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Decision 95-11-027 November 8, 1995

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

ORIGINAL

Shareholders and users of the Lands of Promise Water System, Complainants, vs. Ms. Janet Brown, Conservator for Mrs. Ellen Morck, Defendant.	Case 95-03-047 (Filed March 17, 1995; Addendum May 10, 1995)

John Lambert, In Pro Per, for complainants.
Jose E. Guzman, Jr., Attorney at Law, for Janet Brown, defendant.

PHASE I OPINION

Statement of Facts and Discussion

Early in 1963, Harold J. Morck, owning an approximate 130 acres of land in a rectangular tract bounded by 60th Street West, Sweetser Road, 65th Street West, and Favorito Avenue, about 5 miles northwest of Rosamond in Kern County, recorded a subdivision dedicated to purely residential use and to be known as the "Lands of Promise." Earlier, using an existing well on his property and another well on land within the same tract owned by Arron Smoot, Morck had begun the installation of a water system designed to serve this Lands of Promise subdivision.

Morck proceeded to sell lots ranging in size from 1/2 acre to 10 acres in his subdivision, using a Real Estate Sale Agreement subject to an Addendum Declaration of Restrictions containing covenants and Easements stated to be an important and integral part of the agreement. These addenda stated that Morck and Smoot had given their two wells and a pump to parcel

purchasers for their use,[1] and that the water use and rights to water shall never be separated from any parcel; that buyers and the seller had "Equal, Pro-rata Rights and Interests," and must as Mutual "Pro-Rata" owner-operators assume operating and maintenance responsibilities for the system, including jointly paying costs. The Addendum further stated that "Owners may form and operate a Mutual Water System." Under this scenario, Morck continued to induce sales of lots in his subdivision.

In 1969, as "Owner," Morck applied to the State Health Department for a water supply permit, representing that the small system was for the exclusive use of tract lot owners. And on August 14, 1970, a Temporary Water Supply Permit was issued to "Land of Promise, Owner: Harold J. Morck." With 23 existing connections, the permit limit was set at 30.

By 1971, there were 46 connections as Morck continued lot sales and connections to his water system without reference to his permit limit. But then on August 6, 1971, Morck suffered a stroke, and until his death in 1974 was substantially incapacitated, leaving operation of the system to his wife.[2] After a system inspection, the Kern County Health Department on August 13, 1971 found Morck's operations to be in violation of

[1] A copy of an undated agreement, but stating within that it was made to confirm an oral agreement of "approximately 8/1/63," signed by Morck and a neighbor, Smoot, was entered as apart of complainant's Addendum in this proceeding. The document stated that Morck and Smoot were giving and would share a pump, 2 wells, a pressure tank, and certain piping with subdivision lot owners, and that the beneficiaries "may form a Mutual Water Company if desired."

[2] About this time, the Morcks had turned much of the management of the water system over to Ellen Baron, who determined rates, collected water bills and arranged for necessary repairs. She was paid $250 a month for these efforts. Her daughter-in-law, Sheila Carle, was paid $60 a month to prepare the water bills. After Morck's death, the testimony was that Mrs. Baron basically took over and ran the system until Ms. Brown was made Conservator, when, having become ill with cancer and not in harmony with Ms. Brown, Mrs. Baron terminated the relationship.

his permit. The 46 connections had exceeded the system's capacity, resulting in low pressure and shortages. The county health officials asked the State Public Utilities Commission to look into the situation. A joint county health-PUC inspection on September 22, 1971 found above minimum pressure and no health hazards, but concluded that there were deficiencies which should be addressed. Morck was ordered by the county to make no further connections until improvements were made. In further discussions with county health officials, a status report by a licensed civil engineer was requested as well as well production tests. The county threatened legal action, and the State Department of Real Estate cited the Morcks for code irregularities.

By 1975, more improvements had been added, including a new well and an 8,000-gallon storage, thereby alleviating the supply and pressure problems. In the Conditional Use Permit process related to the new well representations were made that Mrs. Morck wanted to give the water system to the users as soon as Morck's estate then in probate was settled.

