BEFORE THE RAILROAD COMMISSION
OF THE STATE OF CALIFORNIA

ORIGINAL

Decision No. 1683

ADOLPH BECKER,

Complainant,

-vs-

W. H. HOLABIRD, receiver of California Development Company, a corporation,

Defendant.

Case No. 551.

F. W. WEEKS, President of Board of Trustees of City of Holtville,

Complainant,

-vs-

CALIFORNIA DEVELOPMENT COMPANY, a corporation, and W. H. HOLABIRD, receiver of California Development Company, a corporation,

Defendants.

Case No. 552.

LOUIS J. IVEY,

Complainant,

-vs-

W. H. HOLABIRD, receiver of California Development Company, a corporation,

Defendant.

Case No. 573.

Conkling & Brown for complainants, Adolph Becker and Louis J. Ivey

W. H. Sprague, City Attorney, and Conkling & Brown for complainant, F. W. Weeks.

W. B. Mathews and S. B. Robinson for W. H. Holabird, receiver.

O'Melveny, Stevens and Millikin and W. K. Tuller for Title Insurance and Trust Company, trustee.

Valentine and Newby for Boaz Duncan.

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THELEN, Commissioner.

O P I N I O N.

The issue at present before this Commission in each of the three above entitled cases is to determine whether the water system of California Development Company is a public utility water system and whether W. H. Holabird, as receiver thereof, is a public utility, subject to the jurisdiction of the Railroad Commission. The water system now operated by Holabird supplies the water upon which all of Imperial County is dependent for domestic and irrigation purposes.

By agreement of all parties, these three cases were consolidated for hearing on the question of jurisdiction.

The complaint in Case 551 alleges in effect that California Development Company is a New Jersey corporation empowered under its articles of incorporation to sell, rent and distribute water for irrigation purposes for compensation and hire; that shortly after its incorporation, California Development Company acquired an irrigation system in the present County of Imperial and began selling and delivering water generally to a tract of land containing some 350,000 acres, then called the New River Country and now known as Imperial Valley; that said corporation continued to operate its said system and to sell, rent and distribute water for hire and compensation generally to the public of Imperial County for the lands hereinbefore referred to, including the lands of complainant, and also to supply water to various municipalities existing within said area, and was so engaged on December 13, 1909; that all the water so sold, rented and distributed was taken by California Development Company from the Colorado River in Imperial County; that as the result of an action to foreclose a mortgage upon the property of California

Development Company brought by Title Insurance & Trust Company, W. H. Holabird, on December 13, 1909, was duly appointed receiver of the property of California Development Company; that ever since December 13, 1909, Holabird has operated said property and has controlled, operated and managed said water system for compensation and has sold, rented and distributed water to the inhabitants of Imperial Valley and to the municipalities therein for use for irrigation purposes; that during all of said times the rate charged and collected by defendant for the use of water for irrigation purposes has been and still is $ .50 per acre foot and that such rate is reasonable; that complainant owns and possesses a certain 240 acre tract of land in Imperial Valley under the flow of the canals and systems of California Development Company, which lands have heretofore been furnished with water from this system, are ready for irrigation and are worthless without water for irrigation; that it is impossible to procure water for the irrigation of complainant's land from any water system other than that of the defendant; and that complainant has made proper demand and tender for water fromdefendant's system, but that defendant has refused to deliver water to complainant, though having an abundant supply of surplus water at its disposal. Complainant asks this Commission to require defendant to begin the delivery of water to irrigate complainant's land at the same price and in the same manner that defendant furnishes and delivers water to others owning lands under the same system.

The amended complaint in Case No. 552, after making general allegations of the same general tenor as those contained in the complaint in Case No. 551, alleges that the water system of the California Development Company constitutes the sole and only supply of water for all that part of Imperial County which is known as Imperial Valley and contains an area of 400,000 acres of land, a population of ower 25,000 people

and five incorporated cities; that the value of the entire property of California Development Company in charge of the receiver does not exceed $400,000.00; that the reasonnable operating expenses and the income are as set forth; that if the defendant will furnish water to additional lands to the extent of his ability the annual revenue of the system will be increased $150,000.00 without appreciable increase in operating expenses; that the rate charged by California Development Company and the receiver has uniformly been $ .50 per acre foot except that the rate charged the City of Holtville has been $1.00 per acre foot without any reason for the difference in the rate; that the rate so charged for water is grossly exorbitant and yields a return of over 30 per cent on the value of the property; that the California Development Company and the receiver are refusing to deliver water to persons entitled thereto and are claiming the right to deliver water or to refuse to deliver water to whomsoever they think fit and that they make exactions for the right to be allowed to purchase water from them; that they discriminate unjustly in charges for water; and that the receiver has entered into a contract with Imperial Water Company No. 5, a corporation, for the delivery of water, but refuses to enter into contracts with other corporations and persons similarly situated upon the same terms. The complainant prays that this Commission establish the rates to be charged by defendants for water, that defendants be required to deliver water to all persons and corporations who can be served with water and that defendants be prohibited from making any discrimination in rates between the City of Holtville and other customers.

The complaint in Case No. 573 contains allegations similar to those contained in the complaint in Case No. 551, except that there is no allegation that complainant's lands have heretofore been irrigated from the water system of the California Development Company.

In each of these three cases, the defendant, W. H. Holabird, as receiver of the property of California Development Company, interposed a demurrer on the ground that it does not appear from the complaint that defendant is a public utility subject to the jurisdiction of this Commission and also on the ground that it does not appear that leave of the court having control over the receiver has been secured to sue or proceed against the receiver.

A hearing on the demurrers was held in Los Angeles on May 29, 1914. All parties agreed that the Commission should pass upon the question of jurisdiction, and evidence and argument were received on that issue. Commissioner Eshleman, who was designated jointly with myself to hear these cases, felt disqualified and asked to be relieved from participation in the decision. The time granted for the filing of briefs has now expired and the issue of jurisdiction is now ready for decision.

