

Decision No. 6383

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA.

---oOo---

A. HANCOCK, C. S. FILLMORE,
E. E. PARKIN, et al.,
Complainants,

vs.

Case No. 1250.

EAST SIDE CANAL COMPANY, KERN
ISLAND IRRIGATING CANAL COMPANY
and KERN COUNTY CANAL & WATER COM-
PANY,

Defendants.

James R. Farragher for complainants.
E. J. McCutchen and A. Crawford Greene
of McCutchen, Olney, & Willard, and
W. B. Beazley for defendants.

BY THE COMMISSION:

O P I N I O N

This case involves regulation of the distribu-
tion of irrigation water of a public utility having special
contracts outstanding.

1. Pleadings.

The complaint alleges that defendant, East
Side Canal Company, is a California corporation which for
more than ten years has owned and operated what is known as
the East Side Canal, about 20 miles long, diverting water from
Kern River at a point near Bakersfield, with a right to take
continuously from 100 to 150 cubic feet of water per second,
which water is appurtenant to and necessary to irrigate an area
of about 6351 acres, including lands of complainants; that ser-
vice to complainants' land is intermittent and uncertain and
insufficient in quantity; that East Side Canal Company neglects
and refuses to clean out its canal to enable it to carry its

full quota of water, to keep water in the canal to its capacity, to supply complainants the water to which they are entitled, except at intervals and in uncertain quantities, or to assure them any water service for the latter part of the season; and that the other defendants have or claim an interest in or control over East Side Canal Company and its water supply and "participate in, join in, authorize and further the said neglects". The prayer is that the Commission order East Side Canal Company to place its canal in condition and divert into it and deliver to complainants and others similarly situated water to its full capacity continuously during the irrigating season.

The answer denies that said East Side Canal has the right to take or divert water from Kern River or that it has received water except from Kern Island Irrigating Canal Company, which diverts it from Kern River; that its water is received under two contracts with said Kern Island Company, dated January 2, 1894 and January 15, 1896, respectively, providing for a supply of 25 and 5 cubic second feet respectively, copies of both contracts being attached to the answer as exhibits; denies that said canal is entitled to take continuously 100 to 150 cubic second feet; denies that said water is appurtenant to, or necessary for the irrigation of said 6551 acres of land; alleges that all water to which it is entitled under said contracts has been delivered to East Side Canal Company for use on and is appurtenant to lands aggregating approximately 6311 acres; that East Side Canal Company has kept and maintained its canal in good condition,

with capacity sufficient to carry and distribute all of the water to which it is entitled under the agreements referred to, and that it has diverted and distributed all water to which it is entitled under the said agreements, and denies that it has neglected or refused to supply to patrons of the canal water service to which they are entitled under the agreements.

The answer further alleges that Kern County Canal and Water Company is the owner of all the capital stock of the East Side Canal Company except the shares qualifying the directors, and denies that defendant Kern Island Irrigating Canal Company has or claims an interest in or control over the East Side Canal Company or its water supply or the delivery or distribution thereof, and denies that defendants have violated any of the rights of complainants or have been guilty of any neglect or refusal to discharge any obligation resting upon defendants.

III. Hearings and submission.

Public hearings in the case were held by Examiner Westover at Bakersfield, at which hearings complainants' case was presented and further hearings continued to a date to be set, at which time defendants might cross examine complainants' witnesses and present evidence, if desired, after having opportunity to examine certain engineering data relating to water distribution on East Side Canal, to be prepared and filed in the form of exhibits. The last of these exhibits has been filed and counsel have now formally submitted the case on the evidence presented by complainants.

No testimony was offered concerning the condition or capacity of the East Side Canal, or any obligation to deliver water to its full capacity during the irrigation season. The main question presented by the pleadings and

testimony is whether the contracts providing for a supply of 30 cubic second feet for East Side Canal, limit its supply and the service of its patrons to that amount, and whether they are entitled to more water. No jurisdictional question is raised by either party. Defendants, Kern Island Irrigating Canal Company and East Side Canal Company, are admittedly public utilities and the case was tried on that theory.

III. Agreements by defendant Kern Island Irrigating Canal Company.

The agreement referred to in the answer to supply water under the two contracts of January 2, 1894 and January 15, 1896 is declared to be subject to obligations incurred in prior contracts therein referred to, the first under date of December 27, 1870 between the president and Board of Directors of defendant, Kern Island Irrigating Canal Company and the trustees of Swamp Land District No. 111, which will be hereinafter referred to for convenience as the Swamp Land contract; and the second dated July 28, 1888, between Henry Miller, et al and James B. Haggin, et al, hereafter referred to for convenience as the Water Settlement Contract. We will therefore briefly review the two contracts referred to.