Earlier, in September of 1973, some of the lot owners had met and formed an ad hoc committee under the chairmanship of LeeAnne Yost to study upgrading the water system and to work toward forming a mutual water company. They worked with the Morck's attorney, Oran Palmer. By 1976, the system had 50 connections; the 2- and 3-inch distribution lines were inadequate to serve; and a 100,000-gallon storage tank was needed, particularly for insurance purposes for the residents benefit. Faced with the cost of assessments each would have to

In October and November of 1971, in response to a customer of the system who had complained, the Commission's Assistant Executive Secretary wrote to the effect that the system was not under Commission jurisdiction, never having appeared in any Commission proceeding. Information on filing a formal complaint was sent, but nothing further developed.

assume to upgrade the system if the customers decided they did not wish to form a mutual water company. Attorney Schroeter of the Palmer law firm advised the County Environmental Health Services Agency on August 26, 1976 of this. At that point in time, there were an additional 35 possible connections to be considered, and the Palmer law firm was unsuccessfully trying to obtain Proposition Three funds for the system. Thereafter, Mrs. Morck paid for some upgrades, paid the expenses and taxes on the system, and through the use of Mrs. Baron, owned, controlled, operated, and managed the water system, delivering and selling its water to the subdivision property owners. It appears the Ad Hoc Committee was thereafter moribund.

In 1991, Mrs. Morck became ill and no longer was able to manage her affairs. Her niece, Janet G. Brown was appointed conservator of Mrs. Morck and her estate by Superior Court. There were other properties than the water system in the estate. By this time, the water system was serving 61 connections from 6 interconnected wells. There were permits available for another 6 connections.

Soon thereafter Mrs. Baron become ill and terminated her services to the system. Ms. Brown took over the entire operation and management of the water system from her Palo Alto home, employing local people and Rosamond electricians and plumbers as needed. As costs increased, 3 years after the last previous increase in rates, effective August 28, 1993, Ms. Brown

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[1] Earlier, at a March 1994 meeting in Rosamond attended by Morck, property owners, and State Health and County District Attorney officials, it was represented by an engineer employed by Morck at the County's insistence, that to bring the system up to code would cost approximately $54,000. Those attending concluded they would be willing to accept responsibility of the system after it met County code requirements. Thereafter it never got to the point where a formal association, corporation, or mutual water company was ever formed.

established the following rates to apply throughout the metered system:

000	- 999 CF =	Minimum $	27.00	plus	$1.00	per 100 CF	over --	500 CF
1,000	- 2,999 CF =	"	32.00	"	1.00	" " CF	"	1,000 CF
3,000	- 5,999 CF =	"	52.00	"	1.00	" " CF	"	3,000 CF
6,000	- 8,999 CF =	"	85.00	"	1.50	" " CF	"	6,000 CF
9,000	- 14,999 CF =	"	130.00	"	2.00	" " CF	"	9,000 CF
15,000	- 19,999 CF =	"	260.00	"	2.50	" " CF	"	15,000 CF

When Ms. Brown took over operation of the water system, there were some delinquent accounts.[5] A grace period to expire February 15, 1993 was initiated for arrangements to be made for payment of these accounts. In January of 1993, the water customers were notified that on delinquent accounts where mutually acceptable payment arrangements had not been made, service would be disconnected after a 48-hour notice, and a $45 disconnection fee would be charged. Before service would be reconnected, the entire delinquent account would have to be paid together with a $45 reconnection fee and a $100 deposit. A nontransferable "water rights" fee of $500 was made applicable where a property owner sold his property to a new owner.[6]

Since Ms. Brown took over, it appears that newcomers to the subdivision, in addition to the plumbing company charge to install a lateral and meter to hookup, were quoted different "water rights" fees for a right to connect, as well as a deposit of $100 and a meter fee (examples: Loehr $300 + $100; Lambert $500 + $100 + $30; Carle $300; and Middleton $300 + $100). In at least one instance the days in the meter reading month varied sufficiently with the result that the increased total consumption in a 35-day period bumped the customer into a higher, more

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[5] By late July of 1995, these delinquent accounts had increased to an approximate $6,700.

