

Decision No. 31859

ORIGINAL

BEFORE THE RAILROAD COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of EAST SIDE CANAL & IRRIGATION COMPANY, a corporation, and STEVINSON WATER DISTRICT, a public corporation, for an order authorizing the execution of certain agreements and instruments of conveyance in relation to certain franchises, water rights and physical properties.

Application No. 21881

Fred B. Wood and William B. Mead,
for Applicants.
Wilcox & Rodin, by Albert H. Rodin,
for Water Users in Stevinson Water District.
Henry Holsinger, for Water Project Authority
of the State of California.

BY THE COMMISSION:

O P I N I O N

East Side Canal & Irrigation Company, hereinafter called "Canal Company," is a public utility supplying water for irrigation purposes in the vicinity of Stevinson, Merced County. Stevinson Water District, hereinafter called "District," was organized in 1928 under the "California Water District Act." (Deering's General Laws, Act 9125.) Both join in an application for an order authorizing the execution of certain agreements and a deed. The Canal Company proposes to quitclaim to the District all of its physical properties, water rights, and franchises, except its corporate franchise; whereupon the District proposes to lease such properties

and rights to the Canal Company.

The proposed lease is for a term of five years, but is subject to immediate termination in the event that the Canal Company is declared a bankrupt or if a receiver is appointed. The lease also provides that the Canal Company will convey certain waters claimed by the District through the canal system to lands within the District. Waters delivered by Merced Irrigation District (under circumstances hereinafter mentioned) will be conveyed by the Canal Company to lands within Stevinson District, and only the surplus not needed on such lands may be conveyed and sold for use upon other lands within the flow of the system. Waters taken by the Canal Company from the San Joaquin River and from Sand Slough shall be available for distribution and sale for use upon lands within the primary public service area of the Canal Company, as heretofore established by the Commission, to the extent needed, and any surplus shall be available for distribution and sale for use upon such other lands, within or without the District, as may require water and be within the flow of the system.

In consideration of the maintenance and operation of the system, and the conveyance and distribution of water to lands within the District, the Canal Company will charge, for water delivered by it for use within the District (from the owners of lands so served), at the same rates, under the same conditions and upon the same terms as prescribed for the distribution and sale of water for use upon lands outside of the District. The Canal Company agrees to pay all "taxes and assessments" which may be levied upon or in respect to the properties, rights and franchises hired by it from the District. The lease further provides that none of the title or interest of the Canal Company in any of the properties involved, "voluntarily

or involuntarily, by operation of law or otherwise," shall be transferred or encumbered without the written consent of the District.

The Canal Company was organized in 1887 by James J.

(1) Stevinson, and the system was originally constructed for the purpose of irrigating his own lands, a portion of which was later conveyed to James J. Stevinson Corporation, hereinafter called "Stevinson Corporation." About 1902 Stevinson Corporation started to subdivide approximately 11,000 acres of land, generally known as the Stevinson Colony. Land was sold for small home farm operation in parcels of from 5 to 20 acres each. Under an agreement between Stevinson Corporation and the Canal Company, the former agreed with purchasers of land that the Canal Company would convey a water right to such purchasers, for which it added a certain amount to the price of the land sold under such contracts.

It had been anticipated that the Stevinson Colony would develop into a well-settled and thriving community, but small scale farming operations did not prosper. The use of water was discontinued on many parcels, and as a result, the waters held for said lands were transferred to other areas outside of the Colony proper, and where such waters would be put to a beneficial use. A total of some 7,862

(1) Of the 1,000 shares of the Canal Company's stock now outstanding, 995 shares are held by L. J. Stevinson and George J. Hatfield, as voting trustees, and the Canal Company's 1937 annual report states that the real owner is 3 H Securities Company. The capital stock of that company is owned or controlled by members, through birth or marriage, of the family of the late James J. Stevinson. The 3 H Securities Company owns half of the stock of Stevinson Corporation, the other half being owned by members of the Stevinson family, less directors' shares respectively. The Securities Company also owns all of the stock, less directors' shares, of the Canal Company. Practically all of the land within the boundaries of the Stevinson District is owned by Stevinson Corporation, other than certain land owned by Messrs. Archibald Stevinson and Floyd Stevinson, and one or two small parcels held by members of the board of directors of Stevinson District.

acres of lands within the preferred utility service area are now entitled to water from the Canal Company. A considerable portion of this acreage is located outside of the so-called Stevinson Colony.

