

Decision No. 9195-

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

A. HANCOCK, C. S. FILLMORE,
E. E. RANKIN, et al.,

Complainants,

vs.

EAST SIDE CANAL COMPANY,
KERN ISLAND IRRIGATING CANAL
COMPANY and KERN COUNTY CANAL
AND WATER COMPANY,

Defendants.

Case No. 1250.

James F. Farragher for Complainants.

Edward J. McCutchen, Allan P. Matthew
and W. B. Beazley for Defendants.

E. F. Brittain for certain water users
of Kern Island Irrigating Canal
Company. Intervenors.

O. G. Dupy for Edward T. Houghton and
the estate of R. E. Houghton.

BY THE COMMISSION.

OPINION ON REHEARING

This is a proceeding on application for rehearing in which de-
fendants East Side Canal Company and Kern Island Irrigating Canal Company
ask this Commission to grant a rehearing and set aside and annul its order

heretofore rendered in this proceeding, Decision No. 6383, dated June 3, 1919.

The scope of this proceeding is such that it involves the right of the users of water under some sixteen canal companies in Kern County, delivering water for the irrigation of 150,000 to 175,000 acres of land, to receive service, and whether or not the consumers of the East Side Canal Company shall receive additional water over and above that which they have heretofore received under a contract between the East Side Canal Company and the Kern Island Irrigating Canal Company. Therefore, for the sake of clarity and definiteness, it appears advisable that the entire situation be reviewed herein.

The complainants in this proceeding allege in effect that defendant East Side Canal Company has for many years owned and operated what is known as the East Side Canal, about twenty miles long, diverting water from Kern River near Bakersfield, with a right to divert a continuous flow of from 100 to 150 cubic feet per second. It is further alleged that this water is appurtenant to and necessary for the irrigation of 6,351 acres of land; that East Side Canal Company has neglected and refused to clean out the canal so as to enable it to carry its full quota of water to its consumers, to keep water in the canal to its capacity, and to supply complainants with the water to which their lands are entitled, except at uncertain intervals and in insufficient quantities; that defendants Kern Island Irrigating Canal Company and Kern County Canal and Water Company are corporations claiming to have an interest in or control over East Side Canal Company, and that each of them joins in and authorizes the acts complained of. Complainants ask that this Commission issue an order directing defendant East Side Canal Company to place its canal in proper carrying condition to divert water into the canal to its full carrying capacity, and deliver to complainants continuously throughout the irrigation season the water to which they are entitled, and for such other relief as may be warranted.

Defendants' answer denies that East Side Canal Company has any rights

to the waters of Kern River except by virtue of two contracts with Kern Island Irrigating Canal Company, and alleges further that all water to which it is entitled under the contracts has been delivered to East Side Canal Company for use on approximately 6,311 acres; that East Side Canal Company has kept its canal in good condition, and has distributed to its consumers all the water to which they are entitled; that Kern County Canal and Water Company is the owner of all the capital stock of the East Side Canal Company except qualifying shares; that Kern Island Irrigating Canal Company has no interest in or control of the East Side Canal Company, and that none of the defendants have violated any rights of complainants or have neglected or refused to discharge any of their obligations.

Public hearings were held in this proceeding, the matter was submitted, and the Commission rendered its decision, which is No. 6383, directing East Side Canal Company to file rules and regulations providing for the establishment of a rotation schedule of deliveries of water; that Kern Island Irrigating Canal Company prorate its water supply among each of its consumers, including East Side Canal Company, in proportion to the total amount of water available and the needs of all individual consumers, and that the Kern Island Irrigating Canal Company furnish a copy of the detailed computation by which it arrives at its conclusion as to the prorata quantity of water to be delivered to said East Side Canal Company.

Certain other minor clauses were contained in the order relating to time of filing, etc.. Subsequently, defendants East Side Canal Company and Kern Island Irrigating Canal Company filed a petition asking that a rehearing be granted them on the ground that the Commission erred in its findings:

That no jurisdictional question is raised by either party.

That the defendant East Side Canal Company is a consumer of defendant Kern Island Irrigating Canal Company, and entitled to receive water from that company in the same manner as consumers served by said Kern Island Irrigating Canal Company.

That the Commission erred in failing to find and conclude that the right of defendant East Side Canal Company to receive water from the defendant Kern Island Irrigating Canal Company is derived from certain contracts entered into between said companies.

That the Commission erred in failing to find and conclude that the rights of complainants to receive service from the East Side Canal Company are limited to the amount of water secured to them by virtue of their several contracts with said Company.

That the Commission erred in ordering that Kern Island Irrigating Canal Company prorate its water supply between each of its consumers, including East Side Canal Company without regard to and excepting from said order the superior rights of holders of water rights against the said defendant Kern Island Irrigating Canal Company by virtue of certain contracts, viz, the so-called Swamp Land contract, the water settlement contract, Bloomfield Land Association contract, the Solomon Jewett contract, the Balfour-Cuthrie Investment Company contract, and the Castro Contract. All of these contracts are of record herein and are referred to by the Commission in its Decision No. 6383.

That the Commission erred in not finding that certain lands furnished with water by the Kern Island Irrigating Canal Company prior to the furnishing of water service by defendant East Side Canal Company to any of the lands of complainants have prior and superior rights to those of complainants, and that the Commission has not regularly pursued its authority in making its findings and conclusions contained in said order.

