

1934.

23277

KENYA

CO 533/451

1934

23277

The Water Ordinance.

Previous

17366/31

Subsequent

38207/36

Reg 291	18/9
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The Trustees	26
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C.I.
Water Office

1 Govt Dept of Pitting 412 — 22 Aug 1930
Giving the history and the present position
of the Water Ordinance, and recommending
that the Ordinance be brought into force
as it stands in view of the reduction
of cost of operation & the economies of
the Land Commission

The history of the Kenya Water Ordinance (No. 35 of 1929) is set out in the Memoranda ^{to} A.S.C. on 16070/30. The Ordinance appeared to be well suited to the special circumstances of Kenya, but it contained two features which called for special comment. Firstly, as affecting the control of water in native reserves. It was discovered that the terms of Section 88(1) permitted the Water Board to sanction the diversion etc. of water independently of any provisions in the Native Land Trust Ordinance. Such a situation would have been contrary to the wishes expressed by the Governor and to C.O. views. Amending legislation was prepared to provide that the Water Board should obtain the prior consent of the Native Land Trust Board to any action which it proposed to take under the Water Ordinance, affecting water in native reserves or other native areas, but the Bill was never introduced for the reasons explained in paragraph 3 of the despatch. This particular point was examined by the Land Commission and their views are recorded in paragraphs 1595 to 1606 of their Report.

The Commissioners make the point that the Water Ordinance as it now stands "limits itself by declaring in Section 75 that in any area declared to

(para 1596)

be native reserve its powers 'shall be exercised subject to the provisions of any law for the time being in force, relating to native reserves or communal reserves'. It therefore becomes in that respect subservient to those sections of the Lands Trust Ordinance which relate to the use and control of water", but the point that under Section 88(i) the Water Board could exercise the power of sanctioning a diversion etc. of water in native reserves was not taken. The Commissioners considered, however, that in equity the Lands Trust Board has a right to be ^{notified} ~~notified~~ and to enter objections, but not to be the final judge of the matter, ^{the Commissioners} ~~and~~ were unable to recommend that the Lands Trust Board should retain a power of absolute veto, which might prevent a proper development or conservation of the water supplies of the Colony. The necessary safeguarding of water was, in their opinion, a matter over which Government ought to keep a direct control.

The Lands Trust Board have had an opportunity of studying the observations of the Land Commission - vide the memorandum accompanying the Governor's despatch - and have resolved that, in petty cases in the category classed by the Commission as "minor", they will have no objection to any application for a water permit which is not objected to by the Provincial Commissioner or the local Board concerned and is, in the opinion of the

Chief

Is they will be consulted

is subject to a provision in the lines of J.A. of the N.L.T. Ord.

Chief Native Commissioner, "minor".
 IF the Water Ordinance is brought into operation as it stands, which is what the Governor asks for provided that funds for its operation can be found, there can be no question that the Lands Trust Board will not be consulted with regard to cases other than those classed as "minor". But the question remains as to whether any diminution of the powers of the Lands Trust Board is desirable, and on this point, presumably, we must be guided by the Land Commission Report.

The second comment on the terms of the Water Ordinance referred to the grant of easements on lands in native reserves. Section 55. At our request the Governor submitted amending legislation providing that the amount of compensation if any, which shall be paid by the operator shall be determined by the Governor in council, and providing further that an easement shall not be deemed to be a lease, licence, or other disposal of land within the meaning of Sections 7 and 8 of the Native Lands Trust Ordinance. It was also suggested to the Governor that the grant of an easement in a native reserve should be subject to a provision that the proposal to grant such easement had been brought to the notice of the local native council and of the natives concerned, and that such local native council and such natives have had an opportunity of expressing their views upon the proposal. But in view of the Governor's remarks in the last paragraph of the despatch it may not be considered necessary to require amendment of the

Water

concerned with the interests of the Colony as a whole. For this reason we consider that the Board ought not to be the final authority.

..... Its right should be comparable with those of owners of private land. In equity, therefore, it has a right to be notified and to enter objections, but not to be the final judge of the matter". (Paragraph 1599). The Commission go on to say that it seems equally clear that in respect of water which has not yet entered the reserve, the Board has too little power and that they should have the same rights of protecting interests lower down as an owner of private land would have. They made no definite recommendation because of the existence of the amending Water Ordinance and they thought it would be wise to await the final form before framing corresponding provision of an amended Lands Trust Ordinance.