I shall first make my findings of fact and shall then apply the law. Each statement of a fact herein contained is to be regarded as a finding of fact.

California Development Company was incorporated under the laws of New Jersey with a corporate life to extend from April 25, 1896 to April 25, 1946. The certificate of organization shows that the corporation was formed, among other purposes "to acquire, hold, construct and maintain headings, dams, ditches, canals, reservoirs and other structures and appliances for collecting, storing and conducting water and irrigating

land"; "to supply and distribute water to, and irrigate and cultivate the lands of the company and of others"; and "to sell or let such water or the right to use the same."

The total amount of capital stock is $1,250,000.00, divided into 12,500 shares of the par value of $100.00 each. The evidence shows that ownership of stock in California Development Company has never entitled and does not now entitle the holders of such stock to any water, and that this corporation is one organized for profit and is not a mutual company.

On December 15, 1895, there was posted at Hanlon's Heading, a point located on the west bank of the Colorado River, about a quarter of a mile north of the international boundary line between the United States and Mexico, for and on behalf of California Development Company, a written notice of appropriation reading as follows:

"Water Notice.

TO WHOM IT MAY CONCERN. Dec. 15, 1895.

NOTICE IS HEREBY GIVEN that we, the California Davelopment Company, a corporation, organized under the laws of the State of New Jersey do for ourselves and others claim (10,000) ten thousand cubic feet per second of the water of the Colorado River flowing by this intended point of diversion. This intended point of diversion being located on the SW¼ of Section 25, Tp. 16 S., R. 21 E. of San Bernardino Base and Meridian and being further described as a point or location on the west bank of the Colorado River in San Diego County, State of California, one and one quarter miles more or less up the river from the point where the International line between the United States and Mexico intersects the west bank of the Colorado River.

"The said point of diversion is more specifically described as extending from a point due west of the pumping plant of the Paymaster Mining Co. up the river a distance of (500) five hundred feet more or less to a hill.

"We the California Development Company claim the right to the said 10,000 cubic feet per second for the purpose of developing power and for the irrigation of lands in San Diego County State of California and in Lower California, Republic of Mexico. We purpose carrying the water from the above described point of diversion through a canal which will run in a southwesterly direction through Lower California, Republic of Mexico and

thende into that portion of San Diego County State of California lying to the east of the San Jacinto Mts. and known as the New River Country. Said canal will be 200 feet in width and will carry a depth of 10 feet of water. Its length will be 50 milesmore or less.

California Development Company.

"I hereby certify that I witnessed the posting of the original water notice of which this is a true and correct copy.

William T. Heffernan."

The foregoing notice was recorded at the request of W. T. Heffernan on December 19, 1898 in the office of the County Recorder of San Diego County.

The "New River Country" referred to in the notice means the territory now known in general as the Imperial Valley, located in Imperial County, California. At the time California Development Company was incorporated and the foregoing notice was posted, the land in what is now Imperial Valley was desert land belonging to the Federal Government and none of it belonged to California Development Company when the notice of appropriation was posted. The evidence shows that while California Development Company later acquired certain scattered lands in California which it thereafter purported to sell to the Southern Pacific Company, none of this land was ever irrigated by the California Development Company prior to the sale, and none of it has ever been irrigated by California Development Company in its capacity as an appropriator of water. When California Development Company caused the foregoing notice to be posted, claiming the right to 10,000 cubic feet per second of water "for the purpose of developing power and for the irrigation of lands in San Diego County, State of California and in Lower California, Republic of Mexico" it is clear the company intended to appropriate this water primarily for the purpose of irrigating the lands of others, at least in so far as California lands are concerned, and not to irrigate

lands of its own as an appropriator.

The actual construction of California Development Company's system for the irrigation of lands in the Imperial Valley was commenced in 1900 and water was first conducted through it to the Imperial Valley in June, 1901. The system consists of the main intake works, known as Hanlon Heading, located on the west bank of the Colorado River, at a point about a quarter of a mile north of the international boundary line between the United States and Mexico; a main canal known as the Alamo Canal, leading from said heading, crossing the international boundary line, and extending for a distance of approximately fifty miles through Mexican territory to a point known as Sharp's Heading, near the international boundary line, and on the Mexican side, distant eight or nine miles from the town of Calexico, which canal is in part artificial, and in part the natural channel of the Alamo River, and which has, at the present time, a capacity of approximately 4000 second feet of water, and other canals, branching from the Alamo Canal at Sharp's Heading and other points in the vicinity thereof and leading to various portions of Imperial Valley, most of these branch canals entering the United States within a short distance after leaving the Alamo Canal, but some extending westerly for several miles through Mexican territory before entering the United States.

The construction of the main canal for the most part through Mexican territory was made necessary by the fact that a range of sand hills extends in a northwesterly and southeasterly direction along the easterly side of Imperial Valley, between it and the Colorado River, extending to a point below the international boundary. By reason of the laws of Mexico, preventing the acquisition by foreigners of land within a certain distance of the international boundary line, it became necessary for the promoters of the California Development Company to organize a subsidiary

corporation under the laws of Mexico. This corporation was organized under the name of La Sociedad de Irrigation y Terrenos de la Baja California. All its capital stock was held by California Development Company. The Supreme Court of this State in Thayer vs. California Development Company, 164 Cal. 137, very properly referred to this Mexican Company as "the California Development Company under another name," and held that "whatever was done through it (the Mexican company) will be regarded as in fact done by the California Development Company." On May 17, 1904, the Mexican Company secured from the Mexican Government a Concession authorizing the company to carry through its canals in Mexico water to an amount of 284 cubic meters per second from the waters taken from the Colorado River and to carry the same to the United States subject to the exception contained in Article II of the Concession, a translation whereof reads as follows:

> "Article Second. From the water mentioned in the foregoing article enough shall be used to irrigate the lands susceptible of irrigation in Lower California, with the water carried through the canal or canals, without in any case the amount of water used exceeding one-half of the volume of water passing through said canal."

