Decision No. 536

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BEFORE THE RAILROAD COMMISSION
OF THE STATE OF CALIFORNIA.

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In the Matter of the Application of JAMES A. MURRAY and ED FLETCHER for an order authorizing and permitting an increase in the rentals, tolls and charges for water furnished by them and service rendered by them in furnishing water in the County of San Diego, State of California.	Application No. 118.

A. H. Sweet for applicants.
Haines & Haines for certain protestants taking water for irrigating purposes.
D. G. Gordon for certain protestants taking water for irrigating purposes.
Crouch & Harris for certain protestants, domestic consumers in the suburbs of San Diego.

ESHLEMAN, Commissioner.

O P I N I O N.

The application herein was filed on the 25th day of June, 1912, and applies for an order authorizing applicants to increase the rates for water to be charged to their consumers in the County of San Diego. While the application is limited to the question of the reasonableness of the rates charged, yet at the hearing which began on the 8th day of July, 1912, it was agreed by the applicants that the question of service might also be considered by the Commission, and it was stipulated in the record that the entire question of the rates and service of the applicants should be considered, and a decision rendered thereon, and the hearing proceeded upon this theory and evidence was introduced touching these matters. After the completion of the hearing the parties asked and were granted time to submit briefs and hence the case was not finally submitted until March 1st, 1913.

The domestic consumers and the consumers taking water for irrigation purposes were separately represented at the hearing, and

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while both opposed the application they did so on different grounds and asked for different relief. The owners of riparian land within the watershed of the San Diego River below the point of diversion of the applicants' system also appeared informally, but did not present any evidence and are not properly parties to this proceeding.

The issues in this case are so complicated that quite an extensive review of the facts will be necessary. The San Diego Flume Company, was incorporated May 14th, 1886, with a capital stock of $1,000,000.00. Thereafter on the 25th day of May, 1895, its Articles of Incorporation were amended, but both its original and amended Articles bring it within the definition of a water corporation as defined in the Public Utilities Act, and it is agreed by all of the parties that it is a public utility and subject to the jurisdiction of this Commission. Certain filings were made upon the water of the San Diego River, and other streams in San Diego County by the predecessors in interest of the applicants, and all of the present consumers are within the places of designated use as set out in the notices of appropriation. The total amount of water filed upon is in the neighborhood of 12,400 miner's inches, but not nearly such an amount has ever been devoted to any public use. The corporation began the construction of its water system in 1887 and completed it in the latter part of the year 1889 by the construction of a wooden flume capable of carrying in the neighborhood of 5,000 inches of water, extending from the diverting dam on Boulder Creek, a branch of the San Diego River, to the Eucalyptus Reservoir, a distance of 35½ miles, and the construction of a reservoir known as the Cuyamaca Reservoir in the mountains above the point of diversion. Later the La Mesa Reservoir at the lower end of the system and the Murray Hill Reservoir were added. While the flume, as originally constructed, was capable of conveying approximately 5,000 inches of water still a considerable proportion of the filings were allowed to lapse, and while the evidence is conflicting on this point it now

seems that not more than 3,000 or 3,500 inches can be developed in the system, and the net safe yield under the system as it now exists is 256 miner's inches at the head of the flume. The company has served approximately 4,000 acres of land in addition to its domestic consumers, and there are approximately 25,000 acres susceptible of irrigation from the system provided a sufficient quantity of water may be impounded.

The main objection of the irrigation consumers is based upon the fact that certain contracts were entered into by the Flume Company, predecessor of the present owners.

On June 1st, 1910, the system was conveyed to the applicants herein for a consideration of $150,000 and in the deed of conveyance it is provided as follows:

> "This property, water system, franchises, easements, et cetera, are sold subject to all water right contracts, or contracts to rent, sell, supply, or distribute water hitherto made by the party of the first part, (San Diego Flume Company) whether such contracts refer to water already furnished or hereafter to be furnished.
>
> "And the said party of the first part hereby assigns, conveys, transfers and sets over to the party of the second part, (James A. Murray) all its right, title, claim, interest or estate in or to such contracts and all of them, and substitutes and places the party of the second part in the place and stead of the party of the first part in or to such water right contracts, and assigns, transfers and sets over to the second party all liens, or claims of lien, and all other means provided for the enforcement of said contracts which the party of the first part may have, and the second party hereby assumes and agrees to perform all such contracts to the same extent and in the same manner as the party of the first part is now bound to perform the same, provided, however, that such assignment and transfer shall in no way affect the right of the grantor to enforce all equitable or legal remedies to compel payment of any balance due or unpaid for water rentals, or for the amount agreed to be paid for the water rights specified in such contracts.
>
> "It is further understood and agreed that there are now in existence contracts to supply water covering about 625 miner's inches of water at various rentals."

After the transfer of the property to Murray, he in turn transferred an undivided one-sixth interest to Fletcher, and the San Diego Flume Company, a corporation, has now forfeited its charter and we have a system in control of these two individuals, applicants herein.

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The protestants who are irrigators of land and who have taken their water heretofore under the terms of these contracts set up the claim that as to them this Commission has no authority as far as fixing the rate is concerned for which they shall receive water, at least in so far as such rates shall be in excess of an amount necessary to provide for depreciation upon the system and the payment of operating expenses. Their position is that by these contracts the San Diego Flume Company and the applicants herein, by assuming them, have commuted their right to any profit to be realized from the sale of water to those taking it under contracts.

All of the contracts were submitted in evidence, and on account of the strong insistence upon the correctness of their position by these protestants it will be necessary briefly to outline the provisions of such contracts.

The San Diego Flume Company and the applicants, as its successors, have never furnished water for irrigation except under the terms of the contracts, but have furnished without contracts urban users near San Diego for domestic purposes. On February 24, 1891, on the petition of a number of inhabitants, as required by statute, the Board of Supervisors of San Diego County fixed a water rate for this Company at $120.00 per miner's inch per annum, but the Company, as has already been said, did not furnish water at this rate but continued to furnish it at the less rate which is provided for in the various contracts.

There is a substantial agreement between the parties as to the terms and history of these contracts, the controversy being over their legal effect. Messrs. Haines and Haines in their brief have very carefully outlined them, and I find from an inspection of the contracts themselves that their outline is substantially correct.

(1) Contracts for Water for Irrigation at $65.00 per Miner's Inch per Annum.

It appears that in 1886 the San Diego Flume Company entered into a contract with Easton, Frink & Wilde whereby these parties granted to the Company a right-of-way fifty feet wide across what is known as the "S" tract in the El Cajon Valley, and in return therefor were given a right to receive 200 miner's inches of water at the rate of one inch for every 15 acres to be irrigated on paying for such water right at the rate of $10.00 per acre, which would amount to $150.00 per miner's inch, and in addition thereto they were to pay the annual charges fixed by the Board of Supervisors of San Diego County. In 1891, Easton, Frink & Wilde relinquished 50 inches of the original 200 and agreed to take the rest at an annual rental of $65.00 per inch, and subsequently it was arranged that each of the three parties, Easton, Frink and Wilde, should take in severalty 50 inches and be responsible for paying for the same. Frink, however, did not pay for his 50 inches which left 100 inches for which the water right was treated as subsisting, and this 100 inches was divided up and sold to various successors of Wilde and Easton respectively, the consideration for the contract being paid in each instance directly to the Flume Company by Wilde or Easton or by the person designated by them, an arrangement which was permitted under the contract. It appears from the evidence that 56.51 inches of water is now being supplied under the terms of Easton, Frink and Wilde's contract at $65.00 per inch per annum, and that 43.49 inches, although originally supplied under the terms of this contract, is now being supplied under other contracts which by agreement have been substituted for the original contracts. Hence the situation now is that 56.51 miner's inches is being supplied at $65.00 per inch per annum for which an initial consideration for the so-called "water right" of $150.00 per miner's inch was paid together with a right-of-way for a flume fifty feet wide across the "S" tract which, as it appears from the evidence, is about 15 miles long.

(2) Contract for Water for Irrigation at $60.00 per Miner's Inch per Annum.

There were 253.835 miner's inches contracted for at $60.00 per miner's inch per annum with various initial charges ranging from $600.00 to $1,000.00 per miner's inch. As to some of these users this is the original contract, as to others this contract is substituted for a previous contract wherein in some cases they had paid a smaller initial charge and were obligated to pay a higher annual charge, while as to others the opposite was the case.

(3) Contract for Water for Irrigation Supplied at $30.00 per Miner's Inch per Annum.

There are 67.83 miner's inches of water now being furnished at $30.00 per miner's inch per annum. This rate grew out of the following circumstances. The Flume Company secured control of the La Mesa Colony tract and sold out the land therein in ten acre lots, and to the purchaser of each of said ten acre tracts the company gave the right to an inch of water from the system at an annual charge of $30.00 per inch and the further right to a lot in the Town of La Mesa. These sales were made for a consideration of $1,000, ordinarily $500.00 cash and $500.00 one year thereafter and without regard to any particular tract or lot and the tracts and lots were thereafter apportioned by lot. Each of the purchasers got as grantee, a deed in which Bryant Howard and R. A. Thomas and the Flume Company were named as co-grantors and which undertakes to convey a ten acre tract, the right to take an inch of water at the $30.00 rate and a town lot. By reason of the slightly different condition surrounding the original delivery of this water to what is known as the "La Mesa Colony" I insert the form of conveyance which is quite brief:

> "This Indenture Witnesseth: That Bryant Howard and R. A. Thomas, trustees of the La Mesa Colony tract, and the San Diego Flume Company, for and in consideration of the sum of five hundred dollars to them in hand paid, and five hundred dollars to be paid, do hereby grant, sell and convey unto _____ the following real estate situate in the County of San Diego, and in the State of California, to-wit:-

Lot numbered____as designated on the plat of "La Mesa Colony" as surveyed and platted by William M. Fitzhugh, Civil Engineer, now on file in the Recorder's office in said County, containing_____acres also lot numbered_____in Block numbered_____ in the Town of "La Mesa" as designated on said plat, together with the right to take water from the pipes or flumes of said company at the rate of one miner's inch measured under a four inch pressure (for irrigation and domestic purposes) for said tract numbered____subject to the payment of thirty ($30.00) dollars per inch per annum, water rates therefor, and to such rules and regulations in regard to tapping mains or flumes, shortage, wastage, use of water, and payment for same, as the company may adopt for general application to consumers. But the full right of way is hereby reserved for all the pipes or aqueducts of said company.

"And said company hereby agrees to convey water in its pipes or flumes to the edge of said tract numbered____ within a reasonable time after the completion of its main flume line to its reservoir about eight miles east of the City of San Diego, and near said "La Mesa Colony."

"This grant is made upon the express condition that until the promissory note for the sum of $500.00 of even date herewith, and due in one year and drawing 8% interest, given by the grantee herein, for the balance due on the purchase money to be paid as aforesaid, is fully paid, the said trustees on behalf of said company, and the said company on its own behalf, shall retain a vendor's lien on the real estate herein described which may be enforced in accordance with law."

(4) Water Supplied for Irrigation at $45.00 per Miner's Inch per Annum.

There are 3.62 inches of water being furnished at $45.00 per miner's inch per annum. This contract grew out of a contract between the Flume Company and the Teralta Land and Water Company originally for 28 inches of water. The initial consideration in addition to the $45.00 annual rate was $28,000 together with a grant of certain rights of way. It is impossible to trace the remaining 24.38 inches covered by this contract. From the contract book it would appear that some of it by mutual arrangement was subsequently transmuted to water furnished under contracts of other forms and at different rates, but all that we can find definitely from the evidence is that this 3.62 inches of water now being furnished was furnished originally under the terms of the Teralta Land and Water Company contract.

(5) Water for Domestic Use Furnished at $600 per Annum with a charge for Excess at the rate of 10¢ per Thousand Gallons.

On the 1st day of July, 1909, the San Diego Flume Company

entered into a contract with the Columbian Realty Company wherein it agreed to furnish to said company 9.875 inches of water to be delivered to the Columbian Realty Company at a place on El Cajon Boulevard at a short distance east of what is known as the "El Teralta School House" for use upon certain suburban property near San Diego. The Realty Company was to pay to the Flume Company $600.00 annually or $50.00 per month for this amount of water, which amounts to a trifle over $60.00 per inch per annum, and if it should use water in excess thereof the excess should be paid for at the rate of 10¢ per thousand gallons which is at the rate of $473.04 per inch per annum. The Columbian Realty Company surrendered certain contracts covering approximately 5.80 inches, a part of which it had secured through the Teralta Land and Water Company (form (4) herein) and a part for which it was obligated to pay $60.00 per miner's inch per annum. The columbian Realty Company was selling off its lots in this territory and distributing the water to its purchasers for domestic purposes.

(6) Water Supplied for Domestic use at $435 per Annum with a Charge for Excess at the Rate of 5¢ per Thousand Gallons.

This water is covered by a contract entered into in January, 1910, between the Flume Company and the El Cerrito Water Company comprising 14.50 inches of water for which it was to pay $36.25 per month or $435.00 per annum, which amounts to $30.00 per inch per annum, and any in excess of this amount it was to pay for at 5¢ per thousand gallons which is at a rate of $236.52 per inch per annum. In consideration for this contract the El Cerrito Water Company surrendered contracts for water which it had acquired from various individuals owning the land upon which this company at this time desired to distribute water, and was in effect a substitution for contracts that had theretofore been entered into covering the same land.

(7) Water Supplied for Domestic use at the Rate of 6¢ per Thousand Gallons with a Minimum charge of $576.00 per Annum.

This is a contract entered into in 1907 between the San Diego Flume Company and the La Mesa Mutual Water Company, a corporation. Under this contract the Mutual Company is given a right to a maximum of 20 miner's inches of water at 6¢ per thousand gallons, which is at a rate of $283.82 per inch per annum, but it is provided that it shall pay a minimum of $48.00 per month or $576.00 per annum, which means that it must pay for a minimum of about two inches. The right to use the water is limited to certain described land.

(8) Water for Irrigation Supplied at the Rate of $200.00 per Annum.

This is a contract between Levi Chase and the Flume Company for 2.25 inches of water to be used between the 1st of May and the 1st of November at $200.00 per annum for the entire amount, which amounts to $88.80 per inch for these months, with the further right in case it is desired by the consumer to take water after November 1st to pay for the same at a proportionate rate. In consideration for this contract Chase granted the Company a right-of-way for its flume fifty feet wide over his ranch. This contract has been in litigation and was reviewed by the Supreme Court of this State in San Diego Flume Company vs. Chase, 87 Cal. 561. Inasmuch as it is in evidence that the months designated are ordinarily the irrigating months this amounts practically to an annual rate of $88.80 per inch.

(9) Water Supplied for Irrigation at $72.00 per inch per Annum.

There are two contracts outstanding of this form for small amounts of water aggregating .16 of an inch. The annual payment is to be at the rate of $72.00 per inch, but it has been impossible to ascertain the initial consideration paid by the water user.

In addition to these nine forms of contract the Flume Company on December 31, 1909, entered into a contract with the Western Investment Company which recites that the said Western Investment Company having succeeded to 4.80 inches of water rights surrendered the same to the Flume Company which obligated itself thereupon to furnish an equivalent of 5 miner's inches, being 64,800 gallons every twenty-four hours for use within a portion of Normal Heights and a portion of Teralta Heights at 5¢ per thousand gallons for that amount and 10¢ per thousand gallons for all consumed in excess of this amount. This contract was replaced by one made by the applicants,(now styling themselves Cuyamaca Water Company) on May 6, 1912, with the Western Investment Company. In this modified contract it is provided that all residents and property owners in the whole of Normal Heights, a tract of about 1,000 acres, may be served and in addition to this a tract known as Bonnie Brae as well as Blocks A, B, C and D of Teralta Heights included in the former contract. The amount of water is to be "adequate and not limited to five inches" and is to be at the flat rate of 25¢ per thousand gallons, the distributing system of the Western Investment Company to be turned over to the applicants.