Under the Swamp Land Contract of December 27, 1870, Kern Island Irrigating Canal Company agreed to construct and keep in repair during the corporate existence of the company certain works necessary for the reclamation of lands in Swamp Land District No. 111, including a levee sufficient in size to prevent overflow of Kern River and Kern Lake, with a permanent head gate capable of shutting out the water from Kern River, and means for carrying the water over the old channel of what is commonly known as the South Fork of the river. In consideration thereof the Swamp Land District and owners of the land therein, agreed to pay to the company \$16,240 and procure the necessary rights of way, each owner of swamp lands contributing to the \$16,240 to receive one share of stock for each \$50 paid, and as the

contract says "at all times be entitled to a preference in the use of all water passing through said canal for irrigating and domestic purposes, and when demanded for said purposes they shall be entitled to the exclusive use of said water" under uniform rules assuring each land owner his fair proportion of all the water furnished "at rates that shall not exceed in the aggregate the sum of 10% per annum on the capital stock of said company".

Summarized, the contract assured swamp land owners preferential service at limited rates, in return for aid in financing the work through purchase of stock.

The Water Settlement Contract of July 28, 1888, was entered into by a large number of persons, corporations and canal companies claiming to collectively own all of the water of Kern River, either as riparian owners or appropriators, the purpose of the contract being to settle a large amount of litigation then pending in the courts between various parties to the contract. Under its terms (Third) Kern Island Irrigating Canal Company, one of the second parties to the contract, is entitled to all of the water in the river at all times when the water flowing at a specified point does not exceed 500 second feet; also to its proportion, (as one of second parties) of two-thirds of the excess during the six summer months of March to August, inclusive, each year, and to its proportion (as one of the second parties) of all the excess during the remaining six winter months, if the water be diverted by second parties before reaching a specified point.

Defendant Kern Island Irrigating Canal Company by contract dated January 2, 1894 agreed with East Side Canal Company "subject to the conditions and restrictions contained in said agreements hereinbefore referred to, to

furnish and supply to the party of the second part, at the point hereinabove designated, twenty-five (25) cubic feet of water per second, at all times when, after performing the obligations heretofore assumed by it for the supply of water, it shall have in its main canal sufficient water to enable it so to do". The consideration stated is \$3750. The point of measurement is fixed at the head of East Side Canal. The agreements referred to are the Swamp Land Contract and Water Settlement Contract.

The subsequent contract between the same parties of date January 15, 1896 providing for an additional "amount of water equivalent to a continuous flow of 5 cubic feet per second" is identical in form with the contract of January 2, 1894 except as to the amount of water contracted for, and the statement that the consideration is \$750 a year.

The position of defendants Kern Island Irrigating Canal Company and East Side Canal Company, is that they have discharged their full duty to complainants herein and to all other water consumers on the East Side Canal, when they have delivered an amount of water equivalent to a continuous flow of 30 cubic feet of water per second flowing at the headgate of East Side Canal, and delivered that amount less seepage losses and evaporation at users turn-outs.

It appears from the testimony that at the time of the hearing, water equivalent to a continuous flow of 30 cubic second feet until December 8, 1918 had already been delivered. It also appears in evidence that East Side Canal Company owns and operates only the East Side Canal and that all laterals were constructed and are owned and operated

by the adjacent land owners or their grantors, tenants or agents.

Defendant Kern Island Irrigating Canal Company, by contract executed March 14, 1896 with Bloomfield Land Association, agreed in consideration of the conveyance to it of an undivided one-tenth interest in the ditch or canal known as South Fork Canal and certain water rights appurtenant thereto and the payment of \$400 per annum, to furnish water sufficient in the judgment of the land owners to irrigate lands described aggregating about 3350 acres, provided the water so used during any year would not exceed a continuous flow of 5 cubic feet per second, delivery to be subject to ordinary contingencies, failure of water supply and to reasonable general rules and regulations by the company; such water service to be appurtenant to the lands described and pass with it or portions of it subject to the terms of the agreement.