Article XVIII, translated, reads as follows:

> "Article Eighteenth. The Company, grantee, is at liberty to enter into contracts and agreements with individuals and private and public corporations for the use of the water granted to it, being subject in the prices to be charged to the tariff which with due opportunity shall be presented to the Secretary of Development for his examination and approval, the Company, grantee, having the right, nevertheless, to use said water in the irrigation of the lands belonging to it."

It thus appears that the Mexican Government expressly insisted that enough water be reserved, up to one-half the volume, "to irrigate the lands susceptible of irrigation in Lower California" and that the prices to be charged for such water are subject to supervision and regulation by the Mexican Government. If it is now held that this company is not a

public utility in California, we shall have the curious spectacle of one and the same company being a public utility in Mexico, and yet not a public utility across the line in California.

On December 28, 1900, California Development Company entered into a contract with the Mexican Company in which the California Development Company agrees to deliver to the Mexican Company sufficient water to enable the latter "to furnish water for the irrigation of the lands situated in Lower California, Republic of Mexico, and State of California, United States of America, which are irrigable by gravity from the system of canals and irrigating system to be constructed." It was provided that "said waters so to be delivered by said system of canals to form an irrigation system for the purpose of irrigating lands situated in California, United States of America, and in Lower California, Republic of Mexico, which are irrigable from the Colorado River by gravity." It thus appears that the parties contemplated that this system should irrigate up to its capacity all the lands located in California and Lower California "which are irrigable from the Colorado River by gravity." The evidence shows that in Mexico, under rates regulated by the Federal Government, approximately 244,000 acres of land are being actually irrigated or are in process of being placed under irrigation from works now in course of construction.

Turning now to the situation in California, I find that California Development Company constituted Imperial Land Company its exclusive agent for the purpose of selling water stock in the various mutual water companies which the California Development Company later incorporated, as will hereinafter appear, and that this company sold water stock without discrimination as to persons, for location anywhere within the Imperial Valley within territories as to which the California Development Company had

incorporated or would incorporate mutual water companies. Advertisements which were inserted by Imperial Land Company in newspapers circulating in the Imperial Valley, copies of which are in evidence in this case, show clearly the purpose of California Development Company to sell water for the entire New River Country. I quote in part from an advertisement in the issue of the Imperial Valley Press of May 11, 1901:

> "The Colorado Delta, located in Riverside and San Diego Counties, in Southern California, and extending down into Lower California, comprises about 1,000,000 acres of level, irrigable land that has been made during the past ages by alluvial deposits carried down by the waters of the Colorado River."
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> "An extensive irrigation system is now being constructed to reclaim this large tract of country. The main canal will be enlarged and the main branch canals extended to meet the demands for water as the irrigated area is enlarged."
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> "The land to be reclaimed is located in San Diego County, east of the New River, and embraces 500,000 acres of level, fertile land, free from alkali, with sufficient slope to be easily irrigated. It is all government land and can be taken up under the desert land law and the homestead law. 320 acres can be taken up by each person under the desert land law, and residence on the land is not required. This liberal law is to be repealed or unfavorably modified soon."
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> "This tract will be irrigated by mutual water companies, designated as Imperial Water Company No. 1, No. 2, No.3, etc., which companies are formed to distribute water to stockholders at cost."
>
> "The Imperial Valley Land Company sells this water stock to the land owners--one share to each acre. The price is now only $11.25 per share."
>
> "Water will be ready for use for fall and winter crops."

The testimony of F. G. Havens, a witness for the complainants, fully substantiates the "holding out" shown by this advertisement and the others which are a part of the evidence in these cases. I find as a fact from the evidence in these cases that California Development Company held itself out as ready, willing and able to sell from its water system water for domestic and irrigation for all of the Imperial Valley.

The particular agencies which California Development Company at first selected for this purpose were mutual water companies which were incorporated by the agents of California Development Company. The mutual water companies so organized were known respectively as Imperial Water Companies No. 1, 4, 5, 6, 7, 8 and 12. Each of these companies had a number of shares of capital stock equal roughly to the number of acres in the territory assigned to it. That the number of shares did not always coincide with the acreage is shown by the fact that the territory assigned to Imperial Water Company No. 1 includes 140,000 acres, although the company has only 100,000 shares. Each share of stock entitled the owner to four acre feet of water per annum. The shares of stock were all sold by California Development Company and the proceeds thereof, with the exception of certain small sums, went into the treasury of California Development Company and not of the mutual water company. During the first years of this enterprise, there was no way, except in the case of the cities hereinafter referred to, in which a settler could secure any water for irrigation or domestic purposes except by buying water stock from California Development Company and paying California Development Company for the same. It is clear that this was a method adopted by California Development Company of compelling the settlers to supply the money to construct its system. The California Development Company entered into a contract with each of these mutual water companies agreeing to deliver the water necessary to irrigate the lands described in the mutual water company's articles of incorporation to the extent of four acre feet per annum for each outstanding share of stock of the mutual company, at the rate of $ .50 per acre foot. Copies of all these contracts are in evidence in this case. I desire to draw attention at this point to the fact that California De-

velopment Company caused each of these mutual companies to be incorporated, that it sold their stock and kept most of the proceeds, and that the mutual companies were clearly agencies created by California Development Company for the sale of its water to all the residents of Imperial Valley.

