1-4-2011

Pruitt v. Sebelius - U.S. Reply in Support of Motion to Dismiss

United States Department of Health and Human Services

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, ex rel. Scott Pruitt, in his official capacity as Attorney General of Oklahoma,	)	
Plaintiff,	)	
v.	)	**No. 6:11-cv-00030-RAW**
KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; and TIMOTHY GEITHNER, in his official capacity as Secretary of the United States Department of the Treasury,	)	
Defendants.	)	

REPLY MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases (cont'd):

Constitution and Statutes:

Miscellaneous:

INTRODUCTION

Congress enacted the Affordable Care Act's minimum coverage provision, 26 U.S.C. § 5000A, as part of a comprehensive reform to address a crisis in the interstate health care market. When the provision becomes effective in 2014, it will require individuals who are not otherwise exempt to obtain qualifying coverage, or to pay a tax penalty with their income tax returns. Section 5000A, however, applies only to individuals. It imposes no obligations on states; it does not require a state government to take any action, or to forbear from any action. The State of Oklahoma nonetheless asserts that it has standing to challenge the validity of Section 5000A, in lieu of a suit brought by an individual affected by the provision. But as Oklahoma itself recognizes, standing requirements exist because the "decision to seek review must be placed 'in the hands of those who have a direct stake in the outcome.'" Pl.'s Mem. in Opp'n to Mot. to Dismiss at 5, ECF No. 23 (quoting *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972)). Those individuals who are concretely affected by the minimum coverage provision would have that direct stake; the State of Oklahoma does not. Because federal courts lack "the power to invalidate laws at the behest of anyone who disagrees with them," *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1449 (2011), Oklahoma's complaint should be dismissed for lack of jurisdiction.

ARGUMENT

I. Oklahoma Cannot Sue the Federal Government to Exempt Its Citizens from Federal Law

Oklahoma correctly acknowledges that it lacks standing to bring a suit seeking to exempt its citizens from the operation of federal law. (Pl.'s Mem. at 4.) It is black-letter law that a "State does not have standing as a *parens patriae* to bring an action on behalf of its citizens against the federal government because the federal government is presumed to represent the

State's citizens." *Wyoming v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992); *see also Massachusetts v. Mellon*, 262 U.S. 447, 485-86 (1923). Despite its disavowal, Oklahoma seeks precisely the result that *Mellon* forbids. It asks the Court to declare that Section 5000A may not validly be applied, and to enjoin federal officers from enforcing it. Compl. at 7, ECF No. 2 (prayer for relief). In other words, Oklahoma seeks "to protect her citizens from the operation of federal statutes." *Massachusetts v. EPA*, 549 U.S. 497, 520 n.17 (2007). Because established precedent "prohibits" this result, *id.*, Oklahoma lacks standing.

II. The Mere Existence of a State Law Does Not Vest a State with Standing to Challenge Federal Law

Oklahoma attempts to avoid the prohibition against *parens patriae* suits against the federal government, by claiming that its suit seeks instead to resolve an alleged conflict between 26 U.S.C. § 5000A and the recent amendment to the Oklahoma Constitution, OKLA. CONST. art. II, § 37(B)(1). Oklahoma asserts that "'the mere existence of the lawfully-enacted statute is sufficient'" to give the state standing to explore in federal court whether the state law conflicts with the federal law, and, if so, which law should control. (Pl.'s Mem. at 15, quoting *Virginia v. Sebelius*, 702 F. Supp. 2d 598, 605-06 (E.D. Va. 2010), *appeals pending*, Nos. 11-1057, 11-1058 (4th Cir.).) This reasoning is incorrect. The simple existence of a state law that might conflict with federal law does not, by itself, create a case or controversy that a federal court may decide.

The Supreme Court emphasized this point in holding that a state may not challenge the constitutionality of a federal law in the abstract, without a showing that the state itself had suffered a concrete injury from the operation of the federal statute. *Mellon*, 262 U.S. at 484. The Court recognized that the federal courts "have no right to pronounce an abstract opinion upon the constitutionality" of a state or federal law. *Id.* (internal quotation omitted). Instead, "[i]t is only where the rights of persons or property are involved, and when such rights can be

presented under some judicial form of proceedings, that courts of justice can interpose relief. . . . Such law must be brought into actual, or threatened operation upon rights properly falling under judicial cognizance, or a remedy is not to be had here." *Id.* *Mellon* did not announce any new principles when it drew this distinction. Rather, it "relied on the long-established doctrine that general interests in sovereignty – that is, in making and applying law to the exclusion of another government – were not justiciable." Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 491 n.416 (1995).

The Supreme Court has repeatedly reaffirmed that a state may not ask a federal court to decide "an abstract question of legislative power," in the absence of a concrete controversy. *Texas v. ICC*, 258 U.S. 158, 162 (1922); *see also United States v. West Virginia*, 295 U.S. 463, 473-74 (1935); *New Jersey v. Sargent*, 269 U.S. 328, 337 (1926). Oklahoma attempts to distinguish these cases on the ground that they did not involve allegations that state law had been pre-empted, and so there was "no allegation of direct injury to the State" from the challenged federal law. (Pl.'s Mem. at 23.) Oklahoma is absolutely incorrect in its characterization of these cases. Each of these cases involved allegations that state law and federal law were in conflict. And in each of these cases, the Supreme Court held that such an allegation, without more, stated only an "abstract" dispute that a federal court could not resolve.

In *Texas v. ICC*, for example, the state's complaint was "of unusual length" (Pl.'s Mem. at 23) because it recited in detail a number of state constitutional provisions and state statutes that Texas alleged were in direct conflict with the federal Transportation Act of 1920. Texas recited, for example, that it "ha[d] passed and made effective a code of laws governing the issuance of stock, bonds and securities by railroad corporations," and that Congress had infringed upon the state's "code of laws" by enacting a statute that regulated the issuance of

those securities on different terms. Original Bill in Equity at 29-30, *Texas v. ICC*, No. 24 Original (U.S. filed June 6, 1921) (Ex. 1). *See also id.* at 25, 32, 52, 53, 53-54, 63-64 (alleging direct conflicts between state statutes and various provisions of the Transportation Act of 1920).

The Supreme Court recognized that the allegation of conflicts between the state statutes and the federal law, standing alone, amounted only to "the presentation of an abstract question of legislative power," which "does not present a case or controversy within the range of the judicial power as defined by the Constitution." *Texas v. ICC*, 258 U.S. at 162. The Court emphasized that state law and federal law must actually be applied in conflict with each other before a case or controversy will arise; it is not enough simply to assert that the two laws conflict in the abstract. "It is only where rights, in themselves appropriate subjects of judicial cognizance, are being, or about to be, affected prejudicially by the application or enforcement of a statute that its validity may be called in question by a suitor and determined by an exertion of the judicial power." *Id.* (citing, *e.g.*, *Georgia v. Stanton*, 73 U.S. 50, 73 (1867)).

Oklahoma likewise errs in claiming that *New Jersey v. Sargent* did not involve an assertion of a "direct conflict" between state and federal law. (Pl.'s Mem. at 21.) The state did indeed allege such a conflict, explicitly and unequivocally, but the Supreme Court held that the allegation alone did not present a concrete case or controversy. The state recited a number of its state statutes that regulated the use of its waterways, and it claimed standing because it "ha[d] by law provided for the exercise of its right, power, and authority" over the state's waters, and because its statutes controlled over any contrary terms of the Federal Power Act. Original Bill in Equity at 29, *New Jersey v. Sargent*, No. 20 Original (U.S. filed Nov. 21, 1923) (Ex. 2).

The Supreme Court recognized that New Jersey had alleged that the Federal Power Act "will jeopardize its policy respecting the conservation of potable waters." *Sargent*, 269 U.S. at

338. It nonetheless held that the issue was only "an abstract question respecting the relative authority of Congress and the state in dealing with such waters," not a cognizable case or controversy. *Id.* at 330. "Plainly these allegations do not suffice as a basis for invoking an exercise of judicial power." *Id.* at 337. New Jersey lacked standing because "[t]here is no showing that the state is now engaged or about to engage in any work or operations which the act purports to prohibit or restrict, or that the defendants are interfering or about to interfere with any work or operations in which the state is engaged." *Id.* at 338.

Oklahoma similarly errs in its characterization of *United States v. West Virginia*, which it describes as not involving any claim of "interference" by the state with the interests of the United States. (Pl.'s Mem. at 20.) In that case, the United States sought to invoke the Court's original jurisdiction. It claimed that a live controversy existed with West Virginia because the state had enacted statutes that "declared its right of control over the development of electric power on its rivers," and that "[t]hese legislative Acts" had "produced an indivisible injury to the United States" in that the state denied that the Federal Power Act would control over contrary state law. Plaintiff's Brief in Reply at 20, *United States v. West Virginia*, No. 17 Original (U.S. filed Apr. 27, 1935) (Ex. 3). The Court recognized that the state had asserted "a right superior to that of the United States to license the use" of its rivers, and that the state "denie[d] the right" of the federal government to regulate its water under the Federal Power Act, insofar as the federal statute was "an invasion of the sovereign rights of the state." *West Virginia*, 295 U.S. at 469.

Despite these allegations, the Court held that there was no live controversy between the United States and West Virginia, even though there was a live controversy between the United States and a private corporation, which had claimed a privilege under the state statutes to build a dam on waters that the federal government claimed the right to regulate. Because "the bill

allege[d] no act or threat of interference by the state" with the exercise of federal authority, *id*. at 472, the complaint alleged only "a difference of opinion between the officials of the two governments," *id.* at 473. Such a difference of opinion – even a difference of opinion as to whether a state statute or a federal statute is controlling – did not state a concrete controversy. Instead, "[u]ntil the right asserted is threatened with invasion by acts of the state, which serve both to define the controversy and to establish its existence in the judicial sense, there is no question presented which is justiciable by a federal court." *Id*. at 474 (citations omitted). In other words, "rival claims of sovereign power made by the national and a state government," standing alone, could not create a case or controversy in the absence of direct actions by the state or federal governments in conflict with each other. *Id*. at 475.

Oklahoma stands in the same position as the states in these cases. Like Texas, New Jersey, and West Virginia, it alleges only that it has enacted a provision of state law that it claims is in conflict with federal law. Even if such a conflict exists – and it is far from certain that the Oklahoma constitutional amendment could ever actually be applied in a manner in conflict with federal law – this bare allegation presents only an "abstract question" that is not within the power of the federal courts to decide. If the rule were otherwise, Oklahoma could challenge any federal law it wished as inconsistent with other declarations of rights in its Constitution, such as the state's Due Process Clause, OKLA. CONST. art. II, § 7, or its guarantee of the inherent rights of citizens, *id.* art. II, § 2. Any policy dispute could thereby be imported into the judicial arena.

III. Oklahoma Has Alleged No Cognizable Injury to Its Own Interests as a State

As discussed above, a state may not establish its standing to pursue a claim in federal court simply by alleging that state law and federal law are in conflict. At a minimum, a state must instead allege some direct injury to its own activities, as a state government, to allege an

injury that is cognizable in federal court. For example, a state may challenge a federal measure that commands the state government to take action, *e.g.*, *New York v. United States*, 505 U.S. 144 (1992), or that prohibits specified action of the state government, *e.g.*, *Oregon v. Mitchell*, 400 U.S. 112 (1970). Section 5000A, however, places no constraints on the Oklahoma state government. The State of Oklahoma, then, suffers no injury from the provision distinct from the purported injury that it claims is suffered by state residents.

The cases that Oklahoma relies upon in its opposition memorandum confirm this principle. Those cases did not find that a state established standing merely by alleging a conflict between state and federal law; instead, the state had standing to challenge interference with enforcement activities that the state government had undertaken, or planned to undertake. In *Maine v. Taylor*, for example, the state had standing to pursue an appeal of a judgment that had declared its state statute unconstitutional, because a state "has a legitimate interest in the continued enforceability of its own statutes," 477 U.S. 131, 137 (1986), and that interest was threatened because Maine otherwise would have been bound by the lower court's determination that the statute was unconstitutional, *id*. Likewise, the Tenth Circuit held that the State of Wyoming had standing under the APA to challenge a federal agency's interpretation of the federal Gun Control Act, based on the court's conclusion that the agency's interpretation would affect how the state enforced its own regulation of permits to carry concealed weapons. The Tenth Circuit thus concluded that the federal agency "interfere[d] with Wyoming's ability to enforce its legal code" with respect to Wyoming residents who applied for such permits. *Wyoming v. United States*, 539 F.3d 1236, 1242 (10th Cir. 2008), and that Congress had conferred standing on the state insofar as the Gun Control Act "grants states significant latitude to determine the applicability of the Act by relying on state law, in part, to determine the classes

of individuals who may not possess a firearm," *id.* at 1243.

In contrast, Oklahoma does not allege that it intends to engage in any regulatory activities, as a state government, with respect to its constitutional amendment, nor does it seek to assert any rights under the Affordable Care Act. The amendment does no more than declare rights under state law. It does not grant the state government any enforcement powers, or establish any regulatory system. Oklahoma thus lacks standing, because, although a state may have standing to "complain about the curtailment of its statutory powers," it may do so only if federal action actually interferes with "statutory authority exercised" by the state. *Illinois Dep't of Transp. v. Hinson*, 122 F.3d 370, 372 (7th Cir. 1997).

Oklahoma, in apparent recognition of this defect in its standing allegations, argues that the state constitutional amendment is "enforceable under the general provisions of the civil laws." (Pl.'s Mem. at 16.) Oklahoma carefully avoids describing who might enforce the provision, or against whom the provision is enforceable. For the reasons discussed above, it would not suffice to claim that private parties might seek to enforce any rights provided under the provision; at a minimum, a state must allege that its *own* actions as a state government have been interfered with in order to establish standing. Oklahoma does not allege that it, as a state government, could enforce the terms of the constitutional amendment against private parties. The amendment by its own terms applies only to "law[s] or rule[s]," and only to those laws or rules that have been brought into effect after January 1, 2010, making it apparent that the provision applies to the Affordable Care Act alone. OKLA. CONST. art. II, § 37(B)(1). But in any event, nothing in Section 5000A would prevent Oklahoma from enforcing a similar provision against private parties. Section 5000A applies only to individuals, and bars no state actor from doing anything. If Oklahoma wishes to prohibit its own state officials, or private actors within

the state, from imposing additional insurance requirements, it is free to do so.

Oklahoma's unarticulated claim, then, must be that it has enforcement power under the state constitutional amendment to restrain the federal government from implementing Section 5000A. Oklahoma cites *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, for the proposition that it has an interest, with respect to suits by the state against private parties, in the "exercise of sovereign power over individuals and entities within the relevant jurisdiction," which "involves the power to create and enforce a legal code, both civil and criminal." 458 U.S. 592, 601 (1982). But it does not follow that Oklahoma has the same "sovereign interest" to bring suit under its state laws against the United States. The United States is not an "individual[]" or "entit[y]" over whom Oklahoma has "sovereign power." (Pl.'s Mem. at 10.) *See McCulloch v. Maryland*, 17 U.S. 316, 429 (1819) ("The sovereignty of a state extends to everything which exists by its own authority, or is introduced by its permission; but does it extend to those means which are employed by congress to carry into execution powers conferred on that body by the people of the United States? We think it demonstrable, that it does not."). This is not a statute that Oklahoma can "enforce." Because Oklahoma suffers no cognizable injury from its assertion that its state law and the federal law are in conflict, it lacks standing to bring this suit.

Oklahoma also asserts that it has standing because it is "working in conjunction with" the federal government to establish health insurance exchanges. (Pl.'s Mem. at 18.) It argues that, if it succeeds in this lawsuit and Section 5000A is invalidated, the health insurance market "will implode," and no buyers will come to the exchanges that it will establish. (Pl.'s Mem. at 19.) Oklahoma accordingly reasons that it has standing to seek to invalidate Section 5000A to achieve this result. This argument is baseless. A plaintiff may not claim that it has standing because it would be *harmed* by the relief that the plaintiff itself seeks. Instead, a core principle of standing

is that a plaintiff must show that its claimed injuries are fairly traceable to the challenged action of the *defendant* and that those injuries would be *redressed* if the plaintiff were to prevail. *E.g.*, *Summers v. Earth Island Inst.*, 129 S. Ct. 1142, 1149 (2009). That Oklahoma seeks, in pursuing this lawsuit, to cause injury to its own voluntary efforts to establish a health insurance exchange does not help its claim for standing. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976) ("No State can be heard to complain about damage inflicted by its own hand.").[1]

In sum, Oklahoma lacks standing because, despite its disavowal of *parens patriae* standing, its suit in fact seeks to exempt its citizens from the operation of federal law; *Mellon* prohibits the state from seeking that relief. Oklahoma cannot avoid this result by citing an alleged conflict between state and federal law, because the Supreme Court has repeatedly made clear that such allegations of conflicting laws, standing alone, do not state a case or controversy within the judicial power to decide. And, although in some circumstances a state may have standing if federal law obstructs the state's own enforcement activities, Oklahoma cannot plausibly allege standing on these grounds because there are no enforcement activities to obstruct. Section 5000A applies only to individuals, and does nothing whatsoever to limit the actions of the Oklahoma state government.

CONCLUSION

For the reasons set forth above, the plaintiff's complaint should be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject-matter jurisdiction.

[1] Oklahoma may mean to (but does not) argue that, because it may be affected by the provision in the Affordable Care Act that offers grants to states to assist in establishing exchanges, it has standing to challenge the separate provision of the Act enacting 26 U.S.C. § 5000A. This does not follow. "Rather, a plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Davis v. FEC*, 554 U.S. 724, 734 (2008) (internal quotations omitted) (plaintiff must show standing under each separate provision of federal law that it challenges).

DATED this 26th day of April, 2011.

Respectfully submitted,

TONY WEST
Assistant Attorney General

IAN HEATH GERSHENGORN
Deputy Assistant Attorney General

MARK F. GREEN
United States Attorney

SUSAN S. BRANDON
Assistant United States Attorney

s/ Joel McElvain
JENNIFER D. RICKETTS
Director
SHEILA M. LIEBER
Deputy Director
JOEL McELVAIN (D.C. Bar #448431)
Senior Trial Counsel
United States Department of Justice
Civil Division, Federal Programs Branch
20 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Phone: (202) 514-2988
Fax: (202) 616-8202
Email: Joel.McElvain@usdoj.gov

Counsel for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

E. Scott Pruitt
Cornelius Neal Leader
Sandra D. Rinehart
Office of the Attorney General
313 NE 21st St.
Oklahoma City, Oklahoma 73105

s/ Joel McElvain
JOEL McELVAIN

EXHIBIT 1

Original Bill in Equity, *Texas v. ICC*, No. 24 Original (U.S. filed June 6, 1921)

In the Supreme Court of the United States

OCTOBER TERM, 1920

IN EQUITY

Original No. 24

STATE OF TEXAS, COMPLAINANT,

vs.

