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Decision No. ✓

BEFORE THE RAILROAD COMMISSION
OF THE STATE OF CALIFORNIA.

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ORIGINAL

Decision No. 2200

ANGAL FERRASCI, et al.,

Complainants,

-vs.-

Case No. 494.

EMPIRE WATER COMPANY,

Defendant.

John G. Covert and Lamberson, Burke & Lamberson
for complainants.
Scarborough & Bowen for defendant.
H. Scott Jacobs for T. J. Gilkerson, et al.,
Intervenors.

THELEN, Commissioner.

O P I N I O N .

This is an action to compel Empire Water Company to construct a flume or siphon and appurtenances for the purpose of conveying water owned by Empire Water Company and secured by it from Lemoore Canal and Irrigation Company, across Kings River from the east side to the west side of the river, and thereafter to deliver to the lands on the west side of the river in the Empire Ranch their proportion of such water.

The complaint was filed by twenty-nine land owners owning land or having contracts for land in that portion of the so-called Empire Ranch which is located on the west side of Kings River in Kings County, California. The complaint alleges, in effect, that on or about January 8, 1906, Empire Investment Company was in possession of and owned in fee a large tract of land located in Kings County, California; that Kings River flows in a southerly direction through said lands and that all of said lands are adjacent to Kings River and riparian thereto; that Lemoore Canal and Irrigation Company owns

a system of irrigation extending in part to and upon said lands; that on or about January 8, 1906, Empire Investment Company conveyed to Empire Water Company, defendant herein, certain water properties and water rights, more particularly described in deed dated January 8, 1906, a copy whereof is attached to the complaint and marked "Exhibit B", to which deed further reference will hereinafter be made; that on or about January 8, 1906, Empire Water Company entered into a contract with Empire Investment Company to convey to the lands of Empire Investment Company the riparian water of Kings River to which said lands were entitled, and also the water theretofore owned by Empire Investment Company by virtue of its ownership of $8 \frac{5}{8}$ shares of the capital stock of Lemoore Canal and Irrigation Company, as set forth in agreement, a copy whereof is attached to the complaint and marked "Exhibit A", to which agreement more detailed reference will hereinafter be made; that the complainants are in possession of, and own in fee or have contracts to purchase, those portions of the Empire Ranch lying west of the Kings River which are particularly described in the complaint; that Lemoore Canal and Irrigation Company's canals, ditches and irrigation system are located on the east side of Kings River, but can readily be extended to the west side of the river; that the lands of complainants, if irrigated, can produce annually profitable crops of grain, corn, alfalfa, vines and trees; that the riparian water of Kings River to which all the lands of the Empire Ranch are entitled, has been insufficient and inadequate for the purpose of irrigating the lands of complainants or for watering stock or for domestic purposes, and that there is no other source from which said lands can be irrigated except from Lemoore Canal and Irrigation Company water; that complainants are entitled to have delivered to them all the water that may reasonably be required for irrigation, stock and domestic purposes, not exceeding at any one time one cubic foot per second for each quarter section of land, and a pro rata proportion of all the water owned and controlled by Empire Water Company, par-

ticularly of the water represented by the 8 5/8 shares of the capital stock of Lemoore Canal and Irrigation Company; that complainants have not received from any source sufficient water to properly irrigate their lands or for stock and domestic purposes; that complainants have not received any part of the waters represented by said 8 5/8 shares of the capital stock of Lemoore Canal and Irrigation Company, except that in March, 1910, Empire Water Company delivered Lemoore Canal and Irrigation Company water to the west side of Kings River and irrigated over 800 acres of land; that in 1909, Empire Water Company commenced the construction of a siphon across Kings River for the purpose of conveying Lemoore Canal and Irrigation Company water from the east side of the river to the west side, but that this work was later abandoned; that all the lands of complainants can be irrigated by gravity flow by means of water running through the canals and ditches of Empire Water Company and Lemoore Canal and Irrigation Company, if Empire Water Company should extend its canals and construct a flume or siphon, as requested in the complaint; that Empire Water Company has contracted to deliver to all the lands in the Empire Ranch, including the lands on the west side of Kings River, their retable proportion of the riparian waters of Kings River and of the water represented by the stock in Lemoore Canal and Irrigation Company owned by the Empire Water Company; that Empire Water Company has refused to construct the necessary canals and flume or siphon for the purpose of conducting Lemoore Canal and Irrigation Company water from the east side of Kings River to the west side thereof; that in order to so convey Lemoore Canal and Irrigation Company water to the west side of the Kings River it will be necessary to construct a ditch or canal, approximately 1 1/2 miles long, 12 feet wide on the bottom, with banks 3 feet high and 4 feet wide on top, with side slopes two to one, at a grade of at least one foot per mile, and also for the purpose of crossing the main channel of Kings River, a corrugated iron siphon 260 feet long and 42 inches in diameter, with the

necessary bulk-heads; and that the cost of such construction would not be disproportionate to the benefit received by complainants. The complainants accordingly ask that this Commission direct Empire Water Company to construct such canal and siphon or flume, and thereafter to deliver through the same the ratable proportion of the Le-moore Canal and Irrigation Company water to which complainants allege they are entitled.