Before referring to the other sales of water from this system, I desire to draw attention to the fact that by reason of breaks in the headworks at the Colorado River, occasioning great damage to the Imperial Valley, California Development Company became heavily involved financially; that suit was brought by the holders of the company's bonds to foreclose the mortgage; that on December 13, 1909, the defendant herein, W. H. Holabird, was appointed receiver of the property of California Development Company and that ever since Mr. Holabird has been acting as receiver and has been in possession of the system and operating the same.

I shall now draw attention to the various users of water who have <u>directly</u> received water from this system, for compensation.

1. <u>MUTUAL WATER COMPANIES INCORPORATED BY CALIFORNIA DEVELOPMENT COMPANY.</u>

These companies, as already stated, are Imperial Water Companies No. 1, 4, 5, 6, 7, 8 and 12. Each of these companies, as stated, has a contract with the parent company, and distributes the water so received to its own stockholders on the mutual plan.

2. <u>MUTUAL WATER COMPANIES NOT INCORPORATED BY CALIFORNIA DEVELOPMENT COMPANY.</u>

Water has also been sold for compensation from this system to the following mutual water companies which were not organized by California Development Company and which were not required to give up to the latter company any proceeds from the sale of their stock:

Imperial Water Company No. 2- contract dated March 20, 1913
Imperial East Side Water Company- " " " " "
Imperial South Side Water Company- " " " " "
Imperial Water Company No. 3- " " July 29, 1913
Imperial Water Company No. 9- " " Jan. 10, 1914.

In each of these cases the contract was made after the receiver had applied to the superior court for authority to enter into the contract and had been granted authority so to do. The Imperial East Side Water Company has taken only a small amount of water, but the other companies have continuously taken large amounts. Certain creditors of California Development Company, who were also represented at the hearing before the Railroad Commission, objected to the supply of water to these companies, but their objections were overruled for the reason that their rights are confined to the protection of their interest as creditors and do not include the ultimate disposition of the property above and beyond the payment of creditors' claims and that the extension of the company's water distribution by the receiver to new lands and the resultant extension of the volume of water applied to beneficial uses is the creation of new assets of the company and the safe vesting of rights, which if not used at an early date, are in danger of being never obtained. These reasons apply to the position of the creditors in the present proceedings before this Commission.

3. HOLTON POWER COMPANY.

From the beginning this system has sold water to Holton Power Company for use in the generation of electricity. This water is supplied under a contract in quantities of between 175 and 225 cubic second feet, except during shortages of water, when the amount sold is cut down.

4. MUNICIPALITIES.

The city of Imperial received its water under a contract with California Development Company at the rate of $1.00 per acre foot. The receiver continued the delivery to the city until at the city's request the contract was cancelled. The city now secures its water from Imperial Water Company No. 1.

The city of Calexico received its water from the receiver until about a year ago, when the company bought stock in Imperial Water Co. No. 1. The receiver had a draft of a contract with the city, to become effective when approved by the court. It was never so approved and hence never became effective. The city of Calexico accordingly received its water from this system without a contract.

The city of Holtville has been receiving water from this system ever since January, 1910, and has been paying for it at the rate of $1.00 per acre foot. This city has never had a contract and does not now have a contract covering the purchase of this water.

5. PRIVATE INDIVIDUAL.

W. F. McCollum has been receiving water for 2½ years from this system for the irrigation of some 180 acres and has been paying for the water in advance at the rate of $ .50 per acre foot with a minimum of 250 inches to be paid for during each 24 hours' use. The receiver was authorized by the court to supply the water but no contract has ever been in existence.

6. MEXICAN LANDS.

The delivery of water for use of these lands has already been fully explained.

The evidence in these proceedings thus shows that in pursuance of California Development Company's "holding out" of ability and desire to supply water for the entire Imperial Valley, water has in fact been sold from this system to mutual water companies organized by the California Development Company, other mutual companies not organized by this Company, a power company, three municipalities and a private individual. While these sales have generally been under contract, this has not been the case with the city of Holtville, the city of Calexico and W. F. McCollum. The receiver's own attitude toward the contracts is shown by the fact that once he sent notice to all the mutual water companies that their rates would be increased and raise the rates and to again he applied to the court for authority to require payment in advance from most of the mutual water companies, though their contracts provide that payments shall be made half yearly after the water has been delivered.

I find from the evidence in this case that with the exception of two artesian wells in Holtville all the water which is used in the entire Imperial Valley for drinking, irrigation and commercial purposes is secured, directly or indirectly, from the system of California Development Company. The territory so supplied contains 400,000 acres, and the value of real and personal property in the Valley is in excess of $50,000,000.00. Over 30,000 people, including five incorporated cities, are dependent upon this system for their water. Upon this system absolutely depends the welfare of all these people and the security of their property.

I find from the evidence in these proceedings that the Colorado River is the only feasible source of water supply for the people of the Imperial Valley; that the only water which is being brought to this Valley is conveyed through the

system of the California Development Company; that this system has a monopoly of supplying water for the Imperial Valley and that as a practical matter no other water company could take water from the Colorado River and serve the Imperial Valley in competition with the California Development Company or its receiver.

This is clearly a case in which the public welfare requires that this water system be subjected to public regulation and supervision as a public utility. This company, if it is not a public utility, can make or break every landowner in the Imperial Valley. It can deliver water to one and refuse to deliver water to another. By the expedient of refusing to sell except by contract, it can discriminate ad libitum. It can charge one customer one price for water and another customer in the same condition another price. If it is not a public utility, neither mandamus nor any action by this Commission can avail to protect water users if the company refuses to carry out its contracts, and the only remedy remaining will be the more or less futile remedy in the courts on the contract. If this is not a public utility, the court from which the receiver takes his instructions has the option to say whether there shall be a continuance of the water supply to any person in the Imperial Valley. Every reason which gives legislative bodies the right to say that monopolies shall be subject to public regulation and control applies with added strength to this case, where the monopoly is exercised over water--the most vital and necessary to life of all public utility services.