INTERSTATE COMMERCE COMMISSION AND THE RAILROAD LABOR BOARD, DEFENDANTS.

MOTION TO FILE ORIGINAL BILL AND ORIGINAL BILL AND EXHIBITS.

THE STATE OF TEXAS,
By C. M. CURETON,
Attorney General, for the State of Texas.
BRUCE W. BRYANT,
EUGENE A. WILSON,
WALACE HAWKINS,
TOM L. BEAUCHAMP,
Assistant Attorneys General.
And JOHN E. BENTON,
Washington, D. C.
Solicitors for the State of Texas.

VON BOECKMANN-JONES CO., PRINTERS AUSTIN, TEXAS

In the Supreme Court of the United States

OCTOBER TERM, 1920

No..... Original.

THE STATE OF TEXAS, COMPLAINANT,

vs.

THE INTERSTATE COMMERCE COMMISSION AND RAILROAD LABOR BOARD, DEFENDANTS.

MOTION TO FILE ORIGINAL BILL.

Now comes the State of Texas by its Attorney General, C. M. Cureton, and moves the court for leave to file the bill of complaint herewith exhibited, in a suit between the State of Texas and citizens of other States, and arising under the Constitution and laws of the United States, for the purpose of enjoining the defendants from enforcing within the State of Texas, by an abuse of power, without lawful and constitutional authority or by a wrongful and erroneous interpretation thereof, such titles and sections of an act of Congress, the short title of which is "The Transportation Act of 1920," as apply and are designated to give validity and effect to and as create the Railroad Labor Board, which attempt to authorize each of the defendants to do and perform acts and to assume authority under said sections enumerated, and that the proper process may issue thereon, notifying the defendant of the filing of said bill and that they appear and answer thereto and defend the same.

THE STATE OF TEXAS,
By C. M. CURETON,
Attorney General, for the State of Texas.
BRUCE W. BRYANT,
EUGENE A. WILSON,
WALLACE HAWKINS,
TOM L. BEAUCHAMP,
Assistant Attorneys General.
And JOHN E. BENTON,
Washington, D. C.
Solicitors for the State of Texas.

In the Supreme Court of the United States

OCTOBER TERM, 1920

Original No.....

IN EQUITY

STATE OF TEXAS, COMPLAINANT,

vs.

THE INTERSTATE COMMERCE COMMISSION AND RAILROAD LABOR BOARD, DEFENDANTS.

ORIGINAL BILL IN EQUITY.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The State of Texas, complainant, by C. M. Cureton, Attorney General thereof, brings this bill of complaint for itself and representatively on behalf of its citizens in their sovereignty against the defendants above named, and respectfully shows unto this Honorable Court:

I.

That the complainant, the State of Texas, is one of the States of the United States, and the defendants are administrative, governmental agencies of the United States described as follows, to-wit: The Interstate Commerce Commission is a corporate body having legal capacity to sue and be sued and has regulatory powers over common carriers in the United States engaged in interstate commerce, established and now existing under act of Congress known as the "Interstate Commerce Act," said Commission being located at the seat of government of the United States in the City of Washington, District of Columbia, and whose chairman is Edgar E. Clarke, a citizen of the State of Iowa; that the Railroad Labor Board is a corporate body vested with administrative and regulatory governmental powers, having jurisdiction

over disputes arising between common carriers engaged in interstate commerce and their employes and subordinate employes, established and existing under act of Congress of the United States known as the Transportation Act of 1920, amending "An Act to Regulate Commerce," approved February 4, 1887, as amended, approved February 28, 1920, and said Railroad Labor Board, pursuant to the act creating and establishing such Board, has and maintains its principal office in the City of Chicago, in the State of Illinois, and that the chairman of said Board is R. M. Barton, a citizen of the State of Tennessee.

II.

This is a suit of a civil nature arising under the Constitution and laws of the United States against citizens of other States of the United States, who, as designated officials and administrative agencies of the Government of the United States, with their and each of their subordinates, agents and servants, are charged with the duty, in their several spheres of action, of enforcing a certain pretended act of Congress, and is for the purpose of enjoining them from enforcing such titles and sections of an act of Congress commonly called the "Transportation Act, 1920," as will be hereinafter named.

III.

On information complainant alleges that the State of Texas has within its boundaries a territory of approximately 265,000 square miles, containing a population of more than 4,600,000 people, whose transportation needs are served by approximately 16,000 miles of constructed and operated railways; that the State of Texas is a large shipper of products over said railways in both intra and interstate commerce, and is likewise a large purchaser of supplies aggregating many millions of dollars each year shipped in both interstate and intrastate commerce over said railways; that it is also a large purchaser of transportation over said railways, in both interstate and intrastate commerce, on which its officers, agents, and employes, and members of its National Guard travel in the performance of their designated and lawful duties; that it is likewise the owner and operator of a line of railway running from Rusk, in Cherokee County, Texas, to Palestine, in Anderson County, Texas, a distance of 33.55 miles; said railroad is known as the "State Railroad," and is owned and operated, in its sovereign capacity, by the State of Texas; that while said rail-

road is a short line railway located wholly within the boundaries of the State, it is operated generally as a common carrier.

IV.

As heretofore alleged, the State of Texas has within its borders approximately 16,000 miles of constructed and operated railways. That said railways are owned and operated by approximately 125 different railway corporations, all of which, with one exception, are incorporated and chartered under the laws of Texas; that the exception is the Texas & Pacific Railway Company chartered under the laws of the United States. A list of said railways, together with the amount of mileage of each, and the valuation of each, as ascertained by the Railroad Commission of Texas, will be found in Exhibit No. 1 attached hereto and made a part of this petition for all purposes as though pleaded within the body hereof.

V.

That prior to the Act of 1845, admitting Texas into the Union, all the territory comprising the State of Texas existed as an independent nation of the world known as the Republic of Texas. That as such it had all power over its internal and domestic affairs, as well as its foreign affairs, with the right to pass and enforce any and all laws which an independent nation could enact and enforce for the welfare of its people. That it had a constitution and code of laws, with a republican form of government, similar to the Constitution and laws of the United States. That on said date it was admitted into the Union as one of the States of the United States and ceased to exist as an independent nation of the world, but became, and has since continuously been, a State of the United States. That it was admitted into the Union on an equality with all other States of the Union in all respects whatsoever except that it retained the ownership of, and power thereafter continued to own, all public lands within its borders. That upon admission to the Union it obtained the same rights and powers of government, legislative, executive, and judicial, over its internal affairs, as were retained by and reserved to the several States of the Union.

VI.

Complainant is advised, and therefore avers, that the Constitution of the United States does not delegate to the national government any power of police, nor power of legislation with respect to the internal affairs and intrastate commerce of the State of Texas, nor are said powers prohibited by the Constitution to the State of Texas, but are specially reserved to said State, or to the people, according to the determination of the people of said State.

VII.

Complainant is advised, and therefore avers, that in addition to the rights, powers and authority specially or by necessary implication reserved to or retained by the States, or the people, and not granted to the United States by the Constitution and various amendments thereto, there was reserved to the States respectively, or to the people all powers "not delegated to the United States by the Constitution, nor prohibited by it to the States." That among these powers, are the right to regulate intrastate commerce, and all rates, fares, wages, charges, and contracts relative thereto entered into or made effective within any State; the right to regulate private corporations, and combinations and restrictions in trade and commerce in intrastate commerce; and various powers, rights and privileges of the States and of the people not necessary to be enumerated at this time. That all of these powers, thus reserved to the several States and the people, were and are denied to the United States by the Constitution.

VIII.

Upon information complainant avers that acting within and under the Constitution of the United States, the State of Texas, from the time of its admission into the Union down to the present time, has, by its several Constitutions and various statutes, exercised the powers thus reserved to it, or left to the people the right to exercise the powers thus reserved to them. That its present Constitution was adopted by the people and became effective in 1876, and, with certain amendments thereafter made, became, was and is the fundamental law of the State, all provisions of which are valid under the Constitution of the United States. That under its said Constitution, Texas has, from time to time, enacted

statutes for carrying into effect the provisions thereof, and protecting the rights and liberties therein granted to or retained by the people, all of which are valid under the Constitution of the United States. That among the constitutional provisions referred to are those relating to equal rights, due process, special privileges and franchises, perpetuities and monopolies, private corporations, common carriers and railways.

Section 3, Article 1, of the Constitution of Texas declares that all men have equal rights and that no man or set of men is entitled to exclusive, separate public emoluments or privileges.

Section 17 of Article 1 provides that no irrevocable or uncontrollable grant of special privileges shall be made, but all privileges and franchises granted by the Legislature, or created under its authority, shall be subject to the control thereof.

Section 19 of Article 1 declares that no citizen shall be deprived of life, liberty, property, privileges or immunities, except by due course of the law of the land.

Section 26 of Article 1 declares that perpetuities and monopolies are contrary to the genius of a free government and shall never be allowed.

Section 22 of Article 4 makes it the duty of the Attorney General of the State to especially inquire into the charter rights of all private corporations, and from time to time, in the name of the State, take such action in the courts as may be proper and necessary to prevent any private corporation from exercising any power or demanding or collecting any species of taxes, tolls, freight or wharfage, not authorized by law, and upon sufficient cause, to enter a judicial forfeiture of such charters unless otherwise especially directed by law.

Article 10 of the Constitution of Texas relates exclusively to railroad corporations. Section 1 of this article declares that any railroad corporation organized under the law for the purpose, shall have the right to construct and operate a railroad between any points in the State, and to connect at the State line with railroads of other States. It provides that every railroad shall have the right to intersect, connect with or cross any other railroad, and that railroad corporations shall receive and transport each other's passengers, tonnage and cars, loaded or empty, without delay or discrimination, under such regulation as shall be prescribed by law.

By Section 2 of this article railroads theretofore constructed,

and which might thereafter be constructed in this State, are declared to be public highways, and railroad companies common carriers. It makes it the duty of the Legislature to pass laws to regulate freight and passenger tariffs, to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and to enforce the same by adequate penalties. It also provides that in the further accomplishment of these objects and purposes, the Legislature may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable.

Section 3 of this article requires every railroad corporation doing business in the State under the laws or authority thereof to have and maintain a public office or place within the State for the transaction of its business, where transfers of stock shall be made, and where shall be kept for inspection by the stockholders of such corporation books, in which shall be recorded the amount of capital stock prescribed, the names of the owners of the stock and the amounts owned by them respectively, the amount of stock paid, and by whom, the transfer of such stock, and the date of the transfer, the amount of its assets and liabilities, and the names and places of residence of its officers. This section provides for an annual meeting, within the State, of the directors of every railroad company, and makes it the duty of certain officers of the corporation to make reports to certain State officers, the reports to include such matters relating to the railroads as may be prescribed by law. It is made the duty of the Legislature to pass laws enforcing the provisions of this section by suitable penalties.

Section 4 of this article fixes the status of the movable property of railroad companies, as personal property, and makes both real and personal property subject to execution, etc.

Section 5 of this article declares that no railroad corporation or the lessees, purchasers or managers thereof, shall consolidate the stock, property or franchises of such corporation with, or lease or purchase the works or franchises of, or in any way control any railroad corporation owning or having under its control a parallel or competing line. It prohibits any officer of any such railroad corporation from acting as an officer of any other railroad corporation owning or having control of a parallel or competing line.

Section 6 of this article provides that no railroad company

organized under the laws of Texas shall consolidate by private or judicial sale, or otherwise, with any railroad company organized under the laws of any other State or of the United States.

Section 8 declares that no railroad corporation in existence at the time of the adoption of this Constitution shall have the benefit of any future legislation, except on condition of complete acceptance of all the provisions of this Constitution applicable to railroads.

Section 9 requires that railroads passing within a distance of three miles of any county seat shall pass through the same and establish and maintain a depot therein, etc.

Article 12 of the Constitution of Texas relates to private corporations. Section 1 prohibits the creation of private corporations except by general law. Section 2 provides that general laws shall be enacted providing for the creation of private corporations, which shall provide fully for the adequate protection of the public and of the individual stockholders. Section 3 declares the right to authorize and regulate freights, tolls, wharfage or fares, levied and collected, or proposed to be collected, or proposed to be levied and collected, by individuals, companies, or corporations for the use of highways, landings, wharves, bridges and ferries devoted to public use, has never been and shall never be relinquished or abandoned by the State, but shall always be under legislative control and dependent upon legislative authority.

Section 4 makes it the duty of the Legislature to provide a mode of procedure by the Attorney General and district or county attorneys, in the name and behalf of the State, to prevent and punish the demanding and receiving or collection of any and all charges as freight, wharfage, fares, or tolls, for the use of property devoted to the public, unless the same shall have been specially authorized by law.

Section 5 provides that all laws granting the right to demand and collect freights, fares, tolls or wharfage, shall at all times be subject to amendment, modification or repeal by the Legislature.

Section 6 provides that no corporation shall issue stock or bonds except for money paid, labor done or property actually received, and declares that all fictitious increase of stock or indebtedness shall be void.

Section 3 of Article 14 relates to land grants to the railways of the State. It declares that the Legislature shall have no power to grant State lands to any railway company except upon the fol-

lowing restrictions and conditions: First, there shall never be granted to any such corporation more than sixteen sections to the mile; second, that no land certificate shall be issued to such company until it shall have equipped, constructed, and in running order at least ten miles of road; and on the failure of such company to comply with the terms of its charter, or to alienate its lands at a period to be fixed by law, in no event to exceed twelve years from the issuance of the patent, all lands so granted are to be forfeited to the State and again become a part of the public domain. It is made the duty of the Legislature to pass general laws only to give effect to the provisions of this section.

Section 25 of Article 16 provides that all drawbacks and rebatement of freight, transportation, carriage, wharfage, storage, compressing, baling, repairing, or for any other kind of labor or service of, or to any cotton, grain or other produce or article of commerce in this State, paid or allowed or contracted for, to any common carrier, shipper, etc., not the true and absolute owner thereof, are forever prohibited, and it shall be the duty of the Legislature to pass effective laws, punishing all persons in this State who pay, receive or contract for or respecting the same.

Section 48 of Article 16 preserved all laws in effect in the State of Texas when the Constitution of 1876 was adopted, and which were not repugnant to the Constitution or that of the United States, until such laws should expire by their own limitation or be amended or repealed by the Legislature.

Copies of each of the foregoing sections of the Constitution of the State of Texas are shown in Exhibit 2, in the appendix to this bill of complaint, and are made a part hereof for all purposes to the same extent as if pleaded in full herein.

IX.

That under its Constitution, and particularly under the foregoing sections thereof, the State of Texas has enacted a full and complete code of laws relating to railroads and common carriers, corporations, trusts and monopolies.

Title 115 of the Revised Civil Statutes of Texas (1911) with amendments thereto relates to the subject of railroads. Chapter 1 of this title refers to the incorporation of railroad companies. It contains no limitations as to the time, place, necessity for, or circumstances under which a railroad may be constructed. Any

five or more persons who are subscribers to the stock may form such a corporation by complying with the terms of the chapter. (R. S., Art. 6405.) No corporation, except one chartered under the laws of Texas is permitted to construct, build, operate, acquire, own or maintain any railway within the State. (R. S., Art. 6406.) It prescribes the method of incorporation, states when the existence of such a corporation begins, and limits the period of its existence to fifty years. Provision is made, however, for the renewal of corporations whose charters have expired. (R. S., Arts. 6407 to 6416.)

Chapter 2 authorizes amendments to railway corporation charters, and prescribes the manner thereof. (R. S., Arts. 6417 to 6422.)

Chapters 4, 5, 6 and 7 relate to the government of railway corporations by the stockholders, directors and officers. Each director is required to be a stockholder, and a majority must be residents of the State of Texas. (R. S., Art. 6439.) The corporate powers of the corporation are vested in the directors. (R. S., Art. 6445.) The various duties of the directors, and the rights and privileges of stockholders are defined. (R. S., Arts. 6438 to 6480.) The funds of the corporation can only be used for its corporate purposes. (R. S., Art. 6457.) Fully paid stock is non-assessable. (R. S., Art. 6458.) Authority is conferred upon stockholders to fix the amount of loans which railway corporations may negotiate, fix the rate of interest, and provide the security therefor. (R. S., Art. 6468.) Railroad stock and bonds cannot issue except for money, labor done or property actually received, and applied to corporate purposes. Shares of stock cannot issue except at par value. (R. S., Art. 6469.) Fictitious dividends, and other fictitious increase of capital stock or indebtedness is prohibited under penalty. (R. S., Arts. 6470, 6471.) The last four articles of the statute are copied in the appendix, page 85.

Chapter 8 relates to the right of way of railway corporations, the right thereto, the amount thereof, methods of acquirement, including the right of eminent domain, and generally all regulations pertinent to the subject (R. S., Arts. 6481 to 6534). Railroad corporations, in accordance with the constitutional provision, which is shown in the appendix, are authorized to construct and operate their lines between points within the State, and to connect at the State line with railroads of other States. (R. S., Art. 6481.) They are granted the right of way over all public lands,

together with the right to use any material found upon such land necessary to the construction and operation of their roads. (R. S. Art. 6482, copied in the appendix, page 86.) The beds of all streams in Texas exceeding thirty feet in length are the property of the State, and were from the beginning reserved from survey. (Acts of Congress of the Republic of Texas, December 14, 18[illegible] R. S. of Texas, 1876; Art. 3911; R. S., 1895, Art. 4147; R. S., 1911, Art. 5338.) However, railroad corporations are given the right to construct their lines across, along or upon any stream, water course, highway, or canal of the State. (R. S., Art. 6485.) Railway corporations are authorized to intersect, join and unite their lines with any other railway line. (R. S., Art. 6499.) In the acquirement of necessary lands and material for use, railway corporations, if an agreement therefor cannot be made with the owner, are given full and complete power of eminent domain (R. S., Arts. 6502 to 6534).

Chapter 3 of this title relates to the public offices and books of railroad corporations. The general offices of such companies are required to be kept in the State (R. S., Art. 6423). The statute names or defines the officers who shall maintain their offices at the place designated for the general office of the company (R. S., Art. 6424). It provides what books shall be kept at the general offices, which books must be kept open for the inspection of stockholders, any officer or agent of the State charged with the duty of inspecting them, and for examination by the Legislature (R. S., Arts. 6429, 6431 and 6432). Suits are authorized and penalties provided to secure compliance with these articles of the statute (Arts. 6433, 6434). Railway corporations are prohibited from changing the location of their general offices, machine shops or roundhouses, except with the consent of the Railroad Commission of Texas (Art. 6435). These several articles enumerated as contained in Chapter 3, are copied in the appendix, page 81.