The Commission then went on to point out that the present practice is, whenever application for a water permit which might possibly affect native interests is made, the Lands Trust Board and the local board concerned are notified. Many of these applications are of a petty character and if it is laid down that the Board must be notified of every application, the more important work will become ^{very} ~~rather~~ detail, and they therefore recommend that there should be a sharp distinction between major and minor matters. For minor matters the Provincial Commissioner should consult the local Land Board and the local natives concerned and if the

Provincial

Provincial Commissioner and the local Land Board, then the application may be taken as done with us as the native reserve is concerned. If either objects then the matter can be referred to the Governor for decision. If the Chief Native Commissioner appears the matter is often enough to inform the Lands Trust Board, but not otherwise, the decision should be deferred until the Board can look at it. In major matters, the Lands Trust Board should be notified and given the opportunity of recording its opinion by letter to the Governor, and the decision should rest with the Government.

The Commission point out that it would be difficult to decide what was a major and what was a minor operation and they did not try to, but they suggested that the Government consideration should be whether the effect of the water in the river or stream affected would be of course, more or less. They pointed out that a large water project outside the reserve might be in contemplation which would involve the return of all water to the river and that the water in the reserve would not be affected. This, if it were to be a very large scheme, would be classed as a minor one for this purpose. On the other hand, a situation might arise where a lot of small claims, such as for irrigation, would draw off a large quantity of water from a river and not return it. These might well be regarded as major operations.

The final remark of the Commission in paragraph 1600 is as follows:- "We are unable to recommend that the Board should retain a power of absolute veto which might provide the proper development or conservation of the water supplies of the Colony. The necessary safeguarding of water is, in our opinion, a matter over which Government ought to keep direct

control.

control". The Lands Trust Board has been consulted and agrees that the Board would have no objection to an application for a water permit which is not objected to by the Provincial Commissioner or the local Board concerned and is, in the opinion of the Chief Native Commissioner, a minor matter. The Director of Public Works thinks that if this is adopted, there is no need to amend the Water Ordinance on the lines previously suggested.

The thing that puzzles me is why there is this ~~reason~~ ^{objection} for bringing the Water Ordinance into operation. There is, of course, the big scheme relating to the Maragua Tana but although that would not involve a diminution of the water in the river, it would drown out some land and we ~~know~~ that there would be opposition, so it could hardly be smuggled through under the guise of being a minor operation. If it was, the Secretary of State would, I think, wish to comment very severely.

The cost of operating the Ordinance was originally estimated at about £3,500, to provide for the salaries of the necessary engineers, but the estimate has now been reduced to a minimum of £1,500 per annum. As Mr. Freeston points out, the new Lands Trust Ordinance will ~~over-ride~~ ^{over-ride} the Water Ordinance as far as native reserves are concerned, and I think we can approve the bringing into force of the Ordinance (it has been passed by the Governor in Council but I cannot ~~say~~ that non-disallowance has ever been signified) and it will be necessary to signify non-disallowance and say that it may be brought into force and

add

add the warning suggested by Mr. Freeston. One of the troubles is that it was considered here that Section 88 of the Ordinance gave power to the Water Board to sanction for any fixed period of time the diversion and abstraction, obstruction or use of water according to whatever conditions the Water Board might embody, notwithstanding the provisions of Section 75. If, then, the Kenya Government accept the view of the Commission they have got away from the danger of taking action without consulting the Lands Trust Board so the main objection will be done away with.

It would be just as well to get off a despatch by next week's air mail and I submit ~~the~~ draft on it for that purpose.

To be 4.30 12th Nov *J. J. Maffey*
Sir J. Maffey.

The position is clearly set out in Mr. Flood's minute.

The Water Ordinance is in 1940/39, but the only provisions we are concerned with now are Section 75, protecting water in the native areas and Section 88, over-riding (inter alia) section 75. As the Kenya Land Commission point out, water flowing into a Native Reserve is as important to the natives as the water when it gets there, and I have added to Mr. Flood's draft so as to make it clear that as great caution must be observed in the one case as in the other.