Under the facts as heretofore found in this opinion, is this system a public utility system subject to the jurisdiction of this Commission? The answer is found in the Constitution and Statutes of this State. Without referring to other consti-

tutional and statutory provisions which may be held to apply, I shall confine myself to the most recent expression of the will of the people of this State, as found in Section 23 of Article XII of the Constitution, as amended on October 10, 1911; the Public Utilities Act originally in effect on March 23, 1912, and effective, as amended, on August 10, 1913; and Chapter 80 of the Laws of 1913, effective August 10, 1913.

Section 23 of Article XII of the Constitution of California, as amended on October 10, 1911, provides in part that "every private corporation, and every individual or association of individuals, owning, operating, managing or controlling * * * any plant or equipment within this State * * * for the production, generation, transmission, delivery or furnishing of heat, light, water or power * * * * either directly or indirectly to or for the public * * * * is hereby declared to be a public utility subject to such control and regulation by the railroad commission as may be provided by the legislature." The section continues as follows: "and every class of private corporations, individuals or associations of individuals hereafter declared by the legislature to be public utilities shall likewise be subject to such control and regulation."

The section further provides as follows:

> "The railroad commission shall have and exercise such power and jurisdiction to supervise and regulate public utilities, in the State of California, and to fix the rates to be charged for commodities furnished or services rendered by public utilities as shall be conferred upon it by the legislature, and the right of the legislature to confer powers upon the railroad commission respecting public utilities is hereby declared to be plenary and to be unlimited by any provision of this constitution."

Section 2 of the Public Utilities Act, as amended by Chapter 553 of the Laws of 1913 (Statutes 1913, page 934) reads in part as follows:

"(w) The term 'water system,' when used in this act, includes all reservoirs, tunnels, shafts, dams, dikes, head-gates, pipes, flumes, canals, structures and appliances, and all other real estate, fixtures and personal property, owned, controlled, operated or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing, carriage, apportionment or measurement of water for power, irrigation, reclamation or manufacturing, or for municipal, domestic or other beneficial use."

"(x) The term 'water corporation,' when used in this act, includes every corporation or person, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any water system for compensation within this state."

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

Sections 1, 2, 3 and 4 of Chapter 80 of the Laws of 1913 (Statutes 1913, p. 84) read as follows:

"Section 1. Whenever any person, firm or private corporation, their lessees, trustees, receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any water system within this state, sells, leases, rents or delivers any water to any person, firm, private corporation, municipality or any other political subdivision of the state whatsoever, except as limited by section 2 hereof, whether under contract or otherwise, such person, firm or private corporation is a public utility, and subject to the provisions of the public utilities act of this state and the jurisdiction, control and regulation of the railroad commission of the State of California."

"Sec. 2. Whenever any private corporation or association is organized for the purpose solely of delivering water to its stockholders or members at cost, and delivers water to no one except its stockholders or members at cost, such private corporation or association is not a public utility, and is not subject to the jurisdiction, control or regulation of the railroad commission of the State of California."

"Sec. 3. Whenever any private corporation or association organized for the purpose of delivering water solely to its stockholders at cost does deliver water to others than its stockholders or members for compensation, such private corporation or association becomes a public utility and subject to the terms of the public utilities act and the jurisdiction, control and regulation of the railroad commission of the State of California."

"Sec. 4. Whenever any private corporation or association is organized both for the purpose of delivering water to its stockholders or members at cost and to persons, firms, corporations, municipalities or other political subdivisions of the state in addition thereto, such private corporation or association is a public utility and subject to the provisions of the public utilities act and to the jurisdiction, control and regulation of the railroad commission of the State of California."

Bearing in mind these constitutional and statutory provisions, I find that the water system of California Development Company is clearly a public utility system and that W. H. Holabird, as receiver thereof, is a public utility, subject to the jurisdiction of the Railroad Commission. This conclusion is based on the findings of fact which have been set forth in this opinion and in addition thereto on the following specific findings of fact:

1. The water system of California Development Company is owned, controlled, operated and managed in connection with and to facilitate the diversion, development, supply, distribution, sale, furnishing and carriage of water for power, irrigation, reclamation,

municipal and domestic use.

2. W. H. Holabird, as receiver of the water system of California Development Company, is controlling, operating and managing the water system of California Development Company for compensation within this state.

3. The water system of California Development Company and W. H. Holabird, as receiver thereof, are engaged in the business of the sale of water for compensation to W. F. McCollum, an individual, the Holton Power Company, a corporation, the City of Holtville, a municipal corporation, and to numerous mutual water companies as hereinbefore indicated.

4. California Development Company is not organized for the purpose of delivering water to its stockholders or members at cost, but on the contrary is a corporation organized for profit.

5. The water system of California Development Company and W. H. Holabird, as receiver thereof, are engaged in the business of selling water for compensation directly to portions of the public and indirectly to and for the entire public of Imperial Valley, State of California.

6. The water system of California Development Company and W. H. Holabird, as receiver thereof, have a monopoly of the business of transmitting water for sale, rental and distribution from the Colorado River (which is the only source of water for the Imperial Valley) for use for all purposes in the Imperial Valley.

Under the facts as shown in these proceedings and the constitution and statutes of this state applicable thereto, there can be no question whatever that the water system of the California Development Company, and W. H. Holabird, as receiver thereof, are respectively a public utility water system and a public utility and are subject to the jurisdiction of the Railroad Com-

mission unless it can be held that the Constitution and Statutes of California violate in this regard some provision of the Federal Constitution.

As the facts before the Court in the Thayer case, supra, differ materially from the facts now ascertained and set forth herein, and as all the constitutional and statutory provisions hereinbefore set forth were enacted subsequent to the timethe complaint in the Thayer case was filed, I am of the opinion that the decision in that case can be of but little assistance herein, and accordingly shall pass on to a consideration of the federal questions.