Subsequent to the filing of this petition for rehearing, the Commission rendered an order granting an extension of the effective date of Decision No. 6383 during the pendency of the application for rehearing. Arguments on the question of rehearing were heard, and an order was made granting a rehearing. Public hearings were later held in Bakersfield and San Francisco, briefs were filed and the matter is now ready for decision.

The principal issues involved in this proceeding may well be subdivided into two general classifications. The one is jurisdictional and involves the power of this Commission to regulate the distribution of water by these companies, regardless of certain outstanding contracts which purport to give to certain consumers preferential rights and limit the supply of water delivered to others. The second is the question of whether or not water will be taken from one group of consumers and given to another, it being claimed by the group desiring water that there is delivered to the other group of consumers more water than is necessary for the irrigation of their lands. The record shows that the entire water supply available to defendant companies is now being utilized, and that therefore, if the complainants herein are given an additional supply of water it would necessarily follow that other consumers would receive a lesser supply than heretofore.

The district involved in this proceeding receives its water supply for irrigation from sixteen canal companies, all of which are subsidiary companies of the Kern County Canal and Water Company, which, in turn, is subsidiary to the Kern County Land Company. These canal companies either divert the water utilized by them directly from the Kern River or receive their supply from another of the group. The total area irrigated is from 150,000 to 175,000 acres. These companies are the Kern Island Irrigating Canal Company, East Side Canal Company, Anderson Canal Company, Buena Vista Canal Company, Central Canal Company (Calloway), Gates Canal Company, Goose Lake Canal Company, Farmers Canal Company, James Canal Company, James & Dixon Canal Company, Joyce Canal Company, Kern River Canal and Irrigating Company (Beardsley), Lerdo Canal Company, Pioneer Canal Company, Plunkett Canal Company and Stine Canal Company.

The source of the water supply of all of these companies is

the Kern River, and the right to divert water therefrom and the amount of the diversion was practically settled by a contract entered into July 28, 1888 between Henry Miller et al., parties of the first part, and James B. Haggin, et al., parties of the second part, which contract is commonly known as the "water settlement contract." The parties to this agreement claimed to collectively own all of the water of the Kern River, and the purpose of entering into the agreement was to settle and terminate litigation relative to their respective rights to the waters of Kern River, Buena Vista Slough and other sloughs and channels. This water settlement contract was later made a part of what is commonly known as the Shaw Decree, which decree was the result of the aforementioned litigation and was rendered by Judge Lucien Shaw of the Superior Court of Kern County. The decree and the water settlement contract provides that:

"Kern Island Irrigating Canal Company is entitled to the first right to divert 300 cubic feet per second of water, and as to the excess of its rights over 300 cubic feet, its rights are superior to the rights of other interested parties except Kern County Canal and Water Company."

It is also provided that the Kern Island Irrigating Canal Company is entitled to its proportion (as one of the 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 of the excess during the six remaining winter months, if the water be diverted by second parties before reaching a specified point.

The Kern Island Irrigating Canal Company has been and is now diverting this water and has sold it to irrigators whose land can be supplied from their ditches, and has also delivered a part of this water supply to other companies for resale by them. Some of these other canal companies have the right to divert water from the Kern River, and water is sold to them by the Kern Island Irrigating Canal Company at such times as the quantity of water which these canal companies have the right to divert from Kern River is insufficient for the needs of their consumers. The record

shows that this has occurred each year for a number of years.

It is clearly established in our opinion that Kern Island Irrigating Canal Company and East Side Canal Company are operating as public utilities. The Kern Island Irrigating Canal Company claims, however, that there are certain private contractual rights which they are obligated to fulfill, and which create rights preferential and prior to those of its other consumers.

The principle that a company may have dedicated only a portion of its water supply to a public use, and that the remainder may be devoted to a private use is well established by the decisions of the higher courts. Although this may be true in general, it remains to be determined as to whether or not defendant Kern Island Irrigating Canal Company, in this instance, had by its acts dedicated its entire water supply to a public use prior to entering the contractual relations which it contends are matters without the control of this Commission, and whether or not the delivery of water to the holders of these contracts is subject to the regulation and control of this Commission.

For the purpose of determining whether or not the original incorporators of the Kern Island Irrigating Canal Company intended to or did dedicate their entire service to a public use, the history of this company since its incorporation, and any acts prior to its incorporation by its predecessors, which would tend to show the intent to dedicate, have been carefully studied and will next be discussed.

It appears from the evidence that in 1870, or prior thereto, one Colonel Thomas Baker, the founder of Bakersfield, constructed a canal to what is known as "The Mill". This ditch was utilized for the purpose of generating power to operate the mill in question, and also for irrigation. Mr. H. A. Jastro, president of the Kern Island Irrigating Canal Company, stated that when he first came to Kern County in 1870, some lands were irrigated around Bakersfield ^{in this canal} and also lands in the so-called Canfield country and along the South Fork channel.

The evidence shows that Colonel Baker started to build what is now the Kern Island Irrigating Canal Company's system, and that later it was acquired by H. P. Livermore of Livermore & Chester, and that the canal was completed under the administration of Mr. A. R. Jackson.