The proprietors of Kensington Park, a suburban tract of 116 acres, who had no water rights for their land arranged in May, 1910, with the Flume Company for supplying water to be delivered into a distributing system, which such proprietors owned, at 10¢ per thousand gallons. Murray and Fletcher, after they acquired the system, entered into a new contract to supply water to Kensington Park at 25¢ per thousand gallons which is equivalent to $1,182.60 per inch per annum, without regard to the amount needed, and the Kensington Park distributing system was turned over to them. In addition to the contracts here reviewed the Flume Company obligated itself to furnish 40 miner's inches of water to lands in the El Capitan Indian Reservation free of all charges for maintenance and operation in return for a right-of-way for the flume through this

reservation. This water is to be furnished each season between May 1st and November 1st.

While the exact total amount of water rights that have been sold by the Flume Company cannot definitely be determined from the evidence, it is in evidence that in addition to the amount herein disclosed it entered into contracts to deliver about 194 miner's inches in excess of the amount that it has ever delivered under which contracts no waters has ever been delivered, and assuming that it actually delivers the 40 miner's inches to the Indian Reservation we have present consumers

Under Contract Form No. 1.....	56.51	miner's	inches.
" " " No. 2.....	253.835	"	"
" " " No. 3.....	67.33	"	"
" " " No. 4.....	3.620	"	"
" " " No. 5.....	9.875	"	"
" " " No. 6.....	14.51	"	"
" " " No. 7.....	20.	"	"
" " " No. 8.....	2.250	"	"
" " " No. 9.....	.160	"	"
To El Capitan Indians.....	40.	"	"
To the urban tracts of Normal Heights, Bonnie Brae, Teralta Heights and Kensington Park and indefinite amount but originally.....	5.	"	"
Total.....	473.09	"	"

Of this amount 49.385 inches are being delivered to urban users primarily for domestic consumption, while these consumers do in some cases use a part of their water for irrigation. The remainder of 423.715 inches is being delivered to consumers for irrigation purposes solely except as to their incidental domestic use, and all of this domestic service except the 20 inches for La Mesa is made from what is known as the pipe line system of this Company below the La Mesa Reservoir. Under the facts herein stated it is asserted by Messrs. Haines and Haines in their brief that this Commission has no jurisdiction over the delivery of 44.385 inches, 20 inches of which is for the use of the La Mesa Mutual Water Company and by them delivered in the Town of La Mesa, and the remainder delivered to suburban territory of San Diego which has, since the hearing, been incorporated into the Town of East San Diego. I will discuss this

suggestion when I am dealing with the law of the case. If, however, the contention of these protestants is correct, the control of this Commission over this water company is not very substantial, for under the protestants' theory of the case all of the remainder of the water except the five inches delivered to Normal Heights, Bonnie Brae, Teralta Heights and Kensington Park, is removed from our control by reason of contracts.

I will eliminate from consideration the authorities presented by the riparian owners who are not parties to this case, but will endeavor to recommend such a disposition of the matters herein involved as will properly dispose of the case but will be least likely to produce riparian complications. We are asked by the applicants to fix rates, and we are asked by the protestants to enforce better service. However, before taking up and disposing of these matters it will be well to consider just what our authority is under the state of facts disclosed by the record hereinbefore discussed, and thereafter if we are of the opinion that we have authority it will be necessary to discuss the evidence relating to valuation and condition of the system.

The effect of a contract by a public utility with its consumers touching the service which it renders as a public utility has been often before the courts. Particularly is this true of a public utility water company. The parties herein have presented for our consideration a long list of authorities, and I have deemed it best not only to consider the authorities herein presented, but to discuss all of the important litigated cases on the power of a water company to contract decided by our own Supreme Court and the leading cases decided by the Supreme Courts of the arid states together with the federal cases touching upon this question, so as to set at rest as far as we are concerned for all time this question, unless the matter is presented to the Supreme Court and it shall decide that our conclusions are incorrent. In other words, I think it is desirable to determine what we consider as the correct rule for our

own guidance which will insure its being complied with or else squarely presented to the Supreme Court of the State in which event we may look for a final settlement of this question.

Article 14 of the Constitution of this State, so far as is pertinent to the questions before us, reads as follows:

> Section 1. "The use of all the water now appropriated, or that may hereafter be appropriated for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State in the manner to be prescribed by law....."
>
> Section 2. "The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

The Legislature in 1885 passed an Act to regulate the rental and distribution of water outside of municipalities, and the Act as it then stood outlined the method of regulation which the Legislature thought proper under Section 2 of Article 14 of the Constitution. Briefly, the machinery provided was a petition to the Board of Supervisors of the proper county signed by twenty-five inhabitants and taxpayers, in which event the Supervisors were empowered to fix the proper rate to be charged to the consumers by any agency in control of water appropriated to the purposes of sale, rental or distribution. In 1897, an amendment was made to this statute respecting contracts, which reads as follows:

> "Nothing in this act contained shall be construed to prohibit or invalidate contracts already made or which shall hereafter be made by or with any of the persons, companies, associations or corporations described in Section 2 of this act relating to the sale, rental or distribution of water, or the sale or rental or easements or servitudes, or the right to the flow or use of water nor to prohibit or interfere with the vesting of rights under any such contract."

In 1910, Sections 22 and 23 of Article 12 of the Constitution respecting the power of the Railroad Commission were amended so as to confer upon the Railroad Commission of the State all of the power over public utilities theretofore exercised

by boards of supervisors and additional important powers were added respecting both the service and rates of such utilities. These amendments served to deprive the boards of supervisors of any of the powers theretofore conferred upon them by the Act of 1885, heretofore referred to, and of course supersede and repeal anything inconsistent therewith in either the Constitution or the Acts then in force. On March 23, 1912, the Public Utilities Act went into effect. This is an enactment passed pursuant to the amendments to the Constitution heretofore referred to, and which of course supersedes any previous enactment upon the same subject inconsistent therewith. In the Public Utilities Act a water corporation is defined so as to include (Section 2-x) "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", and such water corporation, as defined, is a public utility and "subject to the jurisdiction, control and regulation of the commission and to the provisions of this act." Therefore the applicants herein become subject to the jurisdiction of this Commission in so far as it is possible for the Legislature to confer such authority, and as has already been said, it is admitted by all the parties to this proceeding that these applicants are a public utility and subject to the jurisdiction of this Commission, but the protestants holding contracts urge that as to them action had been taken before the amendment to the Constitution and the passage of the Public Utilities Act which prevents the Legislature from exercising its admitted authority in the absence of such action. In other words, it is admitted that this Commission can exercise to the full its authority over the applicants, both as to rates and service, except as to contractual relations existing between its consumers and the applicants but it is contended by the protestants holding these contracts that such contracts work a limitation upon the authority of this Commission.

It will be easier to understand the litigated cases in this state if we pursue such litigation historically beginning with the cases decided in the federal courts. The County of San Diego has furnished the major portion of litigation in the federal courts affecting this question of contract. In 1896 Judge Ross of the Circuit Court of the United States in the case of San Diego Land and Town Company vs. National City (74 Fed. 79) held squarely that a contract entered into either for an initial payment for a so-called "water right" or for an agreed annual rental or both, was absolutely void, and cited as authority for this position the cases of McCreary vs. Beaudry (67 Cal. 209), and Price vs. Irrigating Company (56 Cal. 431). This case was appealed to the Supreme Court of the United States and decided in 1899, (174 U.S. 739) but the Supreme Court found it unnecessary to pass upon the correctness of Judge Ross's conclusion, deciding the case on other grounds. The same question was before Judge Ross again in the case of Laning vs. Osborne, decided in 1896 (76 Fed. 319), in which case again Judge Ross held unequivocally that no initial charge for a water right could be made and that all private contracts for fixing rates were void. He based this decision on the previous cases of San Diego Land and Town Company vs. National City, supra, Wheeler vs. Irrigating Company (17 Pac. 487)-a Colorado case decided in 1888-, Coombs vs. Agricultural Ditch Company (28 Pac. 966)-a Colorado case decided in 1892-, and the Price and Stevens cases herein referred to. He took occasion to comment on the case of Fresno Canal and Irrigation Company vs. Rowell (80 Cal. 114) and Fresno Canal and Irrigation Company vs. Dunbar (80 Cal. 530) to the effect that the latter two cases are not authority for the legality of a water rate, Judge Ross holding that in those cases it did not appear that the Fresno Canal and Irrigation Company was dealing with appropriated water. The Laning case was appealed to the Supreme Court of the United States, and is reported under the title "Osborne vs. San Diego Land and Town Company" decided in 1900 (178 U.S. 22). The syllabus in this case reads as follows:

"The appropriation and distribution of water in California is a public use, and the right to collect tolls or compensation for it is a franchise, subject to regulation and control in the manner prescribed by law, and such tolls cannot be fixed by the contract of the parties."

This language in the syllabus is not supported by the text; and this fact is adverted to by the Circuit Court of Appeals in San Diego Flume Company vs. Souther (104 Fed. 706). In the recent publication of the Supreme Court this syllabus has been corrected. The Supreme Court in the Lening case again found it unnecessary to pass upon the contention of Judge Ross that such contracts were illegal. While not directly decided, the gist of the opinion seems to be that after rates are fixed by the proper authority contracts fail.

The matter was again before the Circuit Court in the case of Souther vs. San Diego Flume Company, which case was not reported, but which is authority for the same doctrine, namely, that contracts for initial water rights and annual rates are illegal. The case was appealed to the United States Circuit Court of Appeals and decided in 1898 (90 Fed. 164) in which case the Circuit Court of Appeals held that the trend of the decisions of the Supreme Court of California are that "neither the provisions of the Constitution declaring that the use of water of the state appropriated for irrigation purposes is a public use, nor the statutes of 1885 authorizing the board of county commissioners on petition of consumers to fix the rates to be charged by a company supplying water for such purposes, affects the right of such a company to make valid contracts with its consumers for the furnishing of water where the rates have not been so established. Such irrigation companies are private corporations and in the absence of statutory prohibition or regulation have the same right to contract as individuals". The decision of the Circuit Court was reversed and one of these contracts that is now before us was held by the Circuit Court of Appeals to be valid, at least at the time the matter was before this court. The court also refers to the fact that the use of water for irrigation in a state like California

is a public use and that there is no federal question involved in its regulation, and the federal courts under such circumstances will take as conclusive the decisions of these questions by the higher court of the state involved, and cited Fallbrook Irrigation District vs. Bradley (164 U.S. 112) and other cases in support of this well established doctrine. In passing it is well to remark that the Supreme Court of the United States in the Fallbrook case herein referred to clearly decided that the use of water for irrigation is a public use, and the fact that the use of the water is limited to a portion of a community does not make it any the less a public use. A re-hearing was asked for an granted by the Circuit Court of Appeals in the Souther Case on the ground that the same question was definitely and specifically involved in the case of Fresno Canal and Irrigation Company vs. Park, then pending in the Supreme Court of this State. Subsequent to the decision of the Supreme Court in the Park case, which we will hereafter discuss, the Circuit Court of Appeals again decided the Souther case (104 Fed. 706) and held that the decision of the Supreme Court of the State of California in the Park case had effectively set at rest the question of the validity of the contract of Souther with the San Diego Flume Company which it was sought to have set aside. In the case of Mandel vs. San Diego Land and Town Company, Sharp intervenor, (89 Fed. 295) Judge Ross again held that the contract between the San Diego Land and Town Company and Mandel for an initial water rate charge and an annual rate was void. On appeal to the Circuit Court of Appeals this case was decided in 1899 under the title, "San Diego Land and Town Company of Maine vs. Sharp" (97 Fed. 394). The Circuit Court of Appeals sustained Judge Ross but on other grounds than the questions involved in the contract and does not pass upon the validity of the contracts involved. In San Diego Land and Town Company vs. Jasper (110 Fed. 702) decided in 1901, Judge Ross takes occasion to review the decisions up to that time, including the decision of the Circuit Court of Appeals

in the 104th Federal and the decision of the Supreme Court of California in the Park case, and says with reference to the latter:

> "Although that case seems to be generally regarded as sustaining the validity of such exactions for the right to use water appropriated under the provisions of the Constitution of the State of California of 1879 and statutes of the state passed in pursuance thereof, a reference to the case as reported fails to show that any such point was involved."

Then follows a statement of the facts involved in the Park case, and Judge Ross continues:

> "It will readily be seen from the facts thus stated that there is nothing to show that the appropriation of water there in question was made under and by virtue of the Constitution of California of 1879."

The Jasper case was appealed to the Supreme Court of the United States and decided in 1903 (189 U.S. 439). The question of water rights and contract for rates was not directly considered, the main question at issue being the correctness of the method of fixing rates followed by the Supervisors. This case will be referred to on this point later.

The case of Souther vs. San Diego Flume Company, heretofore discussed, as reported in the 104th Federal, was sent back to the Circuit Court for trial on the cross-complaint. The complainants answered the cross-complaint and the case of Souther vs. San Diego Flume Company, decided in 1901, (112 Fed. 228) is the result, and it is only in this case that Judge Ross gives up finally and reluctantly by reason of the decision of the higher court and "accepting as I must the validity of the contracts" he says, he holds that the Souther contract was valid. But in the case of Boise City Irrigation and Land Company vs. Clark (131 Fed. 415) decided May 31, 1904, Judge Ross, who wrote the decision, sitting as one of the judges of the Circuit Court of Appeals decided against the validity of a similar contract in Idaho, although the provisions of Article 15, Sections 1 and 2, of the constitution of Idaho are almost verbatim the same as the provisions of the California Constitution with reference to this matter. In this decision the Circuit Court of Appeals refers to the case of the County of Stanislaus vs. San Joaquin and Kings River Canal and Irrigation Company, decided in 1904, (192 U.S. 201) as

giving strong support to its view on the question of the invalidity of these contracts. I shall have occasion to refer to this Stanislaus case in connection with another aspect of the case before us.

Because of the fact that several Arizona and Colorado cases uniformly appear in all briefs filed on water questions in California, and have not been overlooked in the exhaustive presentation of these matters indulged by counsel in this case, I think it best to review enough cases from these two states so that it may clearly appear what, if any, applicability the rules there laid down have to cases arising under our Constitution.

The case of Wheeler vs. Northern Colorado Irrigation Company (17 Pac. 487), already referred to, was decided by the Supreme Court of Colorado in 1888. Thereunder this court holds that xx a water contract is contrary to the provisions of the Constitution of Colorado which reserves the title to the water, by specific declaration, in the public.

Coombs vs. Agricultural Ditch Company (28 Pac. 966) is another Colorado case decided by the Supreme Court of that State in 1892. In this case the court again holds that water contracts are illegal under the Colorado Constitution.

Gould vs. Maricopa Canal Company (76 Pac. 598) decided by the Supreme Court of Arizona in 1904, holds that water diverted remains public property until actually applied to the land, after which it becomes the property of the user. The only warrant for the diversion of the water by the Canal Company is that it supplies appropriators. The right to the use of the water by the actual user is only lost by abandonment or adverse user. Even signing a waiver does not divest the right. The diversion of water is only made lawful by its use and the man waiving his right, if he could do so, would render non-effective what the law has made effective. A

Canal Company cannot arbitrarily transfer its right in whole or in part. Slosser vs. Canal Company (65 Pac. 332) was overruled on this point. This Slosser case just referred to was decided by the Supreme Court of Arizona in the year 1901, and in this case in addition to the portion of the decision overruled in the Gould case, it is held that the Canal Company is a public agency which having undertaken the diverting and carriage of water is a public agency and subject to the control of the state, and after having cited Section 22 of the Bill of Rights of Arizona the court goes on to review the history of irrigation in Arizona and shows that the rule in Arizona grows up from the law of Sonora, Mexico, relating to the acquisition and construction of public ditches and the appropriation of the use thereof by land owners only, which gives these land owners the right to take in succession in accordance with the respective date of beginning the use, which doctrine is not applicable nor is either of these cases pertinent to the issue here involved, not so much because of the inherent difference in the organic or constitutional provisions of these various western states, but by reason of the different interpretation placed upon such constitutional provisions by the courts of last resort in these states. It is useless by way of precedent to cite these and similar cases to the question of the validity of a water contract under the California Constitution, as distinguished from any public utility contract with consumers, but they do have bearing on the general question of the power of public utilities to contract, and the effect of change of law so as to make such contracts, though lawful when made, unlawful and uninforcible after the state has exercised its power of regulation. That these courts think this is no impairment of the obligation of contracts is undoubted.