While this Commission has no power to render invalid any provision of the Constitution or Statutes of this state, and will ordinarily proceed on the assumption that the same are valid, the question here presented is of such vital importance and so fundamental in public utility regulation that I desire briefly to express my views thereon.

It is urged in this proceeding that defendant's water system has never been "held out" as serving the public, that it has never been "dedicated" to public use, that the constitutional and statutory provisions of this state, if applied to this system, would amount to a "taking" of property and that such application would hence violate the Fourteenth Amendment to the Federal Constitution. This contention makes necessary a consideration of the principles underlying public utility regulation by the states and of the attitude of the Supreme Court of the United States toward state action in this field.

The declarations in the Constitution and Statutes of this state which have hereinbefore been set out constitute a finding by the people of this state that the public interest and general welfare require that the classes of corporations, associations and persons therein specified shall be deemed public

utilities and subject to supervision and regulation as such. The Supreme Court of the United States has repeatedly held that whenever possible it will sustain such findings and that if any state of facts can reasonably be held to exist to sustain such findings, the Court will do so.

In Munn v. Illinois, 94 U.S. 113, 132, referring to constitutional and statutory provisions of Illinois declaring grain elevators and warehouses to be public warehouses, Chief Justice Waite, speaking for the Court, said:

> "For our purposes we must assume that if a state of facts could exist that would justify such legislation, it actually did exist when the statute under consideration was passed. For us the question is one of power, not of expediency. If no state of circumstances could exist to justify such a statute, then we must declare this one void, because in excess of the legislative power of the State. But if it could, we must presume it did. Of the propriety of legislative interference within the scope of legislative power, the legislature is the exclusive judge."

In German Alliance Insurance Co. vs. Lewis, Superintendent of Insurance of Kansas, 233 U.S. 389, 413, decided on April 20, 1914, in which case the Court passed on the validity of a statute of Kansas for the first time subjecting the insurance business to regulation as to rates, the Court says on the same point:

> "What makes for the general welfare is necessarily in the first instance a matter of legislative judgment and a judicial review of such judgment is limited."

The Court then quotes from Chicago, Burlington & Quincy Railroad Company vs. McGuire, 219 U.S. 549, 569, as follows:

> "The scope of judicial inquiry in deciding the question of power is not to be confused with the scope of legislative considerations in dealing with the matter of policy. Whether the enactment is wise or unwise, whether it is based on sound economic theory, whether it is the best means to achieve the desired result, whether, in short, the legislative discretion within its prescribed limits should be exercised in a particular manner, are matters for the judgment of the legislature, and the earnest conflict of serious opinion does not suffice to bring them within the range of judicial cognizance."

of the United States

The Supreme Court has taken the same attitude with reference to state statutes which declare what constitutes a "public use" in eminent domain proceedings and has uniformly upheld such statutes as against the charge that the use was in fact a private use. See Clark vs. Nash, 198 U.S. 361, in which case the legislature of Utah declared that the enlargement of one man's irrigating ditch to enable another man to run his water through it is a public use; Strickley vs. Highland Boy Gold Mining Company, 200 U.S. 527, in which case the legislature of Utah made a similar finding as to an aerial bucket line over private property between a mine and a railroad to accommodate one mine; Hairston vs. Danville & Western Railway Company, 208 U.S. 598 and Union Lime Company vs. Chicago and Northwestern Railway Company, 233 U.S. 211, in which cases the state legislatures had given railway companies power to condemn a right of way across private property to build spur tracks to serve an individual shipper in each case. In the Union Lime Company case, decided on April 6, 1914, Justice Hughes says, at page 218:

> "The assignments of error come to the single point--as to the character of the use. The State through its highest court declares the use to be a public one, and we should accept its judgment unless it is clearly without ground."

The foregoing authorities and others to which it is not necessary to refer show that if a state constitution or statute makes a finding on a question of general welfare, public interest or public use the Supreme Court of the United States will, whenever possible, sustain that finding.

I shall now consider the principles under which a state must act in declaring that any agency is a public utility and subject to public regulation. As I shall show, the Supreme Court of the United States has definitely decided that if the circumstances surrounding a particular business are such that

the public has a special interest therein and that the general welfare demands public regulation and supervision thereof, the state has the right under its police power to find and declare the fact of the public interest and thereafter to regulate and supervise the business, entirely irrespective of whether its owners have "held themselves out" as being public utilities, and without any "dedication" except that they have engaged in that particular business and without any compensation for any so-called "taking", there being here no "taking" in the constitutional sense.

The leading case is Munn vs. Illinois, supra. It appears that in 1870 the Constitution of Illinois was amended so as to declare that all elevators or storehouses where grain or other property is stored for a compensation, whether the property stored be kept separate or not, should be public warehouses. The statute of April 25, 1871 divided such public warehouses into three classes, provided for their licensing and prescribed the maximum rates to be charged by each class. Two individuals named Munn and Scott had been engaged in storing grain of different owners in an elevator in Chicago for many years prior to the constitutional amendment. They had not "dedicated" their property to the public in any way further than to engage in the warehouse business. They had not held themselves out as being public utilities, and had conducted their business free from regulation. After the statute of 1871 was passed, they refused to secure a license or to conform to the rates established. They were prosecuted and fined $100. The judgment of the lower court was affirmed by the Supreme Court of Illinois and finally by the Supreme Court of the United States. The latter court held that the people of Illinois had the right, through their constitution and statutes, to declare that the elevator of Munn and Scott was a public warehouse and to regulate it as such.