The Kern Island Irrigating Canal Company was incorporated in October, 1870. Its original Articles of Incorporation state in part as follows:

"The undersigned citizens of the United States, desiring to form a joint stock company for the purposes hereinafter specified, do hereby certify our mutual agreement to incorporate under the laws of the State of California, in manner and form as follows:

"1. The corporate name of the company shall be the 'Kern Island Irrigating Canal Company.'

"2. The objects of the company shall be to protect from overflow and to supply with water for agricultural, domestic and manufacturing purposes the following described territory situate in Kern County and bounded on the north by Kern River, east by the east boundary of Range Twenty-Eight East, United States surveys from Mount Diablo, south by Kern Lake and a line drawn east from the eastern extremity thereof, and west by that channel of Kern River commonly known as 'Old River'."

While no conclusive evidence was submitted to show specifically under what law of this state this company was incorporated, it appears to have been under the Act of April 14, 1853, and the several Acts amendatory thereof and supplemental thereto. This Act, as modified by the Act of May 14, 1862, which was supplemental to it, provided that corporations could be formed for the construction of canals for the transportation of passengers, for the purpose of irrigation or water power, for the conveyance of water for mining or manufacturing purposes, or for all such purposes.

It also provided that such corporations should have power to "establish, collect and receive rates, water rents or tolls, which shall

be subject to regulation by the Board of Supervisors," and also the power to exercise the right of eminent domain. This act in effect gives to corporations organized under it the power to act as public service corporations for the supply of water for irrigation. The Act of April 2, 1870 (Stats. 1870, 660), is supplemental to the Act of April 14, 1853 and the Act of 1862. This Act is substantially similar to the Act of 1862 except that it prescribes the mode for condemning private property for corporate purposes, and contains nothing corresponding to Section 3 of the Act of 1862, which section provides that the rates established by the company shall be "subject to regulation by the Board of Supervisors."

This Act expressly repeals all parts of other Acts which are in conflict therewith. It appears that the provisions of Section 3 of the Act of 1862 do not conflict with the Act of 1870, but are entirely consistent therewith. Both statutes were in force when this company was organized, and it has, potentially, at least, the powers conferred by both. Thus it appears that Kern Island Irrigating Canal Company had the power, under its Articles of Incorporation, to act as a public utility company in distributing and selling its water.

On December 27, 1870, a contract was entered into between Kern Island Irrigating and Canal Company and the Trustees of Swamp Land District No. 111, which Swamp Land District is included within the area of service of the Kern Island Irrigating and Canal Company as set out in its original Articles of Incorporation. This contract is generally known as the "Swamp Land Contract". It provided that Kern Island Irrigating Canal Company would construct within two years and keep in repair a levee to prevent the overflow of the Kern River; that it would build a levee around Kern Lake and build a canal with all necessary gates and flumes from Kern River to a point near the southerly boundary of Township 29. All levees and canals were to be the property of the Canal Company. Swamp Land District No. 111 agreed that the landowners within the district would pay to the

Canal Company the sum of \$16,240 for which each land owner in the district was to receive one share of stock in the canal company for each \$50 so paid. Furthermore, the Swamp Land District agreed to furnish rights of way. The contract also contained the following provisions:

"And the said party of the second part further agrees, that all work done by said Company shall be held as the private property of the said Kern Island Irrigating Canal Company, with the right to use and dispose of the same and of the water passing through said Canal and of all other extensions, canals or ditches made or to be made by said Company. And the said Trustees further agree to insure the right of way and all rights and privileges necessary for the economical and proper construction of said work and they guarantee the same to said Company for the use and benefit of said Swamp Land District.

"Provided always, and this agreement is made on these express conditions:

"First: That the said Company will give to each and every owner of Swamp Lands making payment of any portion of said sixteen thousand two hundred and forty dollars, one certificate of stock for every fifty dollars paid to said Company, which shall entitle the holder to one vote and to all other rights and privileges of a stockholder in said Company.

"And provided further, that the owners of Swamp Lands within said District Number One Hundred and Eleven, shall 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 such purposes, they shall be entitled to the exclusive use of said water.

"And provided further, that the rules for the disposal of water shall be uniform and shall guarantee to each land owner within the district his fair proportion of all the water furnished, and at rates that shall not exceed, in the aggregate, the sum of ten per cent per annum on the capital stock of said Company.

"It is agreed between the parties to these articles, that the works above mentioned shall be completed within two years from the date hereof, and if the Trustees shall fail to pay the installments as they become due, the same shall be binding on the District and shall bear interest from the date of approval by the Trustees at the rate of two per cent per month until the same shall be paid in full."

Attention is directed to the fact that Swamp Land District No. 111 comprises only a part of the area to which the service of this company is dedicated, as set out in its original Articles of Incorporation. As a matter of fact the area to which this company showed its intent to serve by its statement in its Articles of Incorporation, which statement was made prior to the execution of the so-called Swamp Land Contract, includes a considerable portion of the area now served from the East Side Canal Company, and a very large area outside of Swamp Land District No. 111.

Subsequent to the execution of the Swamp Land Contract, the company proceeded with the construction of canals and levees. The evidence shows that water was first delivered from the extension and enlargement of the old canal in 1873, and that immediately thereafter the company sold water to homesteaders and others whose farms were outside of the boundaries of Swamp Land District No. 111 and within the boundaries of the areas served as defined in the company's Articles of Incorporation. It appears that when this canal was constructed and it was learned by the public generally that water could be obtained from it for irrigation, that there was a rush to take up homesteads and preemptions within the territory served outside of Swamp Land District No. 111, which, at that time, was practically all owned by one man.