[6] After the complaint was filed, the terminology "water rights" was changed by Ms. Brown to "transfer fee." This applied to where one existing service is transferred to another customer. Prior to August 28, 1993, the fee was $300.

expensive base period, making for a substantially higher water bill.

In September of 1994, a group of dissatisfied and frustrated customers attempted to file a formal complaint before the Commission with the apparent purpose of getting help with many diverse questions they had regarding possible legal rights they might have as shareholders of a mutual system, the status of the water system serving them, what maintenance and upgrading work had been done on the system, Edison charges, etc. The attempted filing, failing to meeting the provisions of Rule No. 9 (see Public Utilities (PU) Code § 1702) of the Commission's Rules of Practice and Procedure, was not accepted by the Docket Office Advisor, but instead was referred to the Water Utilities Branch.

By that time, at different times most of the 1994 complainants had ceased paying their monthly water bills, causing individual delinquent accounts ranging to over $300 to accrue. Redrafting their earlier attempted filing, and addressing alleged failures by Lands of Promise Water System to meet Commission rules and PU Code requirements, on March 17, 1995, they filed the captioned complaint to ask for refunds on asserted overcharges. On May 10, 1995, on advice of the Commission's Public Advisor's Office, they filed a lengthy addendum to the complaint. This substantial packet of copies of documents, letters, etc. purported to show that the customers might own the water system. On June 16, 1995, Ms. Brown filed an answer to the complaint and the addendum, asking for a dismissal and generally denying any violations of the PU Code. She further asserted that the property owners earlier had not wanted to form a mutual and that no mutual had ever been formed.

Tentatively, Administrative Law Judge (ALJ) John B. Weiss proposed setting hearing on the complaint for August 10, 1995. However, on July 26, 1995, attorney Schroeter of Bakersfield, defendant's prospective representative for the

hearing, having just been approached by Ms. Brown, requested a delay. Accordingly, an evidentiary hearing was formally noticed on August 8, 1995 for August 29, 1995.

Meanwhile, in July, Ms. Brown had sent notices to delinquent accounts that unless an account was paid in full by July 22, 1995, water service would be terminated. Johnny Lambert, the complainant's representative, and himself one of the delinquent accounts, protested to the Commission Public Advisor's Office and to ALJ Weiss, pointing out the disputed amounts at issue and the question of Ms. Brown's authorization for the substantial 1993 rate increase. Given the pendency of a hearing in the dispute and possible application of the provisions of PU Code §§ 779 and 7911 to the situation, the ALJ advised both Lambert and Brown that disconnections should be stayed pending the hearing on status provided the delinquent, albeit disputed, account balances were deposited with the Commission. Eleven system customers gave Lambert their checks which were delivered to the ALJ by United Parcel Service on July 20, 1995.

The duly noticed public evidentiary hearing was held Tuesday, August 29, 1995 from 9:30 AM to 5:00 PM in the Council Chambers of the Lancaster City Hall. It appeared that many of the current 61 customers of the system were present through the day's hearing.

The Status Issue

The threshold issue to be addressed was necessarily the status of the water system; whether it is a mutual system (and pursuant to provisions of PU Code § 2705 not subject to the jurisdiction, control, or PUC regulation) or a public utility (and pursuant to provisions of PU Code §§ 216 and 2701 subject to the jurisdiction, control, and PUC regulation).

The complainants, in support of their assertion that the system belonged to them as shareholders, in addition to the 8 attachments to the complaint and 53 documents and letters

attached to the Addendum to the complaint, submitted 7 exhibits and the testimony of 5 witnesses in reviewing the history of the system and their relationships with the Morcks and later, Ms. Brown.[8] Much of this evidence and testimony, while reflecting an undoubted original intention (partially in some legal format) but also showed a subsequent increasingly latent, if not later dropped, intention to one day convert the status of the operation to a legal mutual. The evidence showed that all parties, the lot buyers and the Morcks, to some extent shared this intention. But complainant's evidence also conclusively disclosed the tight control and proprietary nature of the operation under the Morcks, and particularly the repeated official representations of Morck as owner. Defendant, in support of its position that the system, whatever the original intentions, had never evolved into mutual status, that the lot owners who would have had to consent to formation of a legal mutual refused to do so when they learned they would be responsible for pro-rata shares of the costs of