I shall proceed from this point to a discussion of the decisions of the Supreme Court of this State and of the United States

respecting the question here specifically before us, which is the effect upon the power of this Commission to fix rates of a public utility water company of contracts entered into since the adoption of the Constitution of 1879 and before the amendment to the Constitution of 1911 and the passage of the Public Utilities Act in 1912. Believing as I do that the basis for the conclusion on this important matter must be found in the decisions of the Supreme Court of this State and of the United States, I have only reviewed the federal cases and the cases from other states in order that it might appear that we were fully apprised of both the existence of these cases and the doctrines announced therein, and that we would not decide this important question without having given due consideration to all of the important litigation bearing thereon. In addition to this I have carefully read, I believe, all of the decided cases in this State bearing at all upon this point, but I shall confine this review to the more important of them.

The first case of importance decided after the passage of the Constitution of 1879 was the case of Price vs. Riverside Land and Irrigation Company (56 Cal. 431), decided in 1880, wherein it is held that every corporation diverting water has imposed upon it a public trust - "the duty of furnishing water, if water it has, to all those who come within the class for whose benefit the use was created". This case was decided before the adoption of the statute under which the contracts here under consideration were made, and the facts evidently arose before the adoption of the Constitution of 1879.

In McCreary vs. Beaudry (67 Cal. 120) the court said:

> "Whenever water is appropriated for distribution and sale, the public has a right to use it; that is each member of the community by paying the rate fixed for supplying, has a right to use a reasonable quantity of it in a reasonable manner. Water appropriated for distribution and sale is ipso facto devoted to a public use, which is inconsistent with the right of the person so appropriating it to exercise the same control over it that he might have exercised if he never so appropriated it."

The next decisions in point of time are the cases of Fresno Canal and Irrigation Company vs. Rowell (80 Cal. 115) and Fresno Canal and Irrigation Company vs. Dunbar (80 Cal. 530), both decided in 1889. In both of these cases the validity of a contract similar to the ones here in question was assumed. Another case of the same character is San Diego Flume Company vs. Chase (87 Cal. 561) wherein the Flume Company, the predecessor of the applicants herein, brought suit for reformation of the contract and the validity of the contract was not even called in question by the litigants. Other cases of the same kind were Cline vs. Benicia Water Company (100 Cal. 310), Balfour vs. Fresno Canal and Irrigation Company (109 Cal. 221) decided in 1895. Thereafter the line of federal decisions heretofore referred to affecting the several San Diego companies was rendered beginning in 1896 and covering a period to 1901 which was immediately subsequent to the decision of Fresno Canal and Irrigation Company vs. Park (129 Cal. 437), decided in 1900, wherein for the first time in the litigated cases outside the federal court the question of the validity of contracts for service of water was directly considered, the other cases theretofore decided having proceeded upon the assumption of the validity of such contracts and not directly deciding this point. Justice McFarland, who wrote this decision, in commenting on this contention raised by the parties in the Park case, after reviewing the cases to which I have just referred, says:

> "It is contended, however, that those cases should not be considered of any value as authorities here, because in all of the said cases the court had entirely overlooked or forgotten prominent provisions of the constitution now called to our attention, and the learned counsel of the parties opposed to the present respondent in those cases failed, through dimness of mental vision, to see and call attention to the conspicuous wall of the constitution behind which, according to appellant's contention, they could have safely put their client. It would be remarkable indeed, if during the consideration of all these various cases, and down to 1898, the thought never suggested itself either to court or counsel that the novel and notable provisions of the constitution about water, now relied on, could be invoked as defenses to those actions; but, as such a thing is barely possible, we will give the question an independent investigation."

Justice Temple, who wrote the concurring opinion in which Justice Harrison joined, does not take the same decided view of this matter as does Justice McFarland. After stating that he does not consider the Rowell and Dunbar cases as authorities entitled to much weight in the matter before the court in the Park case, he says:

> "Nor do I think it a matter to excite our special wonder if, as stated in the opinion, until within the last few years no one would have thought of doubting the right to so contract that in suits brought some fourteen years ago neither counsel nor the court should have made such a point. But since in those cases the point was not raised, and was not alluded to, it could not have been passed upon. The practice of the court is not to decide points involved on appeal unless they are actually raised."

Justice McFarland continuing in the opinion reviews the history of the use of water for mining and irrigation purposes in the state, and he further interprets the language of Section 2 of Article 14 of the Constitution as meaning "that if the legislature shall by statute prescribe the particular manner in which the rights shall be exercised that manner (if it be reasonable) must be followed if consumers insist on it; but in the absence of such statute then 'by authority of law' means by authority of the general substantive law of the land in which all rights to property and its use and enjoyment are founded. Our conclusion is that the contract involved in the case at bar is not made invalid by the provisions of the constitution invoked by the appellant."

The general view expressed by the majority of the court in this opinion is that while the Legislature has under the Constitution provided a method of fixing the maximum rate still within such maximum rate fixed as provided by the Legislature, the consumers and the company may contract and before such maximum rate is fixed they have absolute power of contract respecting this subject under the provisions of the statute of 1885. Justices Van Dyke and Garoutte concurred with Justice McFarland, while, as has already

been said, Justice Harrison concurred with Justice Temple, and in his concurring opinion the following language is used:

> "I concur in the judgment, and generally in the opinion of Mr. Justice McFarland. But while I agree with the construction given to the Act of 1885, to-wit: that it only preserves the maximum rate and does not prohibit special contracts between the supplier and the consumers of water, yet in my opinion, the power to regulate conferred and enjoined upon the Legislature by Sections 1. and 2 of Article 14 of the Constitution is plenary, and the Legislature may, if it sees fit, prescribe the only rates and the only terms upon which water may be sold, rented or distributed. The Legislature may deem it desirable not only by its regulations to prevent extortionate charges but also to prevent favoritism or unjust discrimination. Until it does so, however, I think the parties interested are free to contract."

The Park case, upon which most of the succeeding cases are founded and upon which the Circuit Court of Appeals based its decision reversing Judge Ross, merely holds that the Legislature under the provisions of the Constitution had provided a method in the Statutes of 1885 for fixing the maximum rates by the boards of supervisors, and that within these maximum rates the parties might contract, and further that until the supervisors had fixed such maximum rates the parties might freely contract, and in the concurring opinion the doctrine is laid down that the power of the Legislature is plenary and that it can provide for the fixing of actual rates and prevent discrimination; and the main opinion contains no language which can be held to be in conflict with this language in the concurring opinion of Justice Temple. It likewise appears from this case, as pointed out by Judge Ross in the case of San Diego Land and Town Company vs. Jasper, supra, that there is nothing to show that the appropriation of the water which was the subject of this suit was made under and by virtue of the provisions of the Constitution of California of 1879. On the contrary the implication is strong from the fact that the Fresno Canal and Irrigation Company was organized in February, 1871, that the appropriation was made long prior to the adoption of the Constitution of California of 1879.

The next case directly concerned with a contract between a water company and a patron, is the case of Stanislaus County vs. Bachman (152 Cal. 716), decided in 1908. In that case the court said:

> "The constitutional provision was not intended to prevent a land owner from acquiring and attaching to his land a right to the permanent use of water for its irrigation. If the right to the use of water for that purpose can not be made permanent, but is subject to change or termination at the hands of the public authorities, under the guise of regulation and control, then such use would be of little value. Water for irrigation is not ordinarily used for annual crops, for which the place of use can be changed from year to year, but for trees, and vines, and alfalfa.... Permanent rights to the use of water for irrigation may still be obtained by contract, notwithstanding the provisions of the Constitution, subject only to the condition that the state may, if it choose to do so, regulate and control the use. This was fully decided in Fresno Canal and Irrigation Company vs. Park, (129 Cal. 443). How far the state can go in the regulation and control of the use when thus secured by private contract, it is not necessary here to decide. The legislature has delegated the power of control and regulation of waters outside of the cities to the boards of supervisors of the respective counties. It does not appear that there had been any attempt to regulate or control the use of water in Stanislaus County, and, consequently, the terms of contracts remain in full force and constitute the measure of the rights of the parties, and under the present statute, the contract rights prevail in all cases and the board of supervisors being powerless to effect or interfere with them (Statute of 1887, pg. 49)."

Here the court was referring to the amendment to the statute of 1885 made in 1897, to which a reference has already been given, providing that the statute should not be construed as invalidating contracts already made. As to the effect of this provision I shall have more to say later.

I have also carefully considered several other cases which are usually cited, more or less directly bearing on this subject, but find that they do not change the rule which I conclude is the result of the Park case, namely, that under Article 14 of the Constitution and the statutes of 1885 passed pursuant thereto and the amendments to this statute, the boards of supervisors were empowered only to fix maximum rates, and that until they had fixed

such maximum rates the parties are free to contract, and that after such maximum rates have been fixed the parties are free to contract within such maximum rates, but what effect the change in the statute would have upon such contract made either before or after the board of supervisors had exercised this authority has not been decided nor touched upon by the Supreme Court of this State except in the concurring opinion of Justice Temple in the Park case, wherein the intimation is strongly thrown out that the power of the Legislature to legislate upon this subject is plenary, and that it could prevent discrimination between patrons of a water company organized to distribute water for profit under the provisions of the Constitution of 1879, and hence interfere with contract resulting in such discrimination.

It is interesting to note, however, that in no California case where the validity of a contract for water either for annual rates or for an initial charge is under consideration had the board of supervisors of the county having jurisdiction fixed the rates, so far as the record shows. That such rate had not been fixed in both the Park and Bachman cases is specifically referred to in the decision. In the case of Osborne vs. San Diego Land and Town Company, supra, and San Diego Land and Town Company vs. Jasper, Supra, the Supreme Court of the United States considered this matter but did not reach any conclusion counter to the one I have here stated. In the Osborne case (178 U.S. 22) the Board of Supervisors of San Diego County had not fixed the rates but the contracts of the San Diego Land and Town Company with its consumers provided that the annual rates shall "be fixed by the party of the first part (the water company) as allowed by law." Commenting upon this situation and the effect of the Statute of 1885 with reference thereto, before the Board of Supervisors of San Diego County had acted pursuant to its authority thereunder, the Supreme Court says:

"Its purpose (the act) is regulation deliberate, a judicial and periodical regulation by a selected tribunal, and we cannot believe that the Legislature intends by an absolute and peremptory provision to fix rates upon the water companies unalterable by them, no matter what change in condition might supervene. Against rates which may become unreasonably high the statutes give relief to consumers through petition to the boards of supervisors. Rates which may become unreasonably low, it surely does not intend to impose on the company forever, except as relief may come from the voluntary justice of its customers or by a violation of the statute and appeal to the courts. There is nothing in the act to indicate such purpose, nor does it need to have such purpose. Its dominant idea is regulation of rates by law, not commanded to be exercised by the governing bodies as a voluntary duty as establishing rates in cities and towns, but exercised when invoked by petition. Until the necessity of that what more natural and just then to leave the right with the water companies and recognize it as legal. This is the meaning, we think, of the provisions of Articles 5 and 8 supra. To so interpret them makes the scheme of regulation complete - adequate, without being meddlesome or oppressive. The power of regulation is asserted and provided for, and ready to be exercised to correct abuse, and who doubts but that its exercise would be invoked."

In the Jasper case (189 U.S. 439) the Board of Supervisors of San Diego County had fixed the rates and the point was raised that such a fixing of rates interfered with the contract rights of the consumers. With reference to this the court said:

"It is contended that the owners of water rights described in Osborne vs. San Diego Land and Town Company (178 U.S. 22) which it is said now have been decided to be valid (Fresno Canal and Irrigation Company vs. Park, 129 Cal. 437; San Diego Flume Company vs. Souther, 90 Fed. 164, 104 Fed. 706) are entitled to water upon merely paying their share of the expenses, and that all the water takers have water rights. We shall say nothing on these points."

The Supreme Court upheld the decision of the Circuit Court (110 Fed. 702) which had refused to declare invalid an ordinance of the Board of Supervisors of San Diego County fixing the rates to be charged by the San Diego Land and Town Company. If it were not for the fact that in the contracts involved in this case just considered, the language to which we have already referred in our review of the Osborne case is used, which provides that the rates shall be fixed by the water company as allowed by law, slightly distinguishes the contracts of the San Diego Land and Town Company from the contracts of the San Diego Flume Company,

we would here have a direct affirmance by the Supreme Court of the United States of the validity of the ordinance of the Board of Supervisors of San Diego County fixing rates when the parties had attempted to fix the same by contract. It does not seem to me that the distinction is very important, however, in that under the San Diego Land and Town Company system the right of the water company to fix the rates was reserved and not made definite, while in most of the San Diego Flume contracts a specific rate is set out. It is hard for me to distinguish between the reservation of a power to fix rates as desired and the actual fixing of the rate by contract. Bearing on this subject but not changing this rule are Fresno Canal and Irrigation Company vs. Hart (152 Cal. 450); Fresno Canal and Irrigation Company vs. Ede (152 Cal. 453); Graham vs. Pasadena Land and Water Company (153 Cal. 596); Churchill vs. Russell (148 Cal. 1); Hubbs and Miners' Ditch Company vs. Pioneer Water Company (148 Cal. 407); also, Tule River Ditch Company vs. Angiola Water Company (149 Cal. 496); Hunt vs. Jones, et al. (149 Cal. 297); Calkins vs. Sorosis Fruit Company (150 Cal.426); Fellows vs. City of Los Angeles (151 Cal. 52); Lowe vs. Yolo County Water Company (8 Cal. App. 167); Bashore vs. Mooney (4 Cal. App. 276); De Wolfskill vs. Smith, et al. (5 App. 175); Cozzens vs. Norfork Ditch Company (2 Cal. App. 404). A perusal of the above cases, however, will show that in most cases anything bearing upon the question of contracts with a public service water company is dictum because of the fact that private appropriations in most of these cases were being discussed and not water secured from a public service water company.

I will now consider certain other cases which have been decided from time to time between the decisions in the Park case and

the decision in the Leavitt case, to which reference will hereafter be made, which while not directly deciding the question of contract have a very strong bearing upon the issue of law here involved. The Park case was decided in 1900. Later in the same year the case of Crow vs. San Joaquin and Kings River Canal and Irrigation Company was decided (130 Cal. 309). This was a case wherein the complainant, Crow, had been furnished previously with water by the defendant company under an agreement that if he did not pay for the same he could not require it to be furnished again. The court holds that under these circumstances it is the duty of the company to continue to furnish water to the complainant under the facts stated, and in support of this conclusion says:

> "The use of water, in this state, appropriated 'for sale, rental or distribution' is a public use (Constitution Article 14 Section 1), and by the act of March 12, 1885, enacted to carry out this provision of the Constitution, it is made the duty of the company administering such use,'upon demand therefor and tender in money of the established water rates to sell, rent or distribute such water' to the inhabitants of the county 'at the established rates regulated and fixed therefor, as in this act provided, whether so fixed by the board of supervisors or otherwise', etc. And it is further provided in said act that for failure to do so action may be maintained for 'damages to the extent of the actual injury sustained'. By Section 552 of the Civil Code the same duties are also imposed upon such corporations in favor of those to whom water had been previously sold by such company. (Price vs. Riverside Land Company, 56 Cal. 431; McCrary vs. Beaudry, 67 Cal. 120; Merrill vs. East Side Irrigation Company, 112 Cal. 435). It was therefore the duty of the defendant, under the law as established in this state, to furnish the plaintiff water upon the tender of the established rates; and this rule precludes the idea that any other duties xxx can be prescribed or imposed, except the tender of the rate, as a condition for supplying water, as required by law."