The Kern Island Irrigating Canal Company charged these irrigators for the water delivered to them. In 1876 special legislation was enacted (Stats. 1875-76, 547), which provided that the Boards of Supervisors of the counties of Fresno, Tulare and Kern should be ex-officio water commissioners in and for these counties. The Act further provides in Section 10, that the Board of Supervisors acting as water commissioners shall fix the "maximum rate to be charged by ditch owners for water, per inch, for irrigation, manufacturing or mining purposes, which rate shall apply to ditches heretofore as well as to those hereafter constructed, whether under and by virtue of this Act or any previous law of this State." It is further pro-

vided in Section 11: "All Acts and parts of Acts, so far as they conflict with the provisions of this Act, in the counties herein named, are hereby repealed."

The record does not clearly show, however, whether or not the Kern Island Irrigating Canal Company charged for water at rates established by the Board of Supervisors acting as water commissioners, as provided in the above mentioned Act.

In the late 70's and early 80's other canal companies purchased water from the Kern Island Company whenever their supply was insufficient. Among these canal companies were the Stine, Buena Vista and Farmers. In 1885 the Board of Supervisors of Kern County fixed rates to be charged for water for irrigation, which rates became effective July 1, 1885, and while the ordinance fixing these rates does not specifically mention the Kern Island Irrigating Canal Company, it appears that the rates so established were charged by this company. Similar ordinances were enacted in 1886, 1887, 1893 and 1894. In 1897 the Board of Supervisors changed the rate theretofore fixed by it. In March, 1903, the Board of Supervisors passed the following Resolution:

"The Kern Island Irrigating Canal Company, Farmers Canal Company, Buena Vista Canal Company and Stine Canal Company and Pioneer Canal Company filed annual statements of receipts and expenditures for the year ending December 31, 1902, and no objection being made to the present rate, and no protests having been filed, on motion of Bottoms, seconded by Woody, IT IS HEREBY ORDERED that the rate at which said canal companies shall sell water for the ensuing year shall be and is hereby fixed at 75 cents per cubic foot per second for 24 hours measured under a four-inch pressure."

It therefore appears that Kern Island Irrigating Canal Company charged for water of its consumers at the rates established by the Board of Supervisors without protest.

The evidence in this proceeding clearly shows that no difference was made by the Kern Island Irrigating Canal Company between irrigators within Swamp Land District No. 111 and other irrigators with respect to charges for water. In other words, that company has been charging for water at the rates fixed by proper public authority.

Briefly summarizing, we have here a company which apparently acquired a ditch which had theretofore been delivering water for irrigation and power purposes which it enlarged and extended. The Company was incorporated under laws permitting it to operate as a public utility and dedicated its service to a large area definitely described in its original Articles of Incorporation. Immediately thereafter it contracted with a portion of the area to which it had dedicated its service to extend and enlarge the canal system and grant to the owners of the land to which the system was extended the right to receive service at rates not in excess of ten per cent upon the capital invested, in return for which the owners of the lands agreed to buy for cash a certain amount of the capital stock of the company. The contract also purported to grant a preferential right to the use of the water. The company then proceeded with the construction of an enlarged and extended system and delivered water to all comers desiring it within the area of service. As a matter of fact, as the system was extended to certain lands, and even before its completion, water was sold to homesteaders whose lands were outside the boundaries of Swamp Land District No. 111, and a charge made therefor. This company later charged for water at rates established by the Board of Supervisors of Kern County without protest and clearly admitted itself to be a public utility.

In our opinion the original incorporation of the company and its acts since its incorporation, show an intent to dedicate to a public use its service in the area set out in its Articles of Incorporation, and that any contracts made thereafter by it are subject to the regulation and control of the properly constituted public authority, and that if contracts entered into by this company which provide for a preferential right to

service are permitted to stand, this Commission would be permitting this company to carve out a private and preferential right to the use of water from a public one.

After a careful consideration of all of the evidence, it is hereby found as a fact that Kern Island Irrigating Canal Company has, since its inception, dedicated its service to a public use, and is therefore operating a public utility irrigation system as defined by the Public Utilities Act. As it is clearly established that East Side Canal Company is a public utility, as defined by the Public Utilities Act, it will be unnecessary to discuss this phase of the question herein. The Kern Island Company, having been operating as a public utility since its inception, is subject to the jurisdiction of this Commission in the matter of regulation of the delivery of water and the rates charged, even though it may have entered into contracts with certain consumers granting to them what appeared to be a preferential right.

It is fundamental in public service that one consumer can not have service rendered to him in the rendering of which the utility unjustly discriminates against other consumers. The Kern Island Company has heretofore entered into a number of contracts purporting to give preferential rights to certain consumers. Among these contracts is the agreement between Swamp Land District No. 111 and the Kern Island Irrigating Canal Company. The terms and conditions of this contract have heretofore been set out in detail. It appears that to continue to give a preferential right to the use of water to owners of lands within Swamp Land District No. 111 would be unjust discrimination against other consumers of this company, and that, therefore, in times of shortage, irrigators within Swamp Land District No. 111 should receive only their fair share of the available water supply.