[8] One member of the audience, a property owner customer since 1968, stated that the system "has been a plague for a long, long time," although he could not blame anyone. At the tail end of the system, he asserted that despite a 1,000-gallon reservoir he installed, he has low pressure.

upgrades to meet county requirements under mutual status, and expressing its belief that the Commission had no jurisdiction to determine whether or not the system is a mutual, submitted 16 exhibits and the testimony of 2 witnesses. This evidence, while tacitly conceding early representations by the Morcks of their intention and the rights of lot buyers to form a mutual, and subsequent repeated offers by Mrs. Morck in the mid and late 1970's to turn the system over to the users and also pay her pro rata share of the capitalization costs (but only if users would form a public district or a mutual), also showed proprietary management and control at all times by the Morcks, who provided the initial system and the expensive enhancements and improvements at various times to meet state and county requirements. Over the years of operation, the Morcks paid the system's legal fees, substantial property tax bills, the costs for upgrades of the mains, drilling additional wells, adding a storage tank, fencing, etc. At all times, they represented themselves as "owners" in dealings with officialdom. At least in the first half of its existence, the water system appears to have

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[3] In 1974, Morck's attorney Palmer had advised Morck:

> "As I have told you in our various discussions, the formation of a Mutual Water Company, after property has once been sold is a tremendous up-hill enterprise, as people are not willing to acquire the shares and make same appurtenant to the land. This is why we want to make it crystal clear that if they are going to get the corporation, they are going to have to take the responsibility of capitalizing and of operating it."

been no money maker.[5] As late as 1976, the exhibits show that monthly fixed costs approximated a minimum $550 whereas revenues in the winter months approximated only $220. There was no evidence produced of any interest or intent to form a mutual by the lot owners between the mid-1970's and 1993. Then, late in 1993, Leeanne Yost called Ms. Brown after the latter's takeover of the system to ask for a discussion regarding customer claims of ownership of the system. Ms. Brown refused, stating it was too late for that, that the system belonged to Mrs. Ellen Morck. A witness for defendant, Michael Robbins, who purchased his property and joined the system in 1970, a plumber by trade, stated he was "tickled" with the service. He asserted that complainants represented only a third of the customers, not including him, that a new "board" had been appointed about 4 years previously and that he was on that "board." He does not want to take over the system.

After a short recess, at this point in the hearing, having received evidence and testimony from all parties to the proceeding, ALJ Weiss issued a scoping ruling on the status issue which was designed to allow the parties to proceed with the balance of the hearing. We hereby ratify the ALJ's Ruling, (appended hereto as Appendix A), which held that despite early intentions, a mutual organization had never been formed, and that the Lands of Promise Water System is a public utility and has been operated as a public utility water system as defined in PU Code §§ 216 and 2701.

Other Issues

The ALJ devoted the balance of the hearing on August 29, 1995 to issues related to rate matters. A PUC auditor from the Commission Advisory and Compliance Division (CACD) had

[5] Ms. Brown testified that since her takeover, there was a loss in 1992 as reported on her tax return, but that for 1993 the system either "broke even" or made a profit of less than $70.

been assigned by the Water Branch to attend the hearing to assist in reviewing the system's expense records. Unfortunately, a personal emergency forced his last minute absence, and the ALJ since has received notice of the Auditor's transfer. Ms. Brown had been instructed to bring system expense records for the prior year to the hearing along with any records that would hope to establish a rate base applicable to the system. She did not bring these records, and according to Ms. Brown's testimony, when Ms. Brown terminated in 1992, some early records, particularly the "Orange Book" with records of payments, costs, etc. were not turned over. While letters and other documents contained in the numerous exhibits in this proceeding tangentially refer to thousands of dollars that Mrs. Morck in particular assertedly paid for well drilling, tanks, and piping, apart from operating and maintenance expenses, it was apparent to the ALJ that it probably would be impossible at this late date to establish any reasonably derived rate base that would be fair both to the customers and to the Morck Estate. Accordingly, the ALJ asked CACD's Water Branch to assign another engineer auditor to field inspect the system reasonably soon and to work with Ms. Brown in Palo Alto to audit her system expense records for a test year period with the objective of mutually proposing an Operating Ratio Method to determine what current revenues are required annually to pay operating, maintenance, and associated expenses, including purchased power, employee labor, materials, contract work, transportation, clerical salary, management salary, benefits, office services and rent, office supplies, telephone, postage, professional services, and insurance. To these would be added possible depreciation expense, taxes other than income, franchise taxes, and federal income taxes. And finally, a percentage would be added as compensation or return for the Morck equity interest in the system. From the total revenue requirement required to carry these costs, a proposed rate

