926, wherein the company agreed to convey to the District its utility properties, rights and interests for a consideration of \$75,000, payable in annual installments of \$5,000 up to the first day of January, 1929, at which time the unpaid balance of \$60,000 is due and payable. The agreement provides, among other things, that the District will defend and pay for the costs of any and all actions brought against the Foothill Ditch Company by reason of the diversion of any water from the Kaweah River through the Foothill canal, and also that in case the District is permanently enjoined by any court of competent jurisdiction from diverting water through the Foothill Ditch or in case its electors or directors fail to authorize or provide the funds for the installments, then said District will not be required to complete the transaction and the property will thereupon revert to the company. This agreement also makes rather indefinite and uncertain provisions for the District to continue the supply of water to the Foothill Ditch Company's consumers, setting forth that the District upon taking control and possession of the ditch will thereafter admin-

ister the same subject to the rights of the present consumers and those parties entitled to flowage rights therein.

It is clear from the evidence that while the Foothill Ditch Company as a corporation holds the rights by appropriation to divert certain quantities of water from the Kaweah River, depending upon the stage of the river and the rights of other appropriators, yet upon diversion the title to such waters lies in the water users themselves. This situation was brought about through the sale to land owners located along the ditch, by the predecessors in interest of the present company, of water rights in the waters appropriated upon the basis of one miner's inch of water to each four, and in some cases, five acres. This company therefore does not own the water after diversion but acts rather in the capacity of a common carrier of waters for parties who have vested interests therein.

The pleadings already set out above in considerable detail show quite clearly the main grounds of protest and the principal contentions advanced by the various conflicting interests appearing in this case. The protests entered by those parties other than the actual users of the water delivered by the Foothill Ditch Company indicate collateral interests only and are directed mainly to the possibility of future interference with their water rights and other interests, to the possible disrupting of the present system of river administration and to the possibility of extensive water right litigation should the transfer of this utility property be granted.

The chief concern of the water users themselves lies in the possible loss of the advantages which they have enjoyed heretofore in obtaining excess and surplus waters by reason of the strategic location of the headworks of the Foothill Ditch, which with one minor exception is located further upstream than any other ditch diverting water from the Kaweah River. As previously stated, the Wutchumna Water Company has a prior right

to divert the first 63.4 second feet of water from the Kaweah River. However, as this company can make little if any practical use of the water when the stage of the river falls as low as six second feet at its diversion, it has permitted the Foothill Ditch Company to use this water at such times. This practice in the past has assured the Foothill Ditch Company users a normal supply of water at a time when it was most needed. The users fear that this friendly relationship with the Wutchumna Water Company is likely to be terminated if the District operates the ditch, as this company undoubtedly will join with the other ditch companies on the river in maintaining their rights against the District, with the result that the water users will be deprived of a water supply which they have heretofore enjoyed. The water users also claim that under the jurisdiction of the Railroad Commission their present service is assured at reasonable rates without discrimination, while under control of the District their rates will immediately be increased and in cases of disputes or disagreements the water users will have no remedy other than recourse to the courts, with its attending delays and heavy expense.

For the past ten years there has been almost continuous litigation over water rights and the use of water by the District. The record shows that some time prior to the submission of this proceeding an action was brought in the Superior Court of Tulare County by certain water users and other interests seeking to enjoin the District from diverting any water from the Kaweah River through the Foothill Ditch. From the documentary and other evidence presented in this case it is clear that the right of Lindsay-Strathmore Irrigation District to divert or use any of the water from the Kaweah River or the St. Johns River or any of their branches or tributaries, either through or by means of the Foothill Ditch or any other ditch, is the subject of

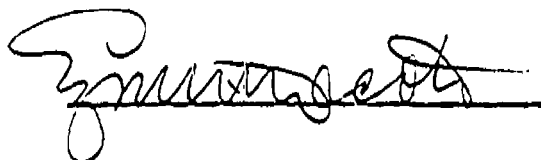
litigation now pending in the courts. It appears therefore that it would not be in keeping with public policy and not to the best interests of the present consumers of the Foothill Ditch Company and the public generally to authorize the transfer of this utility to interests wholly beyond the jurisdiction and control of the Commission when such interests have shown no present unquestioned ability to use the existing ditch system and facilities for the conveyance of water to the lands situate within the boundaries of the irrigation district. It follows that this application should be dismissed without prejudice to either of the applicants herein.

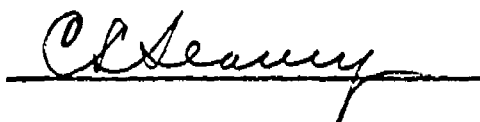
O R D E R

Foothill Ditch Company, a corporation engaged in the public utility business of delivering water for irrigation purposes to certain water users located in the vicinity of the Town of Exeter, in Tulare County, having made application to transfer its properties, rights and interests to Lindsay-Strathmore Irrigation District, which joins in said application; public hearings having been held thereon; the matter having been submitted, and the Commission being now fully informed and advised,

IT IS HEREBY ORDERED that the above entitled application be and it is hereby dismissed without prejudice.

Dated at San Francisco, California, this 6<sup>th</sup> day of April, 1927.

  
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Commissioners.