On January 2, 1894, the Kern Island Irrigating Canal Company and the East Side Canal Company entered into a contract which provides for the delivery of the equivalent of 25 cubic feet per second continuous flow of water of the Kern Island Irrigating Canal Company to the East Side Canal Company in consideration of the payment of \$3,750 per year. This delivery was conditioned upon Kern Island Irrigating Canal Company having sufficient water, after having fulfilled its obligations under the so-called Swamp Lands Contract and the Water Settlement Contract.

On January 15, 1896, a second contract was entered into by these companies providing for the delivery of the equivalent of five cubic feet per second continuous flow of water by Kern Island Irrigating Canal Company to the East Side Canal Company. The consideration was \$750 per year, and the conditions were similar to those contained in the contract dated January 2, 1894. These two contracts last hereinbefore mentioned are the contracts pursuant to the provisions of which the East Side Canal Company now receives its water supply, and it is claimed by defendants that these contracts govern and that this Commission is without authority to require the delivery of an additional amount.

The above contracts purport to grant to the water users under the East Side Canal Company a right secondary only to that of irrigators within Swamp Land District No. 111. If these contracts were fully carried out, it would mean that water users upon other canals which purchased water from the Kern Island Company, and other water users outside of the boundaries of Swamp Land District No. 111, would be compelled to forego the use of water before users under the East Side Canal Company's system would be required to reduce their use of water in any manner. This would be clearly a discrimination against such other users.

The Kern Island Company entered into four other contracts in 1896 and 1898, which contracts purport to be the granting of a right by the Kern Island Company to a certain quantity of water at a certain specified rate in return for which the Kern Island Company receives certain water and ditch rights. These contracts were with the Bloomfield Land Association, Solomon Jewett et al., Manuel and Thomas Castro, and the Balfour-Guthrie Investment Company. A brief summary of the context of these contracts follows:

On March 14, 1896, Bloomfield Land Association entered into a contract with Kern Island Irrigating Canal Company whereby Bloomfield Land Association agreed to convey to Kern Island Irrigating Company a one-tenth interest in the South Fork Canal and all rights to which it is entitled therein. Kern Island Irrigating Canal Company agreed to furnish said Association, for a consideration of \$400 per year, sufficient water for the irrigation of certain described land, provided that the water used during any year should not exceed a continuous flow of five cubic feet per second. The furnishing of this supply was made contingent upon Kern Island Irrigating Canal Company having sufficient water in its canal and is subject to reasonable rules and regulations.

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-twentyfifth interest in the ditch known as the South Fork Canal and certain water rights appurtenant thereto and the payment of \$150 per annum, to furnish a supply of water not exceeding 2-1/4 cubic feet per second continuous flow.

On May 20, 1896, Manuel and Thomas Castro entered into a similar contract providing for the conveyance to Kern Island Irrigating Canal Company of a one-eighteenth interest in the Castro Ditch, and the furnishing of, by Kern Island Irrigating Canal Company, free of charge, a flow of water not to exceed one-fourth cubic foot per second continuous flow. One-half of the Castro land having been sold to Kern County Land Company

an agreement was entered into between that company and Kern Island Irrigating Canal Company, dated June 13, 1899, cancelling the contract between the Castros and Kern Island Irrigating Canal Company, in so far as it concerns the land conveyed to Kern County Land Company.

On July 20, 1898, Balfour-Guthrie Investment Company entered into a contract with Kern Island Irrigating Canal Company whereby Balfour-Guthrie Investment Company agreed to convey to Kern Island Irrigating Canal Company a four-fifteenth interest in South Fork Canal and all its rights therein. Kern Island Irrigating Canal Company agreed to furnish Balfour-Guthrie Investment Company, for a consideration of \$140 per year, sufficient water for the irrigation of certain described land, provided that the water used in any year should not exceed four cubic feet per second continuous flow. The furnishing of the supply was made contingent upon Kern Island Irrigating Canal Company having sufficient water in its canal and is subject to reasonable rules and regulations.

It appears from the text of these contracts and the evidence with relation thereto, that these four contracts were given in exchange for independent diversion rights from the river, and that this exchange is in effect a mere transfer of the point of use from the river to a point upon the Kern Island system, which benefits both the user and the Kern Island Company. The holders of these contracts pay a lesser rate for this service than other water users of the system. In a case of this kind where agreements are entered into such as these, we are of the opinion that no unjust discrimination occurs and that these agreements should not be disturbed.

It now remains to determine whether or not, under all of the circumstances obtaining, complainants herein should receive a greater water supply than heretofore. In other words, the question which is in reality before the Commission is one which involves the question of whether

or not water should be taken from one group of consumers and given to another. The defendants herein are not concerned with whom they deliver the water to, provided they assume no liability because of any change made. The Kern County Land Company, the parent company, is, however, interested to the extent that its lands might be deprived of a certain amount of water.

In order to more intelligently discuss the problem of the distribution of water among the consumers of the Kern Island Irrigating Canal Company, it may be well to describe briefly the operation of the various companies whose operations are interlaced with those of the Kern Island Company. The rights of these companies to their water supply from the Kern River has been discussed heretofore herein.