It is interesting to note that Justice McFarland, who wrote the main opinion in the Park case, and Chief Justice Beatty dissent from this conclusion of a majority of the court on the ground that having made the contract Crow could not avail himself of the benefit of the statutory provision. Another case of similar import is that of Hildreth vs. Montecito Creek Company (139 Cal. 22) which was decided on a question of pleading, but in which certain observations were made which have bearing upon the legal status of

a public service water company, but inasmuch as any such statement was in the nature of dictum a mere reference to this case is sufficient.

One other case already cited must be placed in the same catagory with the Crow and Montecito cases. This is the case of Fellows vs. City of Los Angeles (151 Cal. 52) decided in 1907, wherein Justice Shaw speaks for the court and says:

> "Under Sections 8 and 10 of the Act (Statute of 1885) corporations or persons engaged in furnishing water to the inhabitants of any county, which have appropriated water to that use are required to distribute such water at the rates fixed by the board of supervisors of the county, or as fixed by the corporation or person, and upon tender of such rates and demand therefor by any inhabitant who is entitled to waterfrom such system, such person or corporation is under an obligation and duty to supply such inhabitant with water to the extent of his reasonable share of the available supply belonging to the system."

In this review of the cases down to this point I have failed to refer to a number of cases cited by the parties because I consider them absolutely inapplicable as I do numerous other cases decided by the Supreme Court which on a superficial examination might be considered to have bearing. I have now brought the review of all of the cases which I consider to have any bearing on the question before us down to the case of Leavitt vs. Lassen Irrigation Company (157 Cal. 82) written by Justice Henshaw and concurred in by all the other Justices, except the Chief Justice who took no part in the decision. Because of the strong bearing of this case upon the matter we are considering I think it proper to state the facts that were before the Court. I quote from the opinion:

> "Plaintiff's asserted right to the free use of water for his Buggytown ranch rests upon the following facts: In 1889 and the years following plaintiff constructed the Susan River Irrigation system, by which he appropriated, for the purposes of sale, rental, and distribution the surplus waters of Susan River, in Lassen County. Plaintiff testified that he appropriated these waters for the purposes of sale, rental, and distribution, and also for private use upon his Buggytown ranch. The court finds that immediately after the construction of the system plaintiff appropriated and used from the waters of the system a sufficient quantity to irrigate this ranch. Subsequently plaintiff sold his water system, but, in selling, reserved to himself 'the prior and preferred right to take from said system a sufficient quantity of water to properly irrigate during the irrigating season of each and every year all of the lands comprising said Leavitt's Buggytown ranch'. .....For respondent, the most favorable view which can be taken of the evidence is that he made an appropriation of waters

for the public use of sale, rental, and distribution under the Constitution of 1879; that by means of the same canal and ditches he made a private appropriation of water for use upon his individual land and that when he came to sell his irrigating system he withheld from the sale the waters so privately appropriated. It cannot be said that there was anything illegal in these acts, but when the rights of plaintiff come to be measured by the trial court, it is noticeable that he is given far more than the facts and law warrant. Treating Leavitt's appropriation as being wholly and entirely for public use, he, the owner of the system, was but an instrumentality for the distribution of the waters which he gathered to such members of the public as might apply for them and pay to him the legal charge for the service that he rendered. If he could reserve a part, he could reserve all, and thus, by ipse dixit, convert a public use into private ownership, or , if he could reserve a part for himself, he could with equal authority give away parts to others and by this method destroy what the constitution itself has declared shall forever remain a public use. Therefore, the only tenable ground upon which respondent can stand is that, with his appropriation for public use, he became a private appropriator of water for use upon his Buggytown ranch.....This discussion has been upon the assumption that Leavitt did in fact make a private appropriation for water upon his Buggytown ranch in connection with his appropriation of the waters of Susan River for public use. If, however, the facts should be that he did not make such private appropriation, his attempted reservation of a private right out of a public trust, as above stated, would be futile and void.

"Respondent's second cause of action is based upon a breach of contract. One Purser came into the ownership of Leavitt's irrigation system. As Purser became the owner subject to whatever force and effect attached to Leavitt's reservation of water for his Buggytown ranch, it is to be remembered that all other waters were appropriated for the public use of sale, rental, and distribution, and that Purser stood simply as the agent of the public in the execution of this use. Purser, while so the owner, made a contract with Grace Elledge, a daughter of plaintiff, who was at that time in possession of 160 acres of land. By this contract Purser agreed to supply Grace Elledge with sufficient water from the Susan River irrigation system for the annual irrigation of this land. Grace Elledge agreed to pay the sum of One Dollar per acre annually 'for each and every acre of land which may have been previously cleared of brush or cultivated'. It was further agreed that the water should be delivered by Purser at seasonable times and should be taken and used by Grace Elledge in conformity to the lawful rules and regulations which Purser might make. It was understood that Grace Elledge should have a priority right to the use of water over and above all other consumers saving those who held contracts like her own.....This contract between Purser and Grace Elledge was acknowledged upon February 15, 1896, and upon the same day there was endorsed thereon, but not acknowledged the following: 'For a valuable consideration I hereby assign the within agreement and all my rights thereunder to B. H. Leavitt (signed) Edward T. Purser Grace E. Elledge.' Subsequently Grace Elledge made a deed of the 160 acres of land to her father, Leavitt, granting therewith 'all ditches, water and water-rights used thereunto or appurtenant thereto.'"

After discussing certain minor objections, the court goes on to say:

> "Waiving all minor objections, had Purser the power so to burden his public trust with this perpetual private right? Purser, it is to be remembered, held all of these waters as an appropriator for sale, rental, and distribution under the Constitution of 1879. He was but the purveyor of this public use, the agent in the execution of this public trust. If, by any method however devious, there can be carved out of this public trust such a private right, it must obviously result in the destruction of the public use itself. Nakedly stated, it amounts to this, that a corporation which has appropriated water which the Constitution has declared shall forever be devoted to a public use, may contract with A, B and C to supply them in perpetuity with a given quantity of this water, and then, by assigning in turn to A, B and C its rights under these contracts, confer upon A, B and C a private right superior to and destructive of the public use. If this can be done with one it may be done with many, and water which has thus been appropriated for public rental, distribution, and sale may, by this legerdemain of the law, be transferred into private ownership and use. This may not be done.
>
> " The fundamental and all important proposition then is this, that a public service water company which is appropriating water under the Constitution of 1879, for purposes of rental, distribution, and sale, cannot confer upon a consumer any preferential right to the use of any of its water".

The court then goes on to state that even before the adoption of the Constitution of 1879, this could not be done and reviews various cases touching on the question of the status of a public service water company, citing cases affecting other classes of utilities, as well as water companies, showing that in the mind of the court, a public service water company was affected by the same rules of the law as are other public utilities. The court thereupon, continuing in this very able decision, so clearly outlines its views as to the effect of the decisions of the Supreme Court of this State theretofore rendered, that I desire to set out these views more at length.

> "It does not follow", says the court, " that a water company may not make specific contracts with individual consumers which are within the purview of the Constitution and within valid legislative enactments regulating the public use. This is precisely as decided by Fresno Canal Company vs. Park, 129 Cal. 437. But, as decided in Crow

vs. San Joaquin Irrigation Company, 130 Cal. 309, immediately following the Park case, such a contract, even if violated by the consumer, could not operate to deprive him of his constitutional right to the water furnished by the public service corporation upon tender to it of the legal rate. For the breach of the consumer's contract, the company must seek other redress than that of depriving the consumer of his share of the supply. The language of this court in Stanislaus Water Company vs. Bachman, 152, Cal. 716, must be construed in the light of the facts there presented. The court was there considering the claim of a water company to the right to collect rates in excess of those fixed by a contract made with its predecessor, its claim being in part founded on the theory that by a foreclosure sale it had acquired the water and distributing system free from that contract. The opinion, in the main, goes upon the theory that the water in control of the company was not subject to a public use, and upon that theory it was held that the contract to furnish water to Bachman's land attached the water-right to it as an appurtenance, with the right to receive water from the previous owner of the system and its successors at the contract rates. The company made the additional argument that the water was in fact devoted to public use, that if it could be thus attached to land as an appurtenance, the property dedicated to public use would be converted into private property, and that, as this could not be permitted, the contract was against public policy and void, so far as it attempted to create the appurtenance or fix rates. This argument is not fully stated in the opinion. In answer to the argument the court cited the case of Fresno Canal Company vs. Park 129 Cal. 437, and declared that the constitutional provision regarding water devoted to public use did not prevent a water company from making a contract giving to a particular tract of land the right to receive water for permanent and continuous use for irrigation, subject to the condition that the public authorities could regulate and control the use. Such a contract desposing of water devoted to public use, of course, would not technically attach it to the land as an appurtenance. It would do nothing more than bring the land within the territory to which the public use extended, and establish its status as land permanently entitled to share in the public use. It did not appear in that case that any public regulation had been made and the contract controlled the rights of the parties. It was therefore immaterial, so far as the right to collect the rates in controversy in that case was concerned, whether the water right was appurtenant to the land as private property, or whether the land was entitled to a part of the water as a share in the public use, where public rates had not been fixed and private contracts controlled." * *

"It is, of course, a truism of the law that an act of the legislature conflicting with constitutional

provision must fall. All of the acts of the legislature regulating or attempting to regulate the public use of water so appropriated are subordinate to the provisions of the Constitution, and to be valid, must be in harmony therewith. We have said, and undertaken to show, that a water company organized under the Constitution of 1879, which has appropriated waters of the State for public rental, distribution, and sale, cannot give a preferential right to one consumer over another. * * *

" In Fresno Canal Company vs. Park, 129 Cal. 437, it was held that, in the absence of a rate fixed by the supervisors, a rate agreed upon between the parties could be enforced. In Crow vs. San Joaquin Irrigation Company 130 Cal. 309, it was held that a consumer did not deprive himself of the right to take water under the rate established by law by reason of his refusal to pay under and in accordance with the terms of his contract."

On the same day the court decided the case of Lassen Irrigation Company vs. Long, wherein it reiterated the conclusion which it had reached in the Leavitt case. And recently in the case of Imperial Water Company No. 5 vs. Holabird (197 Fed. 4), the Circuit Court of Appeals of the United States has occasion again to consider water contracts, and regardless of the fact that the same Circuit Court of Appeals had, as heretofore pointed out, on the authority of the Park Case, held such contracts binding, this court goes back to the position of Judge Ross in the early San Diego cases and the Boise City Irrigation case and reaffirms its former position that such contracts are invalid under the Constitution of the State of California and cites as authority for this doctrine the Leavitt case which we have discussed. So that without going further into the general rule applying to contracts of public utilities respecting their public utility functions, I feel that we are justified in concluding that even as to a public utility water corporation, concerning which the decisions have been much more confusing than concerning

any other kind of a utility, the right to fix a rate by contract is subject to the power of the State to substitute a rate fixed by the properly constituted authorities for the rate agreed upon by contract, and the sole function of contracts between a water company and its consumers, is to fix the relationship of the parties before the public authorities shall have acted, and in addition thereto probably would have the effect as to the land involved to "establish its status as land permanently entitled to share in the public use".

It appears sufficiently from what has been stated herein and from the cases herein reviewed, that it is not violative of the provision of the Constitution of the United States which denies to the states the power to impair the obligation of contracts, for a state to fix a rate which shall apply to a public utility such as a water company which conflicts with the rate agreed upon by such utility and its consumers in a contract valid when made and if this rule can be invoked in reference to a water company it, of course, can be equally well invoked in the case of any other utility. But this matter has been pressed upon the attention of the Commission with such force in both this and other cases, involving water contracts as well as contracts with other public utilities, that I deem it advisable that we here consider the decisions on this question of law, rendered by the Supreme Court of the United States. Article I section 10 of the Constitution of the United States provides that no state shall pass any law " impairing the obligations of contracts". The same provision respecting the power of the legislature of

this State is contained in section 16 of Article I of the Constitution of this State, but, of course, does not add to the effect of the federal provision. The power to fix rates of a pblic utility is in the nature of the police power, at least it is the power of government to control property devoted to the public use. Ever since the decision of the case of Munn vs. Illinois, 94 U. S. 113, this has been recognized. In that case, after reciting, the fact that under the common law certain classes of business were regulated and that the rates for certain character of service were fixed by public authority, the court says:

> " This brings us to inquire as to the principle 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'. * * * 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 thus created. He may withdraw his grant by discontinuing the use but, so long as he maintains the use he must submit to the control".

In Fallbrook Irrigation District vs. Bradley 164 U. S. 112, the Supreme Court held that the use of water for irrigation in the State of California was a public use even though under the facts of the case therein discussed, only a portion of the public was served, and in San Diego Land and Town Company vs. National City, 174 U. S. 739, the court again discusses the public nature of the use of water for irrigation in this State, and applies the same rules with reference thereto as theretofore have been applied by the same court to railroads in the case of

Smyth vs. Ames 164 U. S. 466. As has already been stated, Article XIV of the Constitution of this State provides that the use of water is a public use and the decisions on this point to the same effect are so numerous and unanimous, both of the Supreme Court of this State and the Supreme Court of the United States, that it is unnecessary to discuss this further, and we proceed upon the theory that the public use discussed in the Munn case and the doctrine announced there, to which that court has consistently adhered up to the present time is applicable to a water corporation such as the applicants herein, having appropriated water for sale, rental and distribution, and that the same principle which we shall find applicable to the regulation of other utilities applies with equal force to the regulation of the applicants.

In the case of Stanislaus vs. San Joaquin and Kings River Canal Company 192 U. S. 202, the Supreme Court, discusses generally the subject we have here before us. In this case the effect of the change from the law of 1862 of this State, respecting the rates of water companies, to the Statute of 1885 is considered. In commenting upon the fact that the law of 1862 under which this Company was organized allows one and one-half per cent per month upon the capital actually invested, the court says:

> "It seems to us that language of this nature can not properly be construed as a promise or pledge that the limitation as to rates may not be altered at any time when in the judgment of the legislature, it may be proper so to do. Water rates which might have been perfectly reasonable at the time of the passage of the act of 1862, although amounting to one

and one-half per cent per month upon the capital actually invested, might, in the course of years, become exceedingly burdensome to those who use the water, and amount to a very unreasonable compensation to the company for the water it sold. * * * The authority given by the Act of 1862 enabled the Board of Supervisors to conditionally regulate the rates. There is no promise made in the Act that the legislature would not itself subsequently alter that authority. The State simply authorized its agents, the Boards of Supervisors, to regulate rates, but not to reduce them below a certain point. We do not think that from this language a contract can or ought to be implied - that the State might not thereafter authorize the Boards to reduce them, or that it might not itself do so directly. Even as between individuals, such an implication would not be a reasonable one from the language used, and as the contract, if it existed, would take away from the legislature its otherwise undoubted right of regulation upon a subject of great public importance, there is still less reason for implying a contract which would prevent the State from using its power to that end for the future. The language of this portion of the act applies to the Boards and limits their right to reduction, leaving unhampered the right of the State to interfere directly or by authorizing the Boards to reduce the rates below the point stated in the Act. In order to make such a contract the language must be plain, and susceptible of no other reasonable construction."

Continuing, the court reviews the Munn case and other cases wherein the effect of statutes exempting property from taxation is discussed, and the well known rule that such statutes are merely a license and do not prevent the state thereafter to change them and tax the property of corporations formed thereunder, is referred to, and a comparison between the effect of such statutes and those empowering the legislature to regulate the charges for water is adverted to in the following language:

"To regulate or establish rates for which water will be supplied is in its nature the execution of one of the powers of the State, and the right of the State so to do should not be regarded as parted with any sooner than the right of taxation should be so regarded, and the language of the alleged contract should in both cases be equally plain."