I think that the prospect of this five-year-old Ordinance being required in operation at any moment must be based on increasing inconvenience in administering the old system of water permits under the Green Lands Ordinance. We can rule out any idea

of

of smuggling through a scheme injurious to native interests and it is not easy to see why we should not have been told if the simplest explanation of all were the correct one. That is, that it is necessary to have something concrete on which to base the water clauses of the new Native Land Trust Ordinance which will be necessary as the result of the Land Commission's Report.

W.C.S.
14.11.34

J.M.
19.11.34

M.T.
30/11

Lord Plymouth
to see after dispatch
in mail.

Est. 1/4/34

noted
later
1/12/34

By air mail
#112/34

2 To Kenya 999 (1 ansnd) 3 DEC 1934

Lord Ripon
to file

Library (Legal) to
note - see (1) on
1607/30/Kenya

5/12/34

3. Governor Bygone Tel 250 _____ of Nov 34
Request reply to No 1 may be communicated by tel.
DESTROYED UNDER STATUTE

In view of No 2 his can be
not y.
Request.

at all
19.1.35

1

H. Extract from Kenya Gazette No. 32 of 25.6.35
(attached in case with min. on 35040/35 (P.C. 100))

Patby
A. Remond
28.10.35
at all

1

June 25, 1935

THE OFFICIAL GAZETTE

GENERAL NOTICE NO. 814

NOTICE

IVORY AUCTION SALE.

GOVERNMENT trophies, comprising approximately—

- 15,000 lb. Ivory (of all kinds),
- 550 lb. Rhino Horns,
- 2,300 lb. Hippo Teeth,

will be sold by public auction at the Custom House, Dar es Salaam, at 9 a.m. on Saturday, the 10th August, 1935.

The conditions of sale will be those contained in Government Notice No. 76 appearing in the Zanzibar Official Gazette dated 26th January, 1925, Vol. XXXIV, No. 1722.

H.M. Customs, Dar es Salaam,
10th June, 1935.

H. R. LATRELLE,
Acting Comptroller of Customs.

GENERAL NOTICE NO. 815

KENYA AND UGANDA RAILWAYS AND HARBOURS.

TENDERS are requested for the supply of Uniforms for a period of one year or two years from 1st August, 1935.

1. Full details regarding conditions of contract, approximate quantities and the official form of tender may be obtained on application to the Stores Superintendent, P.O. Box 40, Nairobi.

2. Only tenders submitted on the official form will be considered by the Administration.

3. Sealed tenders, marked "Tenders for Uniforms", should be addressed to the Chairman, Railway Tender Board, P.O. Box No. 570, Nairobi, and should reach him by noon of the 13th July, 1935.

4. The lowest or any tender will not necessarily be accepted.

Nairobi,
19th June, 1935.

G. D. RHODES,
General Manager.
Kenya and Uganda Railways and Harbours.

GENERAL NOTICE NO. 816

THE WATER ORDINANCE, 1929.

NOTICE

THE following is published for general information to bring to the notice of the public the rights and obligations which the Water Ordinance, 1929, will confer and impose.

THE WATER ORDINANCE, 1929.

By Proclamation dated 21st May, 1935, published in the Supplement to the Official Gazette of 28th May, 1935, the Water Ordinance, 1929, will be brought into force on the 1st July, 1935. In view of the long period which has elapsed since the enactment of this Ordinance, it has been thought desirable to publish a short statement of the objects

of the Water Ordinance and the principal obligations which it imposes on present and prospective users of the water of public streams and other public bodies of water.

The main principles of the Ordinance may be stated as the establishment and control of water rights by a Water Board on behalf of Government. The primary object of the Ordinance is twofold. Firstly, the conservation of the water resources of the Colony and their employment in the most advantageous way, including the prevention of waste and pollution. Secondly, provision for the control of such resources and the issuing by the Water Board of documents granting a reasonable degree of legal security of title to those who desire to divert or store and use public water lawfully and in the most beneficial manner for the intended purpose with due regard to the limitations of available water resources and the rights of others.

It has been clearly established in other countries that uncertainty of tenure militates against development, and all civilized countries are alive to the necessity for securing the conservation of their water resources and the efficient utilization of them in the interests of the community.

The procedure under existing law by which permission to divert water from a stream or other natural body of water, or to obstruct its flow by means of a dam, can be accorded by the Director of Public Works as prescribed officer under the Water Permit Rules, 1919, will cease on 1st July, 1935.