In the operation of the sixteen canals involved the Kern Island Irrigating Canal Company is used as a clearing house for the diversions and deliveries of all of these canal companies, particularly those companies which have a right to divert water from the Kern River. All of these canal companies are operated and controlled by practically the same men, and are subsidiary companies to the Kern County Canal and Water Company, which, in turn, is subsidiary to the Kern County Land Company.

The officials of these last mentioned companies are also the officials of the various canal companies. For example Mr. H. A. Jastro is president and general manager of all of these canal companies except the East Side Canal Company, and is General manager of that concern. Mr. Jastro is also general manager of the Kern County Land Company. Mr. F. G. Munzer is the secretary and Mr. W. F. Whittaker is the engineer of all of these corporations.

The Kern Island Company records the diversions of these various canal companies during the year and charges against their right to divert from the river the amount so taken. It also charges against itself the quantity of water used by it, which it in turn delivers to its consumers.

among which is the East Side Canal Company.

When the various canal companies have diverted water equal in amount to the quantity which they have the right to divert at the various stages of the river, and when the quantity in the river falls to a point below which they are entitled to any water, they in turn purchase water from the Kern Island Company, which company, as before stated herein, has the right to the first 300 cubic feet per second flowing in the river. The Kern Island Company is thus in the position with respect to these other canal companies of selling water and delivering it either to points upon their system where there are inter-connecting canals or turning the water down the river from their headgates in order that it may be diverted into the other canals. The Kern Island Company has followed this practice for a number of years and has thus permitted the other companies to become consumers, and have established the point of delivery either at their headgate or at different points along their system.

Water has been delivered to the East Side Canal Company and by it to its consumers as application has been made by the consumers. The total quantity to which it is claimed the East Side is entitled per year under their contract is computed, and any water delivered is deducted therefrom. Thus, any use by consumers during the winter months reduces the quantity which they would receive during the summer. The users under all of the systems, including those within Swamp Land District No. 111, make application for water in the same manner. All of these applications are then assembled by the officials of the Kern County Canal and Water Company, who also are the operating officials of the other companies, and sufficient water is then diverted to deliver the quantity applied for, provided water is available in the river.

Counsel for the companies contends that the delivery of water by Kern Island Irrigating Canal Company to the East Side Canal Company

for resale by them is not a dedication of such water to public use and does not create the relation of public service company and consumer, either between the selling and purchasing companies or between the selling company and the customers of the purchasing company.

After a careful consideration of the matter, we are of the opinion that in this instance the East Side Canal Company, if it may not be considered as the same company in fact as the Kern Island Company, is a consumer of the Kern Island Company and receives its supply within the area to which the service of Kern Island Irrigating Canal Company is dedicated. The East Side Canal Company purchases this water and becomes the owner thereof. The water is then distributed by it for irrigation of lands under its system, a large portion of which lands are within the area to which the Kern Island Company has dedicated its service. Furthermore, the consumers under the East Side Canal Company have for many years irrigated their land with this water, and under Section 552 of the Civil Code and Chapter 80 of the Laws of 1913, are entitled to a continuance of this service.

We are of the opinion that the East Side Canal Company is as much a consumer of the Kern Island Company as any corporation or individual now receiving their supply from that source. This is true, in our opinion, not only of the East Side Canal Company, but also of the other canal companies that have regularly purchased water from the Kern Island Company within the area to which that company's service has been dedicated. This does not, however, in any manner make the consumers of the East Side Canal Company consumers of the Kern Island Irrigating Canal Company. Water users from the East Side Canal Company must look for their service and water supply to that company, and that company in turn must look to the Kern Island Irrigating Canal Company for its supply.

It has been claimed that the Kern Island Irrigating Canal Company is delivering a part of its surplus water to the East Side Company. In regard to this we desire to point out that during the past twenty-three years that company has delivered at least the amount called for in the contracts and for more than five years last past has delivered in excess of the contractual amount. This has been true even though a shortage of water has existed during this period. It certainly cannot be contended that the Kern Island Canal Company has been delivering a surplus for temporary use to the East Side Company, and that it has primarily dedicated its supply to the area within Swamp Land District No. 111. This could only be done to the detriment of all of its other consumers except those residing within Swamp Land District No. 111. We do not believe that this is the case and are of the opinion that the Kern Island Company is acting within its scope as a public utility in delivering this water to the East Side Canal Company.

The evidence clearly shows that the entire water supply available to all of these canal companies is fully utilized and that an additional supply cannot be economically obtained. Thus, if consumers under the East Side Canal Company are to receive an additional supply over and above that which they have heretofore received, it would be necessary for this Commission to direct these companies to withdraw a certain portion of the supply which they have heretofore delivered to consumers other than those under the East Side Canal Company, and deliver the supply so withdrawn to complainants.

It is contended by complainants that consumers under the Kern Island System and other companies, such as the Buena Vista, and especially those consumers within Swamp Land District No. 111, are using a greater amount of water than is necessary for their needs, and that in fact so great a quantity of water is used in many instances that the land is damaged. It is further contended that land under the East Side Canal Company requires a greater amount of water to satisfactorily irrigate it than those under the Kern Island system. However this may be, consumers

under the Kern Island System and other systems, such as the Buena Vista, have for many years been receiving this supply of water and contend that the entire supply heretofore received by them is necessary for the satisfactory irrigation of their lands. Indeed, in many instances it was claimed by consumers other than those under the East Side Canal Company that the supply delivered to them during the past few years was inadequate and that a much larger quantity could be economically used by them, which increased use would materially increase the crop yield of their lands. Under some systems, such as the Calloway, it was shown that only one or two irrigations are received annually, and those early in the irrigation season. Because of this fact irrigators under such systems harvest only one or two crops of alfalfa instead of five or six which they could harvest if sufficient water for irrigation were available. Thus it is seen that many of the canals in this vicinity have a much less quantity of water available per acre than has the East Side Canal Company.