Attached to the complaint is a copy of a deed dated January 8, 1906, from Empire Investment Company, hereinafter called the Land Company, to Empire Water Company, hereinafter called the Water Company. By this deed the Land Company conveyed to the Water Company all its ditches, canals, weirs and rights of way over its lands in Kings County and a right of way along Kings River and gave the Water Company authority, as agent to the Land Company, to take and divert the waters of Kings River which belong to the Empire Ranch as riparian to the river, and to distribute and deliver the water through its canal and water system to the Land Company's lands. The property conveyed is specifically described in the deed. The deed recites that it is the intention to convey to the Water Company all the water ditches and parts of the water system located upon the Empire Ranch or used in connection therewith and owned by the Land Company. Section 8 of the deed reads as follows:

"And the said first party (the Land Company) does hereby authorize and empower the said second party (the Water Company) as the agent of said first party and its assigns and successors in interest, and does hereby give to said second party, as such agent, the right to take the water of said Kings River flowing over and across said lands, or to which said lands may be entitled, and to distribute the same through the said second party's water system, in accordance with an agreement executed between the parties hereto of even date, and recorded herewith in the records of said county; provided, however, it is distinctly understood that said first party does not convey to second party any riparian or water rights, and nothing herein shall be construed as a conveyance, transfer or waiver of any riparian rights in and to the waters of Kings River and its tributaries and branches belonging to said land, but the waters and water rights in said river to which said lands may be entitled by reason of their riparian character, shall remain a part of and appurtenant to the said lands, and said second party has only the right to take and distribute the same as aforesaid as the agent of the said first party and its assigns and successors in interest; and the rights and authority hereby

granted to second party as such agent shall continue and be in full force so long as the said agreement shall continue in force and operation."

Although the resolution of the board of directors of the Land Company, in pursuance whereof this deed was executed, recites that the Land Company is to convey to the Water Company, in addition to the property hereinbefore referred to, "8 5/8 shares of the Lemoore Canal and Irrigation Company," the deed does not seem to convey these shares. It was stated at the hearing, and not denied, that these shares were conveyed to the Water Company by a separate transaction, but it does not appear whether such conveyance was by separate instrument in writing and, if so, what the terms of such instrument were.

On the same day, and apparently as part of the same transaction, the same parties entered into an agreement, a copy whereof is attached to the complaint herein and marked "Exhibit A". This agreement, after reciting that the Land Company is the owner of the tract of land particularly described in the agreement, known as the Bates and Miller tract and containing 18,712.12 acres, that the Kings River flows through the tract, that all the lands of the tract are riparian to this river and possess the right to take and use therefrom such water as may be reasonably necessary for irrigation, stock and domestic uses thereon, that the Water Company is the owner of a complete water distribution system over and through said tract by means whereof the entire tract is irrigable and may be supplied with water for irrigation, stock and domestic purposes, that "said first party (the Water Company) also has the right, as the agent of the second party (the Land Company) to take from said river the water to which said lands are entitled as riparian to said river, and to distribute the same to said lands through said water system" and that the Water Company "also owns 8 5/8 shares of the Lemoore Canal and Irrigation Company and the waters to which such shares are entitled, which water may be delivered and distributed through said system to a part of said lands

for all or any of said purposes" and that "both parties hereto mutually desire to create, establish and maintain a binding, secure and permanent arrangement whereby said water system shall be properly maintained, and said waters shall through and by means of such system be perpetually delivered and distributed to all of said lands and the subdivisions thereof for any of said uses or purposes thereon by said second party and any persons who may hereafter succeed to the title of said lands or any subdivision thereof," the parties agree for themselves and for their successors in interest and assigns that the Water Company, "subject to all valid appropriations of and existing rights to the waters of said Kings River" will distribute to all the lands in the Empire Ranch and to each and every subdivision thereof, of not less than 20 acres, all the water that may be reasonably required for the purposes specified, not exceeding at any one time one cubic foot per second for each quarter section. This agreement is made upon certain conditions, among which I desire to draw attention to the following:

1. The Water Company agrees to construct and extend its canals over the entire tract so that it may conveniently furnish and deliver water to all the lands therein and thereafter to maintain its water system, other than lateral ditches, in good order and repair.