Thereafter, documents granting authority to divert, use or store water from or in a public body of water will be issuable by order of the Water Board after compliance by the applicant and the Board with the procedure laid down in the Ordinance and Rules under it. The principal documents granting such authority are—

- (1) "Licences" which grant water rights;
- (2) "Sanctions" which grant authority on a purely temporary basis.

The Water Ordinance is in many respects merely an enabling Ordinance; that is, it provides for the establishment of details of procedure by means of Rules. It cannot therefore be administered until the Rules (including the forms for use with it) have been promulgated. The Rules must be approved by the Water Board and the Governor in Council before they can be printed and promulgated. As the Water Board cannot be convened until the Ordinance has been brought into force, some period will elapse before the Rules and forms are available to the public.

When the Ordinance comes into force it is obligatory, by sub-section (2) of section 21, on every person who is diverting water from streams or other bodies of water by means of works, or obstructing the flow of water by means of dams, or allowing water to be diverted or obstructed, either to apply within six months for a water right in the manner laid down in the Ordinance or to discontinue such diversion or obstruction.

By sub-section (1) of section 20 of the Ordinance those holders of water permits which have been issued by the Director of Public Works under the Water Permit Rules, 1919 (not being permits terminating on the 31st day of December of the year of issue or renewal), who have made and are at the time of the coming into operation of the Ordinance making beneficial use of water in conformity with the terms of their permits, will be entitled to

receive licences under the Ordinance, provided they make application within six months of the date of coming into operation of the Ordinance, subject to the provisions of that sub-section and the provisions of other sections of the Ordinance. Forms of application will be sent to all such registered water permit holders as soon as possible after the Water Board has approved the forms. Water permit holders are advised to fill in these forms and return them as soon as possible. Subsequent procedure by the Water Board and applicants must await the promulgation of the Rules. When a period of twenty-four months after the coming into operation of the Ordinance shall have elapsed, or such further period as may be determined by the Governor in Council by notice in the Gazette, all diversions or obstructions of water from a body of water or obstructions of a body of water effected under any authority or law whatsoever, other than the authority of the Ordinance, except in so far as they may be or become lawful under the terms of the Ordinance, shall cease to be lawful, and unless permit holders apply for a water right within the prescribed period of six months they lose the right to receive water rights in lieu of the permits. The licences conveying the water rights may be in different terms from those granted by the permits.

In view of the fact that over 1,000 water permits (other than yearly permits or their extensions) are extant, and in many cases investigation will be required before the Water Board will find itself in a position to authorize the grant of a water right, it is expected that a period of some years will elapse before all existing permits can be replaced by licences under the Ordinance. It will be realized that a licence granting a water right is an important document. It will be necessary for those who desire to acquire such a right to provide proper plans and other details of their projects as laid down in the Ordinance. In the case of important works the plans and other documents should be prepared by a qualified engineer, and where lands other than those owned by the applicant are or would be encroached on by the works, consents are requisite.

By sub-section (2) of section 20 the holders of yearly water permits terminating on 31st December, 1935, may be issued with consents by the Water Board under section 20 of the Ordinance. It is intended to send a communication to each yearly permit holder after the Rules have been promulgated.

Power exists to appoint District Water Boards to assist in the administration of the Ordinance, the constitution, powers and duties of these Boards being as set forth by Rules under the Ordinance. The Water Board will be asked to consider the question of Rules applicable to District Water Boards shortly after its appointment.

The Water Ordinance provides for the conservation of the water resources of the Colony and the control of the diversion and use of public waters and the drainage of swamps according to the best principles of practice in the Dominion. As the successful and smooth working of the Ordinance will to a large extent depend on the good will of the users of water, it is earnestly hoped that all will co-operate to make the measure a success.

GENERAL NOTICE NO. 817

THE TRADE MARKS ORDINANCE, 1930
TRADE MARKS RENEWED

Trade Mark Number	Advertised in the Official Gazette	Name of Applicant	Class
764	13-7-1931	United Kingdom Tobacco Co. (1929), Ltd.	45
765	13-7-1931	do	45
766	13-7-1931	do	45
767	13-7-1931	do	45
769	13-7-1931	Carrera, Limited	45
770	13-7-1931	do	45

UNPAID RENEWAL FEES

767	13-7-1931	United Kingdom Tobacco Co. (1929), Ltd.	45
771	13-7-1931	E. S. M., Limited.	4

Nairobi.