The available water supply is so limited, and the right of user has become so well established that it would be impossible, under present conditions, to so redistribute the water as to work justice to all concerned. In our opinion the solution of this matter is that which the landowners in Kern County are now attempting to promote, notably, the construction of an impounding reservoir to impound the winter flood waters of the Kern River and deliver them during the irrigation season for the irrigation of the lands which do not now have an adequate supply. Under Section 552 of the Civil Code and Chapter 80 of the Laws of 1913, this Commission cannot injuriously withdraw a portion of the supply heretofore received by a consumer in order to benefit other consumers or to supply water to new consumers.

After a careful study and thorough analysis of the situation, we are of the opinion that those users who have through a long period of years received a certain supply of water, are entitled to a continuance

of use of that water and that even though this Commission has authority over the Kern Island Irrigating Canal Company with respect to service rendered by that company, it would be inequitable for it to deprive other users of water in order that this company and the East Side Canal Company might be enabled to deliver an additional supply of water to complainants herein.

We are of the opinion, however, that the East Side Canal Company and the Kern Island Irrigating Canal Company should continue to deliver the same quantity of water to the East Side Canal Company's consumers as they have heretofore. In other words, we do not believe that the East Side Canal Company should reduce the actual quantity of water delivered to its consumers by twenty per cent, which is the amount it claims has been delivered in excess of the quantity due, owing to mistakes in measurements. Furthermore, the records show that whereas the exact contractual amount is some 22,000 acre feet per year, this company has delivered an average of 25,500 acre feet per year for the past twenty-three years. The quantity last herein mentioned, we believe should be delivered to these consumers in the future.

If a shortage of water occurs, such that it is necessary to prorate the available supply, complainants herein and other consumers under the East Side Canal Company's system should have their supply reduced only in proportion to the reduction in supply to other consumers. On the other hand, if a surplus exists, consumers under the East Side are entitled to their fair share of it.

The engineers of the Commission have carefully checked over the engineering features of this proceeding and have carefully studied the data submitted relative to water use, the distribution of water, the method of measurements and other engineering features. The data submitted by

Mr. H. L. Haehl, engineer for the Company, relative to his experiments with the measuring device used by the East Side Canal Company, have been carefully checked over, and our engineers report that Mr. Haehl's computations are correct and that undoubtedly the company has been delivering a quantity of water to the East Side users over and above that recorded by their measuring devices.

Complainants in this proceeding allege that the East Side Canal Company did not keep its canals in proper repair, failed to deliver the quantity of water to them which the canal can carry when operated to capacity, and that the service rendered was intermittent.

The record is not clear with respect to the condition of the East Side Canal Company's main canal; however, we wish to direct attention to the losses in this canal, which were some 37 per cent as compared to a loss of approximately 21 per cent under the Kern Island system. In directing attention to these losses, consideration must be given to the fact that the East Side Canal Company extends through a territory which has much more porous soil than the district through which the Kern Island system extends. However, in view of the fact that there is not a sufficient water supply available to irrigate all of the lands in this vicinity, the East Side Canal Company and all other canal companies in this district, should exercise extreme care in repairing and cleaning their canals in order that losses from seepage, et cetera, may be reduced to a minimum. This is not only true of the canals owned and maintained by the company, but also by those canals owned by consumers. The consumers should be as careful, if not more so, in repairing their canals and keeping them in condition, in order to prevent losses.

A joint inspection of canals and irrigated areas under these systems of the Kern Island Irrigating Canal Company and the East Side Canal Company was made by representatives of complainants, defendants, and the Commission's Hydraulic Engineering Division. This inspection indicates that the irri-

gators' supply ditches are in rather poor shape in both localities, those under the East Side being in slightly better condition than those under the Kern Island system. This same inspection, however, shows that the lands under the Kern Island, as an average, are better prepared for irrigation than those under the East Side Canal. The preparation of land for irrigation, and the condition of ditches delivering and distributing the water have a very marked effect upon the quantity of water necessary for irrigation. Care should be exercised by the utilities and irrigators alike in this matter. In the past consumers have been required to file their applications for water with the company. Water was then delivered to them in the chronological order of the filing of the application, and entirely regardless of the consumers location on the ditch. It is apparent that this method tends to inefficient operation and increases the loss by seepage, transpiration, et cetera. This is obvious when it is pointed out that a consumer near the intake of the ditch and one at the extreme end of the ditch may apply for water on the same day and be entitled to receive it at the same time, thus necessitating the company's keeping the entire ditch filled with water in order to make these two deliveries. We deem it advisable that a rotation schedule of deliveries be established in order to conserve water in every possible way, which schedule of deliveries should provide for the delivery of water in an orderly manner to those irrigators in a certain neighborhood at one time, and at some later date to irrigators in another neighborhood. By so doing a larger head can be run in the canals and laterals and the percentage of loss decreased.