In the case of the Home Telephone and Telegraph Company vs. Los Angeles, 211, U. S. 265, the court again announces the

same rule and discusses in detail the conditions under which the State will have been considered to have waived, or authorized a municipality to waive, the power to regulate public utilities. The court there says:

> "The surrender, by contract, of a power of government, though in certain well-defined cases it may be made by legislative authority, is a very grave act, and the surrender itself, as well as the authority to make it, must be closely scrutinized. No other body than the supreme legislature has the authority to make such surrender, unless the authority is clearly delegated to it by the supreme legislature."

As early as 1871, and hence long before any of the facts upon which this controversy is based arose, the Supreme Court of the United States in the Legal Tender cases so called, 12 Wall. 550 said:

> "As in a state of civil society, property of citizen or subject is ownership subject to the lawful demands of the sovereign, so contracts must be understood as made in reference to the possible exercise of the rightful authority of the government and no obligation of a contract can extend to the defeat of legitimate governmental authority."

This doctrine has been adhered to by the Supreme Court of the United States through a long line of cases, the last to which I have a reference being the case of Louisville and Nashville Railroad Company vs. Mottley 219 U. S. 467, and the rule is well established that contracts are always made subject and subordinate to the powers of government, and such contracts are entered into subject to the full legal effect of this rule and it is no impairment thereof for the State in the proper exercise of its authority to disregard them. To be sure, the Mottley case discussed the effect of the amendment of the Interstate Commerce Act, requiring transportation to be paid for in

cash, upon a contract, made prior to such amendment, for a pass, admittedly lawful when made but contrary to the provisions of the amendment and it is sometimes attempted to distinguish the principle announced therein from the one applying to the effect of a statute of a state passed after the entering into of contracts lawful when made, but which would be unlawful if entered into subsequent to the passage of said state statute. This distinction is sought to be made, because of the fact that the Constitution of the United States, while inhibiting the states from passing any law impairing the obligations of contracts, does not place any such restriction upon Congress, and that while Congress can pass an act which would render invalid a contract theretofore valid if made concerning the regulation of commerce or other power of the federal government, it is urged that the state cannot exercise a similar power, by reason of the provision of the federal constitution. That this distinction is not justified is readily seen from a consideration of the authorities. The Stanislaus County and the Home Telephone Cases, which dealt solely with state power, clearly lay down the rule that a state cannot be construed as having surrendered its authority to regulate utilities, unless it is made plainly to appear affirmatively that either the state has done this or has empowered a legal subdivision so to do and such legal subdivision has acted. Therefore, it is only necessary to bring the case we are now considering under the rule of the Legal Tender and Mottley cases to show that the state had not contracted with the agency we are here considering, the applicants herein, or their predecessor, either specifically or by a general law which could

be construed as a contract, permitting them to make rates by contract, thereby divesting the state of the sovereign power of fixing these rates, or that it had conferred upon the Board of Supervisors, or any other agency having jurisdiction in the matter, the power so to contract, which power had been exercised by the subordinate authority in favor of these applicants.

The result of the theory that a public utility, on the silence of the state as to its desire to exercise an admitted governmental power, may contract and thereby prevent the state from exerting such authority is plainly stated in the Mottley case. There the court, citing Judge Cooley with approval, says: "Contracts are always more or less affected by general laws even when in no way referred to..... But this incidental effect of the general law is not understood to make it a law impairing the obligation of contracts. It is the necessary effect of any considerable change in the public laws. If the legislature had no power to alter its police laws (and here rates were involved) when contracts would be affected, then the most important and valuable reforms might be precluded by the simple device of entering into contracts for the purpose. No doctrine to that effect would be even plausible much less tenable." In other words, it being well established that the state has the power under the State and Federal Constitutions to fix, either directly or by subordinate authority, the rates of the applicants, the sole question left is, did the state by contract with the ap-

plicantswaive such right and affirmatively allow these applicants to assume this sovereign power, or did it by statute empower the Board of Supervisors so to contract and having empowered the Board of Supervisors to contract did the Board of Supervisors act upon such authority? I think the cases already reviewed, particularly the Stanislaus case from the Supreme Court of the United States and the Crow and Leavitt cases from our own Supreme Court, conclusively show that this has not been done.

Again referring to the Leavitt case, we find the court saying that in the Crow case "immediately following the Park case, such a contract even if violated by a consumer, could not operate to deprive him of his constitutional right to the water furnished by the public service corporation upon tender to it of the legal rate"; and further, " we have stated, and undertaken to show, that a water company organized under the Constitution of 1879 which has appropriated waters of the state for public rental, distribution and sale, cannot give a preferential right to one consumer over another."

In this language the court plainly shows itself to be of the opinion in line with a decision of the Supreme Court of the United States in the Stanislaus case, that the statutes passed pursuant to Article XIV of the Constitution up to the time of this decision in 1909, could not be construed to amount to a contract on the part of the state to waive its admitted right to regulate these agencies, and the inference is also very strong that the legislature does not have the power to contract away this authority, because the authority is anchored in the Constitution, but it is not necessary to a decision of this case that such be

true. The only language which could possibly be construed to have any bearing upon this subject is that in the amendment to the Act of 1885, passed in 1897 (Statutes of 1897, page 49) which reads as follows:

> "Nothing in this act contained shall be construed to prohibit or invalidate any contract already made, or which shall hereafter be made, by or with any of the persons, companies, associations or corporations described in section 2 of this act, relating to the sale, rental or distribution of water, or the sale or rental or easements and servitudes of the right to the flow and use of water; nor to prohibit or interfere with the vesting of rights under any such contract".

Independent of the suggestion of the Supreme Court in the Leavitt case, that this language is unconstitutional, and giving it all of the effect, which, as a valid statute, it could have, it goes no further than to say that the Act of 1885 does not prohibit or invalidate contracts, but does not by implication or otherwise, carry with it the inference that that act does validate or sanction contracts. If it has any effect at all it merely subtracts whatever effectiveness the Statutes of 1885 had against these contracts, and leaves the subject in the same condition with reference to the validity or invalidity of such contracts as though no statute had been passed at all, and we must rely, as the Supreme Court of this State does, in the Leavitt case, upon Article XIV of the Constitution. Granting that the legislature had the power under the Constitution to contract away the right of the State to regulate a water company having appropriated water for sale, rental or distribution, under the decisions heretofore referred to, such contract must be explicit and unambiguous and a direct and affirmative grant and this language in the amendment of 1897 certainly could not be tortured into meaning any such thing.

Contracts such as these are entered into by the parties in full legal contemplation of the power of the State to exercise its authority and although the State has not exercised its authority, such power to exercise such authority is in effect a condition subsequent as much a part of the contract as though written therein by the parties and hence, of course, on the happening of the condition subsequent the effect of the contract as against the power of the State

to regulate becomes nil. It may be asked what relief a party entering into a continuing contract for a full consideration has when the state acts and deprives it of the benefit for which it has paid. This same question was raised in the Mottley case and there discussed by the Supreme Court of the United States wherein the court said:

> "Whether without enforcing the contract in suit the defendants in error may by some form of procedure against the railroad company recover or restore the rights they had when the railroad collision occured is a question not before us and we express no opinion upon it."

In the Leavitt case, the Supreme Court of this State in commenting upon contracts between a water company and its consumers which cannot be enforced by reason of the power of the State to control such agencies says:

> "For the breach of the consumer's contract, the water company must seek other redress than that of depriving the consumer of his share of the supply."

By reason of the fact, as pointed out earlier in this decision, that the powers of the Boards of Supervisors that have been the subject of the discussion in the various cases referred to, have been conferred upon this Commission and enlarged by the provisions of the Constitution and the Public Utilities Act so as to go beyond the power possessed by the Boards of Supervisors under the provisions of the Act of 1885, and that this Commission is now empowered not to fix merely the maximum rate, but the exact rate which shall be charged by every public utility, including a water company, and is empowered to prevent deviations from such rates and as stated by Mr. Justice Temple in his decision in the Park case, the legislature in its exercise of its plenary power conferred upon it by sections 1 and 2 of Article XIV of the Constitution, has deemed it desirable in order "to prevent favoritism or unjust discrimination" to confer upon this Commission the power to fix the actual rates, it can no longer be questioned that this Commission has the right to fix the rates which may be charged by the applicant and prevent deviations from such rates, contracts to the contrary notwithstanding, and by reason of the fact that this same question is continually coming up with

reference to utilities, other than water companies, I deem it proper at this time that we announce a similar conclusion with reference to all utilities. It is my opinion that no contract affecting the relationship which exists between a public utility and its patrons or in any other way affecting the public is of any effect in the face of this Commission's authority, except this Commission shall approve the same as a rate which it has a right to do under the Public Utilities Act, providing such action will not bring about discrimination.

Most that has been said heretofore refers to contracts made prior to the amendment of the Constitution in 1911 and the passage of the Public Utilities Act in 1912. Contracts entered into between a public utility and its consumers subsequent thereto, do not even for the time being establish the relationship of the parties with the condition subsequent that on the action by the state with reference to the subject matter thereof such relationship cannot longer continue and such contracts now require, as a condition precedent to their having any effect whatsoever, the approval of this Commission and when they have the effect of fixing a rate, such approval merely amounts to an establishment of the rate therein agreed upon and does not prevent the Commission, as it may with any other rate, from thereafter changing said rate as provided by law.

Before leaving this subject, however, I think it well to say that contracts entered into in good faith between public utilities and their patrons that are not forced or compelled in any way, and are based upon an adequate consideration should be adopted so far as is consistent with adequate regulation as the basis for the rates for the service performed by a public utility for its patrons. But at any time when changing conditions bring about the necessity of a change in rate, the Commission should exercise its undoubted authority to depart from the conditions of any such contract, however proper such contract might have been in its inception.

The utilities of the State, however, must not take this announcement as authorizing them to repudiate contracts which

they now have. Contracts made prior to the recent amendments of the Constitution and the passage of the Public Utilities Act probably fixed the status of the parties as regards their mutual relationship until the public authorities act, and at any event the matter should be presented to this Commission before either party attempts to change such relationship. As to contracts made since the amendment of the Constitution in 1911, such contracts unless they have had the approval of this Commission by being filed and adopted as a rate are void from the beginning. We make this statement because we do not desire to have this decision used as a means or urged as an excuse for avoiding contracts which the parties do not desire to carry out, for the necessary result of this would be that the parties would avoid the contracts they did not like and seek to have enforced the ones that pleased them. We specifically announce that we expect the status to be maintained until one or the other of the parties to a contract has appealed to this Commission or the Commission has, on its own initiative, taken up and decided the matter.

I do not believe there is any force in the contention of the protestants that the incorporation of East San Diego since March 23, 1912 has served in any way to impair the jurisdiction of this Commission to fix the rates within the confines of this municipality. It is our view that under Section 23, Article XII of the Constitution and section 82 of the Public Utilities Act, the cities are limited to the power which they possessed on the 23d day of March, 1912, and that no extension of this power may be had. The City of East San Diego not being in existence on this date is incorporated as a city of the sixth class at a time when such cities are limited to the powers over utilities which they had vested in them on the 23d day of March, 1912, which of course, as to this city was nil.

Neither do I believe that the contract with the La Mesa Mutual Water Company at so much per thousand gallons made by the predecessors of the applicants is beyond the control of this Com-

mission. The applicants herein as the successors to the San Diego Flume Company are a public utility, and under the provisions of the Public Utilities Act, all rates, fares, tolls, rentals, charges, classifications, contracts, practices, rules and regulations are subject to the approval of this Commission and to change by the order of this Commission, and this Commission has ample authority to fix any charge which any public utility shall make for its commodity and there cannot be found any authority in the Constitution or the Statutes of this State for exempting a wholesale rate of a public utility from the jurisdiction of this Commission. Therefore, while admittedly the Commission under the authority of McFadden vs. Los Angeles, (74 Cal. 571.) has no authority to fix the rate which the La Mesa Mutual Water Company shall charge to its stockholders if it is in fact a mutual company yet this does not at all effect the power of the Commission to regulate the relationship which exists between this corporation as a consumer of water and the public utility which furnishes the same. Therefore, I reach the conclusion that all of the rates and all of the conditions of service of the applicants are properly subject to the jurisdiction of this Commission.

Such being the case it will be necessary to review the facts brought out in the testimony upon which a decision fixing rates and regulating service must be based.

Considering the question of rates and service it would be well to consider just briefly the decisions applicable to the fixing of rates of a public utility. Such decisions, however, are so familiar and the general principles so well established that it will only be necessary to call them briefly to mind. In the case of the City of Palo Alto vs. Palo Alto Gas Company decided by this Commission on the 12th day of March, 1913, the principles which guide this Commission in the fixing of rates are set out. These principles are the result of the decisions beginning with the case of Smyth vs. Ames, 169 U.S. 466, and the

following cases decided subsequently thereto, some of which deal with water companies and others do not, but inasmuch as we have already seen that the Supreme Court of the United States in the case of San Diego Land and Town Company vs. National City, 174 U.S., 739, has held that the principles laid down in the Ames case as applicable to the rates of a common carrier are likewise applicable to a water company such as the one before us, we may consider all of the cases which I shall cite as proper to be considered in this proceeding. These cases are:

Lexington Turnpike vs. Sanford 164 U.S. 578

Osborne vs. San Diego Land and Town Company 178 U.S. 962.

San Diego Land and Town Company vs Jasper 189 U.S. 439

Stanislaus vs San Joaquin and Kings River Canal and Irrigation Company 192 U. S. 202

Knoxville Water Company 212 U. S. 1

Wilcox vs. Consolidated Gas Company 212 U. S. 19

The doctrine which results from these cases is that the present fair value of the property being used by a public utility for the convenience of the public is the basis upon which rates are to be fixed and in the Ames case it is held that original cost of construction, the amount expended in permanent improvements, the amount and market value of stocks and bonds, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates and the sum required to meet operating expenses, are all matters for consideration "and are to be given such weight as may be just and right in each case". The Jasper case also in addition to this, holds that the price at which a plant has been bought at a foreclosure sale is evidence to be considered in a rate fixing inquiry. This case also announces some important principles with reference to the effect upon a right to earn rates of the construction of a property in extent

beyond the needs of its consumers, and to this I shall refer again shortly. The Knoxville case deals primarily with the effect of depreciation upon value.

Evidence was taken upon all of these matters to which the courts have said consideration should be given and this decision is based thereon. It is stated in the evidence that the approximate original cost of this property was $1,250,000 although this is based entirely upon recollection, and has no foundation from accounts submitted in evidence. The San Diego Flume Company, predecessor to the applicants, issued $600,000 of bonds, but it is not in evidence how much money was actually realized from the sale thereof. The amount of capital stock was $1,000,000. Neither these bonds nor the capital stock now have any market value, however, and the evidence shows that the bonds were burned after the acquirement of the system by the applicants and the original San Diego Flume Company as a corporation has gone out of existence.

The applicants, as has already been pointed out consist of two individuals owning the system in common and therefore at the present time there is no outstanding stock nor bond issues of the present owners. But we have considered this matter in connection with the predecessor in interest of the present owners. We have also referred to the fact that the present owners purchased this system in 1910 for $150,000 and, the Supreme Court of the United States in the Jasper case in referring to the price secured under foreclosure proceedings said:

> "But at all events it is decided that the price is often we might say more important evidence than the original cost. Dowe vs. Boidolmann, 125 U.S. 680."

The evidence shows that since purchasing this property the applicants have expended in permanent improvements, additions and betterments to the system, approximately $52,000.

In order to have a basis for considering the other very important elements which the Supreme Court has held shall be con-

sidered in arriving at a value upon which rates are to be fixed, as well as to determine the character of the service, it is well to have before us a more detailed description of this system than we have heretofore given.