Defendant Kern Island Irrigating Canal Company, by contract executed May 16, 1896 with Solomon Jewett, et al. agreed in consideration of the conveyance to it of an undivided one twenty-fifth interest in the ditch or canal known as South Fork Canal and certain water rights appurtenant thereto and the payment of \$150 per annum, to furnish water sufficient in the judgment of the land owners to irrigate lands described consisting of 320 acres, three city lots and one city block in Bakersfield, provided the water so used during any year would not exceed a continuous flow of $2\frac{1}{2}$ cubic feet of water per second, unless the company, without fault on its part, should be unable to obtain from Kern River "sufficient water to fill its canal, in which event the flow to which parties of the first

part shall be entitled shall be the proportion which two and one-quarter bears to the number of cubic feet which can be carried in said canal." The company also agrees to maintain one of the Jewett ditches, delivery to be subject to ordinary contingencies, failure of water supply and to reasonable general rules and regulations by the company.

Defendant Kern Island Irrigating Canal Company, by contract executed July 20, 1898 with Balfour-Guthrie Investment Company, agreed in consideration of the conveyance to it of an undivided four-fiftieths interest in the ditch or canal known as South Fork Canal and certain water rights appurtenant thereto and the payment of \$140 per annum, to furnish water sufficient in the judgment of the land owners to irrigate lands described aggregating about 2560 acres, provided the water so used during any year would not exceed a continuous flow of 4 cubic feet per second, unless the company, without fault on its part, should be unable to obtain from Kern River sufficient water to fill its canal, in which event the flow to which the party of the first part shall be entitled shall be four three-hundredths of the water in the canal.

A similar agreement was made by the Kern Island Irrigating Canal Company with ^{Castro} Manuel and Thomas/ May 20, 1896, under which they were to convey an undivided 1/18 interest in Castro Ditch and receive free water service on 30 acres of land. Kern County Land Company subsequently acquired the Castro land and on June 13, 1899, as successor to the Castros, cancelled the agreement by a new agreement in writing with the Kern Island Company. It therefore need not be further considered.

IV. Organization and operation of Kern Island Irrigating Canal Company.

Kern Island Irrigating Canal Company was incorporated in October, 1870, with an authorized capital stock of \$30,000 divided into 600 shares of the par value of \$50 each. Its articles of incorporation state its objects to be "to protect from overflow and to supply with water, for agricultural, domestic and manufacturing purposes" the territory generally described as south of Kern River, north of Kern Lake, east of the channel of Kern River, commonly known as "old river," and west of the east boundary of range 28. east.

About two months later it entered into the swamp land contract of December 27, 1870, above described, providing preferential service to owners of swamp lands within Swamp Land District/ ^{No.} 111. In consideration of the purchase of its capital stock to the extent of \$16,240 by land owners in the district, by which means its improvements were financed. The contract makes no attempt to make said defendant's stock or any water right or water service appurtenant to any particular piece of land. In terms, the contract only provides preferential service to owners of swamp lands in the district.

Soon thereafter the company built its main canal extending southerly about 17 miles along the west line of the district and began service of water on both sides of its canal within and without the district. Except for the contracts heretofore mentioned it has always sold and served water without specific contracts at its regularly established rates. The only other water company or water distributor which it regularly serves is defendant East Side Canal Company. There are a number of other canal companies to which Kern Island Irrigating Canal Company has customarily sold water and from which it has at times

purchased water. The companies are associated with it in the manner described in the next paragraph. An exhibit showing the purchase and sale of water between said canal companies for the years 1912 and 1913, based on their reports to the Board of Supervisors, was prepared and submitted in evidence. Some of the reports by the other companies appear to be incomplete, but that of the Kern Island Company shows that it sold to other companies in 1912 water of the value of \$12,945.07 and purchased water of the value of \$808.82, or less than 6 $\frac{1}{2}$ % of its sales to other canal companies; and in 1913 it sold to other canals water of the value of \$13,475 and bought water from other canals of the value of \$1,601.70, or about 12% of its sales to other canal companies.

Defendant Kern County Canal and Water Company is the holder of the capital stock of defendants East Side Canal Company and Kern Island Irrigating Canal Company, except the shares qualifying the directors, and of the capital stock of numerous other canal companies in the vicinity, which are closely associated in management and operation with the Kern County Land Company. The stock of defendant Kern County Canal and Water Company is owned by Kern County Land Company, except for the shares qualifying the directors.

The systems of defendants Kern Island Irrigating Canal Company and East Side Canal Company serve Kern Island water to a total of some 72,350 acres, of which about 25,000 or 30,000 acres lie in what was Swamp Land District #111, and in practice are given the preferential service referred to in the swamp land contract; about 6430 acres are served under the contracts issued in consideration of rights in the South Fork of Kern River, under which they are accorded special rates, and 6351 acres are served by defendant East Side Canal Company. All but the 6351 acres are served by Kern Island Irrigating

Canal Company directly.