structure embodying a basic monthly service charge together with a quantity rate to apply to consumption will be prepared and submitted to the ALJ in a report from the engineer-auditor. After a rate structure is accepted by the Commission in a Phase II decision in this proceeding, and after all customer bills since the March 1995 date of filing of the present complaint have been recalculated by the engineer-auditor, to the extent overcharges are determined, the amount of such overcharge to each ratepayer for the period will be credited to that ratepayer's account and amortized over 12 month period to begin January 1, 1996 as reparations for such overcharges.

CACD will work with Ms. Brown to establish appropriate tariff schedules applicable to water service in the Lands of Promise service area. It will then be Ms. Brown's responsibility to make provision for the availability of these adopted tariffs in the service territory during reasonable hours on business days.

In the meantime, in response to expressed strong concerns of the ratepayers at the hearing, the ALJ stated that where an applicant's property lies within the existing rectangular service territory of the utility,[10] no "fee to join" the system (as was heretofore charged), may be demanded or collected, and if an applicant for service owns the premises to be served, no credit deposit may be required to establish services, unless the applicant during the previous 12 months has had service disconnected for non-payment.[11] Bills for service rendered are due and payable when presented and become past due

[10] The boundaries today are the same as those established when the tract was subdivided, and are stated in the opening paragraph in the Opinion of this decision.

[11] In which instance any unpaid balance must be paid and a credit deposit equal to twice the prior average monthly bill may be required.

if not paid within 19 days from date of mailing. If not paid in that period, service may be disconnected after 10 days' notice. Where a property is already connected to the system, no connection fee is permitted. Where the premises of the applicant for service requires installation of a meter and/or service lateral from the utility's distribution line, only the actually incurred plumber's costs to install and make the connection may be charged. Any "transfer" or "fees to join" demanded and/or collected since March 17, 1995, are to be refunded as reparations in the form of a credit applicable to the January 1996 billing period. Pending approval by CACD of tariff schedules to apply to the Lands of Promise system, the Commission ratifies the foregoing ALJ's statements made at the hearing. As those customers were present who had earlier deposited checks applicable to their past due accounts with the ALJ in order to avert disconnection while the status of the system was at issue, at the close of the August 29, 1995 hearing the ALJ returned these checks to those depositors, and ruled that each would have until September 15, 1995 to pay his or her past due account directly to the utility. Ms. Brown was instructed to make no disconnection provided these past due accounts were paid in full by September 15, 1995. During the hearing, several customers questioned whether or not, by virtue of their having initially purchased their lots from Morck with an addendum purporting to give them "equal pro rata rights" in the water system together with an exhortation that they form and operate a mutual, they could charge the utility some fee because some system wells are on various lot owners' properties. The ALJ noted that the wells appear to be dedicated to the system by easements applicable to those lots as set forth in the deeds, but that it was conceivable that these owners could have some legally enforceable interest in the utility entity. However, the ALJ also noted that the

Commission is not a body charged with the enforcement of private contracts. Its function is to regulate public utilities and compel the enforcement of their duties to the public, not to compel them to carry out their contract obligations to individuals (California Water & Tel. Co. v. Public Utils. Comm'n. (1959) 51 C.2d 478). A claim of a proportionate interest in this water utility entity is a contract matter over which the Superior Court has jurisdiction.

Findings of Fact

1. In 1963, Morck recorded a subdivision styled as "Lands of Promise" for property he owned near Rosamond in Kern County, installed a water system with 2 wells and pumps which he dedicated to public use, and thereafter commenced sales of lots of varied size to purchasers who erected homes on their lots and became subdivision residents.