2. The Land Company, its successors and assigns, agree to pay annually on the first Monday in September of each year, "as and for all water rents or charges for furnishing and delivering the water as herein agreed, the sum of one dollar per acre for each acre of said lands owned by them." It thus appears that the charge of one dollar per acre was to be paid according to the number of acres owned by the land owner, entirely irrespective of the number of acres irrigated.

3. The Water Company agrees that if at any time the amount of available water is insufficient to supply the necessities of all

the lands irrigable from its system, the available water shall be pro-rated according to the acreage irrigated.

4. The parties agree that the agreement shall bind and inure to the benefit of all the lands in the entire tract and that the rights and benefits granted thereby and the duties, liabilities and obligations imposed thereby shall remain appurtenant to and binding upon each subdivision of the land and shall not become released or separated therefrom by any method, including adverse possession or statute of limitations, except by written instrument executed by the owners of the subdivisions of the lands and the Water Company, its successors or assigns, and duly recorded in Kings County.

The answer, after denying certain allegations of the complaint, alleges in a separate defense that the facts of the case are as follows:

That the Land Company, in 1905, purchased the Bates and Miller tract, containing about 18,712 acres, and immediately thereafter subdivided the tract, under the name of "Empire Ranch" into 40 acre lots; that the entire tract was claimed to be riparian to Kings River and that Bates and Miller conveyed to the Land Company all appurtenant riparian rights; that the Land Company has sold the entire ranch except 1100 acres on the west side of the river and 365 acres on the east side of the river; that as to some 367 acres on the east side of the river heretofore contracted to be sold the Land Company has brought suit to foreclose the contracts; that with each lot sold there was conveyed or agreed to be conveyed to the purchaser, the lot's pro rata share of the riparian rights appurtenant to the tract; that shortly after the purchase and subdivision of the tract, the Water Company was formed for the purpose of holding, operating and maintaining the ditches and water system over the tract as the agent and trustee of the Land Company and its assigns or successors in interest in the tract; that on January 8, 1906, the Land Company conveyed to the Water Company its water system and properties already herein referred to; that at the same time there was assigned to the Water Company by the Land Company

2 5/8 shares of the capital stock of Lemoore Canal and Irrigation Company, which water had theretofore been used only upon that portion of the ranch which lies east of Kings River; that there are two sources of water supply, first, the riparian water flowing in Kings River, and, second, the waters obtained by virtue of ownership of the shares of stock in the Lemoore Canal and Irrigation Company; that certain lands described in the answer, and located generally in the northeastern and eastern sections of the ranch, can be irrigated only from water secured from the Lemoore Canal and Irrigation Company's system, and that all the other lands in the ranch, both on the east and on the west sides of the Kings River, can be irrigated from riparian water obtained from the Kings River; that about 16,037 acres are to be irrigated from defendant's water system, whereof about 9,486 acres are located on the east side of the river and about 6,551 acres on the west side, and that of said 9,486 acres on the east side some 3,720 acres can be irrigated only from the canals of Lemoore Canal and Irrigation Company, being, as it is alleged, too high for irrigation from the river; that the main canal of Lemoore Canal and Irrigation Company takes water out of the Kings River near the northerly line of Section 32, Township 17 South, Range 21 East, M.D.B. and M., and that the main canal and laterals run thence southwesterly to the Empire Ranch, a distance of some 12 or 13 miles; that under the rules and regulations of the Lemoore Company, each share of stock is supposed to furnish enough water to irrigate 640 acres of land, but that by reason of the great distance the water must flow and the porous character of the land through which the ditches are constructed, about two-thirds of the water taken in at the headgate is lost by seepage, absorption and evaporation before it reaches the Empire Ranch, so that in normal seasons the Water Company secures from its ownership of the Lemoore stock only from 20 to 25 cubic feet of water; and that if it is attempted to distribute this water over the entire Empire Ranch, it would do no one any practical good.

The answer then alleges that the Water Company has really no personal interest in the controversy, that it does not claim any

right to use the Lemoore shares for its own benefit but only for the benefit of the owners of lands in the ranch, that the Company has no interest in distributing the water to one class of users rather than another, and that so far as it is personally concerned, the Company is willing to distribute the water as this Commission may direct, and is willing to construct such canals, siphons or other structures as may be directed by this Commission.