Chief Justice Waite, after referring to the fact that under the police power it has been customary from time immemorial to regulate ferries, common carriers, hackmen, bakers, millers, wharfingers and innkeepers and to establish maximum rates to be charged by them, proceeds to analyze the underlying principles, at page 125, as follows:

> "This brings us to inquire as to the principles upon which this power of regulation rests, in order that we may determine what is within and what without its operative effect. Looking, then, to the common law, from whence came the right which the Constitution protects, we find that when private property is 'affected with a public interest, it ceases to be juris privati only.' This was said by Lord Chief Justice Hale more than two hundred years ago, in his treatise De Portibus Maris, 1 Harg. Law Tracts 78, and has been accepted without objection as an essential element in the law of property ever since. Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has created. He may withdraw his grant by discontinuing the use, but, so long as he maintains the use, he must submit to the control."

Again, at page 133, the Chief Justice says:

> "Neither is it a matter of any moment that no precedent can be found for a statute precisely like this. It is conceded that the business is one of recent origin, that itsegrowth has been rapid, and that it is already of great importance. And it must also be conceded that it is a business in which the whole public has a direct and positive interest. It presents, therefore, a case for the application of a long-known and well established principle in social science, and this statute simply extends the law so as to meet this new development of commercial progress. There is no attempt to compel these owners to grant the public an interest in their property, but to declare their obligations if they use it in this particular manner."

It thus appears clearly from this decision that whenever the facts surrounding the business are such that the public has an interest therein, or is interested therein, sufficiently to justify regulation from the standpoint of the public welfare, the legislature has the right to declare the fact and provide for the regulation. As there is "no attempt to compel these

owners to grant the public an interest in their property," there is of course no "taking" and hence no compensation for any taking. The case shows clearly the distinction between the power of eminent domain and the police power. There is no attempt here to compel the owners against their will to engage in a business which is subject to regulation. Munn and Scott entered into the warehouse business voluntarily and they must be assumed to have done so with knowledge that because of the character of the business or the circumstances surrounding it, the business might thereafter become of such special interest to the public that the general welfare would require its regulation as a public utility.

The principles established in the Munn case have been frequently reaffirmed by the Supreme Court of the United States.

In Township of Burlington vs. Beasley, 94 U.S. 310, the Supreme Court, relying on the Munn case, upheld a Kansas statute providing that "all water, steam or other mills, whose owners or occupiers grind or offer grain for toll or pay are hereby declared public mills."

In the Sinking Fund Cases, 99 U.S. 700, Chief Justice Waite, referring to the Munn case, said at page 747:

> "The inquiry there was as to the extent of the police power in cases where the public interest is affected; and we held that when an employment or business becomes a matter of such public interest and importance as to create a common charge or burden upon the citizen; in other words, when it becomes a practical monopoly, to which the citizen is compelled to resort, and by means of which a tribute can be exacted from the community, it is subject to regulation by the legislative power."

In Spring Valley Water Works vs. Schottler, 110 U.S. 347, the Court, at page 354, says:

> "That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in Munn vs. Illinois, 94 U.S. 113. As was said in that case, such regulations do not deprive a person of his property without due process of law."

It will hardly be necessary to draw attention to the fact that this language applies exactly to the present case.

In Budd vs. New York, 143 U.S. 517, the court upheld a New York statute establishing maximum charges for elevating, receiving, weighing and discharging grain. After an exhaustive review of the Munn case, and of later federal and state cases in accord therewith, Justice Blatchford, at page 545, says:

> "The elevator is devoted by its owner, who engages in the business, to a use in which the public has an interest, and he must submit to be controlled by public legislation for the common good."

In Brass v. North Dakota, 153 U.S. 391, the Supreme Court upheld a North Dakota statute declaring grain elevators to be public warehouses and their owners to be public warehousemen and establishing rates of storage. The case is important in that it does not rest upon the basis of monopoly, but on the general principle that one who engages in a business in which the public has an interest must submit to regulation as long as he remains in the business, if the general welfare demands such regulation.

In Cotting vs. Kansas City Stockyards Company, 183 U.S. 79, the Supreme Court, while declaring void a Kansas statute regulating stockyards because the statute applied only to one company, leaving the others unregulated, reaffirmed the Munn case and also declared the state's power to regulate stockyards as public utilities as follows, at page 85:

> "While not a common carrier, nor engaged in any distinctively public employment, it is doing a work in which the public has an interest, and therefore, must be considered as subject to governmental regulation."

Finally, in German Alliance Insurance Company vs. Lewis, Superintendent of Insurance of Kansas, 233 U.S. 389, decided on April 20, 1914, the Supreme Court expressly reaffirms the Munn, Budd and Brass cases, applies their doctrine to the insurance business, where there can be no possible "grant of a property

interest," and definitely establishes the principle that a business, at first by its nature or the surrounding circumstances clearly private in character may rise to be of public concern and be subject, in consequence, to governmental regulation.

A Kansas statute gave the state superintendent of fire insurance power to regulate and establish rates of fire insurance and was by its terms applicable to insurance companies which for many years had done business in Kansas without regulation and which protested against being regulated. One of these companies, the German Alliance Insurance Company, asked for an injunction against the enforcement of the statute, on the ground that its business was a private business and that the proposed state regulations consequently amounted to a taking of private property for public use. Justice McKenna, who delivered the opinion of the Court, reviewed and affirmed the Munn, Budd and Brass cases. Referring to the Munn case, Mr. Justice McKenna said:

> "In other words, that which had been private property had from its uses become, as was declared, of public concern."

Again:

> "The principle was expressed as to property, and the instance of its application was to property, but it is manifestly broader than that instance. It is the business that is the fundamental thing; property is but its instrument, the means of rendering the service which has become of public interest."