2. The individual lot sales agreements were made subject to covenants, easements, and restrictions contained in an Addendum to the various sales agreements.

3. Inter alia, the Addendum, besides providing for public utility easements on all lots, provided that lot purchasers acquired pro rata interests in the water system, with non-severable rights to receive water, rights which were transferable to subsequent owners, and urged that buyers should immediately organize a mutual organization to assume operating and maintenance responsibilities and pay costs of present and expansion requirements.

4. The lot buyers took no steps to organize and take over the water system, and over succeeding years, while repeatedly indicating an interest and willingness to turn over control, operation and management of the system to either a mutual or a public district, the Morcks or their representatives at all times have controlled, operated, and managed the system, selling and

delivering water to the residents of the Morck Lands of Promise Subdivision.

5. In dealings with the state and county officialdom over the years, the Morcks and their representatives have represented without any formal challenge that the Morcks were "owners" and operators of the water system. At no time did the Morcks seek Commission authorization for their system.

6. As owners, the Morcks have over the years since 1963, paid system employees, well drillers, and managers, and have paid repair and expansion costs, legal fees, maintenance and operating costs including electric power for pumps and pressure tank operations, and taxes.

7. Morck suffered a stroke in 1971, and thereafter until his death in 1974 was intermittently incapacitated, leaving control, operation, and management of the system to his wife and her representatives during a period when, not in compliance with county codes and over taxed as the result of earlier service connections by Morck beyond those authorized by his permit, the system was under investigation by the county.

8. In late 1973, an ad hoc committee representing some of the lot owners was formed to determine what could or should be done about the water system; the consensus being that a mutual water company should be formed. Unproductive discussions with the Morck's attorney followed.

9. By 1976, the lot owners had become aware of the fact that as a mutual organization, they would have to share the costs to expand and upgrade the water system, and interest in pursuing a mutual and take over the system petered out.

10. In 1991, when Mrs. Morck became ill, her person and estate were placed in conservatorship by Superior Court and her niece, Ms. Brown, was appointed Conservator.

11. In 1992, as conservator, Ms. Brown took over control, operations, and management of the water system, and in

August 1993 unilaterally established new rates and increased various fees, leading 15 dissatisfied customers to subsequently file the present complaint alleging improper overcharging.

12. Time is of the essence in resolving the disputes and issues involved in this complaint, and to regularize the operations of this public utility.

Conclusions of Law

1. Pursuant to the provisions of PU Code § 2707, this Commission for the purpose of determining the status of any person, or conservator appointed by any Court owning, controlling, operating, or managing any water system within California, has jurisdiction to hold hearings and issue process and orders.

2. At no time during the existence of the Lands of Promise Water System, was any corporation or association pursuant to the provisions of California's Non-Profit Mutual Benefit Corporation Law, public district, or other legally recognizable mutual entity, organized by the property owners of the Morck subdivision, intentions notwithstanding.

3. At all times since the 1963 inception of this water system, the Morcks and/or their employees and representatives have owned, controlled, operated, and managed the water system, selling and delivering water to the persons in the Morck subdivision, thereby pursuant to provisions of PU Code §2701 constituting the water system to be a public utility subject to the jurisdiction, control, and regulation of the Commission.

PHASE I ORDER

IT IS ORDERED that:

1. After duly noticed public hearing, pursuant to the provisions of Public Utilities Code (PU) § 2702, the Lands of Promise Water Systems (LOP System) is determined to be a water public utility subject to the jurisdiction, control, and regulation of this Commission.

2. The August 29, 1995 Ruling of the Administrative Law Judge determining the LOP System to be a public utility and his subsequent statements at the hearing pertaining to interim payment issues are ratified by the Commission.

3. LOP System shall provide full assistance to Commission staff personnel conducting an investigation and audit of the books, records, and physical plant of the utility.

4. Until further Commission order in a Phase II Order, rates will remain those in effect March 1, 1995, but subject to partial refund credit to be determined in the Phase II Order to be forthcoming in this proceeding.