A petition in intervention was filed by T. J. Gilkerson in behalf of himself and other land owners owning land in fee or having contract rights to land in that part of the Empire Ranch which lies east of Kings River. The petition alleges, in part, that for more than twenty years prior to the execution of the agreement dated January 8, 1906, all the water secured from the Lemoore Canal and Irrigation Company's system was used only upon the lands lying east of the Kings River; that the amount of water to which the Lemoore stock is entitled is insufficient to irrigate more than one-third of the ranch; that it would be a physical impossibility to distribute the Lemoore water to all the lands on the ranch, and that if such attempt were made, the amount of water delivered would be too small to be of any practical benefit to anybody; that the purchasers of the 3,720 acres of land on the east side of the Kings River, referred to in the answer of the Water Company, bought their lands knowing that they could be irrigated only from Lemoore Canal and Irrigation Company water and that they believed that their lands had a prior right to the use of the water; that a prosperous community has grown up on the east side of Kings River; and that if Lemoore water is shared with the owners of lands on the west side of the river, the tract of 3,720 acres will become barren and wholly unproductive.

The evidence in this case was taken at Hanford, before Commissioner Eshleman, on January 14, 1914, and March 16, 1914. Briefs were thereafter filed. By order of January 2, 1915, the Railroad Commission directed me to prepare, subject to the approval of all

parties, the opinion and order in this case, in lieu of Commissioner Eshleman, whose term as a member of this Commission had in the meantime expired. All parties have in writing consented to this arrangement, and it now becomes my duty to present an opinion and a draft of an order in this case.

The evidence in this case shows, in part, that prior to the year 1906, Bates and Miller were the owners of a ranch in Kings County, containing 18,712.12 acres. The Kings River flows through this ranch in a southerly direction in such a way that out of some 16,037 acres of land which are irrigable from the defendant's water system, some 9,486 acres are located on the east side of the river and about 6,551 acres on the west side. This entire tract had and still continues to have riparian rights in the waters of Kings River. In addition to these waters, the owners of the tract purchased $8 \frac{5}{8}$ shares of the capital stock of Lemoore Canal and Irrigation Company out of a total of 53 shares, becoming thereby entitled to about one-sixth of the water of Lemoore Canal and Irrigation Company. Certain water from the Lemoore Company was used for irrigating lands in this ranch on the east side of the Kings River continuously from at least 1901 to the date of the sale of the ranch by Bates and Miller to Empire Investment Company in 1905. After the ranch was sold to Empire Investment Company, this company constructed a system of canals and ditches for the purpose of irrigating the entire ranch. It then procured the incorporation of a new company, to be known as Empire Water Company, with the intention of having this company attend to the entire water business. The Land Company sold off its land on the west side of the river, except some 1100 acres, and all the land on the east side, except some 365 acres. About 367 acres which were sold on the east side of the river are now in litigation in suits by the Canal Company to declare the contracts forfeited. During the first few years after 1906 there seem to have been no particular difficulties in connection with the water supply, but with the advent of the dry years of 1912 and 1913, the water available for distribution was no longer sufficient to irrigate all the lands

which demanded water. The land owners on the west side of the Kings River secured but very little water in 1912, and practically none in 1913, and suffered severely because of the failure of their water supply. The land owners on the east side of the river, while not securing the entire amount of water which they desired, fared much better than their neighbors on the west side, for the reason that in addition to their share of the riparian water, they also secured the entire Lemoore water. The owners on the west side of the river claim that they are entitled to a ratable proportion of the Lemoore Water, and hence filed the complaint in the present proceeding, for the purpose of securing an order to compel the Water Company to construct the necessary flume or siphon across the Kings River, and the subsequent delivery through the same of a ratable proportion of the Lemoore water.

This case presents two main questions:

1. Is the Water Company a public utility?
2. If so, are the complainants entitled to a delivery by the Water Company of a portion of the Lemoore water?

At the hearing, the defendant took the position that it is not a public utility. The intervenors took the same position. The defendant, however, took the further position that if this Commission should hold that it is a public utility, it would comply with any order which the Railroad Commission might make, and that if directed to distribute Lemoore water to the owners on the west side of the river, it would construct the necessary structures and deliver the water, as might be directed by this Commission. The defendant took the position that the controversy is one primarily between the land owners on the two sides of the river, and that as between them it will remain neutral.