This 26th day of June, 1935.

W. M. KEATINGE,
Registrar of Trade Marks.

GENERAL NOTICE NO. 815

POST OFFICE NOTICE.

ARRIVAL OF KEVIN MAIL IN ENGLAND.

IT is notified for general information that the mails despatched from Mombasa on the under-mentioned dates arrived in England as stated:—

Date of despatch from Mombasa	Name of vessel by which despatched	Date of arrival in England
25th Dec. 1934	S.S. "Loughborough County"	14th June, 1935
27th May, 1935	S.S. "A. S. S. S."	15th June, 1935
1st June, 1935	S.S. "Chantilly"	16th June, 1935

General Post Office,

Nairobi,

19th June, 1935.

A. W. DRURY,
*for Postmaster General,
Uganda and Tanganyika.*

GENERAL NOTICE NO. 819

POST OFFICE NOTICE.

ARRIVAL OF AIR MAIL IN ENGLAND.

IT is notified for general information that the Air Mail despatched from Nairobi on the under-mentioned dates arrived in England as stated:—

Date of despatch from Nairobi	Date of arrival in England
19th June, 1935	17th June, 1935
24th June, 1935	22nd June, 1935

General Post Office,

Nairobi,

21st June, 1935.

A. W. DRURY,
*for Postmaster General,
Uganda and Tanganyika.*

C. O.

23277/34 Kenya

2
9
52

Mr. Flood. 1A

Mr.

Mr.

Mr. Parkinson.

Sir G. Tomlinson.

X Sir C. Bottomley. 14-11

Sir J. Shuckburgh

+ Perm. U.S. of S. 19/21

Party U.S. of S.

Secretary of State

mm

by air mail

AIR MAIL

Downing Street,

3 DEC 1934

1934.

DRAFT.

Sir,

KENYA.

EQ. 999

G.V.

(1)

I have the honour to acknowledge the receipt of your despatch No. 422 of the 22nd of August 1934, and to inform you that I agree that the Water Ordinance of 1929 may now be brought into force without amendment if the necessity for such action arises and provided that funds for its operation can be found. I note that the estimate of cost is now reduced from £3,800 to £1,500 and I trust that it will be possible to keep the necessary expenditure down to the lower figure. As you are aware, it will be necessary to embody the recommendations of the

FURTHER ACTION.

Carler

Carter Commission in a new Native Lands Trust Ordinance, which, when enacted, should override the provisions of the Water Ordinance, (so far as water in native lands is concerned) in virtue of Section 75 of the latter as it now stands.

In order to meet the objection raised by Lord Passfield, as to the effect of Section 58 of the Water Ordinance, it will, I think, be necessary to insert the words "Other than the provisions of Section 75" in Section 58 at some date when it is next found necessary to amend the Ordinance. In the meantime, between the coming into force of the Water Ordinance and the enactment of a new Native Lands Trust Ordinance, care should be ~~taken~~ that no action is taken under the Water Ordinance which would conflict with the recommendations of the Land Commission's report.

Added, as these provisions cover my Reserve Areas, it is a better idea, if any necessary to make a further amendment covering from the overriding provision in section 58 cover in their water flowing into a native area is concerned.

In conclusion I have the honour to inform you that His Majesty will not be advised to exercise his power of disallowance in respect to ~~any~~ 1/5 25/4/1929

C. O.

Mr.
Mr.
Mr.

Mr. Parkinson
Sir G. Tomlinson
Sir C. Bottomley
Sir J. Shackleton
Parlt. U.S. of S.
Parly. U.S. of S.
Secretary of State

Legislative Council of Kenya No. 1929
entitled "The Water Ordinance"
I have, etc.

(Sgd.) P. CUNLIFFE-LISTER.

DRAFT.

FURTHER ACTION.

KENYA.

No. 422



GOVERNMENT HOUSE,
NAIROBI,
KENYA.

RECEIVED
15 SEP 1934
SECRETARY

22nd AUGUST, 1934.

Sir,

I have the honour to refer to Lord Passfield's despatch no. 520 of the 8th July, 1930 on the subject of the water Ordinance, 1929.