The Canal Company has a diversion dam and headworks on the San Joaquin River some fifteen miles above the main service area, and distributes water through some twenty-two miles of main canal and thirty-six miles of laterals or ditches. It claims the right by appropriation to divert and use seven-eighths of 281 cubic feet of water when that amount of water is flowing in the San Joaquin River at the head of its main canal, and seven-eighths of the water flowing therein when there is less than 281 cubic feet of flow in the river at the diversion point. In addition, the Canal Company claims rights by appropriation to divert and use waters from various creeks, drains, sloughs and spillways, most of which are intercepted by the main canal.

A more detailed description of the history of the system and its operating methods and problems will be found in prior Commission decisions involving the Canal Company.⁽²⁾

Since at least 1925 the Canal Company has obtained an additional and more dependable water supply from intercepted waste and drainage waters emanating from the Merced Irrigation District. However, it is claimed that these waters belonged to Stevinson Corporation, and later to the District, and that the Canal Company has used such waters temporarily and by permission only. In 1930 a consent decree was issued in litigation instituted by Stevinson Corporation

(2) See, for example, Re East Side Canal & Irr. Co. (1914), 4 C.R.C. 597 (Decision 1391, Case 309); Re East Side Canal & Irr. Co. (1930), 34 C.R.C. 465 (Decision 22222, Case 2720); Calif. Farm Bureau Fed. v. East Side Canal & Irr. Co. (1933), 38 C.R.C. 431 (Decision 25593, Case 3138); Re East Side etc. Co. and Stevinson Water District (1933), 38 C.R.C. 544 (Decision 25736, App. 17759).

against the Merced Irrigation District and based upon alleged infringement of riparian rights. Stevinson Corporation granted to Merced District the particular rights claimed by it, and Merced District agreed to deliver to Stevinson Corporation 24,000 acre feet of water per annum, plus an additional amount to take care of seepage and evaporation losses between the points of delivery and the East Side Canal. The agreement also provided that waste, drain, seepage and surplus waters which flowed into specific creeks, sloughs, etc., or other drains which reach or intersect the East Side Canal, should be deemed water delivered by the Merced District. Rights obtained by Stevinson Corporation under this decree were later conveyed to Stevinson District. Under the proposed agreements involved herein, the Canal Company would relinquish all claims to prior rights or equality in use in and to these waters in favor of the District, and only the surplus not needed on lands within the District would be available to lands outside of the District and supplied by the Canal Company.

As heretofore stated, the above waters have been used by the Canal Company at least since 1925. In 1930 the Commission had occasion to consider the rates and service area of the Canal Company. (34 C.R.C. 465.) It then appeared that waters emanating from the Merced District and intercepted by the East Side Canal had been filed upon by agents of Stevinson Corporation or by agents acting on behalf of landowners within the District. The Commission's 1930 decision stated that by reason of the community of interests existing between Stevinson Corporation and the Canal Company, no protest had been made by the latter against such filings.⁽³⁾ It was pointed out that should

(3) For example, in 1927 and 1928 certain predecessors of the District filed applications with the Division of Water Rights for the appropriation of certain waters of Bear Creek, claiming both the natural flow and any foreign waters. Subsequent to the 1930 Commission decision,

Stevinson Corporation attempt to confine the use of such waters exclusively to its own lands, consumers of the Canal Company would be left wholly dependent upon the direct diversion from the San Joaquin River, which supply had never been adequate nor sufficiently dependable.

In 1933 the Commission denied an application of the Canal Company to transfer its properties to the District, and found that only by use of the intercepted drainage waters, including the waters claimed by the District, was it possible to render sufficient service within the utility area. (Re East Side Canal & Irr. Co., 38 C.R.C. 544.)

While the present application requests an order, pursuant to section 51 of the Public Utilities Act, authorizing the transfer of the Canal Company's properties to the District, the latter claims that it already owns and is entitled to possession of all properties and rights of the utility. Such claim is based upon certain court judgments and orders.