1. IS DEFENDANT A PUBLIC UTILITY?

Empire Water Company was incorporated under the laws of California on November 17, 1905. The purposes for which it was incorporated are specified in its articles, as follows:

"That the purpose for which said corporation is organized is to purchase, locate, lease and in any other way acquire, hold, distribute, sell, mortgage, lease and in any other way dispose of water, water rights, as well as the stock of other water or irrigation companies, and any other means or source of water supply; to construct, maintain and operate canals, ditches, pipe lines and any other means of conveying water, reservoirs, weirs, dams and other ways and means of impounding water, water works, dams and any and all other machinery and appliances for raising, receiving, handling and distributing water, either for domestic use, for stock or for irrigation on either farming lands, farming neighborhoods, cities, towns, villages or any other place or locality; and also for the purpose of furnishing power for any use or purpose whatsoever; to purchase and otherwise acquire, hold, handle, use, sell or in any other way dispose of any property of whatsoever nature, both real and personal, and wherever the same may be situated, which may be convenient and necessary in carrying out the purposes of this corporation, and to maintain, construct and operate any kind of machinery, works, roads, bridges and all manner and means of transportation and communication which may be convenient or necessary in carrying out said purposes and the conduct of the private business of said corporation, but not for any public use or toll whatever, and to do and perform all things authorized or granted by the laws of this State to corporations."

Capital stock is authorized of a total par value of \$500,000.00, divided into 5,000 shares, of the par value of \$100.00 per share. The articles do not state that water is to be distributed to stockholders only, nor is there any limitation in the articles with reference to the territory to be served with water by the Company.

The by-laws of Empire Water Company contain no provision for the distribution of water except Article XI, which reads as follows:

"The water belonging to and controlled by this company shall be distributed through its various ditches, canals and other water ways to the lands of the Empire Ranch in accordance with the terms and conditions of the contract executed between this company and the Empire Investment Company and recorded in the records of Kings County, California, and to such other persons and lands as the board of directors of the company shall determine in accordance with the rules and regulations for the distribution of such water as the board of directors of this company may from time to time by resolutions adopt; and the said board shall have the full power and right to adopt rules and regulations necessary for the proper and equitable handling and distribution of water to the persons entitled thereto, which said rules and regulations shall prescribe the price or terms for the delivery of such water and the ditches or mains by which the water shall be delivered to the various lands and the manner in which the water shall be delivered from such ditches and canals to the landowners, and such other matters and regulations as the board may deem necessary."

The by-laws contain no provision limiting the delivery of water to stockholders of the corporation or to a specific tract of land. The distinguishing features usually found in the by-laws of mutual water companies are not found in these by-laws.

There is no necessary relationship whatsoever between the ownership of stock in this company and the ownership of lands in the Empire Ranch.

Reference has already been made to deed dated January 8, 1906, from the Land Company to the Water Company and the agreement of the same date between the same companies with reference to the operation of the Water Company. It is clear from these documents that the Water Company is the owner of a system of canals and ditches for the transportation of water and that it operates the same for compensation.

Intervenors claim that the Company is not a public utility on the ground that it does not own any water. While the evidence shows that with reference to the riparian waters of Kings River the Water Company is simply the agent of the land owners for the distribution of the water, acting in this respect as a common carrier for all the land owners, the Water Company became and is still the owner of the 8 5/8 shares of the capital stock of the Lemoore Canal and Irrigation Company and of the waters represented thereby, which waters it distributes through a portion of its water system for compensation. For its services the Water Company claims the right to collect \$1.00 per acre for each acre of land under its system.

On these facts, I am of the opinion that the question whether the Water Company is or is not a public utility can be conclusively answered. Section 23 of Article XII of the Constitution of California, as amended on October 10, 1911, declares that all corporations, associations and individuals therein specified, including those engaged in the production, generation, transmission, delivery and furnishing of water, either directly or indirectly, to or for the public, and every common carrier, are public utilities subject to such control and regulation by the Railroad Commission as may be

provided by the Legislature. The same section empowers the Legislature to declare that other classes of private corporations, individuals or associations shall be public utilities, subject to like control and regulation by the Railroad Commission. Acting under the authority thus conferred, the Legislature of this State enacted Chapter 14 of the Laws of the Extraordinary Session of 1911, commonly known as the Public Utilities Act, and thereafter amended this Act and also enacted Chapter 80 of the Laws of 1913. Section 2(x) of the Public Utilities Act defines the term "water corporation" to include "every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any water system for compensation within this state."

Section 2 (bb) of the Public Utilities Act, as amended on June 14, 1913, reads as follows:

"The term 'public utility,' when used in this act, includes every common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger and warehouseman, where the service is performed for or the commodity delivered to the public or any portion thereof. The term 'public or any portion thereof' as herein used means the public generally, or any limited portion of the public including a person, private corporation, municipality or other political subdivision of the state, for which the service is performed or to which the commodity is delivered, and whenever any common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger or warehouseman performs a service or delivers a commodity to the public or any portion thereof for which any compensation or payment whatsoever is received, such common carrier, pipe line corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, wharfinger or warehouseman is hereby declared to be a public utility subject to the jurisdiction, control and regulation of the commission and the provisions of this act. Furthermore, when any person or corporation performs any service or delivers any commodity to any person or persons, private corporation or corporations, municipality or other political subdivision of the state, which in turn either directly or indirectly, mediately or immediately, perform such service or deliver such commodity to or for the public or some portion thereof, such person or persons, private corporation or corporations and each thereof is hereby declared to be a public utility and to be subject to the jurisdiction, control and regulation of the commission and to the provisions of this act."