Chapter 9 defines various rights and duties of railway corporations. It grants to them the right to have a seal, the power of succession, and the right to sue and be sued, plead and be impleaded. (R. S., Arts. 6535, 6536.) They are given the power to purchase real and other property, or receive grants of the same and to convey such property (R. S., Arts. 6537, 6538). Excess lands are required to be alienated within a limited time. (R. S., Art. 6539.) They are given the right to erect buildings, stations, fixtures and machinery, to receive and convey persons and prop-

erty by force of steam or other mechanical power, and, in substance, to do anything appropriate or necessary to carry out their corporate purposes. (R. S., Arts. 6541, 6542, 6543.) They are authorized to borrow money, execute mortgages, and issue and dispose of bonds, subject to the provisions of the statutes. (R. S., Arts. 6544 to 6547.) In certain instances, railroad corporations may abandon, change or relocate any portion of their lines of road, and in the exercise of such authority are granted the power of eminent domain, if necessary. (Acts Texas Legislature, 4th Called Session, Chap. 27, Vernon's Complete Texas Statutes, Arts. 6548a to 6548e, inclusive. Copied in the appendix, page 86.)

Chapter 10 prescribes the duties and liabilities of railroad corporations. Part of these requirements are that trains shall be run for the transportation of passengers and freight, and that railway corporations shall receive, transport and deliver passengers and freight upon the payment of the legal fares, rates or charges. Such corporations are prohibited, under penalty, from refusing to do so, or from abandoning the operation of their trains, or from abandoning their roads or any part thereof, or failing to resume the operation of their lines when ordered to operate them by the State Railroad Commission. (R. S., Art. 6552, copied in the appendix, page 89.) This article, however, does not apply to roads to which the right of eminent domain is not granted by the laws of the State. (R. S., Art. 6552a, Vernon's Complete Texas Statutes.) This chapter contains various provisions regulating the operation of railways, many of which it does not appear necessary to specifically mention, though they are a portion of the code of laws of Texas governing railway corporations. The statute makes it unlawful for one railroad corporation to consolidate with another owning or having under its control a parallel or competing line; and prohibits absolutely the consolidation of any company organized under the laws of Texas with one organized under the laws of any other State or the United States, whether by private or judicial sale, or otherwise. (R. S., Arts. 6604, 6605, 6606, copied in the appendix, page 90.) Railroad corporations are required to receive freight and passengers from connecting lines upon terms defined by the statute. (R. S., Arts. 6608 to 6617.) Passenger fare is fixed by the statute at a maximum of 3 cents per mile, except where the passenger fails to purchase a ticket, when it is 4 cents. A minimum charge of 25 cents is required.

The maximum rate for children under ten years of age is 2 cents per mile. (R. S., Art. 6618, copied in the appendix, page 91.)

Chapter 11 relates to the collection of debts from railroad corporations, to wages of employes, and prohibits the abandonment of the main track of any railroad when once constructed and operated. Persons in the employ of railroad companies are entitled to thirty days notice before a reduction in wages may take effect. This and other provisions relative to the subject will be shown in the appendix. The statute provides that the property and franchises of a railroad corporation may be sold for its debts, but certain liabilities are required to be assumed by its purchasers or successors. (R. S., Arts. 6619 to 6625, shown in the appendix, page 91.)

Chapter 12 relates to the forfeiture of the charters of railway companies which do not comply therewith by constructing their lines, together with various relief measures enacted, from time to time, with respect thereto. (Vernon's Complete Texas Statutes, Arts. 6633 to 6636.)

Chapter 13 defines the authority and duties of railway ticket agents. (R. S., Arts. 6637 to 6639.)

Chapter 14 fixes the liability of railroad companies for injuries to their employes. (R. S., Arts. 6640 to 6652.)

Chapters 15 and 16 is the Railroad Commission Act of the State of Texas. It creates a Railroad Commission, defines its membership, and the various powers and duties of the Commission. In effect the Commission is authorized to adopt all necessary rates, charges and regulations to govern and regulate freight and passenger tariffs, correct abuses, and prevent unjust discrimination, and to enforce the penalties prescribed. The manner and method by which the Commission is to exercise the power conferred upon it is fully set forth in the statute. The power conferred upon the State Commission is in many respects similar to that conferred upon the Interstate Commerce Commission, and generally upon State railway and public utility commissions throughout the United States, and complainant deems it unnecessary to plead it in detail. So much of the act as we believe the court may find it necessary to examine or consider, we have copied in the appendix in Exhibit No. 3, page 95 hereof. Among other subjects placed under the jurisdiction of the Commission is the issuance of stocks and bonds by railroad corporations. The jurisdiction of the Commission over this subject is complete. The

statute, which was enacted in 1893, declares that the power and authority of issuing or executing bonds, or other evidences of debt, and all kinds of stock and shares thereof, and the execution of all liens and mortgages, by railroad corporations in the State, are special privileges and franchises, the right of supervision, regulation, restriction, and control of which has always been, is now, and shall continue to be vested in the State government, to be exercised according to the provisions of this and other laws. (R. S., Art. 6717.) Bonds cannot be issued in excess of the reasonable value of the property, except in certain emergencies. (R. S., Art. 6718.) The method and manner of issuing stock and bonds is fully set forth in the statutes copied in the appendix, page 113.

Complainant has not intended to refer to nor copy in the appendix the entire railway code of the State, but only so much thereof as will give the court a general conception of its extent, in so far as appears necessary for the proper presentation of the issues in this action.

In addition to the foregoing, Title 20, Articles 707 to 732, inclusive, of the Revised Civil Statutes of this State, defines the duties and liabilities of common carriers. Title 18, Chapters 14 to 21, of the Revised Penal Code of the State, creates and defines offenses relating to railways, their management, and operation and prescribes punishments therefor. The State has, also, a complete code of general corporation laws, many provisions of which apply to railways, union depots, and telegraph corporations. In addition to various penalties and remedies set forth in the statutes relating to railways, the general laws of the State provide for suits by information in the nature of a quo warranto against railway corporations.

By Title 130, Revised Civil Statutes, adopted in 1911, the State of Texas has created a code defining and punishing trusts, monopolies and combinations and conspiracies in restraint of trade. The provisions of these laws will be referred to in other paragraphs of this bill of complaint, and are shown in the appendix, page 120, as Exhibit No. 4, here referred to and made a part hereof to the same extent as if pleaded in full in the body hereof.

X.

Complainant alleges upon information, that in addition to the foregoing, prior to the adoption of the Constitution of the State in 1876, by special laws, and since, by a general law, copied in

the appendix, page 126, as Exhibit No. 5, the State of Texas has granted lands to various railroad corporations of the State, making in the aggregate approximately 24,454,713 acres. A list of the lands granted with the names of the roads to which granted is shown in the appendix, page 129, as Exhibit No. 6, and is referred to and made a part hereof for all purposes to the same extent as if set forth in the body of this pleading. Upon information and advice complainant avers that these lands were all granted upon condition, expressed or necessarily implied, or imposed by the provisions of Section 3, Article 14, and Section 8, Article 10, of the Constitution of Texas, that the railroad corporations receiving such lands would comply with the terms of their charters, which, complainant avers, comprehends all the laws of the State applicable thereto, including the rates, fares, charges, classifications, regulations and practices constitutionally prescribed by the laws of the State, or by the agencies of the State created for such purpose; that, as such, the railway corporations receiving such grants, and their successors in rights, franchises and liabilities became bound and obligated by contract, expressed or implied, to so be bound by the laws of Texas, and by the lawful rates, fares, charges, classifications, regulations and practices prescribed by the State, or by the agencies of the State for such purpose.

On information and advice complainant avers that several of the railroad corporations, now in existence within the State, either received grants of land as alleged, or are successors to the rights, privileges, franchises and liabilities of those which did receive grants, and are bound in the same manner and to the same extent as if such grants had been originally made to them.

XI.

That, as shown by the foregoing allegations, the State of Texas has fostered the construction and growth of the railroads within its borders by the gifts of public lands, and rights of way over all public lands, public roads and public streams.

Complainant has confined the corporate powers of railway corporations chartered by it within limits of the State with one exception, that of the Gulf, Colorado & Santa Fe Railway Company, which was chartered by special laws prior to the adoption of the Constitution in 1876, and which constructed and owns a small

amount of mileage in Oklahoma. Complainant has prohibited any corporation, except one chartered by the State or the United States, from owning or operating any railroad in the State of Texas; and no railroad corporation operates in the State of Texas under a charter from any other sovereignty than that of the State, except the Texas & Pacific Railway Company, which is chartered by the United States and operates a line of railway running from Texarkana, in Bowie County, approximately 862 miles to El Paso, in El Paso County.

XII.

Complainant upon information alleges that the railroad corporations chartered by it, and operating in Texas, have issued bonds under the laws of Texas against their properties in large sums and amounts, the aggregate of which is approximately $358,382,410; that the names of such corporations, the approximate mileage, and bonded indebtedness of each are shown in the appendix to this bill of complaint, marked Exhibit No. 7, and is referred to and made a part hereof for all purposes as though pleaded in the body of this complaint; that all such bonds so issued were issued and sold to the public generally upon the condition, expressed or necessarily implied from the laws under which issued, that such railroad corporations will abide by the laws of Texas, and will continue to operate their lines of railroad in accordance therewith, and be governed by the lawful rates, fares, charges, classifications, regulations and practices prescribed by the State, or by its agencies created for such purpose; and upon the condition, expressed or necessarily implied, that the State of Texas would require said corporations to be so bound.

That the State of Texas has not consented that such obligation to be so bound may be abrogated.

XIII.

Complainant is advised, and therefore avers, that each and all of the foregoing constitutional provisions and laws were passed for the benefit of the railroad corporations and the people; that the railroad companies of the State have, since their incorporation, or since the passage of the laws, respectively, enjoyed the franchises, rights, and privileges granted; and by reason thereof have exercised the business of common carriers for hire, and collected hundreds of millions of dollars in rates, fares and charges

for their services, and have issued stock, bonds and securities, and obtained large sums of money therefor; that the railroad corporations of the State were enabled so to do upon condition that they severally should accept as the law governing them the Constitution of the State of Texas, all the constitutional statutes of the State, and the lawful orders of its Railroad Commission. The Constitution and statutes of the State, and the orders of its Railroad Commission are also in like manner applicable to that portion of the line of the Texas & Pacific Railway Company operating within the State of Texas. But all of the railroad corporations of the State are particularly bound and obligated to observe the lawful passenger fares fixed by the statutes of the State of Texas from time to time, and lawful freight rates, charges and classifications prescribed by the Railroad Commission of the State of Texas, and all the lawful orders made by the Railroad Commission in carrying into effect the statutes of the State. That such obligation of the railroad corporations of the State, and of those operating railroads in the State, to abide by all the statutes of the State and all lawful orders of the Railroad Commission made pursuant thereto, became, has continued to be, and now is, a part of the charter contract of each of them, and cannot be abrogated without the consent of the State, or those authorized to act for the State of Texas.

That the State of Texas has not consented to the abrogation of such charter contracts.

XIV.

That the allegations heretofore and hereafter made to the effect that the charters of the railway corporations, and laws of the State under all the facts shown, constitute contracts with the State, are not made for the purpose of invoking the jurisdiction of this court at this time for the determination of whether or not said facts do constitute contracts, or whether or not such contracts exist, for the reason that said allegations, if made for such purpose, would defeat the jurisdiction of the court, under the opinions of this Court in California vs. Southern Pacific Company, 157 U. S., 229, and Minnesota vs. Northern Securities Company, 184 U. S., 199; but said allegations are made as inducement for showing that the power and authority attempted to be conferred on the Interstate Commerce Commission to determine and fix rates, fares and charges for intrastate commerce within the State of Texas, to de-

termine when railway corporations within the State may cease operation, and take up and abandon their lines of railway, or construct additional lines of railway, or issue stocks, bonds and securities, or form pools and combinations, or consolidations, cannot constitutionally be conferred upon the Commission, for the reason that the authority of Texas railway corporations to comply therewith or accept the pretended benefits thereof, present justiciable questions, power to determine which cannot be conferred upon the Interstate Commerce Commission; and that the provisions of the Transportation Act of 1920, purporting to confer such authority on the Commission, violates the judiciary articles of the Constitution, and the due process clause of the Fifth Amendment to the Constitution.

XV.

Upon advice complainant avers the State of Texas is within all the protective clauses of the Constitution of the United States, and has reserved to it all legislative, executive and judicial powers which were respectively reserved to the States at the time of the formation of the government of the United States and the adoption of its Constitution.

That among other rights so reserved to the several States of the Union, and to the State of Texas, was that permitting them to create and control private corporations, and particularly private corporations engaged in the business of common carriers, the property of which lies wholly within the State. That the government of the United States and the Congress, which is its agency for legislative matters, and the Interstate Commerce Commission, a legislative and administrative agency created by the Congress of the United States, have no judicial authority authorizing them to determine any justiciable question where the rights of the State are involved; that justiciable controversies between the State of Texas and a sovereign State or the United States can only be determined under the Constitution of the United States, particularly under Article 3, Section 2, and the Eleventh Amendment to the Constitution of the United States, in the Supreme Court of the United States; and cannot be determined before any other court, nor before any legislative body or before Congress, nor before any legislative or administrative board or commission, nor before the Interstate Commerce Commission of the United States; that no citizen of the State of Texas, no citizen of any other State,

and no corporation of any kind or character can bring an action against the State of Texas, or against those lawfully acting for it as public officers, in any court, nor before the Interstate Commerce Commission of the United States, without the consent of the State of Texas; and that such consent has not been granted by the State of Texas.

Notwithstanding the aforesaid constitutional provisions, the Interstate Commerce Commission Act as amended by Section 402 of the Transportation Act of 1920, was passed, as complainant is advised, in violation thereof. Subdivisions 18, 19, 20, 21 and 22 of this section are copied in full in the appendix to this bill of complaint, page 134, marked Exhibit No. 8, and is herein referred to and made a part hereof for all purposes as though set forth at length in this complaint.

These subdivisions of this section prohibit any carrier from making an extension of its line of railroad, from constructing a new line of railroad, or acquiring or operating any line of railroad or extension thereof, or engaging in transportation over or by means of any additional or extended line of railroad, until the carrier shall have first obtained from the Interstate Commerce Commission a certificate that the present or future public convenience and necessity require, or will require the construction or operation of such additional or extended line of railroad; carriers by railroad are likewise prohibited from abandoning all or any portion of a line of railroad, or the operation thereof, until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. The applications for issuance of such certificates are to be under such rules and regulations as to hearings and other matters as the Commission may prescribe. Upon receipt of an application for such certificate, the Commission is required to give notices thereof, and file a copy with the Governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed shall be abandoned.

The right of being heard is given by the act in the same manner that hearings are provided for upon complaints or for the issuance of securities. The Commission is given power to issue such certificates as are prayed for, or to refuse, or to issue for a portion of a line of railroad or extension thereof, etc. The act declares, "from and after issuance of such certificate, and not be-

fore, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained or attached to the issuance of such certificate and proceed with the construction, operation or abandonment covered thereby."

As heretofore shown, the State has a complete system of laws for chartering, regulating, and controlling railroad corporations. These laws prohibit such corporations from abandoning the operation of their trains, and from taking up and removing their main tracks when once constructed and operated; except, as under actual practice, the Legislature grants consent, or except under conditions named in the statutes, the Railroad Commission of Texas consents thereto.

That the substance and effect of these paragraphs of the Transportation Act is to authorize a carrier to bring an action before the Interstate Commerce Commission against the State and all other interested parties, for the purpose of obtaining a decree authorizing the complaining carrier to abandon all or any portion of its line of railroad, or the operation thereof; that said act in effect provides for the service of a subpoena or notice on the public and on the State involved by delivery of a copy thereof to the Governor of the State, with the right of such State to be heard; that said act purports to give the Interstate Commerce Commission the power to hear such application, the pleadings and evidence of the parties, including that of the State, and to issue a decree granting to the complaining carrier the right to abandon all or any portion of its lines of railroad or the operation thereof. That said act purports to confer authority upon the Interstate Commerce Commission to grant such certificate of abandonment, and the railroad company to carry into effect the terms of the same, without securing the approval of the State or any of its agencies or authorities. That the legal effect of said statute is to authorize the Interstate Commerce Commission to adjudicate:

(a) That such complaining railroad has complied completely as to time and effect with its charter contract with the State which chartered same.

(b) Or that the State has violated the terms of its charter contract in such manner and form and under such circumstances as would authorize the carrier to no longer abide by and within the same.

(c) Or that the financial condition of the road is such, and all the facts and circumstances which surround it are such that it

is not able longer to comply, and ought not in law be required to comply, with its charter contract with the State and the laws and regulations governing its operation.

(d) Or that to further comply, with its charter contract with the State and abide by the laws made for its regulation, would be to take the property of such carrier without due process of law.

(e) Or that for the carrier to longer comply with such charter contract and the laws governing its existence and operation would be confiscatory and unreasonable.

(f) Or that for the carrier to longer abide by its charter contract and the laws of the State governing its existence constitutes a burden on interstate commerce.

(g) Or that other facts exist which authorize the corporation to abandon and take up its line of railroad or to abandon the operation of the same.

That each and all of the issues hereinabove suggested, and which may be determined by the Interstate Commerce Commission, and all such issues which it is contemplated may be determined by the Interstate Commerce Commission, whether here enumerated or not, are each and all justiciable issues between the State of Texas and the complaining carrier, or present questions for determination by the legislative department of the State.

Upon advice complainant alleges that, notwithstanding these averments, the Transportation Act of 1920, in the sections hereto fore referred to, pretends to confer authority upon the railway corporations of Texas to cease the operation of their lines, and to take up and remove their main line tracks without the consent of the Legislature of the State of Texas, or the Railroad Commission of the State of Texas, and in violation of the Constitution and laws of Texas; that said sections of the Transportation Act, therefore as to railroad corporations created by the State of Texas, are unconstitutional and void because they are violative of the Constitution of the United States, and particularly of the following provisions, towit:

(h) They violate the Tenth Amendment to the Constitution reserving to the States and the people all power not granted to the United States nor prohibited to the States.

(i) They violate subdivision 3, Section 8, Article 1, of the Constitution limiting the authority of Congress to the regulation of interstate and foreign commerce.