This order is effective today.

Dated November 8, 1995, at San Francisco, California.

DANIEL Wm. FESSLER
President
P. GREGORY CONLON
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners

APPENDIX A

RULING OF THE ADMINISTRATIVE LAW JUDGE ON THE STATUS OF THE SYSTEM

Both parties having had opportunity to complete presentation of each's position on the issue, this is the ALJ's Ruling on the status of the Lands of Promise Water System. But, first, I will review the evidence which led to my conclusion and this Ruling.

The addendum materials and Exhibits 1 through 23 entered by complainant and defendant substantially show that there was long an intent by all parties: the earlier purchasers of land who bought with an understanding that as to the water supply a mutual would be formed; the Morcks who sold the lots with assurances to that point, and more recent purchasers, that a mutual would be formed. For example, quoting from the addendum to the July 1968 Real Estate Sale Agreement with the Perichs, "the undersigned buyers are given 'Equal Pro-rata' rights and interests in 'Lands of Promise Domestic Water System,'" and that these rights shall "never be separated from the land" in the event of future land sales, and that "the subdivider is in no sense to be considered to be an operator, maintainer, provider or supplier of water." The April 1970 Arlien sale contract states that the restrictions, covenants, and easements of the addendum are "an important and integral part of this contract." And earlier, in March of 1963, Arren Smoot and Harold Morck gave the basic system including two wells and piping on their respective lands to the lot purchasers, and that these "beneficiaries may form a mutual water company if desired." Morck repeatedly stated that "It is solely their own system." The documents in the complainants' addendum make clear the intent for mutual status. Government agencies were led by Morck to understand that the intent was transfer of the system to a mutual. But then, Morck's July 1969 application to the Kern County Health Department described three "good producing wells for the exclusive use of tract owners" while listing Harold J. Morck as "owner" of the system. And the April 1970 temporary permit was to

Morck as owner when issued, as was the water supply permit issued in August of 1970. Subsequent Health Department correspondence with Morck was as owner.

On August 6, 1971, Morck suffered a stroke and thereafter was apparently more or less incapacitated part of the time until his death. The Health Department attempted an evaluation of the system about this time, and this evaluation indicates that an intent to still form a mutual was still alive. The August 1972 Health Department requested verification that the system would meet all regulations prior to it being turned over by the Morcks to the lot purchasers again shows an intent to form a mutual. About this time, Morck was advised to contact the Public Utilities Commission (PUC), but did not. A customer wrote the PUC and was told that the water system was not under the Commission's jurisdiction. In March of 1972, Mrs. Morck stated that Morck had engaged attorneys to prepare legal documents to form a mutual. Meanwhile, despite a Health Department permit limit of 30 connections, Morck continued to sell lots beyond that limit. And no mutual had as yet been formed. In November of 1973, property owners met and formed a Steering Committee, with Mr. Yost as Chairman. They concluded that they should form a mutual water company. This was done after Yost had been told by Mrs. Morck's attorney, Brian Palmer, that Mrs. Morck was ready to proceed with formation of a mutual once she was satisfied that all was OK with the Health Department. In addition, a Board of Zoning Adjustment Resolution on February 13, 1975 had listed Ellen K. Morck as owner of another well site; the objective of the resolution was to permit transfer of an existing private well to be a mutual well facility. And in April of 1976, Mrs. Morck's local representative, Ellen Baron, told a Kern County official that Mrs. Morck wanted to give the system to the residents once Morck's estate was settled, Morck having since died. But still there was no follow-up to actually take necessary steps to form a legal mutual entity.

Then, as of August 26, 1976, attorney Brian Palmer advised the Environmental Health Service Agency that the property owners did not wish to form a mutual because to meet County Code requirement costs to bring the system into compliance, an assessment would be needed from each which they could not afford. Palmer was also trying to line up the system to qualify to receive Proposition 3 grants to fund needed improvements.