Chapter 80 of the Laws of 1913 provides specifically for the regulation of water companies and for the powers and duties of the Railroad Commission with reference thereto. Section 1 of the Act reads as follows:

"Whenever any person, firm or private corporation, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any water system within this state, sells, leases, rents or delivers water to any person, firm, private corporation, municipality or other political subdivision of the state whatsoever, except as limited by section 2 hereof, whether under contract or otherwise, such person, firm or private corporation is a public utility, and subject to the provisions of the public utilities act of this state and the jurisdiction, control and regulation of the railroad commission of the state of California."

Section 2 of the Act defines the water companies which shall not be subject to the jurisdiction, control or regulation of the Railroad Commission, and reads as follows:

"Whenever any private corporation or association is organized for the purpose solely of delivering water to its stockholders or members at cost, and delivers water to no one except its stockholders or members at cost, such private corporation or association is not a public utility, and is not subject to the jurisdiction, control or regulation of the railroad commission of the State of California."

Section 3 reads as follows:

"Whenever any private corporation or association organized for the purpose of delivering water solely to its stockholders or members at cost does deliver water to others than its stockholders or members for compensation, such private corporation or association becomes a public utility and subject to the terms of the public utilities act and the jurisdiction, control and regulation of the railroad commission of the State of California."

It would seem that under these constitutional and statutory provisions there can be no reasonable doubt that Empire Water Company is a public utility, subject to the jurisdiction of the Railroad Commission.

Intervenors, in taking a contrary position, rely on Del Mar Water, Light and Power Company vs. Eshleman, et al., decided by the Supreme Court of this State on April 11, 1914, 167 Cal. 666. There is nothing decided in this case in any way contrary to the conclusion here reached. The case did not refer to the constitutional and statutory provisions which must now

govern the solution of the problem to which we are addressing ourselves and, as the Court itself specifically pointed out on petition for rehearing, nothing said in the case has the force of decision unless concurred in by four Justices. The point decided in this case is best expressed by the language of the Court itself, in the opinion delivered on May 11, 1914, on petition for rehearing. This language is, in part, as follows:

"The concurring opinion herein is the only one that is agreed to by the necessary number. That opinion contains

the only propositions

which are to be considered as decided. It does not hold that the plaintiff company is not a public utility, or that it is not engaged in distributing water for public use; it merely declares that the land of the complainant, Glass, is not, and is not found by the Commission to be, within the district or area, to the use of which the water owned or controlled by that company is dedicated and, therefore, that he is not entitled to demand distribution thereof to his land."

The facts of the present case are entirely different from those on which the Supreme Court thus passed.

I find that defendant is a public utility, subject to the jurisdiction of the Railroad Commission.

2. ARE THESE COMPLAINANTS ENTITLED TO LEMOORE WATER?

The remaining question to be considered is whether these complainants are entitled to Lemoore water.

Lemoore Canal and Irrigation Company was incorporated under the laws of this State on September 8, 1902. Its articles specify that it was incorporated for the purpose of acquiring, conducting and operating water ditches and canals for irrigation purposes within the counties of Fresno and Kings, and particularly to acquire, own and operate those water ditches in said counties which were known as the ditches of Lower Kings River Water Ditch Company. The Company was also empowered to purchase, lease, locate, appropriate, contract concerning and otherwise acquire, sell and deal in water, water canals and water rights. The Company was authorized to issue 53 shares of stock, of the par value of \$2000.00 each. The articles of incorporation do not specify any particular portion of these two counties to which the distribution of water is to be confined.

Lemoore Canal and Irrigation Company succeeded to the rights of The Lower Kings River Water Ditch Company of Tulare County, which company was incorporated or attempted to be incorporated on October 16, 1873. The articles of this company do not specify any particular lands on which the company's water is to be used.

The evidence in this case contains no reference to the contents of any notice of appropriation of the waters now diverted by Lemoore Canal and Irrigation Company or its predecessors. There is nothing in the evidence to show that by any notice of appropriation or articles of incorporation or other document the use of the waters secured from the Lemoore Canal and Irrigation Company's system was limited to any particular lands in the Empire Ranch.