No 4
16040/30

2. In that despatch it was suggested that it would be desirable to pass a short amending Ordinance to provide that the water Board shall obtain the prior consent of the Native Lands Trust Board to any action which it proposes to take under the water Ordinance affecting water in native reserves or other native areas, whether the water in question is water situated actually within the boundaries of such areas or is water situated outside those areas, interference with which would affect the supply within those areas, and also to provide that the above provisions and section 75 of the water Ordinance shall be excepted from the scope of section 88.

Answered (2)

3. A Bill was accordingly prepared and a copy was transmitted to you under cover of Kenya despatch No. 569 of the 25th September, 1931.

No 1
17266/31

The provisions of this Bill were approved, subject to two amendments, in your telegram No. 346 of the 20th November, 1931, but the bill was never

No 3
17266/31

introduced ...

THE RIGHT HONOURABLE
MAJOR SIR PHILIP CURLIFFE-LISTER, F.C., G.B.E., M.C., M.P.,
SECRETARY OF STATE FOR THE COLONIES,
DOWNING STREET,
LONDON, S.W.1.

introduced into the Legislative Council for two reasons. First, the financial situation did not permit of provision being made for the cost of operation of the water Ordinance, then estimated at approximately £3,500 per annum. Secondly, it was rightly supposed that the subject of the amending Bill was one on which the Kenya Land Commission would make recommendations.

4. The force of the first objection is now mitigated by the reduction of the estimate of cost to a minimum of £1,500 per annum, and the need for bringing the water Ordinance into operation may shortly become imperative. The purpose of this despatch is to enquire whether, in view of the considerations set out in the following paragraphs, you would see any objection to the water Ordinance being brought into force without amendment, provided that funds for its operation can be found.

5. The Kenya Land Commission in paragraphs 159a to 160c of their report have taken a different view from that expressed by Lord Passfield in paragraph 3 of his despatch of the 8th July, 1930. They hold that, while the Native Lands Trust Board have a right to be notified and of objecting in cases where diversions affecting water in native reserves are concerned, whether such diversions are to take place outside or inside the reserve, the Board should not be the final judge of the matter. In short, the Board's position is that of a riparian owner and decision rests with the Government.

No 7
Nov/30

6. Since the Board have themselves been in

some doubt as to their position in regard to the control of water, a memorandum, of which a copy is enclosed, was submitted to them on the 25th July. The Board endorsed generally the views expressed therein and passed a resolution in accordance with paragraph 6 of the memorandum.

7. It will necessarily be some time before legislation reflecting the Commission's recommendations regarding water inter alia can be passed. It would be obviously undesirable to introduce an amendment to the Water Ordinance not in accordance with either the Commission's Report or the draft legislation reflecting it, with the sole object of enabling the Water Ordinance to be brought into operation. I therefore trust that you will raise no objection to the Water Ordinance being brought into force as it stands, if necessity for such action arises.

I have the honour to be,

Sir,

Your most obedient, humble servant,

H. P. M. S.
GOVERNOR'S DEPUTY.

For consideration by the Central Lands Trust Board on 25.7.54.

MEMORANDUM REGARDING WATER IN AND
FLOWING INTO NATIVE RESERVES AND THE POWERS
OF THE CENTRAL LANDS TRUST BOARD
IN RELATION THERETO.

The position with regard to the granting of water permits affecting Native Reserves is by no means clear. Section 4 of the Native Lands Trust Ordinance, 1930, vests the management and control of all matters relating to land in the Native Reserves in the Central Native Lands Trust Board and that is the only general reference which can in any way be interpreted to mean that the water running through a native reserve is likewise vested in the Central Board. The only other reference to water in the Native Lands Trust Ordinance is in section 17 which qualifies sections 15 and 16 of that Ordinance, which sections give to the Governor certain specific powers. (In this connection it is interesting to note that even in 1930 the Central Board were given an absolute veto over the Governor in matters coming under sections 15 and 16).

In the past section 4 has been held to mean that every application for a permit to abstract water from streams in Native Reserves had to be submitted to the Central Board for their prior consent and this interpretation has been followed as being the correct law in the Carter Commission Report (vide paragraph 1597).

2. With this interpretation the Attorney General does not agree. He is of opinion that section 4 only gives to the Central Board the powers to which a private owner of land is entitled. Water may be considered in much the same way as minerals with regard to the question of ownership. The Chief Native Commissioner in his evidence before the Commission expressed some doubts as to the legal necessity for obtaining the sanction of the Central Board before granting a water permit. It does therefore, appear, that applications for permits for diversions which may affect native interests are referred to the Board by virtue of the fact that the Board has the management and control of land in Native Reserves, and the Board is thus given the opportunity to object to an application in exactly the same way as an owner of a riparian farm may object to an application for a permit affecting his interests.