(j) They violate the Eleventh Amendment to the Constitution prohibiting suits against the State.

(k) Said sections violate Sections 1 and 2 of Article 3 of the Constitution conferring exclusive jurisdiction over justiciable controversies upon the Supreme Court and inferior courts of the United States.

(l) That said sections violate the Fifth Amendment to the Constitution which prohibits the taking of property without due process of law.

That said sections of the Transportation Act of 1920, in so far as the same provide that railroads cannot be constructed, nor extensions made of existing roads, without the consent of the Interstate Commerce Commission as provided for in said sections are likewise unconstitutional and void because violative of each and all of the foregoing provisions of the Constitution of the United States; and particularly for the reason that such power and authority is not conferred upon the Congress, nor upon the Interstate Commerce Commission, by subdivision 3, Section 8, Aricle 1, of the Constitution of the United States, giving Congress the power to regulate interstate commerce; and particularly for the reason that the Tenth Amendment to the Constitution of the United States reserves to the people the power and authority to engage in lawful occupations, and of the Fifth Amendment to the Constitution, which prescribes that one may not be deprived of liberty or property without due process.

XVI.

That, as heretofore alleged, Section 5 of Article 10 of the Constitution of Texas prohibits the consolidation of the stock, property or franchises of a railroad corporation with the stock, property or franchises of any parallel or competing line, regardless of the manner of such consolidation; that Section 6, Article 10, Constitution of the State of Texas prohibits the consolidation of any railroad company organized under the laws of Texas by private or judicial sale, or otherwise, with any railroad company organized under the laws of any other State or of the United States; that these constitutional provisions have been carried into effect by the various statutes of the State heretofore referred to in this pleading, and which are set out in full in the several exhibits in the appendix to this bill of complaint; that these constitutional

provisions and statutes thereunder were all passed by virtue of the power reserved to the State of Texas by the Tenth Amendment to the Constitution of the United States; that the statutes prohibiting the consolidations referred to are substantially the re-enactment of the constitutional provisions, with penalties and remedies for violations thereof, added thereto.

That among the powers reserved to the State was and is the power to pass and enforce anti-trust laws, and laws prohibiting monopolies, combinations and conspiracies in restraint of trade. That among the provisions of its Constitution adopted in 187[illegible] and now and always hitherto in effect, is Section 26, Article [illegible] of the Constitution of the State of Texas aforesaid, which declares that perpetuities and monopolies are contrary to the genius of a free government and shall never be allowed; that said provision inhibits any combination or contract, the tendency of which is to prevent competition in its broad and general sense. It applies, among other subjects, to the business of common carriers and the methods, manner and purposes of their operations. That in conformity with this and other provisions of the Constitution and the general reserved power of the States to pass laws for the protection of the people, the State of Texas has passed and has now in effect a complete code of laws defining, prohibiting and punishing monopolies, trusts and conspiracies against trade, which are shown in the Revised Civil Statutes of Texas of 1911 in Articles 7796 to 7818, inclusive, and copied in Exhibit No. 4, page 120 in the appendix. That said code of laws, among other things, declares that a trust is a combination of capital, skill or acts by two or more persons, firms, corporations or associations of persons for various purposes, and among others, to create, or carry out, restrictions in trade or commerce, or aids to commerce, or transportation; or to carry out restrictions in the free pursuit of any business authorized or permitted by the laws of this State; or to fix, maintain, increase or regulate the price of merchandise, produce or commodities, or prevent or lessen competition in the manufacture, making, transportation, sale or purchase of merchandise, produce or commodities; or to prevent or lessen competition, or aids to competition, or in the transportation of any product for market or to fix or maintain any standard or figure whereby the price of any article or commodity or merchandise, produce or commerce or the cost of transportation shall be in any manner affected, controlled or established; or to make, enter into, main-

tain, execute or carry out any contract, obligation or agreement by which the parties thereto bind themselves in any manner to fix the charge for transportation, or by which they will maintain the cost of transportation or preclude a free and unrestricted competition among themselves or others in the transportation of any article or commodity or in the business of transportation; or make any agreement relative to transportation whereby the market price of any article or commodity may be in any manner affected.

That the word "monopoly" is defined by the Texas statutes referred to as being, among other things, a combination or consolidation of two or more corporations whereby the direction of the affairs of such corporations are in any manner brought under the same management or control for the purpose of producing, or where such common management or control tends to create a trust as defined in this chapter of the Texas statutes. That said statutes also define conspiracies against trade, and contain other provisions, which we will not undertake to state in detail, but will refer the court to all the articles cited for a correct statement as to the laws of Texas relative to this subject.

That in addition to the powers reserved to the State of Texas by the Tenth Amendment to the Constitution of the United States, to protect its people against consolidation of railway corporations, and against trusts, monopolies, and conspiracies in restraint of trade, there was and is reserved by the Tenth Amendment, to the people, the primary and fundamental right to have their business, and the business of the country generally, and particularly the business of common carriers, conducted in a manner free from trusts, monopolies, and combinations and conspiracies in restraint of trade, and under the free and untrammeled right that the business of common carriers shall be entered into and conducted upon a competitive basis; that, notwithstanding the aforesaid rights, guaranteed to the State of Texas and to the people, and notwithstanding the valid provisions of the Constitution and laws of Texas, there was enacted the said Transportation Act of 1920, particularly Section 407 thereof, violative of the same, and in violation of the Constitution of the United States in the respects hereafter noted.

Section 407 of the Transportation Act of 1920, amends the first paragraph of Section 5 of the Interstate Commerce Act. This section (407) is copied in full in the appendix, page 136, is marked Exhibit No. 9, and made a part hereof for all purposes to

the same extent as if set forth in the body of this petition. Among other things, this section makes it unlawful for any carrier subject to the act, except upon specific approval of the Interstate Commerce Commission, to enter into any contract, agreement, or combination with any other carrier for the pooling of freights of competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads. It is provided, however, that when the Commission is of opinion, after hearing upon application of any carrier or upon its own initiative, that the division of traffic or earnings "will be in the interest of better service to the public or economy in operation, and will not unduly restrain competition," the Commission shall have authority to approve or authorize, if consented to by all carriers involved, such division of traffic or earnings under such rule and regulation, etc., as the Commission may find to be just and reasonable. The Commission is also authorized, after hearing, upon application of any carrier, or carriers, to permit one of such carriers to obtain control of any other carrier or carriers by lease, or by purchase of stock, where the Commission is of the opinion that such action will be in the interest of the public.

Subdivision 4 of this section makes it the duty of the Interstate Commerce Commission, as soon as practicable, to prepare and adopt a plan for the consolidation of the railroad properties of the continental United States into a limited number of systems. Certain limitations and requirements relative to these consolidations are set forth.

Subdivision 5 of the section makes it the duty of the Commission, when it has agreed upon a tentative plan of consolidation, to give the same due publicity, and upon reasonable notice, including notices to the Governors of each State, to hear all persons who may file or present objections thereto. The Commission is authorized to prescribe a procedure for such hearings and to fix a time for bringing them to a close. After the hearings it is made the duty of the Commission to adopt a plan for such consolidation and publish the same. The act requires that the consolidation made by the carriers, under the act, shall be in harmony with the aforesaid plan of the Commission.

Subdivision 6 of this section makes it lawful for two or more carriers by railroad to consolidate their properties, or any part thereof, into one corporation for the ownership, management and operation of the properties theretofore in separate ownership, management and operation. The conditions specified for such consolidations by carriers are set forth in this subdivision of the section. Paragraph (c) of this subdivision of the section prescribes that when the carriers propose a consolidation, they shall present their application therefor to the Interstate Commerce Commission, and thereupon the Commission is required to notify the Governor of each State in which any part of the property sought to be consolidated is situated, the notice to give the time and place for public hearing. If after such hearing the Commission finds that the public interest will be promoted by the consolidation, and that the conditions specified have been or will be fulfilled, then the Commission may enter an order approving and authorizing such consolidation; and thereupon such consolidation may be effected in accordance with the order, if the carriers involved assent thereto, "the law of any State, or the decision or order of any State authority, to the contrary notwithstanding."

Subdivision 8 of this section (407) declares that the carriers affected by any order made under the provisions of this section, and any corporation organized to effect a consolidation, approved and authorized in such order, shall be and are relieved from the operation of the anti-trust laws of the United States, and from all other restraint or prohibitions by law, State or Federal, in so far as may be necessary to enable them to do anything authorized or required by any order made under and pursuant to the provisions of this section.

Complainant upon advice avers that the aforesaid provisions of the Transportation Act are in violation of the following provisions of the Constitution of the United States:

(a) Of the Tenth Amendment to the Constitution of the United States reserving to the State of Texas the right to regulate its own intrastate commerce, the right to prohibit trusts, combinations and conspiracies in restraint of trade, the right to determine for itself through its legislative department as to whether or not the pooling permitted by the aforesaid sections of the Transportation Act will "unduly restrain competition," and whether or not the acquirement or control or consolidation of common carriers will be "in the public interest," and the right to determine whether or not the railway corporations operating within its borders should be consolidated into a limited number of systems; and are further violative of the Tenth Amendment in that it deprives the people of the fundamental right, guaranteed to them

by said amendment, that the business of common carriers sha
conducted upon a competitive basis, and that there shall be
pools, combinations or consolidations between such carriers.

(b) That said provisions of the Transportation Act na
above are violative of subdivision 3, Section 8, Article 1 of
Constitution of the United States which limits the power of C
gress to the regulation of interstate commerce, and has the ne
sary effect of prohibiting Congress from regulating intrastate co
merce; and that the authorization of pools, combinations, and
solidations as provided for in said sections quoted is not the re
lation of interstate commerce.

(c) That said sections of the Transportation Act violate S
tions 1 and 2 of Article 3 of the Constitution of the United St
conferring judicial power exclusively upon the Supreme Co
and inferior courts of the United States, and denying such po
to the legislative department of the government, or to admin
trative agencies created by it; that said sections of the Transp
tation Act, in substance and effect, authorize a hearing before
Interstate Commerce Commission, upon notice to the Gover
of the State, for the purpose of determining whether or not th
consolidations prescribed by this pretended law shall be consum
mated. That such, in effect, is the determination of a justiciab
controversy in which the State has an interest; and said pretende
law purports to confer upon the Interstate Commerce Commissio
power and authority to determine the issues, and to bind the Sta
by its orders and decrees.

(d) That said sections of the Transportation Act are furthe
violative of the Eleventh Amendment, and Article 3 of the Con
stitution of the United States in that they authorize a judicia
determination of justiciable questions by actions against the Sta
brought in a tribunal other than the Supreme Court of the Unite
States, and by parties other than States or the United States.

(e) That said sections of the Transportation Act, and particu
larly the first paragraph, designated as Section 5, paragraph 1, in
that it leaves to the Interstate Commerce Commission, an admin
istrative or executive board, created by Congress, to determine
when and what will constitute an undue restraint of competition
without defining undue restraint of competition, violates Section
1 of Article 1 of the Constitution of the United States, and sub
division 19 of Section 3, Article 1, of the Constitution, which con
fer legislative power exclusively upon Congress, and deny such

power and authority to the executive department of the govern
ment. Said sections of the Transportation Act further violate the
last named provisions of the Constitution of the United States in
that they attempt to confer legislative authority upon the Inter
state Commerce Commission to determine whether or not the
transportation system of the United States, and of the State of
Texas, shall be conducted by the consolidation of existing railways
into a limited number of systems instead of the present plan by
which the transportation of the country is conducted; and to de
termine by the exercise of legislative authority the number and
location of such systems, and whether or not the public interests
will be promoted by such consolidations. That said sections of
the Transportation Act are further violative of these last named
provisions of the Constitution in that they confer legislative au
thority upon an executive board to determine whether or not the
anti-trust laws of the United States, and the various laws of the
States of the United States containing restraints and prohibitions
against consolidations, monopolies, combinations and conspiracies
in restraint of trade, shall continue to be effective against and
apply to railroad corporations; and in that these sections purport
to confer authority upon said executive board to suspend such
laws of the United States and of the States as are operative
against railroad corporations or common carriers.

(f) That said sections of the Transportation Act in providing
for a determination of the rights of the State, as therein specified,
before the Interstate Commerce Commission, violate the Seventh
Amendment to the Constitution of the United States, which guar
antees the right of trial by jury.

(g) Said sections of the Transportation Act likewise violate
the Fifth Amendment to the Constitution of the United States
which declares that liberty or property shall not be taken without
due process, and that private property shall not be taken for a
public use without just compensation.

XVII.

That, as heretofore alleged, the State of Texas, under the power
reserved to it by the Tenth Amendment to the Constitution, and
under the power to regulate its intrastate commerce, has passed
and made effective a code of laws governing the issuance of stock,
bonds and securities by railroad corporations; that notwithstand-

ing said fact, and notwithstanding such power and authority reserved exclusively to the States, the Transportation Act of 1920 in Section 439 thereof, contains a pretended law in substance as follows:

The Transportation Act of 1920 amends the Interstate Commerce Commission Act by inserting between Sections 20 and 21 thereof a new section to be designated as Section 20a. This amendment is found in Section 439 of the Transportation Act of 1920. Said section is copied in the appendix, page 139, marked Exhibit No. 10, and made a part hereof to the same extent as if pleaded in full herein.

Among other provisions, this amendment provides that it shall be unlawful for any carrier to issue any shares of capital stock or any bond or other evidences of interest in or indebtedness of the carrier, or assume any obligation of liability as lessor, lessee, guarantor, endorser, surety or otherwise in any respect as the surety of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier and after investigation by the Commission, the Commission authorizes such issue or assumption. The Commission is given the authority to make such order if it finds that such issue or assumption is for some lawful object within the corporate purpose of the carrier and compatible with the public interest, and that same is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public, and which will not impair its ability to perform that service; and that same is reasonable, necessary, and appropriate for such purpose.

The Commission is given power to grant or deny the application, or grant it in part or deny it in part, etc. The act prescribes the substance of the forms of all such applications. When the Commission receives an application under this section, it is required to give notice to, and file a copy of the application, with the Governor of each State in which the applicant carrier operates.

The Railroad Commission, public service or utility commissions, or other appropriate State authorities of the State, are given the right to make, before the Interstate Commerce Commission, such representation as they may deem just and proper for preserving and conserving the interest of their people and the States, respectively, involved in such proceedings. The Interstate Commerce Commission is authorized to give hearings upon such applications. Subdivision 7, however, of this section declares that the jurisdiction conferred upon the Interstate Commerce Commission shall be exclusive and plenary, and that carriers may issue securities and assume obligations or liabilities in accordance with the provisions of this section without securing approval other than herein specified. This act makes securities without compliance therewith void. It likewise prescribes a heavy penalty for any director, officer, attorney or agent of a carrier who knowingly assents to or concurs in any issue of securities, etc., contrary to the orders of the Commission.

Complainant, upon advice, avers that the aforesaid section of the Transportation Act is violative of the Constitution of the United States in the following respects:

(a) It attempts in paragraph 7 thereof to confer upon the Interstate Commerce Commission exclusive and plenary authority to regulate the issuance of stock, bonds and securities by railroad corporations created by the State of Texas and engaged in intrastate commerce, and to deny such authority to the State of Texas, in violation of the Tenth Amendment to the Constitution of the United States, reserving such power to the State of Texas.

(b) Said section of the Transportation Act violates subdivision 3, Section 8, Article 1, of the Constitution of the United States conferring power upon Congress to regulate interstate commerce, and denying to Congress the power to regulate intrastate commerce.

(c) That said section of the Transportation Act violates Article 3 and the Eleventh Amendment to the Constitution of the United States in that they authorize an action, by an application to the Interstate Commerce Commission, to be brought against the State of Texas before a tribunal other than the Supreme Court of the United States, by citizens of the United States, and of the State of Texas, and by persons and corporations other than a State or the United States.

(d) That said section of the Transportation Act violates Sections 1 and 2 of Article 3 of the Constitution of the United States conferring judicial authority exclusively upon the courts, and effectively denying it to Congress, or any administrative or executive board created by Congress; that subdivision 6 of said section of the Transportation Act recognizes that the State, and the people of the State, have rights to be preserved relative to the issuance of stocks, bonds and securities by railroad corporations created by

and operating within the State, but requires the State to appear, after notice, before the Interstate Commerce Commission, and next before the Supreme Court of the United States, for the defense and preservation of the rights and interests of the State and of the people of the State; that the hearing provided for before the Interstate Commerce Commission is made conclusive and plenary by subdivision 7 of said section of the Transportation Act, and the rights and interests of the State concluded without a hearing before the Supreme Court of the United States, in violation of the Eleventh Amendment to the Constitution; and without a hearing before the courts, in violation of Sections 1 and 2 of Article 3 of the Constitution of the United Sates, as previously alleged.

(e) Said section of the Transportation Act violates Section 1 of Article 1 and subdivision 18 of Section 8 of Article 1 of the Constitution of the United States in that they confer legislative power upon the Interstate Commerce Commission, an executive board created by Congress, to determine whether or not the issuance of stocks, bonds and securities by railroad corporations is "compatible with the public interest," without having defined that which is compatible with public interest.

(f) Said section of the Transportation Act violates the Fifth Amendment to the Constitution of the United States, which declares that liberty and property shall not be taken except by due process of law.

(g) Subdivision 12 of said Section 439 of the Transportation Act of 1920 is unconstitutional and void, because in violation of each of the articles and sections of the Constitution of the United States set forth in the foregoing paragraph of this bill of complaint; and further, the same is violative of Section 5, Article 10 of the Constitution of the State of Texas, which declares that no officer of a railroad corporation shall act as an officer of any other railroad corporation owning or having control of a parallel or competing line. Said provision in the Constitution of Texas is a valid one under the Constitution of the United States, adopted by the State of Texas under the Tenth Amendment to the Constitution of the United States, and under subdivision 3 of Section 8 of Article 1 of the Constitution of the United States, which together reserves the power and authority to the State of Texas to regulate its intrastate commerce, and control corporations created by it.

XVIII.

Complainant, on information and belief, alleges that, beginning as early as 1893, under constitutional laws appropriate thereto, the Railroad Commission of Texas valued the then existing railroads within the State of Texas, and has continued to do so since as to existing and all subsequent railroads. That it has, under proper constitutional statutes, supervised, regulated and limited the issuance of stocks and bonds by railroad corporations; that the result has been that it has ascertained and made public the value of railroad properties within the State of Texas used in intrastate commerce; that the railroads of the State of Texas have been, in the main, economically and properly constructed, with but a comparatively small amount of alleged "water" in the stock and bonds issued by Texas railroad corporations.