Crane v. East Side Canal & Irrigation Co., 6 Cal. App. (2d) 361, affirmed a judgment awarding damages against the Canal Company, in the amount of \$19,200, on the doctrine of anticipatory breach of a contract, executed in 1898, which created a water right appurtenant to certain land, and which obligated the Canal Company to supply water

(3) cont'd.
and on July 20, 1931, the Canal Company filed a like application for the appropriation of Bear Creek water. In 1936 the Supreme Court affirmed a decree which sustained the validity of all three applications and declared that Stevenson District and the Canal Company were the owners, severally, of the inchoate right to appropriate stated quantities of water of Bear Creek, with priority as of the days of filing, although such applications were still unperfected. (Crane v. Stevenson etc., 5 Cal. (2d) 387, 392.)

thereon, the Canal Company having conveyed its water rights to other parties, and being unable to supply water in fulfillment of the agreement. In 1928, in consideration of \$200,000 (\$10,000 of which went to the Canal Company), and of the dismissal of certain pending litigation, Stevinson Corporation and the Canal Company had conveyed certain water rights to Southern California Edison Company. And in 1929, in consideration of \$100,000 and of the dismissal of other pending litigation, Stevinson Corporation conveyed to seven other water companies all of its water rights on the San Joaquin River within Merced County. As a part of the consideration for the latter grants, the Canal Company and Stevinson Corporation dismissed certain pending litigation involving their water rights.

Plaintiff in the Crane case contended that the conveyance of such water rights and the dismissal of the above suits had rendered it impossible for the Canal Company to fulfill the terms of the 1898 contract. In affirming judgment for the plaintiff, the Court held that the Canal Company "was bound by the terms of its contract to exercise due diligence to prevent strangers from interfering with its water rights, and to preserve those rights so that it could fulfill its contract with the plaintiff." (6 Cal. App. (2d) at p. 373.)

Shortly after the Crane judgment became final, it was assigned to J H Securities Company, which instituted an action against the Canal Company, because of nonpayment, secured a judgment in the amount of \$24,972.50, and obtained a writ of execution. A sale of all franchises (except the franchise of being a corporation) of the Canal Company was held on December 10, 1936, pursuant to sections 724a and 724e of the Code of Civil Procedure, at which the Stevinson District became the purchaser for the sum of \$20,000. On January 18, 1938, more than

twelve months having expired since the date of the sale, and no redemption having been made, a Sheriff's deed issued to the Stevinson District. This deed states that it conveys to the District "Any and all franchises (except the franchise of being a corporation) belonging to" the Canal Company, "which franchises include the right to collect rates or compensation for use of water supplied to inhabitants of" Merced County "and for the irrigation of lands within the flow of the main canal and lateral distributing ditches from said main canal belonging to or under the control of" the Canal Company, "which said main canal is described as follows, * * *; And said lateral distributing ditches from said main canal include the following: * * *. And all the rights and privileges of said franchise and said franchises, excluding the franchise to be a corporation, * * *. TOGETHER with all tenements, hereditaments, appurtenances, rights and privileges thereunto belonging or connected therewith."

While the utility system is still being operated by the Canal Company, it is asserted that such operation is by sufferance of the District, which claims to be in possession of and entitled to possession of the utility's water rights and physical properties necessary for the execution of the powers and the receipt of the proceeds of such franchises. But it is to be noted that the Sheriff's deed does not specify, nor does the record herein disclose, what, if any, specific franchises of the Canal Company have been thus conveyed to the District. It does not appear what particular property necessarily must be in the possession of the District in order to exercise any particular franchise that may have been conveyed. No authorities have been cited to the effect that title to all physical properties and water rights automatically passes with franchises sold upon execution. While the Commission will not

attempt to pass upon the legal questions thus suggested, grave doubts exist as to what properties may have been acquired by the District, and we cannot recognize the District as the legal owner of all of the Canal Company's properties and rights. However, we do not believe that the Commission is called upon to determine any question of title.