Mr. Haehl's experiments tend to show that the soil under the East Side Canal Company can not retain more water sufficiently close to the surface to be of benefit to the plants irrigated, than the amount which would percolate through it from a five-inch irrigation. Practically all the irrigators under this system average one foot or more per irrigation. As a matter of fact, in June, 1919, almost 15 inches per average

irrigation was applied by the irrigators of alfalfa under the East Side Canal Company's system. In July, 1919, more than 18 inches was applied on the average in the irrigation of field crops, and almost 14 inches for the irrigation of vineyards. The average for all crops under the East Side was 13.3 inches per irrigation, of which not more than 5-1/2 inches was retained by the soil sufficiently close to the surface to be of benefit to the crops. The balance wasted into the subsoil. This indicates that users under the East Side Canal Company, and, as a matter of fact, practically all users in this district, are applying too much water per irrigation. In our opinion a lesser quantity should be applied per irrigation and the crops should be irrigated more frequently. This would materially reduce the quantity of water necessary to be diverted from the ditch in order to assure the irrigator that his crops have the proper amount of water.

In view of the fact that the problems herein presented to the Commission are much involved and of complicated nature, the various phases of the matter have been discussed fully. It is contended by defendants that the issues herein presented involve only the question as to whether or not the East Side Canal Company has maintained its canal in proper condition to render service, and whether or not it is obligated to maintain in its canal a continuous flow of water and to the extent of the canal's capacity during the irrigation season.

We are of the opinion that the question of whether or not the East Side Canal Company can secure an additional supply of water from Kern Island Irrigating Canal Company, which question is involved herein, is one which requires a survey and analysis of the entire operations of the Kern Island Company. Furthermore, in order to come to a conclusion in this matter, the right of the East Side water users and the East Side Canal Company with respect to the other consumers of the Kern Island Irrigating Canal Company must be given careful consideration, as upon the rights

of these various consumers depends the right of the East Side water users, and in turn, the East Side Canal Company to receive water. Therefore, we have deemed it advisable to discuss this matter from the broadest aspect of the issues herein presented.

We find here, in the Kern Island Irrigating Canal Company, a company which, in our opinion, has been since its inception acting as a public utility water company, and as such is subject to the regulatory powers of this Commission. This company has available for its use only a limited supply of water which cannot readily be increased. It has, in the past, devoted its entire water supply to beneficial use. It has been and is confronted with the problem of allocating to its various consumers the water supply which it has available, the quantity of which varies in different years, dependent upon the yield of the watershed of Kern River, which fluctuates with the quantity of rainfall in each year. Its right to divert from the stream, except what might be termed its basic supply of 300 cubic feet per second, is dependent upon the rights of the other canal companies and individuals, which rights it must respect. The problem concerns not alone the Kern Island Company, but also the other canal companies diverting water from Kern River, and is one with so many varying factors and so complicated that it is very difficult to arrive at an equitable solution. This Commission cannot give to any water user or consumer a preferential right over another consumer, nor authorize or permit a utility to grant discriminatory or preferential service to any of its consumers, to the detriment of others.

There is an area susceptible of irrigation in Kern County many times as large as the present available water supply can irrigate, and therefore the available water should be made to perform its highest duty. The various utilities should do all in their power to reduce the

loss of water in transmission and distribution to a minimum, and the consumers, in their turn, should conserve water in every manner possible.

Wherever possible the water users should reduce their use of water to a quantity consistent with good irrigation practice. Irrigators' and companies' ditches should be kept in good shape and proper distribution methods should be put into effect, and every possible means utilized to conserve water. If this is not done the area which can be irrigated by the available supply will be reduced, and the district as a whole will suffer loss because of a reduction in the quantity of its products.

We do not deem it proper, in this proceeding, to direct the method of proration in case of a shortage of water supply, nor the method of allocating any available surplus which may occur. However, we suggest that this be done in accordance with the principles set out in this opinion. Nor, in view of the scope of this proceeding, will the Commission direct defendants to alter their methods of operation, except in the establishment of a rotation schedule of deliveries, which, in our opinion, will be of benefit to the consumers and companies alike. Clearly, we can not in justice direct the Kern Island Company to deliver to complainants herein the quantity of water which the East Side Canal Company's Canal can carry, which is between 100 and 125 cubic feet per second, as this would mean depriving other consumers of a large part of the water now utilized by them.

It will be noted that the whole situation of the diversion of water from Kern River has been discussed herein from various angles. The matter has been analyzed with infinite care and in much detail in order that all concerned may have a clear understanding of the various phases of the problem. As all matters which were taken up in the previous order herein have again been taken up and discussed in detail, the opinion and order heretofore issued in this proceeding (Decision No. 6383), will be set aside.

consequent shortage of water supply, the amount delivered shall be decreased only in proper ratio to the decrease in supply, and in years in which an increased supply is available, the quantity of water delivered shall be increased and equitably prorated among all consumers.

IT IS HEREBY FURTHER ORDERED that in all other respects, the complaint herein be, and it is hereby dismissed.

Dated at San Francisco, California, this 30th
day of June, 1921.

H. B. Bond
H. S. Loveland
Dwight Martin
J. T. Penner
Commissioners.