That Texas is a very large State, containing approximately 16,000 miles of railroads traversing the State in all directions; that Texas has many advantages in favor of the economical construction and maintenance of its railroad; that it had, in the beginning, many millions of acres of virgin pines and hardwoods, and yet has, all appropriate for use in the construction of railways and equipment, and which have been utilized from the beginning for this purpose; that large deposits of limestone, granite, rock, clays, gravel, sand and all other kinds and classes of natural resources appropriate and necessary for the economical construction and maintenance of railways have been available, and these natural resources have been continuously used for such purposes. That the greater portion of the surface of the State of Texas is level and rolling, without intersection by hills, mountains and valleys, or other physiographic characteristics requiring expensive cuts, fills and tunnels in the construction of railways; that throughout a great portion of Texas territory, and particularly the greater portion of the territory lying southwest of the City of Austin and west of the City of Dallas, or lines drawn north and south through the City of Dallas, and east and west through the City of Austin there are but few streams to be crossed, and comparatively few bridges, culverts and fills to be constructed; that Texas is and has always been a dry and arid climate, suitable to the preservation of cross ties, rails, dumps, cuts, fills, bridges, culverts and other elements of a constructed railroad; that through a large portion of the State the rainfall is only 10 inches per

annum, through a large portion it is 20 inches, and less
through all that part of the territory west of a line drawn
and south through the City of Dallas, the rainfall is approxim
30 inches and less per annum, while in much of the territor
of such a line, the rainfall is but little in excess of such an am
all of which is suitable for the economical construction and
tenance of railway lines. That the State of Texas had and
joyed, and still has and enjoys all these natural advantages,
tributing to the economical construction, maintenance and o
ation of the railway lines within its borders; that the railr
in Texas have had and do now have these natural advanta
that the people of Texas are entitled to all these natural ad
tages heretofore enumerated, and all other natural advanta
whether specially named here or not, and are entitled to any
vantage which has accrued to them by the valuation of their ra
roads as aforesaid, and the supervision of the issuance of sto
and bonds by railroads by the Texas Railroad Commission.

That a table of the mileage and valuation of each of the ra
roads within the State of Texas, as ascertained and found by
Railroad Commission of Texas, is appended hereto as Exhibit
1; that the same is, for all practical purposes, substantially corre

That the people of this State are entitled to a system of rat
fares and charges which produce a reasonable return upon the
valuations, or valuations substantially the same as these, and th
no system of rates reasonable within themselves producing su
return are, or can be, discriminatory against interstate commer
or give any undue or unreasonable advantage to or preference
persons and localities in intrastate commerce within the State
Texas, or create an undue and unreasonable prejudice to perso
and localities in interstate commerce, even though such rates
less than the charges for the same service for the same distance
movements and carriage in interstate commerce.

That the average valuation per mile of railroad properties wit
in the State of Texas, held for and used in the service of transpo
tation, is materially less than the average valuation of such pro
erty throughout the United States, or in any of the groups
districts into which the United States has been divided by
Interstate Commerce Commission.

This allegation is based upon information received from vario
sources, including Exhibits Nos. 1, A, B, C, D and E, attache

hereto and shown in the appendix, respectively on pages 162-172 hereof.

Upon advice, complainant alleges that, under the law, the State of Texas and its citizens are entitled to a system of rates, fares and charges for intrastate transportation, which do not produce in excess of a reasonable return on the value of the railroad properties held for and used in the service of intrastate transportation; that such right is denied them by the several sections of the Transportation Act of 1920, hereinafter complained of, in violation of the Constitution of the United States.

That among the rights reserved to complainant at the time of its admission to the Union was that of having definite boundaries, fixed at the time of its admission, or changed thereafter only by agreement with the United States; that at the time of its admission into the Union, Texas had certain definite boundaries, which now exist, with the exception of such changes as have been mutually agreed upon between it and the United States, or fixed by decree of court.

That among other rights reserved to the State of Texas is that of regulating and controlling its own intrastate commerce, and basing the rates, fares and charges in such commerce upon the value of the service, and upon the value of the railroad properties actually used, or held for use, in intrastate commerce.

That notwithstanding the foregoing, the Congress of the United States, in the Transportation Act of 1920, in Section 422 thereof, in amending the Interstate Commerce Act, enacted a new section, to be known as Section 15a of the Interstate Commerce Act, which is copied in the appendix as Exhibit No. 11, page 143 hereof, and here referred to and made a part of this pleading to the same extent as if fully set forth in this bill. This section, in part, provides in substance as follows:

The first subdivision of said Section 15a defines the terms used in the section. The term "rates" is declared to mean rates, fares and charges, and all classifications, regulations and practices relating thereto. The term "carrier" is declared to mean a carrier by railroad, or partly by water within the continental United States, subject to the act, excluding, however, sleeping car and express companies, street or suburban electric railways, except as operated as a part of a general steam railway system, excluding electric railways in the same manner and excluding belt line railways, terminal switching railways, or other terminal facility owned

exclusively and maintained and operated and controlled by any State, or political subdivision thereof. The phrase "net railway operating income" is also defined.

Subdivision 2 of this section declares that the Interstate Commerce Commission in the exercise of its power to prescribe charges and reasonable rates shall initiate, modify, establish or adjust such rates so that the carriers as a whole, or as a whole in each of such rate groups or territories as the Commission may from time to time designate, will, under honest, efficient and economical management and reasonable expenditures for maintenance of way, structures and equipment, earn an aggregate annual net railway operating income equal, as nearly as may be, to a fair rate upon the aggregate value of the railway property of such carriers held for and used in the service of transportation. The Commission is likewise given reasonable latitude to modify or adjust any particular rate which it may find unjust or unreasonable, and to prescribe different rates for different sections of the country.

Subdivision 3 requires the Commission from time to time to determine and make public what percentage of the aggregate value constitutes a fair rate thereon, and requires that such percentage shall be uniform for all rate groups or territories which may be designated by the Commission. In making such determination, the act requires the Commission to give due consideration, among other things, to the transportation needs of the country, and to the necessity of enlarging such facilities in order to provide the people of the United States with adequate transportation. The act expressly requires the Commission for the two years beginning March 1, 1920, to take as a fair return designated in the statute, a sum equal to five and one-half per centum of the aggregate value of the railway properties, but permits the Commission in its discretion to add thereto a sum not exceeding one-half of one per centum of such aggregate value to make provision, in whole or in part, for improvements, betterments or equipment.

Subdivision 4 of this section authorizes the Commission to determine the aggregate value of the property of the carriers. In doing so, the Commission may utilize the results of its investigation under Section 19a of this act in so far as deemed by it available, and is required to give due consideration to all the elements of value recognized by the law of the land for rate-making purposes.

Subdivision 5 declares that in as much as it is impossible, with-

out regulation and control in the interest of commerce of the United States considered as a whole, it proposes to establish uniform rates upon competitive traffic which will adequately sustain all the carriers which are engaged in such traffic, and which are indispensable to the communities to which they render the service of transportation, without enabling some of the carriers to receive a net railway operating income, substantially and unreasonably in excess of a fair rate upon the value of their properties, that it is declared that any carrier which receives such an income so in excess of a fair return, shall hold such part of the excess as is designated in the act as a trustees for and shall pay it to the United States.

Subdivision 6 provides that if any carrier receives for any year a net railway operating income in excess of six per centum of the value of the railway property held for and used by it in the service of transportation, that one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half thereof shall be recoverable by and paid to the Interstate Commerce Commission for the purpose of establishing and maintaining a general railroad contingent fund, described in the act.

Subdivisions 7 and 8 relate to the disposition which a carrier may make of its reserve fund, which includes the payment of dividends of interest on its stock, bonds or other securities. The carriers are not required to maintain a reserve fund in excess of 5 per centum of the value of their properties, and when such maximum amount has been reached, its proportion of the excess income may be used by it for any lawful purpose. The Commission is authorized to prescribe rules and regulations for the determination and recovery of the excess income, payable to it. The general railroad contingent fund so recoverable and payable to the Commission is made a revolving fund to be administered by the Commission. It is to be used by the Commission in the furtherance of the public interest in railroad transportation, either by making loans to carriers or by purchasing transportation equipment and facilities, and leasing same to carriers. The Commission is given authority to purchase, contract for the construction, repair and replace or sell equipment, etc. The manner of making loans of funds or leases of equipment to carriers is fully set forth in the act, particularly in Subdivisions 10 to 16 of this section.

Subdivision 17 declares that the section shall not be construed

as depriving shippers of their right to reparation in case of overcharges, unlawfully excessive or discriminatory rates, or rates in excess of their relation to other rates, but no shipper shall be entitled to recover upon the sole ground that any particular rate may reflect a proportion of excess income to be paid by the carrier to the Commission in the public interest under the provisions of the section.

Under Subdivision 18, any carrier or corporation organized to construct and operate a railroad proposing to undertake the construction or operation of a new line, is authorized to apply to the Commission for permission to retain for a period not exceeding ten years, all or any part of its earnings derived from such new construction in excess of the amount previously provided for in the section, for such disposition as it may lawfully make of the same.

That said Section 15a purports to authorize the Interstate Commerce Commission to create super-States out of the several States, or parts of them, in disregard of the boundaries of the States. That such super-States are authorized to be created for governmental purposes affecting the rights of the several States and their inhabitants, including the State of Texas, and the inhabitants thereof. That the creation of such super-States, or "rate groups," so-called, is in violation of the Constitution of the United States, and in derogation of the rights of the States to be and remain exclusive governmental units, with fixed boundaries in so far as the application and enforcement of the laws of the United States, and the States themselves are concerned, including all laws relating to both interstate and intrastate commerce.

That said Section 15a violates the Constitution of the United States in, among others, the following particulars:

(a) It violates the Tenth Amendment to the Constitution of the United States, reserving to the State of Texas the right to exist as an exclusive governmental unit of the United States within its defined boundaries.

(b) That said section violates the intent and meaning given the Constitution as a whole by the various provisions thereof specifying or recognizing the States as exclusive governmental units of the United States for the exercise of all political, legislative, judicial and executive authority; that said section directly violates subdivision 3 of Section 8, Article 1, which recognizes the States as governmental units in the regulation of commerce; it violates subdivisions 5 and 6, of Section 9, Article 1 of the Constitution, which recognizes the States as governmental units for purposes of commerce, taxation and duties.

It violates subdivision 1 of Section 3, Article 4, of the Constitution which prohibits the formation of a new State within the jurisdiction of any other State, and the formation of any State by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, and of Congress; and it violates the Tenth Amendment to the Constitution which recognizes the States as governmental units to which is confided the reserve power not delegated to Congress or retained by the people.

That these and various other provisions of the Constitution, define and recognize the States as governmental units of the United States for all legislative, executive and judicial purposes; and, as such, deny to Congress the power to create out of the several States, or parts of States, any governmental unit for legislative, executive or judicial purposes. That Section 15a, having authorized the creation of rate groups for legislative, executive and judicial, or quasi-judicial, purposes in violation of the Constitution of the United States, is null and void.

(c) Said Section 15a violates the Fifth Amendment to the Constitution of the United States, prohibiting the taking of property without due process, in that it requires the rates, fares and charges made to be based on the aggregate value of the property in the rate group, instead of the value of the property actually in use for transportation purposes within the State; also in the collection, over and above a reasonable charge for transportation service, in rates, fares, and charges, of amounts of money which become the property of the United States. That such requirement violates the due process clause referred to, and that portion of the Fifth Amendment which prohibits the taking of private property for public use without just compensation.

(d) That Section 15a violates subdivision 3, Section 2, Article 1, and subdivision 4, Section 9, Article 1 of the Constitution, which declare that a direct tax can not be collected except upon apportionment among the several States according to population; that said section also violates subdivision 1, Section 8, Article 1 of the Constitution, which declares that duties, imposts and excises shall be uniform throughout the United States.

(e) That subdivision 6 of said Section 15a, among other things, declares that if, under the provisions of this section, any

carrier receives for any year a net railroad operating income in excess of 6 per centum of the value of the railroad property held for and used by it in the service of transportation, one-half of such excess shall be placed in a reserve fund established and maintained by such carrier, and the remaining one-half shall become the property of the United States to be used by the Commission in the manner specified in the act; that this, in effect, provides for the collection of a direct tax in violation of the provisions of subdivision 4 of Section 9, Article 1 of the Constitution, declaring that direct taxes must be in proportion to the population; and in violation of subdivision 3, of Section 2, Article 1, of the Constitution, which declares that direct taxes shall be apportioned among the several States according to the population; that the same is in violation of subdivision 1, Section 8, Article 1, of the Constitution, which requires that Congress, in levying duties, imposts and excises shall make these uniform throughout the United States; that said section, in that it authorizes the collection of money for the government by the carrier in excess of a reasonable rate of return to the carrier, authorizes the taking of property without due process, and the taking of property for public use without just compensation, in violation of the Fifth Amendment to the Constitution of the United States.

(f) Subdivision 17 of said Section 15a of the Interstate Commerce Act as amended, is particularly in violation of the Fifth Amendment to the Constitution prohibiting the taking of property without due process, and the taking of property for a public use without just compensation, in that it expressly declares that if any particular rate may reflect a proportion of excess income to be paid by the carrier to the Interstate Commerce Commission in the public interest, yet, the shipper shall not be entitled to recover the same, nor be entitled to reparation therefor.

(g) Subdivision 18 of said Section 15a of the Interstate Commerce Act, as amended, is particularly in violation of the Fifth Amendment to the Constitution prohibiting the taking of property without due process in that, under certain conditions, the carrier is permitted to retain an excess of receipts over and above a reasonable rate or return for the service without accounting therefor to the shipper, or to the Government.

(h) That subdivisions 6 to 16, inclusive, of said Section 15a, as amended, providing in substance for loans by the Government of the United States of funds to carriers, and the purchase and

lease of equipment by the Government to carriers, are particularly in violation of the Constitution of the United States in that such provisions are beyond the powers conferred upon Congress by subdivision 3, Section 8, Article 1, of the Constitution, granting Congress the right to regulate interstate commerce; in that these sections authorize the use of public funds for other than governmental purposes when no authority therefor is conferred upon Congress by the Constitution; but, on the contrary, the use of public funds for governmental purposes only is one of the rights reserved to the people by the Tenth Amendment to the Constitution; and in that these sections confer special privileges upon common carriers in violation of subdivision 1, Section 2, of Article 4, of the Constitution.

XIX.

That among the rights reserved to the several States of the Union and to the State of Texas by the Constitution of the United States, is that permitting them to create and control private corporations, and particularly private corporations engaged in the business of common carriers, the property of which lies wholly within the State creating them. That the government of the United States and the Congress, which is its agency for legislative matters, and the Interstate Commerce Commission, a legislative and administrative agency created by the Congress of the United States, have no judicial authority authorizing them to determine any justiciable question where the rights of the State are involved; that justiciable controversies between the State of Texas and a sovereign State or the United States can only be instituted and determined, under the Constitution of the United States, particularly under Article 3, Section 2, in the Supreme Court of the United States; and cannot be determined before any other court, nor before any legislative body, or before Congress, nor before any legislative or administrative board or commission, nor before the Interstate Commerce Commission of the United States; that no citizen of the State of Texas, and no citizen of any other State, and no corporation of any kind or character can bring an action against the State of Texas, or against those lawfully acting for it as public officers in their official capacities, in any court, nor before the Interstate Commerce Commission of the United States, without the consent of the State of Texas.

That notwithstanding the aforesaid allegations, and all other allegations made in previous paragraphs of this bill of complaint which, for the immediate purpose of this paragraph, are here reiterated as though pleaded as a part of this paragraph, complainant alleges: That the Congress of the United States did, by an act approved February 28, 1920, generally known as the Transportation Act of 1920, pass a pretended law in Sections 416 and 418 thereof, the substance of which will now be in part stated.

Section 416 amends Section 13 of the Interstate Commerce Act, while Section 418 amends a portion of Section 15 of the Interstate Commerce Act. The entire amended Section 13 and the first paragraph of Section 15 as amended are copied and shown in the appendix hereto respectively as Exhibits Nos. 12 and 13, pages 150-151.

Section 13 as amended provides that whenever in any investigation under the provisions of this act, or in any investigation instituted upon petition of the carriers concerned, there shall be brought in issue any rate, fare, charge, classification, regulation or practice made or imposed by authority of any State, that the Interstate Commerce Commission before proceeding to hear and dispose of such issue, shall cause the State or States interested to be notified of the proceeding. The Commission is authorized to confer with the authorities of any State relative to this matter and to hold joint hearings with State agencies having the power to make rates where the rate making authority of the State is or may be effected by the action taken by the Commission.

Subdivision 4 of this section provides that whenever in any such investigation the Interstate Commerce Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation or practice imposes any undue or unreasonable advantage, preference or prejudice as between persons and localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable or unjust discrimination against interstate or foreign commerce, which is forbidden and declared to be unlawful, the Commission shall prescribe the rate, fare or charge thereafter to be charged, and the classification, regulation or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice or discrimination. This subdivision declares that such rates, fares, charges, classifications, regulations and practices so prescribed by the Commission shall be observed, the law

of any State or the decision or order of any State authority to the contrary notwithstanding.

The substance of subdivision 1 of Section 15 as amended is: That whenever, after full hearing upon the complaint made, as provided in Section 13, or after full hearing under an order for investigation and hearing made by the Commission on its own initiative, the Commission shall be of the opinion that any individual or joint rate, fare or charge, or that any individual or joint classification, regulation or practice, is or will be unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial, or otherwise in violation of any of the provisions of this act, then the Interstate Commerce Commission is authorized and empowered to determine and prescribe the just and reasonable rates, fares or charges to be thereafter observed, and what classifications, regulations or practices will be just, fair and reasonable to be thereafter followed; and shall make an order that the carriers cease and desist from such violation to the extent which the Commission finds that same does or will exist, and that the carriers shall not thereafter publish, demand or collect any rate, fare or charge for transportation or the transmission of intelligence other than the rates, fares or charges prescribed by the Commission, and that the carriers shall adopt the classifications and shall conform to and observe the regulation or practice prescribed by the Commission.