The evidence shows that the system consists of the Cuyamaca Reservoir located at the head of Boulder Creek at an elevation of about 4,600 feet. The drainage area tributary to the Reservoir is about twelve square miles, and it has a storage capacity of about 11,400 acre feet. Water stored in this Reservoir is released into the natural Channel of Boulder Creek down which it flows to what is called the diverting dam, which is located about 12½ miles below the Cuyamaca Reservoir on the San Diego River. At this point it is picked up together with the natural flow of the stream and carried through a flume to the lands of the consumers. This flume is about 33 miles long, of which .8 of a mile is tunnel, .76 of a mile is steel syphon, and 31.4 miles wooden flume. This flume is a rectangular structure open at the top running at a uniform grade of 4.75 per mile throughout its entire length and is constructed to carry in the neighborhood of 5,000 miner's inches of water. Near the end of the flume are three storage reservoirs known as Murray Hill, with a capacity of 134 acre feet, La Mesa with a capacity of 1,460 acre feet and Eucalyptus with a capacity of 26 acre feet. Eucalyptus and Murray Hill Reservoirs are at the end of the flume at an elevation of approximately 625 feet. The La Mesa Reservoir is connected with the end of the flume by an open ditch following the contour of the hills and is about two miles directly west of Eucalyptus and Murray Hill Reservoirs. Its elevation is about 485 feet. Service from the system is first rendered in the vicinity of Lakeside and from thence westerly through El Cajon Valley to La Mesa directly from the flume itself. From La Mesa westerly the service is divided into two classes known as high service and low service covered by pipe systems, the former being served by Murray Hill and Eucalyptus and the latter by La Mesa Reservoir.

The district covered by this pipe service includes La Mesa and Lemon Grove and that section westerly to the city limits of San Diego. The nucleus of the system consisting of the Cuyamaca Reservoir, the diverting dam, flume and Eucalyptus Reservoir was constructed in 1888-9. La Mesa Reservoir was added in 1895 and Murray Hill Reservoir in 1910 and 1911. The pipe distribution system extending from Murray Hill and Eucalyptus Reservoirs westerly has been gradually installed since 1888 as demand required and is of various ages.

The dams forming Cuyamaca, La Mesa, Murray Hill and Eucalyptus Reservoirs are of earth. The diverting dam is of masonry. These structures are permanent in character and are in good condition. The flume is a timber structure and as previously indicated has been in use since 1888. It is in very poor condition. The evidence shows that in the twenty-four years past its useful life has practically ended through the operation of depreciation and decay. Its condition is such that at the present time repairs in most cases are impossible due to the inability of the timbers to withstand new work. It is admitted by all of the engineers who testified in this case that it should be replaced immediately not only because of its physical condition and the necessity for large maintenance charges, but also because of the large saving of losses in the water transmission. I FIND AS A FACT that adequate service for the consumers requires the immediate replacement of this flume.

The pipe distributing system, as has already been said, is of varying ages from 1888 to the present time, and much of it is in immediate need of replacement. While I do not find that the same losses as are incident to the condition of the flume are brought about by the condition of these pipe systems, yet I do find as a fact from the evidence that 45% of the pipe distribution system has outlived its useful life, and that adequate service to the consumers requires the immediate replacement of at least 45% of the pipe distribution system.

Because of its great importance the question of the water supply, the safe yield of this system has been carefully considered. Mr. Charles H. Lee, Hydraulic Engineer, made an investigation on behalf of the company, and Mr. Philip E. Harroun, Hydraulic Engineer for the Commission, made a similar investigation on behalf of the Commission. These two engineers' conclusions check within 4%, and because of this substantial agreement I am spared the difficulty of determining to which one greater weight should be given. The evidence shows that large losses occur throughout the system. It is found that, of the total storage in Cuyamaca Reservoir, 56% is lost in seepage, evaporation and transpiration, leaving but 44% of the annual catchment available at the reservoir for transmission. As previously stated, this stored water is passed down the open channel of Boulder Creek about 12¾ miles to the diverting dam. In passing down this channel the transmission loss was found to range from 15% to 84%, the average being about 30%, leaving available at the diverting dam an average of a little less than 31% of the water stored in the Cuyamaca Reservoir. The losses in transmission in the flume and those in the distribution systems from the flume to the consumers are not capable of subdivision, and as in the case of transmission from Cuyamaca Reservoir through Boulder Creek to the diverting dam, will vary with the supply turned into the flume. It is agreed by Mr. Lee, testifying for the company, that this loss will amount to at least 25%, while Mr. Harroun suggests a slightly higher figure. I will, however, for this purpose accept the transmission loss of 25%. The amount of water which the present consumers require for adequate service has been determined from the actual measurements of the amounts delivered at the meters during the years 1909 and 1910 when a normal supply was available. It is pointed out that during these years all consumers were allowed to take all of the water they wanted up to the limitation of amounts set out in their contracts, and it is urged that the amounts taken in these years will cover the requirements of the consumers,

and I believe such is the case. In 1909 there were delivered to the meters of the consumers of this system 247 miner's inches, and in 1910, 265 miner's inches. The evidence shows that aside from domestic consumers no consumers were added to this system between 1909 and 1910, and the 18 miner's inches by which the 1910 supply exceeded the 1909 supply being considerably greater than could be accounted for by the domestic consumers added to the system, I am inclined to think that 265 miner's inches more nearly approximates the needs of the consumers than the smaller figure. Assuming the needs to be the average between these two amounts, and, as I have said, I think this will be somewhat low, we would have 256 miner's inches as the amount of water which the requirements of the consumers demand be available at their meters. Remembering that there is a 25% loss between the diverting dam and the consumers' meters, it will appear that 256 miner's inches is only 75% of the amount which should be available at the head of the flume, which would then be 340 miner's inches.

The record of the water supplied, kept by the Flume Company was admitted in evidence from the year 1899 to and including 1911. This record covered a period of dry years from 1899 to 1904 inclusive, two of which the evidence shows were the driest on record in Southern California, and it also contains a record of a period of normal and above normal years from 1905 to 1911, and it is the opinion of the engineers that this probably gives a full range of conditions which may be met in this watershed.

In determining the safe net yield of a system for irrigation it is testified that much more difficulty is encountered than to obtain the same fact with reference to a domestic supply. In the case of water supplied for domestic purposes the system must be capable of supplying at all times sufficient water for its consumers, and the safe net yield must be based upon the minimum possibility of this supply because the demand is continuing and any substantial diminution works great hardship upon the consumers. This, however, is not the case with an

irrigation system. In periods of shortage it is possible for crops to get along with a supply below that which they normally require. The determination of this minimum amount for crop requirements which may be used as a basis for determining the safe net yield must be a combination of measurement and judgment. This problem is the result of the following considerations. If in California, where the rainfall varies greatly from year to year, each irrigation system be limited in its operation to supplying that number of consumers only whose reasonable requirements would be met in the driest year, the result would be that most all of the water companies in this state would in by far the majority of the years be allowing a great portion of the water supply to waste which would serve to restrict the area which might be irrigated, and also by reason of this fact raise the cost for each unit of water used. While on the other hand if the water company be permitted to take on consumers up to the limit of its ability to serve in the year of maximum supply - and this has been too often the case in California - we would have a condition wherein in almost every year the consumers' crops would suffer for water. Good judgment will dictate a medium auroum which while not perhaps actually the average will insure in the driest year which the history of the region in question for a sufficient number of years shows is likely to occur, a sufficient amount of water to carry crops through the year without serious or permanent injury, if as in this case the crops are trees and vines. A somewhat different rule perhaps might be followed with crops of different character. Therefore, while in the case of Palmer vs. Southern California Mountain Water Company we were inclined to take as the basis for the safe yield the maximum requirements of the consumers and the minimum precipitation and run-off, which is necessary when considering domestic service, yet I believe for the reasons I have already pointed out, such a rule here where irrigation is being considered, would not be to the advantage either of the company or the irrigators, and would be contrary to public policy if applied to a company whose consumers, as here, are largely irrigators.

Mr. Lee and Mr. Harroun are in accord with their conclusion that the year 1902 may be safely taken as a proper average year to determine the safe net yield of the system. On the basis of this year's supply it is found that the flow of the San Diego River together with the storage available in the Cuyamaca Reservoir and regulated by the storage in La Mesa, Eucalyptus and Murray Hill Reservoirs will produce as at the diverting dam 256 miner's inches, and this may be taken as the safe net yield of the system available as at the diverting dam. Deducting the loss of 25% assumed for transmission we have 192 miner's inches at the consumers' meters. As we have previously seen the requirements at the present consumers' meters are 256 miner's inches. Therefore we see that in a year like 1902, which was a year of ordinary and not excessive drought, the accepted average year, the consumers on this system would have to get along with three-fourths supply and the engineers agree that to make the consumers safe there should be 100 per cent of the requirements available in the system in such a year. This whole matter is so difficult to determine and of such tremendous importance to the State that I have outlined briefly what the evidence on this point shows in this case, and have made such observations as I think the evidence warrants, but taking conditions as they actually exist in this system both Mr. Lee and Mr. Harroun are of the opinion that the adequacy of the system to supply its consumers is not more than 75%, which means that an arrangement for conserving the supply so as to produce 33 1/3% more water must be brought about in order to do justice to the present consumers under this system. It is my opinion that the adequacy of this system as here understood can be brought up to 100% without serious difficulty, so that even in such dry years as 1899, 1900 and 1904, the supply could be kept up beyond the minimum which results in substantial and permanent damage to the crops of these consumers. And as to other years than those of excessive drought the adequacy of the system can be brought up to 100% without any difficulty whatsoever by merely making the needed repairs to the system. Plenty of water is now in control

of the applicants not only to serve their present consumers but to extend their supply to others, but having admitted by these contracts these irrigation consumers to the status of users from the system, and having performed acts which bring the land of these contractholders "within the territory to which the public use extends" and having established the status of such lands "as land permanently entitled to share in the public use" (Leavitt vs. Lassen, supra), it is the duty of the applicants to furnish an adequate supply to these present consumers, either domestic or irrigation. It is my belief that after having furnished water to the consumers by contract or otherwise, that a public water company while it does not "technically attach it (the water) to the land as an appurtenance", assumes an obligation which it cannot get rid of except by abandoning the water which is the subject of the public use, (Leavitt vs. Lassen), and it should be prevented from loading its system with any consumers in addition to those with whom it has assumed obligations until it shall have increased the safe yield of the system beyond the needs of its present consumers. This was our position in the case of Palmer vs. Southern California Mountain Water Company heretofore referred to, decided on January 21st, 1913.

I, therefore, find as a fact that the applicants have a supply of water in their control devoted to public use adequate to furnish all of the necessary demands of those for whose benefit such public use was created, but that by reason of inadequate facilities such applicants are wasting said water and are not properly or adequately supplying the demands of their said consumers; and I further find as a fact that the facilities for furnishing a supply of water to such consumers and the supply of water available under the present condition of this system for the service of such consumers are, and each of them is, inadequate, insufficient, unjust and unreasonable; and I further find as a fact that the increase of the net safe yield of this system at least 33-1/3% over its present safe supply is necessary to render its facilities and service

adequate, sufficient, just and reasonable.

The consumers did not insist upon the applicants introducing in evidence their plans for the improvement of their service and the increase of their supply by additional storage or otherwise by reason of the fact that if such plans were made public it might embarrass the applicants in carrying them out and might add to the cost which would ultimately be reflected in the rate to the consumers. Yet these plans have been submitted to the Commission, and its engineers, and it is my opinion and the opinion of our engineering department that if carried out they will serve not only to increase the supply sufficiently for the needs of the present consumers, but will greatly increase such supply, and I therefore do not make a finding nor suggest an order as to the specific character of the improvements, except as relates to the flume, to be made by these applicants, to take care of the inadequacy which I have found as a fact exists. Yet if the applicants do not immediately proceed to carry out such or similar plans, in addition to what is ordered herein, I will recommend that an order be entered requiring specific action on the part of this utility designed to cure its inadequacy, and I recommend that this be held in abeyance for a reasonable time and that no decision or order be rendered upon the specific improvements to be made in addition to those herein ordered, looking to an increased supply, but that if such improvements are not actually undertaken within a reasonable time that the Commission render a decision based upon evidence which will hereafter in such event be required to be formally submitted in this case, requiring proper action to be taken.

In order for rates of a public utility to be just to such utility they should be sufficient after caring for cost of operation, maintenance and depreciation to yield a reasonable return upon the present fair value of the property devoted to the public use. While the courts have well established this rule and have indicated from time to time the elements to which I have already referred, which should be considered by a rate fixing body, yet they have never

defined the word "value", a term concerning the meaning of which there is of course much dispute. In fact, its meaning is the bone of contention between the two great schools of economic thought. That as applied to a public utility, however, it cannot have the significance which the man on the street attaches to it, namely, what the property considered will sell for is, it seems to me, is so plain that I become impatient with the superficial thinking which attributes such meaning to it. And were it not for the fact that even such an eminent authority as the Supreme Court of the United States rejects the view that what a utility property as a whole will sell for determines its value, mainly on the ground that because of the nature and magnitude of such properties they do not change hands often enough to use this method as a guide I should think the mere statement of this theory would carry with it its refutation. Of course in a rate fixing inquiry what a property as a public utility will sell for has no place as a factor, except as such amount is affected or determined by the cost to produce such property and not by its earning capacity. When one would sell a farm or a store the buyer desires to know what such farm or store will earn, and if he finds the property will earn say ten per cent net on ten thousand dollars he will be willing if there is a reasonable likelihood of such a condition remaining permanent to give ten thousand dollars for it. But certainly the ten per cent net earning on a certain value is determined by the price for which he sells the commodity the property produces for sale. And so in the case of a public utility the value determined from the earning power depends upon the rates and the rates are what is to be determined, and we find ourselves in a circle. To illustrate again concretely: Suppose we have a gas plant which at certain rates is earning $8,000 net per annum after paying maintenance and operation charges and providing for depreciation. This amount is 8 per cent on $100,000, and if this method is correct the property is worth $100,000. But if the rates be reduced so but $4,000 net per annum is earned then the property is worth but

$50,000, and by the same token if the rates are increased so that an earning capacity of $16,000 net per annum results the value of the property is $200,000. In short to adopt such a view means we cannot regulate the rates of public utilities because every time we do so we change value and if we reduce such value we will be depriving the utility of a part of its property without compensation, which we may not do under the constitution of the United States, and if we raise rates we present value to the utility which thereafter we can not take away for a like reason. But the courts are thoroughly committed to the view that we can regulate the rates of public utilities, ergo this method of arriving at value must be discarded.

It is fortunate therefore that the Supreme Court of the United States has failed to define "value" and has contented itself with pointing out certain elements that should be considered leaving the determination of the composite fact "value" to the discretion of the tribunal empowered to act. My own view is that the nearest and fairest approximation which may be made to a correct "value" upon which a public utility shall be allowed to earn is the amount of the investment wisely made and this view is not at all in conflict with the position of the courts in this regard. The elements which we have been directed to consider may all well be secondary evidence of this ultimate fact. However, this may be, this Commission in every rate fixing enquiry should give careful consideration, as we have done here, to each of the elements prescribed and should give that weight to each in each case to which we conscientiously think in that case it is entitled with the hope that thereby we may arrive at such fair value of the property devoted to the public use as is just and fair to the utility and at the same time not oppressive to the consumer.

I have already considered the evidence on original cost, stocks and bonds and cost to the present owners and will now consider the cost of reproducing the property in its present physical condition. The appraisal of the property on behalf of the applicants was prepared in detail by Mr. Fulton Lane and concurred

in generally but not as to details by Messrs J. B. Lippincott and W. S. Post. It is presented in detail in Applicant's Exhibits Nos. 2, 3, 4, 5 and 6. The appraisal for the Commission was prepared by Mr. P. E. Harroun, Hydraulic Engineer for the Commission.

The word "present value" here used should not be misunderstood. It is a term used by engineers to represent a result which is obtained by taking the cost to reproduce a property, under consideration, new and then deducting from that cost the amount which in the engineer's opinion the structure has depreciated. To this result they apply the term "present value" and when such term appears in this opinion it should be so understood and as not having any other significance than the one here suggested.

I submit here two tables comparing the results obtained by Mr. Lane and Mr. Harroun in parallel columns first as to their general appraisals and second as to their land values and shall discuss these tables some what in detail.