Referring then to the dissenting opinion of Justice Field in the Munn case and Justice Brewer in the Budd case, which dissenting opinions voice with consummate ability every objection at present made by certain members of the bar and others in this state against the performance by government of the work of government as that work grows pari passu with changing conditions, Justice McKenna, with an insight which looks beyond the doubt and hesitancy of the present to the needs of our people in the future, says:

"Against that conservatism of the mind, which puts to question every new act of regulating legislation and regards the legislation invalid and dangerous until it has become familiar, government--state and national--has pressed on in the general welfare; and our reports are full of cases where in instance after instance the exercise of regulation was resisted and yet sustained against attacks asserted to be justified by the Constitution of the United States. The dread of the moment having passed, no one is now heard to say that rights were restrained or their constitutional guaranties impaired."

Referring to Brass vs. Stoeser, supra, Justice McKenna says:

"The case is important. It extended the principle of the other two cases and denuded it of the limiting element which was supposed to beset it--that to justify regulation of a business the business must have a monopolistic character. That distinction was pressed and answered."

Finally, in holding the Kansas statute to be valid, Justice McKenna says:

"The cases need no explanatory or fortifying comment. They demonstrate that a business, by circumstances and its nature, may rise from private to be of public concern and be subject, in consequence, to governmental regulation. And they demonstrate, to apply the language of Judge Andrews in People vs. Budd (117 N.Y. 1,27) that the attempts made to place the right of public regulation in the cases in which it has been exerted, and of which we have given examples, upon the ground of special privilege and conferred by the public on those affected cannot be supported. 'The underlying principle is that business of certain kinds holds such a peculiar relation to the public interests that there is superinduced upon it the right of public regulation.'"

If there is any business which holds such a peculiar relation to the public interests that it demands public regulation, it is certainly the water business. Just as in the Oil Pipe Line Cases, decided by the Supreme Court of the United States on June 22, 1914, the Court looked through the shadow to the substance and held that oil pipe lines which by compelling the sale of oil to them before it was transported through their pipe lines had technically avoided being common carriers were nevertheless common carriers subject to governmental regulation; so here the California Development Company, notwithstanding the device of placing intermediaries between itself and

the public has nevertheless in fact and effect been distributing water to the whole public of Imperial Valley. Its monopoly of the business alone justifies regulation of its business under the Munn case and others. But as Justice McKenna points out, monopoly is by no means a condition precedent to regulation. If the business, even though not a monopoly, bears such a peculiar relation to the public that the general welfare demands public regulation, then, as is the case here, the public has the right to impose the regulation which its interests demand.

In the present case, while a regard to the shadow and to mere form might not lead to the conclusion that the water system of California Development Company has been used to serve the whole public, I find that in substance the system has been serving water to the entire Imperial Valley. And if it be held that this finding is not conclusive, I find that under the recent constitutional and statutory changes, all of which the State under the decisions of the highest court in the land had the right to enact and to make applicable to this system, the system of the California Development Company is now a public utility water system and W. H. Holabird, as receiver thereof is now a public utility, subject to the power and jurisdiction of the Railroad Commission of this State.

I have given consideration to defendant's objection that this Commission cannot proceed for the reason that complainants have not secured leave to sue from the court which appointed the receiver, and find that the point is not well taken. The Public Utilities Act, in defining a water utility, specifically includes (Section 2, x) a "receiver appointed by any court whatsoever" operating such utility. Section 60 of the Act, referring to the filing of complaints and the procedure thereon, provides in part that "upon the filing of

a complaint, the commission shall cause a copy thereof to be served upon the corporation or person complained of", whereupon under the Commission's Rules the defendant must satisfy the complaint or answer within the time prescribed by the Commission. There is no intimation anywhere in the Act that if the utility is a receiver, the consent of some other authority must be secured before the Commission may proceed as directed by the Public Utilities Act to do. The receiver derives his powers from the statutes of this state and these statutes are subject to modification by subsequent statutes as has here been done. See also, to the effect that the reason of the rule requiring the consent of the court appointing a receiver to be obtained before bringing suit does not apply before administrative bodies such as the Interstate Commerce Commission and this Commission, Board of Trade of Troy vs. Alabama Midland Railway Co., 6 I.C.C.R. 1 and Evans v. Union Pacific Railway Co., 6 I.C.C.R. 520.

Before leaving this point, I desire also to direct attention to the fact that under the great weight of authority of the later decisions, a failure to secure permission to sue a receiver is merely an omission which will subject the party suing without such leave to proceedings for contempt of the court appointing the receiver, and does not impair the jurisdiction of the court to proceed with and determine the cause. High on Receivers, 4th ed. 1910, sec. 254a; and 34 Cyc 411 and cases there cited.

It will be understood, of course, that the present decision deals only with the question of this Commission's jurisdiction. If this decision stands, it by no means necessarily follows that complainants in any or all of these cases will ultimately secure the relief for which they ask.

I understand that some of the parties may desire to have this decision reviewed by the Supreme Court before the cases

are tried on the issues of fact. If so, the Commission will do its full share in expediting the presentation of the case to the end that an early decision may be secured.

I submit the following form of order:

ORDER.

A public consolidated hearing having been held in the above entitled cases on the question whether the Railroad Commission has jurisdiction over the defendants and this question being now ready for decision,

The Railroad Commission, in reliance on each statement or finding of fact contained in the opinion which precedes this order, hereby finds that the water system of California Development Company is a public utility water system and that W. H. Holabird, as receiver thereof, is a public utility, subject to the jurisdiction of the Railroad Commission.

It is accordingly ordered that the demurrers in each of the above entitled cases be and the same are hereby overruled and defendant in each of said cases is hereby given twenty (20) days from service of a certified copy of this opinion and order in which to satisfy the respective complaints or to answer.

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

Dated at San Francisco, California, this 28th day of July, 1914.

H. D. Loveland

Alex Gordon

Max Thelen

Edwin O. Edgerton

Commissioners.