Upon information received from the opinions and orders of the Interstate Commerce Commission construing and applying the Transportation Act of 1920 in the following cases: Ex parte 74, in the matter of the applications of carriers in official, Southern and Western Classification territory for authority to increase rates, 58 I. C. C., 220; No. 11,764, in the matter of intrastate rates within the State of Texas, 60 I. C. C., 421; No. 11,703, in the matter of intrastate rates within the State of Illinois, 59 I. C. C., 350; No. 11,829, Nebraska rates, fares and charges, in the matter of intrastate rates, etc., 60 I. C. C., 305; No. 11,623, in the matter of rates, fares and charges, etc., in the State of New York, 59 I. C. C., 290; No. 11,763, in the matter of intrastate passenger fares, etc., in the State of Wisconsin, 59 I. C. C., 391; No. 11,775, in the matter of rates, fares and charges, etc., in the State of Arkansas, 59 I. C. C., 471; No. 11,776, in the matter of intrastate fares and charges, etc., in the State of Minnesota, 59 I. C. C., 502; No. 11,894, in the matter of rates, fares and charges, etc., the

State of Indiana, 60 I. C. C., 337; No. 11,762, in the matter of intrastate fares, etc., in the State of Michigan, 60 I. C. C. and No. 11,863, in the matter of intrastate rates, fares, charges, etc., in the State of Louisiana, 60 I. C. C., 467, complainant alleges that in construing said Sections 13 and 15 as amended, in the light of, and in connection with Section 15a previously set forth in this pleading, and in construing said three sections together, the meaning and effect of the same are that

(a) The Interstate Commerce Commission, in the administration of Section 15a, must determine, as nearly as may be, the aggregate value of the railroad property of the carriers defined in that section, held for and used in the service of transportation

(b) That the Interstate Commerce Commission is authorized by said Section 15a, to divide the United States up into groups and has done so, finding the aggregate value of the carriers' property held for and used in the service of transportation in each group

(c) That the Interstate Commerce Commission, by said section 15a, is required to determine the revenue needs of the carriers by the groups to which the States are assigned, and not by States.

(d) That the rate made by the Interstate Commerce Commission must be based on the aggregate value of the properties held for and used in the service of transportation within the entire group, and not by States.

(e) That in making rates, it is the duty of the Interstate Commerce Commission to disregard the value of the railroad properties held for and used in the service of transportation within each particular State, except in so far as such value is a part of the aggregate value of the property of the carriers so used in the group to which the particular State has been assigned. That the intent and meaning of said Section 15a and Sections 13 and 15 is to repose in the Interstate Commerce Commission full and final authority to provide the revenues found necessary to yield the specified return, by considering the entire structure of rates, both State and interstate, and the aggregate value of the railroad property held for and used in the service of transportation without regard to State lines.

(f) That under said sections of the Transportation Act, when the Interstate Commerce Commission has fixed the interstate rates, charges, fares and classifications which are reasonable for any group as such, based on the aggregate value of the property of the

carriers held for and used in the service of transportation within the group as a whole, then that the rates, charges, fares and classifications made by any State for intrastate commerce, regardless of the valuation of the properties held for and used in the service of transportation in intrastate commerce within the State, must be identical with those fixed by the Interstate Commerce Commission for interstate commerce;

(g) That if the rates, fares, charges and classifications fixed by State authorities for intrastate commerce are not the same as those for interstate traffic fixed by the Interstate Commerce Commission for the group in which the State has been placed by the Commission, then it will "result in intrastate rates, fares and charges being lower than the corresponding rates, fares and charges contemporaneously maintained on interstate traffic within the State and between points in the State and points in other States within that group; and will result in undue and unreasonable advantage to and preference of persons and localities in intrastate commerce within such State, and in undue and unreasonable prejudice to persons and localities in interstate commerce, and in unjust discrimination against interstate commerce";

(h) That under such circumstances the Interstate Commerce Commission has authority under said Sections 13, 15 and 15a, as amended by the Transportation Act of 1920, to remove such undue preference, prejudice and unjust discrimination "by making increases in said intrastate rates, fares and charges which shall correspond with the increases" theretofore made by the Interstate Commerce Commission for interstate rates, fares and charges within the group to which such particular State has been assigned by the Commission;

(i) That under said Sections 13, 15 and 15a of the Interstate Commerce Act, as amended by the Transportation Act of 1920, when once the Interstate Commerce Commission has placed a State within a group and made interstate rates, fares and charges for the group, based on the aggregate value of the railway properties within the group, the rate making authorities of the State have no alternative but to advance the intrastate rates, fares and charges to a level with the interstate rates, fares and charges so fixed; and upon the failure of the State authorities to so do, the Interstate Commerce Commission has authority, under said sections of the Transportation Act, to advance the intrastate rates, fares and charges to the same level as the interstate rates, fares and

charges fixed by them for the group, regardless of the valu
the railway properties held for and used in the service of in
state transportation, regardless of conditions as to local cos
equipment, construction and maintenance, and as to the valu
the service locally to the people.

That Sections 13, 15 and 15a of the Interstate Commerce
as amended by the Transportation Act of 1920, construed, appl
and considered together, are null and void and violate the Co
stitution of the United States in various particulars, and am
others, the following:

(j) Said sections authorize the Interstate Commerce Co
mission to make intrastate rates, fares, charges and classifica
in violation of subdivision 3, Section 8, of Article 1 of the Co
stitution conferring upon Congress authority to regulate inte
state commerce only; and in violation of the Tenth Amendme
to the Constitution reserving to the States the right to regul
intrastate commerce and make rates, fares, charges and classifi
tions governing the same;

(k) Said sections of the Transportation Act violate the Ten
Amendment to the Constitution of the United States in that the
invade powers reserved to the State of Texas to regulate intrasta
commerce, and to create, control and regulate corporations do
business in the State of Texas;

(l) Said sections of the Transportation Act violate the Fif
Amendment to the Constitution of the United States, prohibiti
the taking of property without due process and declaring that pr
vate property shall not be taken for public use without just co
pensation. Said sections particularly violate said amendment t
the Constitution in that they require the making of arbitrary an
unreasonable rates, fares and charges based upon an aggregate va
uation of properties held for and used in the service of transpor
tation in defined groups of States, instead of the valuation o
property held for and used in the service of tranpsortation withi
each particular State of the group; and in that said sections au
thorize the collection, by the carriers, of unreasonable and exces
sive rates, fares and charges, a portion of which is to be retained
by the carriers and a portion of which becomes the property o
the United States;

(m) Said sections violate subdivision 1 of Section 2, Article
of the Constitution, in that they confer the special privilege upon
citizens who reside in States in which the average value of rail

way properties held for and used in the service of transportation
is equal to or greater per mile than the average value per mile
of such aggregate property within the group in which such State
is placed, to pay rates, fares and charges on the value or less than
the value of such property; while they deny this privilege to citi-
zens residing in States where the average value per mile is less
than the average per mile in the same group valuation;

(n) That said sections violate subdivision 3 of Section 2, Ar-
ticle 1, of the Constitution, and subdivision 4 of Section 9, Article
1, prohibiting a direct tax except apportioned among the States
according to population; also violate subdivision 1, Section 8, Ar-
ticle 1, declaring that all duties, imposts and excises shall be uni-
form throughout the United States.

(o) That in substance and effect, these paragraphs of the
Transportation Act also authorize the carriers to bring actions
before the Interstate Commerce Commission against the State for
the purpose of obtaining a decree authorizing the complaining
carriers to disregard the rates, fares, charges, classifications, reg-
ulations, etc., provided by State laws or orders of the State Rail-
road Commission; that they in effect provide for the service of
notice upon the State involved by the delivery of a copy of the
petition, subpoena or notice to the State; that said act purports
to give the Interstate Commerce Commission the right to hear such
application, pleadings and evidence and to issue a decree granting
the relief prayed for; that said paragraphs of the act purport to
authorize the Interstate Commerce Commission to grant the re-
lief asked for by the carriers without the consent of the State, or
State authorities and in disregard of State laws and State au-
thorities. Complainant upon advice avers that the issues named
for determination in the statutes quoted are justiciable issues be-
tween the State on the one hand and the carriers on the other,
and present questions for determination by a court and not by a
regulatory or administrative body. That said statutes are in vio-
lation of the Constitution of the United States in that the exe-
cution of the same, and the exercise of authority under them by
the Interstate Commerce Commission, involves the exercise of
judicial power in violation of Article 3 of the Constitution of the
United States conferring the judicial power exclusively upon the
Supreme Court and inferior courts, and in that they violate the
due process clause of the Fifth Amendment, that they also violate
the Eleventh Amendment to the Constitution of the United States

prohibiting suits against the State by any citizen of the United States or subject of any foreign State; that they further violate Article 3 of the Constitution of the United States in that they attempt to confer jurisdiction on a tribunal other than the Supreme Court of the United States, to determine justiciable questions to which a State is a party, or that may affect the justiciable rights of a State;

(p) That paragraph 4 of said Section 13 is void in this: That the elements of "undue, unreasonable or unjust discrimination against interstate or foreign commerce," declared to be unlawful in said section, are not defined with definiteness and certainty, that said provision is so vague, indefinite and ambiguous that, in effect, the Congress has delegated to the Interstate Commerce Commission the power to enact the law, instead of laying down the rule, as was its duty to do, by which the Interstate Commerce Commission is to be governed; all in violation of Section 1, Article 1, and subdivision 18 of Section 8, Article 1, of the Constitution conferring legislative power exclusively upon the Congress.

XX.

Complainant avers that Sections 300 to 316, inclusive, of the Transportation Act, 1920, provide for the creation of one board known as the "Railroad Labor Board," and for the organization of various boards to be called "Railroad Boards of Labor Adjustment." The short title prescribed for the latter by the provisions of the law is "Adjustment Boards," while the former is designated "Labor Board."

The respective powers and duties of these boards are set forth in detail in the act, but will only be briefly referred to in this pleading. The whole of the Transportation Act relating to these boards is embraced in Sections 300 to 316, inclusive, of the Transportation Act, 1920, as printed in Exhibit No. 14, pages 152-159, in the appendix to this petition; and is here referred to and made a part hereof in all respects as if pleaded fully herein.

Railroad Boards of Labor Adjustment may be established by agreement between any carrier, group of carriers or the carriers as a whole, and any employes or subordinate officials of carriers or organizations, or group of organizations thereof. Each such adjustment board is required, upon the application of the chief executive of any carrier or organization of employes, or subordinate officials, whose members are directly interested in the dispute,

or upon the written petition signed by not less than one hundred unorganized employes or subordinate officials directly interested in the dispute, or upon the adjustment boards on motion, or upon the request of the Labor Board, whenever such board is of the opinion that the dispute is likely to interrupt commerce, to reserve for hearing, and, as soon as practicable, with due diligence, decide any dispute involving grievances, rules or working conditions not decided in conference between carriers and their employes or subordinate officials, etc. The Railroad Labor Board created by the act, is composed of nine members; three members constituting the "Labor Group," representing the employes and subordinate officials of the carriers, are to be appointed by the President, by and with the advice of the Senate, from not less than six nominees whose nomination shall be made and offered by such employes in such manner as the Interstate Commerce Commission shall, by regulation prescribe; three members, constituting the "Management Group," representing the carriers are to be appointed by the President, by and with the advice and consent of the Senate, from not less than six nominees whose nomination shall be made and offered by such employes in such manner as the Interstate Commerce Commission shall, by regulation, prescribe; three members constituting the "Public Group," representing the public, are to be appointed directly by the President, by and with the advice and consent of the Senate. Vacancies on the Labor Board are to be filled in the same manner as the original appointments. The regular term of office fixed for members of the Labor Board is three years, and the salary of each is ten thousand ($10,000) dollars annually. It is made the duty of the Labor Board to hear and decide any dispute involving grievances, rules or working conditions in respect to which any Adjustment Board certifies that it has failed or will fail to reach a decision within a reasonable time, or in respect to which the Labor Board determines that any Adjustment Board has so failed or is not using due diligence in its consideration thereof.

In case the appropriate Adjustment Board is not organized under the provisions of Section 302 of the act, it is provided that the Labor Board, upon the application of the chief executive of any carrier or organization of employes or subordinate officials, whose members are directly interested in the dispute, or upon a written petition signed by not less than one hundred (100) unorganized employes or subordinate officials directly interested in the

dispute, or upon the Labor Board's motion, if it is of the opin[ion] that the dispute is likely to substantially interrupt comme[rce], shall receive for hearing and decide any dispute involving grie[v]ances, rules, or working conditions which have not been decid[ed] in conference between the carriers and their employes under Sec[-]tion 301 of the act, and which an Adjustment Board would be required to receive and decide under Section 303. By subdivision B of Section 307, the Labor Board is authorized, upon the ap[pli]cation of the chief executive of any carrier, or organization of employes or subordinate officials whose members are directly in[-]terested in the dispute, or upon a written petition signed by not less than one hundred unorganized employes or subordinate offi[-]cials directly interested in the dispute, or upon the Labor Board's own motion, if it is of the opinion that the dispute is likely substantially to interrupt commerce, to receive for hearing and decide all disputes in respect to wages or salaries of employes of carriers not decided in Section 301 of the act.

All decisions of the Labor Board are required to be entered upon the records of the Board, to be communicated to the president, to each Adjustment Board, to the Interstate Commerce Commission, and to be given further publicity in such manner as the Board may determine.

Subdivision D of Section 307 prescribes that all decisions of the Labor Board in respect to wages or salaries, and of the Labor Board and Adjustment Board in respect to working conditions, shall establish rates of wages, salaries and standards of working conditions, which, in the opinion of the Board are just and reasonable. This subdivison of the section sets forth certain things which must be considered by the boards in determining the justness and reasonableness of wages, salaries and working conditions. The Labor Board is required to elect a chairman by a majority vote of its members, and maintain a central office in Chicago, Illinois, but is authorized to meet in such other places as it may determine. The Board is required to collect and publish annually the decisions and regulations of the Labor Board and Adjustment Boards, and all court decisions, and administrative decisions and regulations of the Interstate Commerce Commission, with respect to these sections.

Any party to any dispute to be considered by an Adjustment Board or by the Labor Board are declared to be entitled to a hearing either in person or by counsel. The members of the Labor

Board are given authority to subpoena witnesses, and require the production of papers, documents, and evidence from any place in the United States, at any designated place of hearing. The taking of depositions is likewise authorized. The members of the Labor Board are given authority to administer oaths and examine witnesses. When necessary, any member of the Labor Board, officer, employe or agent thereof, may, upon written authority of the Board for the purpose of examination, have access to and the right to copy any book, act, record, paper or correspondence, relating to any matter which the Board is authorized to consider or investigate. Any person on demand, who refuses such right of access, etc., becomes liable, upon conviction, to a penalty of five hundred ($500) dollars for each offense. It is made the duty of every officer and employe of the United States when requested by any member of the Labor Board, or by an Adjustment Board, when duly authorized by the Board for such purpose, to supply any data or information pertaining to the administration of the functions vested in it by this title which may be contained in the records of his office.

Section 313 declares that the Labor Board, in case it has reason to believe that any decision of the Labor Board or an Adjustment Board is violated by any carrier or employe or subordinate official or organization thereof, may, upon its own motion, after due notice and hearing to all persons directly interested in such violation, determine whether in its opinion such violation has occurred, and make public its decisions in such manner as it may determine.

Said sections of the Transportation Act are unconstitutional and void for various reasons, among which are the following, towit:

(a) Because said sections violate the Tenth Amendment to the Constitution of the United States reserving to the States and the people of the States all powers not granted to Congress. That among the rights so reserved to the people is the right to fix wages and working conditions by contract when dealing with each other in the relation of employer and employe, and particularly the right to fix wages and working conditions upon contracts by and between common carriers and their employes, subject only to the qualification that freight and passenger rates, fares, and charges shall be reasonable in both interstate and intrastate traffic, to be determined, respectively, by the United States and the States; or, if such right was not reserved primarily and finally to

the people, then it was reserved primarily and finally to the States, and conclusively denied to the United States;

(b) That said sections of the act further violate the Tenth Amendment to the Constitution of the United States in this:

That among the powers reserved to the States is the power to pass and enforce anti-trust laws and laws prohibiting combinations and conspiracies in restraint of trade; that the State of Texas, acting by virtue of this sovereign power thus reserved to it, has heretofore made and established and now has in force and effect, under its Constitution and statutes, a code of anti-trust and anti-combination laws for the protection of its citizens. That the substance and effect of these laws has heretofore been set forth in this pleading in paragraph IX, and is here referred to and made a part of this paragraph; said laws are copied in Exhibit No. 4, page 120, in the appendix hereof, and are made a part of this pleading.

That notwithstanding said valid and constitutional laws of the State of Texas, passed and enacted under authority of the power reserved to the State, and the people of the State, by the Tenth Amendment to the Constitution of the United States, the said Transportation Act of 1920, in Sections 300 to 316, inclusive, authorizes and requires the carriers and their employes to enter into trusts, conspiracies, combinations and monopolies in restraint of trade in violation of said valid, constitutional and statutory provisions of the Constitution and laws of Texas, and in violation of the Tenth Amendment to the Constitution of the United States.

That in addition to the power reserved to the State of Texas under the Tenth Amendment to the Constitution of the United States to protect its people against trusts, monopolies, conspiracies in restraint of trade, there was and is reserved, by the Tenth Amendment, to the people the primary and fundamental right to have their business, and the business of the country generally, and particularly the business of common carriers, conducted in a manner free from trusts, monopolies, and combinations and conspiracies in restraint of trade, and under the free and untrammeled right that the business of common carriers and their employes engaged in such business shall be entered into and conducted upon a competitive basis. That notwithstanding said allegations, the Transportation Act of 1920, in Sections 300 to 316, inclusive, in violation of the Constitution of the United States, and of the valid and constitutional laws aforesaid, and of the rights of the

people reserved to them, has authorized and prescribed a method for the carriers and their employes to conspire, and enter into a combination, or combinations, which create, and tend to create, and carry out restrictions in trade, commerce, aids to commerce, and in transportation, and to carry out restrictions in the free pursuit of the business of common carriers and the occupations of their employes. That said sections of the Transportation Act authorize the doing of each and all of those things heretofore specifically mentioned as having been forbidden by the anti-trust, anti-monopoly and anti-conspiracy statutes of the State of Texas; that all the evils herein referred to and prohibited by the statutes of Texas may be effectuated and carried out by railway corporations and their employes, in the manner authorized by said unconstitutional statutes of the Transportation Act of 1920, either voluntarily or under the direction of the said Railroad Labor Board acting under its pretended authority;

(c) That said sections of said act further violate the Tenth Amendment to the Constitution of the United States and subdivision 1, Section 2, Article 4, of the Constitution of the United States, in this: That among the powers reserved to the State, and to the people, by said constitutional provisions, is that the citizens of each State shall be entitled to the privileges or immunities of the citizens of the several States, and that all freemen shall have equal rights and that no man or set of men shall be entitled to special privileges. That in conformity with these powers reserved to the States, and the people of the States, for the purpose of effectuating these rights thus reserved, the State of Texas placed in its Constitution in 1876 a provision known as Section 3, Article 1, especially declaring, "All free men, when they form a social compact, have equal rights, and no man, or set of men, is entitled to separate public emoluments or privileges but in consideration of public services." That this language was contained in substance in all previous Constitutions of the State of Texas, including the Constitution of 1845, under which Texas was admitted into the Union.