TABLE I SHOWING COMPARATIVE VALUATIONS OF SYSTEM OF APPLICANTS'.

CUYAMACA WATER CO.

ITEMS.	Reproduction Cost (With Overhead)		Annual Depreciation (With Overhead)		Present Value. (With Overhead)	
Collective System.	For the Company: LANE	For R.R.Commission: HARROUN	For the Company: LANE	For R.R.Commission: HARROUN	For the Company: LANE	For the R.R.Com. HARROUN
1)Lands & Rights-of-Way.	$239701.00	$116000.00	$ None	None	$239701.00	$116000.00
2)Bldgs. & Improvements on Lands.	15858.00	13320.00	677.00	466.00	8948.00	5540.00
3)Cuyamaca Dam,	43311.00	37950.00	360.00	370.00	34850.00	28450.00
4)Diverting Dam,	38167.00	34370.00	378.00	343.00	35916.00	25764.00
5)Flume System,	717837.00	585000.00	22567.00	18900.00	235583.00	145000.00
6)Eucalyptus Dam,	11992.00	10910.00	127.00	110.00	9588.00	8720.00
7)La Mesa Dam,	24294.00	16200.00	359.00	163.00	20023.00	13440.00
8)La Mesa Ditch,	6550.00	7080.00	156.00	186.00	3729.00	3720.00
9)Murray Hill Reservoir and Pipe Line,	48707.00	49500.00	488.00	495.00	48219.00	49005.00
Distribution System:						
1)Pipe Lines,	92928.00	87730.00	6012.00	5310.00	28237.00	29030.00
2)Meters,	684.00	684.00	14.00	14.00	384.00	384.00
Miscellaneous:						
1)Material on Hand,	3481.00	3481.00	92.00	----	3389.00	3389.00
2)Tools, Equipment, Etc.,	3985.00	3985.00	331.00	----	3322.00	3322.00
3)Telephones,	2633.00	2340.00	75.00	69.00	456.00	1170.00
TOTALS,-	$1250128.00	968550.00	31636.00	26426.00	672345.00	432934.00

TABLE 2 SHOWING DETAIL VALUATION COMPARISON SHEET OF LANDS OF APPLICANT'S SYSTEM.

ITEM RIGHT OF WAY AND LANDS	FOR R. R. COMMISSION HARROUN QUANTITY	UNIT	UNIT COST	TOTAL COST	FOR COMPANY LANE QUANTITY	UNIT	UNIT COST	TOTAL COST
Indian Reservation		Acre			60	Acre	$400.	$24000
Indian Line to Los Coches		"			58	"	10.	580
Los Coches to Section 5 House.	233	"	$28.00	$6510.00	60.	"	75	4500
Sec. 5 to End of Flume		"			30	"	150	4500
Flume to La Mesa Reservoir		"			25	"	150	3750
Cuyamaca Lands	1675	"	56.00	93800.00	1675	"	100	167500
La Mesa Res. Site	96.7	"	112.00	10810.00	96.7	"	250	24175
Eucalyptus Res. Site	4.36	"	112.00	480.00	4.36	"	350	1526
Murray Hill Res.Site	26.2	"	168.00	4400.00	26.2	"	350	9170
Totals	2035.26			$116000.00	2035.26			$239701.

Examination of the first table shows that the cost of reproducing the property, as based upon the prices of labor and materials as of August, 1912, as estimated by the Company, is $1,250,128.00. Mr. Harroun estimated its reproduction cost as $968,550.00. On the same basis the present value of the property was found by the engineers for the Company to be $672,345.00, as against $432,934.00 by Mr. Harroun. To the present value of the physical items entering into the property, as determined by Mr. Lane for the Company to be $672,345.00, there is added by him the sum of $159,480.00 as intangible values, making a total value of the property as appraised by the engineers for the Company of $831,825.00. The item of $159,480.00 of intangible value is arrived at by taking the cost of maintenance and operation, depreciation and interest on the value of the property for the two years during which it has been in the possession of its present owners, and from this sum deducting the gross earnings during that time. It is in the nature of a "going business" value. I do not believe any such intangible items should in this case be considered. It is the same as saying the more you lose the richer you become and the more valuable the agency which brings about such loss. The testimony shows that the property was bought by its present owners for $150,000.00. If the accumulated deficiencies, as arrived at by Mr. Lane, had amounted to a sum such that if added to the actual cost to the owners--that is, $150,000 plus this accumulated deficiency--had reached a sum in excess of the present value of $432,934, I would consider perhaps some equity in the applicants demand. For these reasons I do not consider that this item should be included.

It is apparent from the second comparative table above presented that a large discrepancy exists between the values placed upon the lands and right-of-way by Mr. Lane and Mr. Harroun. Mr. Lane finds this item to have a value of $239,701.00 as against the value arrived at by Mr. Harroun of $116,000.00, a difference

of $123,701.00 in favor of the Company.

The details of Mr. Lane's valuation of the lands are given on Sheet No. 1, of Applicants' Exhibit No. 2. In examining the details it is found that under the head of right-of-way 60 acres of the total of 233 acres are within the Indian Reservation. Mr. Lane places the value of this right-of-way at $24,000.00. He states that he bases this upon the value of the right which the Indians have, which is to use water from the flume free of charge, but does not give the details of its determination. In other words, because the United States exacts a free use of 40 inches of water for its wards and Mr. Lane believes this water is worth a certain amount he assumes that the land thus purchased for a right-of-way is worth the amount paid for it. This of course is not the proper rule. (San Diego Land & Town Co. vs. Jasper 189 U.S. 439, Boise Irrigation Co. vs. Clark 131 Fed 415). If it were, a public utility might contract away a part of its service for an inadequate consideration and thereby burden its other consumers by reason of its fraud or generosity. It certainly is a novel theory that servitudes on a property which cause it to perform a service for nothing increase its value. But if the applicants urges here that the price which the government has exacted is the proper measure of the value of this portion of the property and is alone to be considered then we can very readily simplify this whole matter by accepting the sum of $150,000, which the applicants paid for this property as the correct measure of its value. , The right-of-way through this reservation contains 60 acres it consequently follows that its value on Mr. Lane's theory is $400.00 per acre.

The right-of-way lying between the Indian Reservation and Los Cochos Trestle, and containing 58 acres, he values at $10.00 per acre. The right-of-way within the Indian Reservation is less valuable if any than that from the reservation to Los Cochos, and if it were not for this capitalized water right value would certainly not have a value of over $10.00 per acre. If, however, it be taken at the same rate as that immediately adjacent it would make the value of the right-of-way

$23,400.00 less than he estimated. On this basis his average acre price for right-of-way would be $59.79, ranging from $10.00 to $150.00. In Mr. Harroun's estimate of the cost he has used a uniform rate for the right-of-way of the flume of $25.00 per acre, the land being uncultivated and barren, and I believe from all of the testimony this is ample.

With reference to the Cuyamaca lands, comprising 1675 acres, to which Mr. Harroun has given a value of $56.00 per acre with overhead and Mr. Lane $100.00 per acre without overhead, I have carefully considered all of the testimony in addition to that produced by the engineers. Four witnesses, Mr. W. L. Detrick, Frank T. Hill, I. B. Williams and George W. McCain, testified with reference to the value of this land, but any fair estimate of their entire testimony will not justify a figure of $100.00 per acre for all of this 1675 acres of land. They testified that some of it is worth $100.00 per acre, and Mr. McCain testified that some of it is worth $150.00 per acre, but it is in evidence that no land in the vicinity in tracts as large as this is being sold, and that one large tract of 20,000 acres is being offered in the whole for $200,000. No one of these gentlemen testified that the entire 1675 acres is worth $100.00 per acre, and they specifically stated that some of it is not. This land is many miles from the railroad in the mountains, and I do not believe from the testimony that it is worth anywhere near $100.00 per acre when taken in its entirety, but in order to be sure that no injustice is done to the applicants and in view of the fact that the engineers did not carefully inspect this land nor did other real estate experts do so, I am willing to allow a total valuation of $144,000 for the Cuyamaca land and find that this value is at least ample and if anything in excess of the real value of this land.

In the constructural items of the system considerable discrepancies are found among the various items as presented by Mr. Lane and Mr. Harroun. . . . . These discrepancies are

traceable largely to the use of different unit costs. Mr. Lane's unit costsin most cases are much in excess of Harroun's and seem to be based to a considerable extent upon the costs of work elsewhere rather than at this particular point. Some of these costs are also found to contain local overhead charges, ranging from 10% to 15%, and contractors' profits of from 20% to 30%. Harroun's unit costs do not contain such items. It may be stated that Mr. Lane used in addition to his unit costs an overhead charge of 20% on all construction items, with the exception of the pipe distribution system, where he has used 15% overhead. Harroun used 10% for Contractors' profits and 12% overhead compounded or a total of 23.2% all told.

The unit costs used by the engineer of the Commission in the determination of the value of this property have been from a careful personal analysis of the situation based upon 25 years' experience in construction of similar work which Mr. Harroun has had. I cannot help but feel that the unit costs which he has used are fully justified and liberal.

Mr. Lane's unit costs are also based in some cases upon material prices much in excess of those used by Harroun. This is particularly true in the case of the unit costs used in the reproduction of the flume. His lumber has been taken at a base price of $33.00 for redwood, where Mr. Harroun uses $27.00. This illustrates the conditions. The same conditions are also true in regard to the prices for materialx. The evidence shows that all such were from actual quotations from reputable firms who were entirely willing to enter into contracts at the prices furnished to the engineering department of this Commission, which prices Mr. Harroun uses.

Mr. Lane also includes in his value of the flume $25,236.00 for what he calls reserve lumber. Since Murray & Fletcher have owned this system they have been making some repairs and replacements to the flume and trestles which support it.

This reserve lumber valued by Mr. Lane at $25,236.00 is refuse lumber which had been taken out of the old structure and is scrapped. The evidence shows it is located at various points along the flume, mostly in inaccessible places, is badly rotted and it has in my opinion no value other than for firewood, and on account of its inaccessibility would not pay for loading and hauling to a market for that purpose.

In arriving at the present value of the physical items entering into the property from the reproduction costs, it has been previously stated that straight-line depreciation methods were used by all engineers concerned in the valuation.

Mr. Lane and Mr. Harroun differ also in regard to the estimated life of certain of the structures. This is especially true in regard to the flume. Mr. Lane's estimate of the remaining useful life of this structure is considerably in excess of Mr. Harroun's. He considers that the timber flume has a remaining useful life of four years. Mr. Harroun testified that he had carefully examined this structure and believed that its usefulness has ended, and that it should be replaced immediately, not only because of excessive maintenance charges, but also because of the large leakage which takes place through the structure at the present time, and which is impossible to remedy without practically entire reconstruction. He consequently considers that the flume has a remaining life of but two years, or one-half that of Mr. Lane's, or simply sufficient remaining life to replace this structure. A very large element of the discrepancy in value is in this consideration. The evidence shows a like discrepancy in regard to other structures, and I am convinced from the evidence that Mr. Lane has not depreciated them sufficiently.

For the reasons I have herein stated I shall accept in the main the conclusion as to the condition of the system and the cost to reproduce it and the amount it has depreciated arrived at by Mr. Harroun except as to those matters wherein I have pointed out my

disagreement. In doing this I am not to be considered as reflecting upon Mr. Lane or the other engineers testifying. In fact I have found a gratifying frankness on the part of both the engineer witnesses for the applicant and the proprietors of the system and their attorney. Every request of the Commission for information has been fully and freely complied with and every endeavor made to present to this Commission the facts. But on these matters where expert judgment is required and where our own engineers after submitting to the fullest cross examination still maintain the correctness of their conclusions if we retain our confidence in our engineering department,- and it still has our fullest confidence else we would change it,- we should accept, I believe, the report of our own engineers, unless on cross examination they appear to us to have erred either in their ascertainment of facts or their expert opinion based thereon. I believe for this very reason the report of our engineers should always be submitted to the parties in the case and the engineer making the same be required to submit to the most searching cross examination, and merely because he is the Commission's engineer he should not, and of course will not, be spared the same examination as any other witness. But after this is done and his testimony remains unchanged I believe as I have already said, it should be given great weight. For an engineer for a party be he ever so honest and capable - as I believe every engineer in this case is - has the natural tendency where there is room for honest doubt to resolve such doubt in favor of his side. He should, and honest men do, fight against this tendency but I believe so long as he is to any extent an advocate as a privately employed engineer always is, he inevitably will manifest this tendency, just as a lawyer who being a sworn officer of the court and hence, in conscience at least, no different from a sworn engineer witness, always when he has an honest doubt as to the law - and some even when they have no such doubt - urges upon the court that view of the law most favorable to his client. Here our engineers can have absolutely no reason to manifest this tendency either way and therefore I

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take the position I do, but in justice to the applicants and their engineers I deem it necessary to make the foregoing statement.

Mr. Harroun's cost to reproduce depreciated to its present condition as corrected for the Cuyamaca lands gives a figure of $483,134. This, however, as has already been pointed out is only one of the elements to be considered. Taking it together with all the other elements required to be considered I find as a fact from the evidence that the present fair value of the property of the applicants devoted to the public use is $352,500.50.

I find from the evidence that the annual cost of operation and maintenance of this property is $28,600, annual depreciation $21,150.03 and interest at 7% on fair value of property of $352,500.50, $24,675.00, making a total gross earning necessary to be earned $74,425.03, assuming that the annual operation is not excessive. I am of the opinion, however, that the annual cost of operation is too high by reason of the facts to which I have referred in the analysis of the conditions of the system. It was said in the case of San Diego Land and Town Company against Jasper (189 U.S. 438):

> "If a plant is built as probably this was for a larger area than it finds itself able to supply, or apart from that if it does not as yet have the customers contemplated neither justice nor the constitution requires that say two thirds of the contemplated number should pay a full return."

Here the flume and the filings indicate an enterprise much in excess of the present scope of this company's operations. The flume is built for approximately 5,000 inches and the company now claims between 3,500 and 4,000 inches and it is my opinion from a careful consideration of all the evidence that it can develop without infringing the right of anyone in excess of 3,000 inches which is more than six fold its present capacity to serve land, it being obligated to serve in the neighborhood of 4,000 acres in addition to its domestic consumers. In fact it is set out in the application that although they now serve but 4,000 acres that by the expenditure of approximately one million dollars the system can be made capable of furnishing water to 25,000 acres that are tributary

to the flume, and this is in addition to the rapidly increasing domestic demand for which a very much higher rate is paid. Can a company reserve from use a large quantity of water, serve its consumers in a very wasteful manner and maintain facilities for such service in an inadequate and decaying condition and demand an earning in addition to charging these unnecessary operating expenses and excessive losses from the system, the water representing which losses could easily be sold to waiting patrons without increasing such operating expenses? I think not and I believe this conclusion is based on common sense and I know it is sound law.

I think there are conditions when not even operating expenses might be demanded but I do not urge any such drastic rule here particularly since the evidence shows that the present owners have shown a better disposition as regards their patrons than has heretofore prevailed and likewise because they took this system burdened with contracts like an old man of the sea about it, illustrating the foolish policy of a public utility that in return for a lump sum at the beginning enters into contracts for annual payment for a continuing service that uniformly spells diaster, as the years pass, and depreciating structures and increasing cost of maintenance make such annual payment, as here, inadequate to the needs of the system. If the consumers under this system are wise they will recognize that regardless of past abuses present necessities demand for them adequate service which will be economy for them in the end even though the annual charge be a little higher, and the present owners of the system will likewise realize it is up to them in order to reserve control of the water in excess of that presently used to take immediate steps without any compulsion to put this system into shape.