The history of the $8 \frac{5}{8}$ shares of Lemoore Canal and Irrigation Company stock now owned by the Water Company is as follows:

1. On March 31, 1902, The Lower Kings River Water Ditch Company of Tulare County, the predecessor of Lemoore Canal and Irrigation Company, sold $7 \frac{1}{2}$ shares of its stock to Miller, Bates and Davies. On October 25, 1902, a certificate for $2 \frac{1}{2}$ shares was issued to E. O. Miller, being Certificate No. 76; a certificate for $2 \frac{1}{2}$ shares was issued to George E. Bates, being Certificate No. 77; and a certificate for $2 \frac{1}{2}$ shares was issued to Samuel Davies, being Certificate No. 78.

2. In September, 1904, Certificate No. 153 was issued by the same company to George E. Bates. This certificate was for $\frac{3}{8}$ ths of a share, and represented $\frac{2}{8}$ ths of a share purchased by George E. Bates from Charles King on August 16, 1904, and $\frac{1}{8}$ th share purchased by Bates from Curtis and Wilson on September 7, 1904.

3. An additional $\frac{2}{8}$ ths share was purchased by Bates from Stiles McLaughlin on May 15, 1904, and Certificate No. 159 was issued to Bates therefor.

4. On June 28, 1905, $\frac{1}{2}$ share was purchased by E. O. Miller from James Whitaker. This stock was represented by Certificate No. 130, dated February 29, 1904.

The defendant reports that each of these certificates was transferred with the Empire Ranch to the Empire Investment Company in December, 1905. The fact that these certificates were transferred with the Empire Ranch seems to be the only fact in this connection bearing on the question whether or not the water secured from the Lemoore Company is appurtenant to the entire ranch. There is no evidence as to any document of transfer bearing on the question whether or not it was intended to have the water represented by this stock appurtenant to the ranch as a whole or simply to some portion thereof.

The agreement of January 8, 1906, between the Land Company and the Water Company is equally uncertain. While there is language in the agreement tending to sustain the contention of the complainants that the Lemoore water was made appurtenant to the entire ranch, one of the recitals of the agreement declares that the Water Company "owns $8 \frac{5}{8}$ shares of the Lemoore Canal and Irrigation Company and the waters to which such shares are entitled, which water may be delivered and distributed through said system to a part of said lands for all or any of said purposes." The agreement does not state to what part of the lands the Lemoore water was to be delivered.

Both the complainants and the intervenors rely on actual use of the Lemoore water. Complainants allege that in 1910, in the month of March, quite a head of Lemoore water was turned from one of the Lemoore ditches into the Kings River, and that by means of a dam constructed by the Water Company below this point across the Kings River, this water was thence turned into the canals on the west side and that some 800 acres of land were thus irrigated from Lemoore water. The defendant and the intervenors, on the other hand, contend that this water was surplus water which was being wasted into the river and that the dam had been constructed for the purpose of diverting such water as might be flowing in the Kings River until a certain weir located lower down across the river might be repaired.

One of the Water Company's ditch tenders even went so far as to testify that this Lemoore water was turned into the river by mistake. Complainants further draw attention to the fact that in December, 1909, the Water Company began the construction of a siphon across the Kings River at such a point that it would be possible to convey Lemoore water through the same from the east to the west bank of the river. Complainants draw attention to this fact in support of their claim that the Water Company thus recognized a duty to deliver Lemoore water on the west side of the river. The Water Company, on the other hand, introduced in evidence an agreement dated August 20, 1909, between Empire Water Company and certain owners of land in the Empire Ranch on the west bank of the river, including the principal complainants in this case, in which agreement it is recited that the Water Company has the opportunity of procuring surplus or extra water which is outside of and in addition to the water which the Company usually controls and conducts through its canals, and which water the Water Company is willing to sell to land owners on the west side upon receipt of adequate compensation. It is agreed that if such surplus or extra water is secured and the extra pipe lines and canals are constructed, these matters shall be considered outside of the agreement of January 8, 1906. The land owners agree that if they take any of the extra or surplus water, they will pay such reasonable rates and charges as the Water Company may prescribe. The Water Company contends that it undertook the construction of the siphon in accordance with the provisions of this agreement and that the agreement itself shows on its face that the land owners on the west side must have recognized that the Water Company was not under the obligation, apart from this agreement, of delivering Lemoore water to them. There is nothing in the record to show from what source the Water Company expected to secure the extra or surplus water or whether it actually made arrangements to secure any such water.

Complainants further showed that during the year 1912 a number of them installed a pumping plant in the Kings River and pumped from it surplus water which was wasted into the river from

the Lemoore system.