But notwithstanding the express reservation of equal privileges to all citizens contained in said subdivision 1, Section 2, Article 4, of the Constitution of the United States, and notwithstanding the reservations made in the Tenth Amendment to said Constitution, and in the aforesaid valid and constitutional provision of the Constitution of Texas, the said Transportation Act of 1920 in viola-

tion thereof, has, by Sections 300 to 316, inclusive, conferred upon certain citizens of the United States, individual and corporate, certain special privileges, the exercise of which affects the right of all citizens of the State of Texas, and of the United States;

(d) That among other things, said sections of the Transportation Act authorized the carriers and their employes to create official boards, known as "Railroad Boards of Labor Adjustment," which "Boards of Labor Adjustment" may be established by agreement between any carrier, group of carriers or the carriers as a whole, and by employes or subordinate officers of carriers, or an organization or group of organizations thereof. That such "Railroad Boards of Labor Adjustment" thus authorized to be created are given authority by Section 303 of the act over questions involving grievances, rules and working conditions between carriers and their employes, and to establish wages which shall be the lawful wages between the carriers and employes. That said "Railroad Boards of Labor Adjustment" are given authority to, and are required to perform various and sundry duties outlined and prescribed in Sections 300 to 316 of the Transportation Act of 1920, the effect of which is to give said boards power to define, regulate, fix and determine grievances, rules, working conditions and salaries and wages between carriers and their employes, and thus to materially and substantially affect all freight and passenger fares, rates and charges paid by the public. That the decisions of said "Adjustment Boards" are required to be published by the "Labor Board" created by said act; that such "Adjustment Boards" are given visitatorial powers over all officers and employes of the United States for the purpose of procuring data or information pertaining to the administration of the duties of their office.

That all violations of the orders of the "Adjustment Board" are made violations of the law; and when the "Labor Board" determines that the orders of the "Adjustment Board" have been violated, Section 313 of the Transportation Act requires that the fact of such violation shall be made public in such manner as the "Labor Board" may determine. That the manner and method of the creation, organization and operation of such "Adjustment Boards" deny to the State, and to the people, their right to be charged in transportation rates, and charges, for a wage scale and reasonable working conditions produced by competition; that said act authorizes the carriers and employes, by means of said Adjust-

ment Board erected by themselves to enter into conspiracies in restraint of trade, which may materially add to the cost of transportation, and to pass the cost on to the producer and consumer who are not given the right to be heard by said act; that wages and working conditions become a part of the rate fixed for passenger and freight service by the carriers, and said sections of the Transportation Act direct the fixing of this portion of the rate by an authorized and legalized conspiracy among the carriers as between themselves and between their employes under or by a board created and erected by themselves, without giving the State, or the people, the right to be heard;

(e) That said sections of the Transportation Act authorizing the creation and erection of "Railroad Boards of Labor Adjustment" are in violation of subdivision 9, Section 8, Article 1, of the Constitution of the United States, which grants to Congress alone the power "to constitute tribunals inferior to the Supreme Court."

(f) That said sections in the Transportation Act violate subdivision 3, Article 6, of the Constitution of the United States in that they assign to the members of such "Adjustment Board" the exercise of the prerogatives and functions of public officers without requiring them to take oath of office required of officers by the Constitution;

(g) Said provisions of the Transportation Act creating such "Adjustment Boards" are in violation of subdivision 2, of Section 2 of the Constitution of the United States, in that the members of such Board though exercising the functions of government as public officers are not required to be appointed by the President, nor by the head of any department of the Government, but are appointed by the carriers and their employes.

(h) That said Sections 300 to 316, inclusive, of the Transportation Act, authorize the creation of a board to be known as the "Railroad Labor Board" to be composed of nine members. The provisions for the creation of this Board are contained in part in Section 304.

That the "Labor Board" thus created, as public officers of the United States, receive a fixed salary and their expenses to be paid by the United States, and exercise certain franchises and functions of government defined and set forth in the sections of the act referred to. The Board, under conditions named in the act, has authority to decide any dispute involving grievances, rules or

working conditions between carriers and their employes, and ... establish rates of wages and salaries, and standards of work... conditions, and to supervise generally the relationship be... carriers and their employes. They have authority to make ... ders, and suspend them; to administer oaths, have hearings, ... evidence, and to do generally any and all things relative to ... matters of their jurisdiction, which may be done by the Inter... Commerce Commission relative to its jurisdiction, or by a co... with reference to matters cognizable by a court.

The "Labor Board" is required to select a chairman, and ma... tain central offices in Chicago, Illinois, but may meet in o... places. Any parties to any dispute to be considered by the "... justment Board" or the "Labor Board" are entitled to a hear... either in person or by counsel. The Board is given power ... punish any carrier, employe, or subordinate officer, or organiza... tion thereof, when it concludes after hearing that any decision ... of the "Labor Board" or of the "Adjustment Board" is violated. The punishment prescribed in Section 313 is that the Board may make public its decision in such manner as it may determine. That the effect of this act is to make unlawful the violation of any wage scale or standard of working conditions prescribed, or other matter subject to the jurisdiction of this Board, or the Adjustment Board, and thereby, and by means of publicity, to hold the violator thereof up to public scorn and contempt, and public injury; and to make unlawful any such violation, to the end that the party charged with such violation will be unable to maintain an action in a court of equity for redress of his or its claims, wrongs or injuries; that the manner of making known the opinion of the "Labor Board," nor the extent it shall be made public, is not prescribed by the law, but is left to the discretion and determination of the Board.

Said Section 313 is unconstitutional and void in that it fixes or permits the "Adjustment Boards" or "Labor Board" to determine and fix a penalty which is by its nature unusual and cruel and in violation of the Fourth and Eighth Amendments of the Constitution of the United States.

In this connection complainant alleges that because of said section the railroads have been compelled and are now being compelled to submit to unreasonable contracts and awards and are without remedy at law to properly and effectually adjust the questions which have been passed upon and recommended by the "La...

...or Board" and "Adjustment Boards," but have been compelled and are being compelled to submit to same and to bear the expense occasioned thereby and to add such expense to the operating expense account which said account is used by the Interstate Commerce Commission in determining the rates and fares of freight and passenger traffic on the railroads of the United States and the State of Texas in the manner hereinabove alleged.

Complainant shows that the punishment as fixed is unusual and cruel in that it is uncertain and when inflicted it is impossible to determine the extent of the injury, but complainant alleges that it would result, under many circumstances, in irreparable loss to the railroads and to the people of the United States and of the State of Texas in this, towit: When the "Labor Board" and "Adjustment Boards," or either of them, have made a decision and the railroad company does not see fit or is unable to comply therewith and said fact is published in the manner authorized and directed in Section 313, the employes of the railroad involved would immediately engage in a strike; that sympathetic shippers would divert their freight and boycott the railroad and many other shippers not interested in the subject matter would divert freight, fearing a "tie-up" and a failure of delivery; that passengers would travel by other routes because of fear of missing connections or for other reasons and the extent of the loss to the railroad company and to the shippers along its line who do not have access to other roads for travel and shipping their freight could not be estimated and would be an enormous amount and the punishment thereby inflicted upon the railroad company as a penalty would be cruel, unusual, indefinite and unreasonable and therefore in violation of the Fourth and Eighth Amendments of the Constitution of the United States.

(1) That said provisions of the law relative to the Labor Board, permitting the "Labor Group" and the "Management Group," to name the nominees from which the President must make his appointments, deny to all citizens the right to be considered for appointment, and to be appointed by the President to these offices, and create special privileges in violation of the Constitution of the United States; said provisions are in violation of paragraph 1, Section 2, Article 4, of the Constitution of the United States, which reserves to all citizens alike the same privileges and immunities; that they violate subdivision 3, Section 9, Article 1, of the Constitution of the United States in that it attaints all citizens

of the United States who do not belong to the "Labor Group" ... the "Management Group" by denying to them the right to sele... their public officers, and making their eligibility to public of... depend upon nomination by classes of individuals, defined ... "Labor Groups" and "Management Groups."

Said provisions of this act violate subdivision 2, Section 2, of ... ticle 2 of the Constitution of the United States in that they den... to the people and to the President the constitutional right of ... President to appoint public officers from the citizens generally ... the United States, and require him to have the consent and ... vice of those organizations, defined by the act as the "Labor ... Group" and the "Management Group" in addition to the advice ... and consent of the Senate. Said provisions of this act also viol... the said several provisions of the Constitution in that it author... certain individuals known as the "Labor Group" and "Manage... ment Group" in effect, to select and appoint the members of ... "Labor Board," when the right of selecting and appointing publ... officers can only be exercised through the elective franchise of ... the people, or by the President alone, or by the President with ... advice and consent of the Senate. Said provisions of the law ... are further violative of Article 6, subdivision 3, of the Constitu... tion of the United States, in that they do not require the mem... bership of said "Labor Group," and of said "Management Group ... to take the oath of office prescribed by the Constitution before ... exercising the function of officers in appointing the members of ... the Labor Board or giving their consent and advice to the appoint... ments to be made by the President. Said provisions of the Trans... portation Act violate subdivision 1, Section 2, Article 4, of the Con... stitution giving to all citizens the same rights and privileges, and ... also the Tenth Amendment to the Constitution, reserving to all the ... people their rights, in that they confer upon two privileged classes ... towit: the "Labor Group" and to the "Management Group," the ... power and authority to select the membership of the Labor Board, ... or to exercise the official function of advising and consenting to ... the appointment of certain public officers by the President.

(j) That said sections of the act violate subdivision 1 of Sec... tion 1 of Article 2 of the Constitution of the United States, which ... vests the executive power in the President; that appointment to ... office is an executive function, and cannot be vested in any other ... department than the executive department of the government ... without express constitutional sanction. That Congress is with...

... power to define the *"groups"* or classes from which the Presi... shall make his appointments; that provisions to the effect ... the "Labor Group" and the "Management Group" shall make ... certain nominees is not the prescribing of qualifications of the ... officers composing the "Labor Board," but is an arbitrary and ... unconstitutional grant of special privileges to the "Groups" re... ferred to; said provisions of the act under consideration and par... ticularly the last sentence in subdivision 3 of Section 304, provid... ing for the manner of filling vacancies on the "Labor Board," ... are violative of the various provisions of the Constitution hereto... fore referred to, and violative of subdivision 3 of Section 2, Ar... ticle 2, of the Constitution of the United States, which gives the ... President plenary power without the advice or consent of anyone ... to fill vacancies which may happen during the recess of the Senate.

(k) Said provisions of the act referred to violate the Tenth Amend... ment to the Constitution of the United States, in that one of the ... powers reserved to the people themselves is that the United States ... shall not make any law which shall abridge the privileges or im... munities of citizens of the United States, nor deprive any person ... of liberty without due process, or deny to any person equal pro... tection of the laws.

(l) Said sections of the act under consideration are further ... unconstitutional and void in that no opportunity is given the In... terstate Commerce Commission, any of the State Railroad or Pub... lic Utilities Commissions, or the public, or any individual citizen, ... to make complaint to or appear before said "Labor Board" for the ... purpose of presenting the side of the public on any matter, includ... ing wages and working conditions, over which the Board has juris... diction; that all of the acts of the Board enter into and affect the ... public, and the freight and passenger fares and charges to be paid ... by the public in a material way, and the denial by the law of the ... right of the public, either through its duly constituted officers or ... organizations or by individuals, of the right to be heard, is in ... violation of the Fifth Amendment of the Constitution of the ... United States, which declares that property shall not be taken ... without due process.

(m) Said sections of the act, and particularly subdivision (d) ... of Section 307 is further violative of the due process clause of the ... Fifth Amendment to the Constitution, and of Section 1, Article 1, ... subdivision 18, Section 8, of Article 1, in that in said sections, ... and specifically said subdivision, an attempt is made to confer

legislative authority upon the Labor Board and Adjustment Boards, to establish rates of wages and salaries and standards of working conditions, which are reasonable, without the law first having defined the kind and character of wages and salaries which shall be reasonable, nor defined, what shall be under the law reasonable standards of working conditions.

Said subdivision (d) of Section 307 is also in violation of the Constitution in this: that in enumerating the circumstances which must be considered by the Boards in determining the justness and reasonableness of wages and salaries and standards of working conditions, the act has omitted therefrom the value of the service to the carriers and to the public, for which wages and salaries are to be paid, and has omitted therefrom the value and cost of the various articles, classes and commodities handled in commerce and other material matters for consideration, which would necessarily be considered by carriers engaged freely in commerce. That such omission will necessarily result in unreasonable wages and take the property of the public without due process in violation of the Constitution of the United States.

(m) Said act, in Section 308, violates subdivision 17, Section 8, Article 1, of the Constitution of the United States, in that it authorizes the "Labor Board" to have its offices in Chicago, Illinois, instead of Washington City, in the District of Columbia, which is the seat of government of the United States.

(n) Said act in Section 311 violates the Fourth Amendment of the Constitution of the United States, which declares inviolate "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures," and that "no warrant shall issue but upon probable cause, etc," in that Section 311, subdivision (a), confers upon the Labor Board, any of its members, officers, employes or agents the pretended right of access to, and privilege of copying from, any book, account, record, paper or correspondence relating to any matter which the Board is authorized to consider or investigate; and a heavy penalty is prescribed for any person who denies such right of access or hinders, delays, or obstructs the exercise of such right. That said section does not confine this visitatorial authority to the carriers or employes, or organizations of each, but applies to all citizens of the United States regardless of their relationship to the business of common carriers.

(o) Said act, and particularly Section 313, is in violation of

Article 1 of the Constitution of the United States, and particularly of Section 1 of said article, which vests all legislative powers in the Congress of the United States in this: that said Section 313 provides that the punishment for failure of any carrier, employe or subordinate officer or organization thereof, to obey the orders of the "Labor Board," or an "Adjustment Board," or for violating such orders of either Board, shall be, by the "Labor Board" making public its opinion when such violation has occurred in such manner as the "Labor Board" may determine. That the publicity described is the method of punishment fixed for violations of the orders of the Labor Board and Boards of Adjustment, but the same is arbitrary, indefinite, uncertain, and undefined; that leaving the character, manner, method and extent of the punishment to the determination by the "Labor Board" is, in effect, conferring legislative authority upon executive officers in violation of the Constitution of the United States, as above stated; that said provision also violates the due process clause of the Fifth Amendment to the Constitution in that it injures or destroys the reputation of one accused of violating the orders of said Boards without trial or judicial proceedings under the law, and without a penalty having been fixed by Congress therefor; that said section is also in violation of Article 3 of the Constitution of the United States, which confers the judicial power exclusively upon the courts of the United States. That whether or not a carrier or employe, or organization of either has violated an order of said Boards, contrary to law, is a justiciable question, cognizable only by courts created under Sections 1 and 2 of Article 3 of the Constitution of the United States, and the attempt to confer this authority on the "Labor Board" is an encroachment both on the legislative and judicial powers of the government as defined in the Constitution.

Said section is also violative of Section 3, Article 3, of the Constitution of the United States and of the Sixth and Seventh Amendments to the Constitution of the United States, prescribing trials by jury in civil and criminal cases and requiring that such trials shall be in the State where the offense, if any, was committed.

For all of the foregoing reasons, said Sections 300 to 316 of the Transportation Act of 1920 are unconstitutional, null and void.

XXI.

Complainant avers that the Railroad Labor Board and the Interstate Commerce Commission, without power or authority, constitutional or otherwise, are each exercising functions, powers and authority attempted to be given to each of them respectively by act of Congress in the "Transportation Act of 1920" and are making findings, entering orders, and attempting to enforce its provisions in accordance with said act and several sections hereinreferred to, and are claiming and intend to exercise power and authority under said act and said several sections thereof.

That the acts of the Railroad Labor Board in fixing wages, salaries, establishing working conditions, practices and regulations of the various employes of the railroads of the United States and of the State of Texas have caused an enormous increase in the amount of railroad operating expense; and that its orders in force and effect at the present time have resulted in unnecessary, unreasonable and unjust wage to many of the employes of the railroads within the State of Texas; that such salaries and wages are out of proportion to wages paid for like services in other and similar positions and employment, paid and received by the people of the State of Texas, and is an unjust and unreasonable demand upon the railroads of the State of Texas resulting in the necessity for and an increased operating income; and complainant further avers that by reason of such unjust, unreasonable wages, salaries, working conditions, practices and regulations, the Interstate Commerce Commission acting under the pretended authority of the Transportation Act in order to create and obtain for the railroads of the State of Texas an operating income pursuant to the Act of Congress of 1920 above alleged, and sufficient to pay the wage scale and carry out the practices and regulations as fixed and maintained by said Labor Board, has fixed fares and charges for the transportation of passengers and freight which are unjust and unreasonable. All of which causes and has caused great loss to the producers and shippers of the State of Texas, a great diminution of freight and passenger traffic to the railroads of the State of Texas and has caused and is causing a great financial loss to the people of the State of Texas, producers, shippers and carrier alike in violation of the constitutional right particularly guaranteed to them by the Fifth and Fourteenth Amendments of the Constitution of the United States.

That the Interstate Commerce Commission has granted Certificates of Convenience and Necessity to railroads within the State of Texas authorizing and directing them to cease operation of trains and to dismantle their railroads and dispose of their physical property contrary to the Constitution and laws of the State of Texas, and in disregard of their contract obligations with the people of the State of Texas, and particularly of the vicinities through which such railroads pass. That the Interstate Commerce Commission has refused to grant Certificates of Convenience and Necessity and to permit railroads within the State of Texas to advertise and charge fares and freight rates and to receive passengers and freight from connecting carriers and transport same in accordance with the laws of the State of Texas, and has refused to permit the construction of railways within the State of Texas by persons and corporations who have complied with the Constitution and laws of the State regulating the chartering, organization, construction and maintenance of railways wholly within the State of Texas. That the Interstate Commerce Commission is exercising the powers attempted to be granted in the Transportation Act to supervise and regulate the issuance of bonds, certificates and other securities by the railroads of the State of Texas when so issued in accordance with the Constitution and laws of the State of Texas regulating the issuance of bonds, certificates and securities; that thereby the railroads of Texas and the people of Texas are compelled to submit to the demands and conform to the rules and regulations of the Interstate Commerce Commission at an unnecessary expense and great inconvenience resulting in the loss of property and in the taking of their property without due process of law contrary to their right guaranteed under the Constitution of the United States.