The condition here well illustrates the evils of the permanent contract system for selling any commodity, particularly water. Here the consumers are contesting the right of the company

to avoid these contracts, while we have other cases before us where the companies are comparatively new where the consumers are contesting the right of the companies to make the contracts. In other words, the right of these companies to make such contracts is uniformally contested by the consumers in the early years of a water company and defended by the company, while in the later years after the initial consideration has been spent and, the annual rates that are often too low have shown the company the disadvantage of such contracts, we find the company desiring to be rid of them and the consumer desiring to retain them. One of the main reasons for the consumers position is that they have looked upon these contracts as conferring upon them some preferential water right, which they do not do, other than to admit the consumers to the class for which the use is created. Once having been admitted they are as firmly attached to the system and as much entitled to a permanent right to take water therefrom as it is possible for them to be under any circumstances and the contracts in this respect are no longer of value to them.

Thus there is seen to be no need for the consumers to have any alarm that this decision will have the effect of interfering in any way with the permanent rights they now have. In these they should be protected both by the conservation of the supply, and the limitation of the service to those that may be adequately served, and this we propose to do. But the only danger which confronts both the consumers and this company is the danger that by the wasteful methods here found to exist the failure to put to a beneficial use but a very small proportion of the water in control of this system will divest the right to the water and these consumers will find themselves in a position where, as against somebody else who has put this water to a beneficial use, neither they nor the applicants will be able to prevail. This is the real danger in the situation and the one which should cause both the applicants and the consumers to be reasonable, the one reasonably willing to improve the facilities, the other willing to pay a reasonable and adequate

rate for the service.

I feel under these circumstances that pending the renewal at least of the flume that the applicants cannot in justice and under the law demand more than the proportion of its operating and maintenances expenses which its adequacy represents, which is approximately $21,000. I feel that a similar reduction of the other items would be warranted but out of desire not to hamper the present owners unduly and feeling the consumers can readily pay a little more without hardship if their service is improved I shall recommend that the gross earning allowed be $66,825.03.

The gross revenue from all sales of water ending June 1st, 1912, was $49,076.69. I have purposely eliminated $120.46 not secured from water sales. This makes an annual gross return of $24,538.35 and assuming this to be a typical gross annual revenue it appears that in order to realize the amount allowed here the rates must be raised an amount sufficient to increase the gross revenue $42,286.68. How shall this be equitably brought about?

As much of this added burden as is possible should be placed upon the domestic consumers for two reasons. First, this class of service is more expensive both to serve originally and thereafter to maintain, and second, it will stand without hardship such increase. This second reason for a higher rate is recognized in every class of utility and its validity as regards freight classifications is so well established that it is unnecessary to cite authorities. Gold ore is no more expensive to transport than coal, yet it may be and is assessed a much higher rate proportionately than the slightly added risk at all warrants.

Of the domestic service, that to La Mesa should have a lower rate than prevails for the domestic service nearer San Diego, because of the greater service performed by the company in the latter case. I, therefore, find as a fact that a rate of 15 cents per thousand gallons is a just and reasonable rate to be charged by the applicant to the La Mesa Mutual Water Company,

with a minimumcharge of $100.00 per month.

I find as a fact that a rate of 25 cents per thousand gallons, with a minimum charge of $1.25 per month, is a just and reasonable rate to be charged to all consumers for domestic purposes other than the La Mesa Mutual Water Company. The applicants to pay for all meters and all pipes to the property line, the consumer to pay for pipes and fittings on the property and the same to remain the property of the consumer.

This fixing of domestic rates will increase the revenue of the applicants as follows: for the ColumbianRealty Company covering 9.875 inches from $60.00 per inch per annum to $1182.51 per inch per annum, which means an increase per inch of $1122.51, or for this contract an increase in revenue of $11084.80; the 14.5 inches to the El Cerrito Water now paid for at the rate of $30.00 per inch per annum, at the rate of 25 cents per thousand gallons will yield an increase per inch of $1,152.51, or a total increase of $16,711.50; the five inches furnished to Teralta Heights and vicinity is sold at a rate of 5 cents per thousand gallons and the increase to 25 cents per thousand gallons would mean an increase in revenue of $4,730.00; the increase in revenue from the La Mesa Mutual Water Company is hard to determine. If the increase affected the entire 20 inches the gross revenue increase would be $8514.52. I believe we are safe in assuming an increased revenue here of at least $5,000. Thus in the aggregate the domestic consumers at these increased rates will increase the gross annual revenue if all the water is sold by $37,526.30. If it is not all sold it is not the concern of the other consumers for water may not be reserved for sale and the cost of its development charged to those who do use water (San Diego Land and Town Co. vs. Jasper supra; Boise Irr. Co. vs. Clark Supra).

I shall recognize the land and the consumers thereon covered by theseccontracts for domestic consumption to be within the class for which the public use is created, and by so reserving the necessary supply for these lands the other consumers have a right

to have the proportionate cost of delivering this water and the proportionate valuation of the system which this quantity of water represents deducted from the entire cost of delivery and the entire value of the system to determine the cost and the interest on the system which they shall be required to pay.

The total gross amount of revenue to be produced by this system being $42,286.68 there still remains $4678.48 to be secured from increases in irrigation rates. Inasmuch as approximately 165 inches of water delivered from the flume itself is either delivered directly to the consumers or delivered into systems mutually owned by the consumers and by them distributed to the places of use, I am of the opinion that a somewhat lower rate should apply to this water for irrigation than to the water delivered for irrigation through pipes to the consumers who do not take from the flume, primarily because of the added cost of facilities properly attributable to the second service and the added cost of delivery. After a careful consideration of all of the evidence I am of the opinion that a rate of $65.00 per miner's inch per annum should be fixed for all water delivered for irrigation in the first class to which I have referred, taking from the flume, and that a rate of $70.00 per inch per annum should apply to all other irrigation users, and I find as a fact that such rates for these respective users are just and reasonable rates. While this latter rate of $70 per inch serves to raise the rate to the consumer in most instances from $30 per inch to this amount, yet when we bear in mind that the rate of $30 per miners inch per annum, which is charged for irrigation to a great many consumers from this system is by far the lowest irrigation rate for the same class of service of which we have any information, we feel that more than doubling this rate will not impose a heavy burden upon such consumers. Other consumers from this system have in a few instances paid more per inch per annum than the $70 and a great number have been paying

$65, while these favored consumers are given a rate not half as high. This is certainly a discrimination and if for no other reason the $30 rate should be condemned.

The effect on the revenue of this change in irrigation rates will be as follows:

The 56.51 inches which are now sold at $65.00 per miner's inch and delivered mostly in the El Cajon Valley will have no increase. On all of the 253.5 inches now sold at $60.00 per miner's inch per annum there will be an increase of $5.00 per inch, which will equal a total increase in gross annual revenue of $1,267.50. Deducting from the 165 inches served from the flume the 56.5 now served from the flume upon which a $65.00 rate now applies, we will have a remainder of 108.50 inches on the flume included in the 253.5 which is now sold at $60.00 an inch which has been raised $5.00 per inch per annum, which increase is covered in the $1,267.50 above. The remaining 145 inches of the 253.5 inches is now to be collected for at the rate of $70.00 per inch per annum, which means an added $5.00 per inch to what is accounted for in the $1,267.50, which, therefore, will represent an added annual revenue of $725. There are 67.83 inches which will be raised from $30.00 to $70.00 per inch, making a gain in revenue of $40.00 per inch per annum which is a total gain of $2,713.20. An increase of $25.00 per inch for the 3.62 inches now sold at $45.00 per inch per annum adds $90.50 to the gross annual revenue. A loss will be occasioned in the Chase contract of approximately $30.00 per annum and the change in the price for the .16 inches now sold at $72.00 per inch per annum will have a negligible effect upon the revenue. Therefore, we have from irrigation sources a total increase of $4,755.20 which is slightly in excess of the $4,678.48 which was required to be realized from increases in irrigation rates.

I, therefore, find as a fact that the rates herein set out for domestic and irrigation consumers respectively are just and

reasonable rates to be charged by the applicants herein, to their consumers and all rates in conflict therewith or different therefrom are found to be unjust, unreasonable, discriminatory or insufficient.)

There is one other matter to be disposed of before entering an order herein. It is the peculiar contention of the applicants that they are only required to furnish to their consumers gravity water, and they base this contention mainly upon the contracts which they are attempting to have disposed of. I do not recognize any such contention as correct. These applicants have a certain amount of water in their control at the present time largely in excess of the amount which with reasonable losses can be devoted to beneficial use. Their only warrant to the control of this water is that they devote it to beneficial use, and whether they deliver it to consumers as it runs down from the natural flow or withhold it in impounding reservoirs either above or below its consumers, their present warrant for its reservation is that they supply their present consumers and they certainly have no right to withhold it at this date because they expect to serve other consumers below the La Mesa Reservoir, because those other consumers under the law are not yet admitted into the class for which this use is created (See Tyndale Palmer vs. Southern California Mountain Water Company, decided January 21, 1913, and authorities therein cited). They not only must use every endeavor to apportion this water ratable to the consumers in times of scarcity (Leavitt vs. Lassen, supra), but under the present condition of the system they must not admit any more consumers to the class for which the use is created except such consumers be domestic consumers within the territory already described which we have here held as beneficiary of the public use, and in such territory they must only add domestic consumers up to the minimum safe yield represented by the number of inches of water attributable to such territory.

In other words, it is my opinion that under the present condition of affairs that upon the suburban tract, for example, where these applicants have obligated themselves to deliver 5 miner's inches of water on demand, and have thereby admitted this territory to the beneficial use of the water that such water should be limited to consumers whose ordinary demands represent even less than 75% of 5 miner's inches, and this Commission should take good care that until these applicants improve their system they admit no new domestic consumers except on the terms indicated and that they admit no more irrigation consumers whatsoever. This is the kind of priority which we have heretofore held, to which being a member of a class for which a public use of water is created entitles such member of such class, and he should be absolutely protected and his supply never diminished by additions to the class but merely by necessary and unavoidable failure of supply.

I submit the following form of order:

O R D E R

The applicants, James A. Murray and Ed Fletcher doing business under the name of Cuyamaca Water Company, a public utility having appropriated water for sale, rental and distribution within the County of San Diego, State of California, having applied to this Commission on the 25th day of June, 1912, for an order authorizing them to increase their rates for irrigation and domestic service, and a hearing having been held beginning on the 24th day of August, 1912, at which hearing it was stipulated by the applicants that this Commission should fix just and reasonable rates for this utility, and likewise that this Commission should consider and make an order with reference to the service of said utility, and it being fully agreed that all matters pertaining to the rates and service of this utility within the jurisdiction of the Commission are properly before it at said time, and the hearing having been concluded and thereafter on the application of the parties time having been granted for filing briefs, and the case having been finally submitted on the

1st day of March, 1913, and being fully apprised in the premises,

THE COMMISSION HEREBY FINDS AS A FACT that the facilities of the applicants are inadequate, insufficient, unjust and unreasonable to its consumers, and that large, excessive and unreasonable losses occur in the system of these applicants,

THE COMMISSION FURTHER FINDS AS A FACT that in order to furnish the reasonable demands of their present consumers, being those entitled to participate in the public use to which the water in the control of these applicants is appropriated, it will be necessary for these applicants to increase their supply so as to have an increase of 33 1/3% over what they are now able to supply at their consumers' meters.

THE COMMISSION FURTHER FINDS AS A FACT that the applicants have in their control an ample supply of water, if the excessive losses are prevented, to supply the reasonable demands of their consumers and to increase the supply available to them for their use by 33 1/3%.

THE COMMISSION FURTHER FINDS AS A FACT that the flume of this system, heretofore referred to and described in the Opinion, has entirely passed its useful life and that it should be at once renewed.

THE COMMISSION FURTHER FINDS AS A FACT that no new consumers may be served from the system of the applicants under the present condition of the facilities without injuriously withdrawing the supply of the present consumers to which they are entitled, except in the case of domestic consumers and to the extent set out in full in the opinion.

THE COMMISSION FURTHER FINDS AS A FACT that the fair value of the property of the applicants devoted to the public use and upon which they would be fully entitled to earn a return provided their system were in adequate condition, is $352,500.50.

THE COMMISSION FURTHER FINDS AS A FACT that while the actual cost of maintenance and operation of the property, as judged by the two preceeding years, is $28,600 per annum, that because of the

condition of the system that said amount is excessive, and unreasonable and that a reasonable annual amount for maintenance of this system is not in excess of $21,000.00.

THE COMMISSION FURTHER FINDS AS A FACT that the proper amount for depreciation to be set aside annually by these applicants is $21,150.03.

THE COMMISSION FURTHER FINDS AS A FACT that $24,675 per annum is the maximum net earning to which these applicants are entitled under the present condition of their facilities, but we do not find specifically that this is the proper amount but are willing to allow it under all the circumstances for the present.

THE COMMISSION FURTHER FINDS AS A FACT that the rate of 25¢ per thousand gallons with a minimum charge of $1.25 per month, the applicants to furnish all meters and cost of connection, the user to furnish pipes upon his premises, is a just and reasonable rate for domestic consumers other than the La Mesa Mutual Water Company.

THE COMMISSION FURTHER FINDS AS A FACT that a rate of 15¢ per thousand gallons with a minimum monthly charge of $100.00 is a just and reasonable rate to be charged for water to the La Mesa Mutual Water Company.

THE COMMISSION FURTHER FINDS AS A FACT that a rate of $65.00 per miner's inch per annum is a just and reasonable rate for water delivered to consumers from the flume in the manner described in the opinion.

THE COMMISSION FURTHER FINDS AS A FACT that a rate of $70.00 per miner's inch per annum is a just and reasonable rate for all present irrigation consumers from this system for whom a rate has not heretofore in this order been fixed.

And basing its order upon the above findings of fact and the further findings set out in the opinion herein,

IT IS HEREBY ORDERED that the applicants herein begin immediately the construction of a flume in lieu of the one now

used, which flume shall be of a character satisfactory to this Commission after the plans therefor have been submitted to it, but shall in any event be a closed flume or conduit of suitable material to be determined on the submission of the plans to this Commission; and

IT IS FURTHER ORDERED that within thirty (30) days from the date of this order that the applicants file with this Commission plans and specifications of said flume; and

IT IS FURTHER ORDERED that said applicants take immediate steps to increase the available supply of water so that the same may be increased over the present available supply at least 33 1/3%. While the Commission does not at the present prescribe details with reference thereto its reserves and does not finally determine this question, and in the event that these applicants do not within a reasonable time in the opinion of the Commission begin the construction of other facilities than the ones specifically ordered herein, this particular matter being held open for decision and for the further submission of evidence, will again be considered by this Commission after due notice to the applicants and the parties hereto as required by law; and

IT IS FURTHER ORDERED that no additional consumers be added to this system except domestic consumers under the terms hereinbefore in this Opinion and Order set out; and

IT IS FURTHER ORDERED that the following rates be and they are established as just and reasonable and the only rates to be charged by the applicants herein:

(1) For domestic use 25¢ per thousand gallons with a minimum charge of $1.25 per month, the applicants to furnish meters and cost of installation of all facilities, the consumer to furnish pipes upon his own premises.

(2) For water to the La Mesa Mutual Water Company for domestic use within the Town of La Mesa 15¢ per thousand gallons with a minimum charge of $100.00 per month.

(3) For water for irrigation purposes, except domestic purposes incident thereto, taken from the flume as hereinbefore described, $65.00 per miner's inch per annum.

(4) For water for irrigation purposes, except domestic purposes incident thereto, other than that taken from the flume, $70.00 per miner's inch per annum.

All of said rates to be charged under just and reasonable regulations as regards service as the company may adopt and this Commission approve, and shall apply on and after July 1st, 1913, and before such time the applicants shall file with this Commission rates in accordance herewith, and

IT IS FURTHER ORDERED that each and every portion of this order is made in contemplation of the performance by the applicants of every other portion thereof, and that this order is not to be considered as separable, and that no rates other than the ones that are now being charged by these applicants may be charged or collected, until said applicants have complied with all of the provisions of this order or shall satisfy this Commission that they are in good faith proceeding to comply therewith.

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 March, 1913.

John M. Eshleman

H. D. Loveland

Alex Gordon

Max Thelen

Edwin O. Edgerton

Commissioners.