Thus, the evidence submitted without question shows that there was an initial intention by all the principals involved to set up a mutual association to take over, own, and operate the system, with all property owners including the Morcks, to be shareholders on a pro rata basis grounded in the number of lots each owned. There seems to be some confusion whether a mutual organization requires equal capital infusions by its members to operate, improve, (or) repair the system to the level required by local Code requirements. Had a mutual been formed, all members including the Morcks, would have had to contribute to a capital investment for that purpose, on a pro rata basis associated with each member's property interest. There was no basis or requirement that Morck had to finance all the improvements, only his share. Thus, attorney Palmer's reference to individual contributions (usually termed as "assessments"). And where a natural disaster occurs to a mutual's facilities, the mutual must assess each member his share of the restoration costs.

But to form a legally constituted and binding mutual association, more than mere intent is needed. An association of some characterization, with by-laws or a constitution, rules, equal voting rights, and certificates attesting proof of ownership in the mutual at least, must be formed with all members participating. Usually, such an association for tax purposes is formed under California's Non-Profit Mutual Benefit Corporation Law (Sections 7110 et seq. Corporations Code). There is no evidence of any of this in this proceeding. Legally, no mutual was ever actually formed. Apparently, the closest it came was at the point where the property owners' interest may have been chilled by

attorney Palmer's disclosure of potential costs they would have to share as shareholders in a mutual. All along, the Morcks have represented themselves as the owners of the system in seeking permits, etc. The Morcks have paid all the taxes levied over the years and have operated as they chose. At all times, both before and since Ms. Brown's tenure as conservator for Mrs. Morck, the system has operated as a proprietorship, at all times charging for water delivered, and operating without input from or sharing of control with the property owners. The Baron letter of April 4, 1976 clearly shows that as manager for Mrs. Morck she paid county tax bills. Status is not something to be assumed or evaded, it simply depends upon the facts of each case and the law. Public Utilities (PU) Code § 216 defines a "Public Utility" as including every water corporation where the service is performed or the commodity is delivered to the public or any portion thereof, and for which any compensation or payment whatsoever is received. And PU Code § 2701 states that any person, firm, or corporation owning, controlling, operating, or managing any water system in California, who sells or delivers water to any person, whether under contract or otherwise, is a public utility and subject to the jurisdiction, control, and regulation of the Commission.

Morck and Mrs. Morck may well have intended their water system, both initially and later, to become a mutual organization, but when the formalities necessary to legally set up, constitute, and put into operation a mutual organization were never pursued, whatever the reason, and all along the Morcks or their agents set the water rates and received the payments, the system performed as a public utility. When land is sold to members of the public coupled with the inducement of water service, and the seller continues to provide water service (for compensation) there has been a dedication to the public use (Rose v. Campbell (1961) 58 CPUC 754). From the start the Lands of Promise Water System provided public utility operations without the PUC having granted a certificate of public

convenience and necessity, either to construct or to operate. This was a violation of the law. PU Code § 1001 requires that before such an undertaking begins, Commission authorization is legally required. The record shows that Morck, despite advice to go to the Commission, chose not to do so. But the omission does not change the de facto status.

Whether the Morck estate really holds full title to the entity and all its facilities may well be a valid legal issue. Based on the covenants, easements, and restrictions statements signed by Morck, purchasers were to obtain equal rights to at least some of the facilities that made up the system. The Morck-Bobak letters of July 1963 substantiate this assertion. But property rights are a matter for the Superior Court, not the PUC, and any issue as to whether or not at least some of the purchasers may have acquired some property right or legal interest in the system entity is a complex contract and property rights issue for the Court. The Commission deals with and regulates the actions of the utility entity as a whole, not with the possible share interest of owners. Morck in his own words represented himself as a "fellow participator," but the possible proportionate interests are clouded by time. Attorney Hartsock recognized the dilemma of ownership and control in his March 23, 1995 letter, and his "constructive trust" theory is interesting but costly of pursuit. The time for formation of a mutual is now long past. The system has operated as a public utility too long, and the omelet cannot be easily reshelled as an egg.

Therefore, IT IS RULED that the Lands of Promise Water System is not a mutual, but has been and is a public water utility

under PU Code §§ 216 and 2701, and is subject to the jurisdiction, control, and regulation of the Commission.

Issued this 29th day of August in the City of Lancaster.

John B. Weiss
Administrative Law Judge