It follows that at present a permit may legally be issued notwithstanding any objection that may be lodged by the Board.

3. This position appears not to have been recognized by the Secretary of State in commenting on the Water Ordinance, 1929, which provides for the granting of water rights by the Water Board "subject to the provisions of any law for the time being in force relating to native reserves or communal reserves". In his despatch ...

despatch No. 520 of the 8th July, 1930 Lord
Passfield stated:-

"In general, the Ordinance appears to be well suited to the somewhat special circumstances of Kenya. But there are two points on which I desire to offer comment.

The first is as to the relation between this Ordinance and the Native Lands Trust Ordinance. Section 75 of the Water Ordinance, as is pointed out by the Attorney General, makes that Ordinance subordinate to 'the provisions of any law for the time being in force relating to land in native reserves or communal reserves' and therefore, to the Native Lands Trust Ordinance the relevant provisions of which are Sections 15-17. I observe, however, that Section 88(1) of this Ordinance provides that 'notwithstanding anything contained in this Ordinance' it shall be lawful for the Water Board to authorize by sanction the diversion etc., of water, and I am advised that in view of this provision, it would be possible for the Water Board to take action under this Section notwithstanding the provisions of Section 75. Thus, the Water Board could exercise the powers in question independently of any provisions in the Native Lands Trust Ordinance. Clearly this was not the intention, and I would suggest that it would be desirable, in order to avoid any possibility of misconception, to pass a short amending Ordinance to provide in suitable terms:-

- (i) that the Water Board shall obtain the prior consent of the Central Board set up under the Native Lands Trust Ordinance to any action which it proposes to take under the Water Ordinance affecting water in native reserves or other native areas, whether it is water that is situated actually within the boundaries of such areas, or water situated outside those areas, interference with which would affect the supply within those areas;
- (ii) that the above provisions, and also Section 75 of the main Ordinance, shall be exempted from the scope of Section 88 of the principal Ordinance."

The effect of this was to suggest that the Central Board should be given, in an amendment to the Water Ordinance, powers that the Board do not possess under the Native Lands Trust Ordinance, under which their powers appear to be limited to those of objection as representing native riparian interests.

4. The need for bringing the Water Ordinance into operation is urgent. Uncertainty as to what the Board's powers in the matter are or should be has been one of the factors delaying the application of the Ordinance, in view of the amendment suggested by the Secretary of State to deal with this particular question...

question.

5. The suggestion made by the Secretary of State must now, however, be read in conjunction with paragraphs 1602 and 1603 of the Carter Commission Report, where the Commission recommends:-

"In minor matters, the Provincial Commissioner should recommend, after consulting the Local Land Board and the natives concerned, and, if both the Provincial Commissioner and the Local Land Board approve, then the application should be taken as approved in so far as the native reserve is concerned. But if either the Provincial Commissioner or the Local Land Board objects, then the matter should be referred to the Governor for decision.....If the matter in issue cannot be classed as 'minor', the procedure regarding the consultation and recommendation should be as before, but the Lands Trust Board should be notified and should have the opportunity of recording its opinion by letter to the Governor and to the Secretary of State. Decision should rest with Government."

The Director of Public Works has expressed the view that, if this recommendation is adopted, there should be no real necessity to amend the Water Ordinance at all. He observes that rule-making power extends to water rights in Native Reserves under sub-section 11 of section 97 of the Water Ordinance.

6. It is desired to know whether the Board agree with the views of the Carter Commission as quoted in paragraph 5 above.

7. Pending the introduction of legislation to give effect to the Carter Commission's proposals generally, the Board have no legal power to delegate their authority in regard to water permits affecting Native Reserves. As a result the Board have at present to deal with all applications for such permits (although the legal necessity for their doing so is doubtful), a procedure which results in unnecessary delays and reference to the Board of a number of petty cases in the category classed by the Commission as 'minor'.

8. It is accordingly suggested that the Board should resolve that the Board have no objection to any application for water permit which is not objected to by the Provincial Commissioner or the Local Board concerned and is in the opinion of the Chief Native Commissioner 'minor'.