On the other hand, the intervenors showed that for over 20 years, Lemoore water has been used, to a greater or less extent, in irrigating lands on the east side of the river. They claimed that 3720 acres on the east side are too high to be irrigated from the riparian water and that these lands are absolutely dependent upon the Lemoore water. The intervenors contend that by reason of actual user, they have secured the right to the continued use of Lemoore water and that the Water Company has no right to take the water across the river to the people on the west side.

The intervenors also contend that if the Lemoore water were distributed over the entire acreage irrigated on both the east and the west side of the river, the water would be spread out to such an extent that it would be of but little advantage to anyone.

In this connection Mr. R. W. Hawley, this Commission's Hydraulic Engineer, testified that if the Lemoore water in the year 1910 had been pro rated to all lands of the Empire Ranch, .7 foot of water in depth could have been delivered in that year. He, however, also testified that, in his opinion, but little good could be accomplished by spreading the Lemoore water in such a way as to provide but .7 foot in depth over the area. It was made clear that in a dry year and during the driest months of any year, no such supply would be available. Attention should here be drawn to the fact that at such times as Lemoore water would be available for delivery to the west side, such water would generally not be necessary for the reason that at such times riparian water in the Kings River would usually be available in sufficient quantity to meet the requirements of the west side.

As Commissioner Eshleman several times stated at the hearing, this Commission will not, if it has any discretion in the matter, direct a public utility to distribute its available water supply over such an area of land that no one will receive much good therefrom. It would be the Commission's inclination in such cases, following the suggestion of the Supreme Court in Leavitt vs. Lassen, 157 Cal. 82,

and Section 5 of Chapter 80 of the Laws of 1913, to direct the Company to supply no further consumers and to limit its water to those who have theretofore actually used it, as long as the supply is not sufficient to irrigate a larger acreage. I am convinced, on the facts of this case, that the Water Company should not be called upon to take the Lemoore water from those who have hitherto used it and compel them to share this water with the acreage on the west side which has not hitherto used the water except in the sporadic cases hereinbefore referred to. Of course, if there is surplus Lemoore water after the reasonable requirements of the east side have been met, this must be taken to the west side, if needed there, as was done in 1910. It goes without saying that the Lemoore water must be applied to as large an acreage as is consistent with reasonable service.

If during years of low supply the east side alone uses the Lemoore water and the west side secures no advantage therefrom, it is at once obvious that the east side is securing a much more favorable service than the west side and that it is unfair to the west side to be compelled to pay the same rates as those which are paid on the east side. While the pleadings in this case do not permit of a decision on the question of rates, the Commission will entertain an application either on behalf of the Water Company or on behalf of the west side users to establish more equitable rates, if either the Company or the west side users should desire to file such application.

The Commission's attention was also drawn informally in this proceeding to an alleged failure on the part of the Water Company to protect the riparian rights of the Empire Ranch. The Water Company replied, with apparently much justice, that it does not own any riparian rights; that these rights are owned by the land owners; and that it is their duty to see to it that the rights are protected. This is a matter of considerable importance and the land owners on both sides of the river including Empire Land Company should take such action as may be necessary to protect their rights in this respect.

Certain other matters were informally drawn to the attention of the Commission, some of which have already been adjusted. If there are matters still unadjusted they may be taken up with the Commission either informally or formally, as the complainants may be advised.

I submit herewith the following form of order:

O R D E R.

A public hearing having been held in the above entitled case and the case having been submitted and being ready for decision,

IT IS HEREBY ORDERED as follows:

1. Whenever Empire Water Company, after serving the reasonable requirements of its consumers east of the Kings River, as specified in Section 2 hereof, shall have under its control surplus or waste water from the system of Lemoore Canal and Irrigation Company, Empire Water Company shall convey said waters to the west side of Kings River for use by its consumers on the west side, if needed by them.

2. Empire Water Company shall not distribute water served from the system of Lemoore Canal and Irrigation Company to any lands to which it has not been applied during the last five years and shall do all in its power to so distribute and apply said water that whenever possible a portion of said water may be applicable for use by its consumers on the west side of Kings River.

3. If Empire Water Company or its consumers on the west side of Kings River desire to file an application for an order adjusting rates by reason of the inequality of the service as between the east side and west side consumers, this Commission will entertain such application.

4. In other respects, the complaint herein is hereby dismissed.

The foregoing opinion and order are hereby approved and ordered filed as the opinion and order of the Railroad Commission of the State of California.

Dated at San Francisco, California, this 5th day of March, 1915.

Max Thelen
H. D. Lovelace
W. L. Gordon
Edwin O. Edgerton

Commissioners.