A large portion of the area served is water logged swampy land and a large area is seriously affected by innumerable "sand streaks", as they are characterized by the witnesses, or strips of sandy and gravelly soil, the abandoned beds of many small streams. It does not appear from the testimony, however, that the canals of defendants are affected by them, although they seriously interfere with the proper operation of the ditches of the irrigators. The water logged lands are principally in the old Swamp Land District No. 111 and appear to have received water not needed, at times when consumers on the East Side Canal were receiving insufficient water for their crop.

The company submitted an exhibit at the request of the Commission showing water deliveries at less than regular rates during the five years 1913 to 1917, inclusive, under the four contracts already described. The exhibit shows that of the total amounts of water estimated by the company to be due under the several contracts there was a total delivery under the Jewett contract of 64.5%, under the Balfour-Guthrie contract of 97.3%, under the Bloomfield contract of 20.6% and under the Castro contract of a total of 400 cubic second feet for 24 hours.

As the latter contract was canceled June 13, 1899, there was no apparent reason for delivering this water, especially as it was free under the contract. The validity of the three remaining contracts and the propriety of delivering under them water called for in each instance is not questioned by complainants. It will be noticed that these contracts do not provide for preference in service but only for special rates. The question of rates, however, is not before us in this proceeding.

The company's obligation under the Swamp Land contract is expressed to be personal to the owners of land and not to serve specific lands. We quote:

"Owners of swamp land in said District No. 111 shall at all times be entitled to a preference in the use of all water passing through said canals"****

There is no provision in the contract by which water is to become appurtenant to the lands or by which lands as such are entitled to preferential service regardless of who may own them. The evidence here does not show the ownership of the lands in the district nor those in the district who are served with water.

As to the contracts providing for 30 cubic second feet of water for the East Side Canal the contract is made between two of defendants, all of whose stock in each instance is held by defendant Kern County Canal and Water Company, except for shares qualifying the directors. As practically the only stockholder of both companies it controls both systems. It practically dealt with itself in making the two contracts in question, although they were made by two separate entities legally distinct from it and from each other. There appears to be no reason why the East Side Canal Company as a consumer of Kern Island Canal Company, a public utility, should have its service limited by such a contract nor why it should not enjoy equal service advantages with the Kern Island Company's other consumers. From the testimony of a number of consumers along the East Side Canal it appears that the admittedly limited service received by them is not sufficient for their legitimate needs and that service will be improved by a suitable system of rotation in deliveries.

East Side Canal Company serves water only under contracts, for which consumers paid \$10 per acre. The contracts of early issue provide a rate of \$1.50 per acre. Those of later issue provide that the consumer will pay for water delivered at cost fixed

by the company, which cost shall not exceed the rate established by the Board of Supervisors.

It also appears that if all consumers of water derived from the Kern Island Canal receive equally good service, cause for complaints will be eliminated.

O R D E R

Public hearings in the above entitled case having been held, the matter having been submitted and being now ready for decision,

IT IS HEREBY ORDERED that defendant East Side Canal Company file with the Commission within 20 days proposed rules and regulations providing for the establishment of a rotation schedule of deliveries of water upon the filing of application by consumers in the spring of each year for water desired during the entire season, said schedule to be placed in effect upon approval by the Commission, and that it keep its system in a proper state of repair to provide good service.

IT IS HEREBY FURTHER ORDERED that defendant Kern Island Irrigating Canal Company pro-rate its water supply between each of its consumers, including East Side Canal Company, in proportion to the total amount of water available, and in proportion to the needs of all individual consumers whose water service is derived from the canal of said defendant Kern Island Canal Company, considering therein the crops irrigated by said consumers.

IT IS HEREBY FURTHER ORDERED that defendant Kern Island Irrigating Canal Company furnish to the Commission within 30 days a copy of a detailed computation by which it arrives at its conclusion as to the pro-rate quantity of water to be delivered to said East Side Canal Company, and that it file with this Commission at least once a month beginning 30 days after date

hereof, a statement of the amount of water available at its
intake for diversion into its canals, and the amount so
diverted.

Dated at San Francisco, California, this 3^d
day of ~~May~~ June, 1919.

Edwin O. Edgerton
H. D. Loveland
H. A. Brundage
Commissioners.