Under California law a transfer of franchises or properties cannot relieve such franchises, or the properties held for their operation, from liabilities and obligations theretofore incurred or contracted. Persons to whose use water has been appropriated or dedicated are vested with a right to have the supply continued by whomsoever may be in control thereof. Such right exists until relief therefrom has been granted by the proper authority. Where water has been supplied for irrigation use, the right to receive and use it becomes in the nature of an appurtenance to the land.

Counsel for the District contends that the latter has something akin to a legal title to the properties of the Canal Company, but recognizes an obligation to conduct the public utility business of the Canal Company, with all of the latter's "powers and privileges and subject to all of its liabilities."

Under the circumstances, and for the purposes of this proceeding, this application may be considered as one whereby a utility seeks authority to transfer to a District properties and rights to which the utility has title. In authorizing a transfer of utility properties to an entity not subject to regulation under the Public Utilities Act, the Commission has jurisdiction to impose such conditions as, in its judgment, will protect and safeguard the pre-existing rights of those entitled to service, and is confronted here with the duty of protecting the rights of the so-called "outside users" of water.

It may be that such outside users possess water rights created by contract, or otherwise, as distinguished from and in addition to rights resulting from the appropriation or dedication of waters to the use of their lands, or as utility consumers.

The rights of outside users would not be protected under the proposed agreements, for such users would be deprived of waters which they have been receiving for years, and would be relegated to reliance primarily upon waters obtained by the Canal Company by direct diversion from the San Joaquin River and from Sand Slough. It is clear that without the continued use of the waters emanating from the Merced Irrigation District, the Canal Company could not and has not in the past been able to provide a reasonable and dependable service. (38 C.R.C. 544, 548.) Under the proposed lease those receiving water from the Canal Company would be assured of a source of supply from the San Joaquin River only for a possible maximum period of five years. The record is silent as to what provisions will be made by either the Canal Company or the District to ensure any service to the utility consumers upon the expiration of the lease period of five years.

We believe that water users outside of the District boundaries would receive greater protection by an outright transfer of the utility properties to the District and the future operation thereof by the District itself, subject to appropriate conditions safeguarding the rights of the utility consumers. While the present application will therefore be denied, such denial will be without prejudice to the filing of a supplemental application for authority to transfer, subject to conditions which shall be in substantial accord with those hereinafter indicated. The details of the suggested conditions, or addi-

tional conditions which may be proper, will be considered in connection with such supplemental application.

Any authorization granted for such a transfer will be upon condition that the District shall continue in adequate and proper amounts, at reasonable rates and under reasonable conditions and requirements, the water service which the Canal Company has obligated itself to furnish as a public utility to all those consumers or lands within the present service area of the Company which are now outside of the boundaries of the District, and that the obligations and liabilities of the District to furnish water upon such lands shall be and remain the same as the existing obligations and liabilities of the Canal Company.

Another condition of such authorization will be that the District, as to all water users located outside of its present boundaries but within the present service area of the Canal Company, shall not exact rates or charges in excess of those exacted by it for water furnished upon lands within the present boundaries of the District. The intent of such a condition would be that so-called "outside users" should not be required to pay more for water furnished and delivered to their lands than is paid by water users whose lands are within the District, provided that in determining the cost of water furnished upon lands within the District there should be excluded therefrom all taxes and assessments paid by owners of lands within the District, the proceeds from which are used for the purpose of paying interest on the bonded indebtedness of the District or for other expenses incurred in constructing, extending or improving its canal or other water system for the purpose of furnishing or delivering water to or upon lands located within the present boundaries

of the District.

Should the parties present such a supplemental application, there should be attached thereto a copy of a proposed agreement or instrument of conveyance, together with a proposed resolution of the board of directors of the District. These documents should recite that the conveyance is made by the Canal Company and accepted by the District subject to all of the terms and conditions of such order as the Commission may make authorizing the transfer.

O R D E R

East Side Canal & Irrigation Company and Stevinson Water District having joined in an application for authority to execute and deliver certain agreements and a deed of conveyance, which are attached to said application, and upon the terms and conditions therein set forth, a public hearing having been had before Examiner MacKall, and good cause appearing,

IT IS ORDERED that said application be and it is hereby denied without prejudice.

Dated, San Francisco, California, this 20th day of March, 1939.

Robert A. ...
Frank R. ...
Paul ...
...
Justus J. ...
Commissioners.