And that the Interstate Commerce Commission is making rates, charges, fares, issuing orders, regulations and schedules and establishing practices requiring and compelling the railroads of the State of Texas to comply and conform thereto; and that the said Interstate Commerce Commission has issued an order placing the State of Texas in what is designated as the "Western Freight Group" and has and will continue to require the railroad companies of the State of Texas to charge and control fares, rates and charges contrary to the statutes of the State of Texas and its Constitution and valid contracts of said railroad companies, all of which acts, orders, rules and regulations are contrary to the stat-

utes and Constitution of the State of Texas and the United Sta
and as heretofore alleged, the railroads of Texas are n
and will be called upon to pay more than their just share upon pr
erty within the State to supply the operating income demand
by the railroads of the United States; that said Interstate Co
merce Commission intends and will whenever it deems it necessa
and desirable, authorize the creation and operation of trusts, co
binations and monopolies among railroads in Texas without
gard for the Constitution and statutes of Texas relative there
and thereby the people of the State will be deprived of their ri
to have competing carriers and freight competition; that the Sta
of Texas in its sovereign capacity is being sued and has been an
will be sued and made a party to suits involving the rights, po
ers, privileges, sovereignty and property of said State before
Interstate Commerce Commission of the United States contra
to the Constitution as herein alleged.

Complainant further alleges that great and grievous injury
damage is resulting to it and its citizens by reason of the ena
ment of the Act of Congress known as "The Transportation A
of 1920"; that it is shorn of large powers of sovereignty, w
legislative, executive and judicial powers reserved to it by th
Constitution of the United States, and it is deprived of privileg
and immunities guaranteed to it as a sovereign under the Co
stitution of the United States, and that citizens situated in th
boundaries of Texas and that its citizens and railroads are una
thorized to do and prohibited from doing acts and things othe
wise legal and lawful except for the provisions of said act and th
acts of the defendant herein.

Forasmuch, therefore, as complainant is without adequa
remedy at law and its only protection in the premises must ar
from the powers of this Honorable Court, in the exercise of it
original jurisdiction, the State of Texas respectfully prays th
there be granted a writ of subpoena issuing out of this Honora
Court to be directed to the Interstate Commerce Commission
service upon its chairman, Edgar E. Clarke, to the Railroad La
Board by service upon its chairman, R. M. Barton, the defendan
herein named, demanding them and requiring them and each
them to appear and answer thereto, but not under oath, answ
under oath being expressly waived; and that the so-called Tra
portation Act of 1920, and particularly Sections 300 to 316,
clusive, 402 to 407, 416 and 418, 402, subdivisions 18 to 22, 4

visions 1 to 8, 422, subdivisions 1 to 18, 439, subdivisions 1
be declared invalid, unconstitutional and void; and that the
endants named herein and constituted bodies corporate be de-
and adjudged illegal and without statutory or constitu-
al authority; and that any and all laws or parts of laws,
ing, empowering, regulating the creation, appointment, qual-
ion and terms of service and granting authority to defend-
named and the several members thereof be declared in-
unconstitutional and void and the acts, orders and all things
orized to be done or performed by defendants be declared void,
id and of no force and effect and without force of law, or
any part of said Transportation Act of 1920 be held to be consti-
nal, the remaining sections and portions thereof and all other
in aid thereof be declared invalid, unconstitutional and void;
that the defendants and each of them be enjoined and restrained
enforcing all or such invalid and unconstitutional portions of
laws herein complained of in the State of Texas in such a man-
as to interfere with the regulation of internal affairs of the com-
ant and the enforcement of its Constitution and its consti-
nal and valid laws, regulations and contracts, and the con-
tional rights of its citizens, and that complainant may have
other and further relief as to this court may seem just and
table in the premises.

STATE OF TEXAS,
By C. M. CURETON,
Attorney General for the State of Texas.
BRUCE W. BRYANT,
EUGENE A. WILSON,
WALACE HAWKINS,
TOM L. BEAUCHAMP,
Assistant Attorneys General, and
JOHN E. BENTON,
Washington, D. C.,
Solicitors for the State of Texas.

State of Texas,
unty of Travis.

I, Tom L. Beauchamp, being duly sworn, depose and say that
am an Assistant Attorney General of the State of Texas and
e of the solicitors signing the foregoing bill of complaint; that
have read same and know the contents thereof; that so far as

the same are allegations of fact, they are true of my own knowledge, and so far as they are allegations upon advice, information and belief, I believe them to be true.

TOM L. BEAUCHAMP.

Subscribed and sworn to in the City of Austin, County of Travis, at the Capitol of the State of Texas in said county, this 23rd day of May, A. D. 1921.

VANCE STOCKTON,
Notary Public, Travis County, Texas.

EXHIBIT NO. 1.

SUMMARY OF VALUATIONS OF RAILROADS AS ASCERTAINED BY THE RAILROAD COMMISSION.

EXHIBIT 2

Original Bill in Equity, *New Jersey v. Sargent*, No. 20 Original (U.S. filed Nov. 21, 1923)

Supreme Court of the United States

OCTOBER TERM, 1923.

No. 27 Original 20.

STATE OF NEW JERSEY,
Complainant,

vs.

HARRY M. DAUGHERTY, PERSONALLY AND INDIVIDUALLY AND AS ATTORNEY GENERAL OF THE UNITED STATES; JOHN W. WEEKS, PERSONALLY AND INDIVIDUALLY AND AS SECRETARY OF WAR; HUBERT WORK, PERSONALLY AND INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR; AND HENRY C. WALLACE, PERSONALLY AND INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE, AND JOHN W. WEEKS, HUBERT WORK AND HENRY C. WALLACE, AS MEMBERS OF AND CONSTITUTING THE FEDERAL POWER COMMISSION,
Defendants.

MOTION TO FILE ORIGINAL BILL OF COMPLAINT AND ORIGINAL BILL AND EXHIBITS.

STATE OF NEW JERSEY,
By THOMAS F. McCRAN,
Attorney General.
State House, Trenton, N. J.

WILLIAM NEWCORN,
First Assistant Attorney General,
Solicitor and of Counsel with the Complainant.

INDEX.

Supreme Court of the United States

OCTOBER TERM, 1923.

No. Original.

STATE OF NEW JERSEY,
Complainant,

vs.

HARRY M. DAUGHERTY, PERSONALLY AND INDIVIDUALLY AND AS ATTORNEY-GENERAL OF THE UNITED STATES; JOHN W. WEEKS, PERSONALLY AND INDIVIDUALLY AND AS SECRETARY OF WAR; HUBERT WORK, PERSONALLY AND INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR; AND HENRY C. WALLACE, PERSONALLY AND INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE, AND JOHN W. WEEKS, HUBERT WORK AND HENRY C. WALLACE, AS MEMBERS OF AND CONSTITUTING THE FEDERAL POWER COMMISSION,
Defendants.

MOTION TO FILE ORIGINAL BILL.

Now comes the State of New Jersey, by its Attorney-General, Thomas F. McCran, and moves this Honorable Court for leave to file the bill of complaint herewith exhibited, in a suit between the State of New Jersey and citizens of other States, and arising under the Constitution and Laws of the United States, for the purpose of enjoining the defendants from enforcing within the State of New Jersey, by an abuse of power, without lawful and constitutional authority or in pursuance of

wrongful and erroneous interpretation of the provisions of an Act of Congress, the short title of which is "The Federal Water Power Act," and that proper process may issue thereon notifying the defendants of the filing of said bill and that they appear and answer thereto and defend the same.

STATE OF NEW JERSEY,
By THOMAS F. McCRAN,
Attorney-General of the State of New Jersey.
WILLIAM NEWCORN,
First Assistant Attorney-General,
Solicitor and of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1923.

No. Original.

STATE OF NEW JERSEY,
Complainant,
vs.
HARRY M. DAUGHERTY, PERSONALLY AND INDIVIDUALLY AND AS ATTORNEY-GENERAL OF THE UNITED STATES; JOHN W. WEEKS, PERSONALLY AND INDIVIDUALLY AND AS SECRETARY OF WAR; HUBERT WORK, PERSONALLY AND INDIVIDUALLY AND AS SECRETARY OF THE INTERIOR; AND HENRY C. WALLACE, PERSONALLY AND INDIVIDUALLY AND AS SECRETARY OF AGRICULTURE, AND JOHN W. WEEKS, HUBERT WORK AND HENRY C. WALLACE, AS MEMBERS OF AND CONSTITUTING THE FEDERAL POWER COMMISSION,
Defendants.

ORIGINAL BILL IN EQUITY.

The State of New Jersey brings this bill of complaint, for itself and representatively for its people, against the defendants above named, for original determination, by this Court, of controversies of a civil nature, arising under the Constitution and laws of the United States, between the complainant, the State of New Jersey, and the defendants, all of whom are citizens of other States, as hereinafter more fully set forth; and the complainant, respectfully shows unto this Honorable Court, upon information and belief, as follows:

I. That the complainant, the State of New Jersey, is one of the States of the United States, and that the defendant Harry M. Daugherty, is a citizen and resident of the State of Ohio, and the duly appointed and acting Attorney-General of the United States; that the defendant John W. Weeks is a citizen and resident of the State of Massachusetts, and the duly appointed and acting Secretary of War of the United States; and the defendant Hubert Work is a citizen and resident of the State of Colorado, and the duly appointed and acting Secretary of the Interior of the United States; and the defendant Henry C. Wallace is a citizen and resident of the State of Iowa, and the duly appointed and acting Secretary of Agriculture of the United States; and the said John W. Weeks, Hubert Work and Henry C. Wallace are members of, and constitute the Federal Power Commission, and are duly qualified and acting as such.

II. Said defendants above named are, and each of them is, as hereinafter more fully set forth, claiming the right to exercise, and are exercising and threatening to continue exercising, in and against the State of New Jersey and its people, certain powers and authority purporting to be conferred, and claimed by them to be conferred, but which are not actually, lawfully or constitutionally conferred on them by or under the Federal Water Power Act, and whereby the State of New Jersey and its people heretofore have been, and hereafter will be irreparably damaged, for which the State has no adequate remedy at law and subjecting the State of New Jersey and its people to a multiplicity of suits.

The said defendant Daugherty, as hereinafter more fully set forth, is claiming the right to exercise and is exercising and threatening to exercise and perform certain alleged duties, powers and authority purporting to be conferred and imposed, and claimed by him to be conferred and imposed, but which are not actually, lawfully or constitutionally conferred or imposed upon him,

by and under Sections 9, 10, and 12 of the Act of Congress of March 3, 1899 (Ch. 425), entitled "An Act making appropriations for the construction, repair and preservation of certain public works and rivers and harbors, and for other purposes."

As hereinafter more fully set forth, sufficient grounds exist for uniting such separate causes of action against the defendant, the said Daugherty, with the causes of action against all of the defendants, as authorized by Rule XXVI of the Rules of Practice of the Courts of Equity of the United States.

III. On the 31st day of December, 1824, the Legislature of the State of New Jersey adopted an act entitled, "An Act to incorporate a company to form an artificial navigation between the Passaic and Delaware Rivers," the preamble to the act reciting:

> "Whereas, the construction of a canal, to unite the River Delaware, near Easton, with the tide waters of the Passaic, will be of great public benefit and advantage to the people of New Jersey; now, therefore, in order to secure to the State the results of this public work, and also as an inducement to a company to engage in this important undertaking, and in consideration of the risks and expenditures which they may encounter in its execution and operations; therefore, be it enacted," &c.

Under the provisions of the said act, the company possessed power and authority to purchase, receive in donation, possess, enjoy and retain, demise, grant, alien, and sell, all such lands, tenements, hereditaments, waters, streams and water privileges, rights, goods, chattels, and effects of every description whatsoever, as may be necessary for carrying into effect any of the provisions of this act, and under the restrictions and limitations therein mentioned.

Subsequent legislation was enacted, extending the privileges and powers of the Morris Canal and Bank-

ing Company, with the result that under the corporate power vested by the State in the said corporation, it constructed a canal from the Delaware River, at Phillipsburg, to the termini thereof, to wit, the waters of the Hudson, at or near the City of Jersey City, a distance of 106.69 miles, which canal was operated by the said canal company as a canal, together with the locks, works, devices, wharves, toolhouses and offices necessary to operate the same, up to and until the 14th day of March, 1871, when, by a special act of the Legislature, the corporation was authorized to lease the canal, with the appurtenances thereof, to the Lehigh Valley Railroad Company, which corporation continued to operate the same, under its said lease, until March 1st, 1923.

Under the provisions of the act above referred to, the company was authorized to take such lands, waters and streams as might be necessary for the canal, making due compensation to the owners either by appraisement or by agreement, and through this and other provisions of the charter and supplements, the company acquired lands at the outlet of Lake Hopatcong and Greenwood Lake, and raised dams at these places, which considerably enlarged the area of the lakes; and also placed a dam across the Pompton River, diverting some of the waters of that river into the canal. The company was further authorized to raise the waters in Green Pond, at the outlet of which the company also acquired the lands, and the overflow from that Pond has been used as a feeder to the canal. The canal was also fed directly from the Rockaway River at Dover, Powerville and Boonton. It also has a feeder at Beach Glen near Rockaway, and is fed from the Musconetcong River and its tributaries, the waters of which are received into the canal at Stanhope, Waterloo and Saxton Falls. The eastern level of the canal is fed from the Hackensack River.

The corporation, or its lessee or lessees, was authorized to use the surplus water of the canal of said com-

pany, or any of its feeders, not needed for the purposes of navigation, in furnishing and supplying the inhabitants of any city, town or village along the line of said canal, or in the vicinity thereof, with a sufficient quantity of pure and wholesome water for manufacturing or domestic and other uses, and to make contracts with the corporate authorities of any city, town or village, or with individuals, for such supply of water, for such compensation as may be mutually agreed upon, and to erect such works, and make such alterations in the said canal as may be necessary or proper to enable said company or its lessee or lessees, to furnish such supply of water from the said canal; and in accordance with the power thus vested, the said corporation did enter into contracts with various municipalities of the State of New Jersey for the purpose of furnishing potable water for the use of the inhabitants thereof, and from the date of the entry of the said contracts between the said parties, did continue to supply a number of municipalities and manufacturing industries along its route with water for domestic, manufacturing and power service, as herein authorized.

The grant further provided that the State of New Jersey might acquire the said canal and its appurtenances at the expiration of ninety-nine years, by paying the fair reasonable value thereof, and in lieu of exercising this right, this charter shall continue for a further period of fifty years, at the expiration of which time the canal property, together with all the appurtenances, lands, wharves, docks and buildings erected thereon, the rights and privileges possessed by the said corporations, shall be vested in the State of New Jersey.

On the eleventh day of March, 1922, the Legislature of the State of New Jersey enacted an act entitled, "An Act to authorize the acquisition by the State of the Morris Canal (as defined in this act) in whole or in part, and all the stock of the Morris Canal and Banking Company and the rights of all stockholders in said com-

pany and in said canal property and water rights, and all or any part of the right, title and interest of the Lehigh Valley Railroad Company in said canal property and water rights by virtue of its lease of said canal from the Morris Canal and Banking Company, or otherwise; to provide for a commission authorized to negotiate and agree upon terms of settlement with the Morris Canal and Banking Company and the Lehigh Valley Railroad Company, in relation to the said canal property and water rights, and to vest in said commission certain powers necessary for carrying out the terms of settlement and to make such other provisions as may be necessary to effectuate the objects aforesaid."

Under the provisions of the said act a commission composed of three citizens of the State of New Jersey was appointed as commissioners to negotiate and agree upon the terms of settlement with the Morris Canal and Banking Company and the Lehigh Valley Railroad Company, with full power to acquire all the property, real and personal, and to vest the title of the same in the Board of Conservation and Development, subject to the further action of the Legislature.

Under the authority of the said act the commissioners did enter into an agreement with the Morris Canal and Banking Company and the Lehigh Valley Railroad Company, whereby all the right, title and interest in and to the canal property and its appurtenances were transferred to the State of New Jersey, together with the corporate stock of the Canal Company, which agreement was filed, as in the said act directed, on the first day of November, 1922, and deeds were executed and delivered to the State of New Jersey on the first day of March, 1923, conveying all the right, title and interest of the corporations aforesaid in and to the canal property, and the appurtenances thereof.

The entire canal system, together with the dams, locks, wharves, and docks, was constructed and maintained by the Canal Company, or its lessee, from the year

1824 to March, 1, 1923. The United States has not made any expenditure, nor incurred any liability, nor done any work for or on account of such canal construction and maintenance. It has not at any time made or incurred liability for any expenditure or done any work for the improvement of the navigability of any of the waters constituting the canal system as herein described.

There is opportunity for the development of considerable water power at a number of planes west from Lake Hopatcong and above Saxton Falls on the Musconetcong River, and it is the intention of the State of New Jersey to utilize the canal property acquired for the purpose of water power development, as well as the development of its comprehensive plan hereinafter mentioned, for the conservation of potable waters.

In addition to the development contemplated by the State of New Jersey of the water power of the canal and its feeders, it is contemplated by the State of New Jersey to develop the water power possibilities of the Delaware River. A few of the localities along the river above Trenton where dams could be erected and power developed are the following: one at Scudder's Falls, with a 15 foot dam, 1,575 H.P. can be developed at the minimum flow of the river, with 7,500 H.P. available during nine months of the year. At Lambertville, with a fall of 14 feet, a minimum of 1,442 H.P. can be developed, and for nine months of the year 6,900 H.P., day and night. At the same place, the feeder of the Raritan Canal now furnishes nearly 1,400 gross H.P. At Point Pleasant, with a 15 foot fall, the minimum flow would yield 2,190 H.P. with 8,025 H.P. available for nine months of the year. Near Tumble Station, another 15 foot fall could be developed, yielding 2,190 H.P. with 8,025 H.P. available for nine months of the year. Between Tumble Station and the mouth of the Lehigh at Easton, the total fall of the river is 56 feet. At several intermediate points power as good as that at Point Pleasant could be developed.

At Foul Rift, just below Delaware, a total fall of 16 feet can readily be obtained. This would yield 1,632 H.P. minimum, with 5,920 H.P. for nine months of the year. Between the Water Gap and Belvidere the total fall of the river is 60 feet, and within this distance dams can be constructed to develop falls of from 6 to 10 feet, furnishing a minimum of 5,280 H.P., and a maximum of 19,020 H.P. during nine months of the year. The total descent between Port Jervis and Delaware Water Gap is 111 feet, with several opportunities to develop from 10 to 20 foot falls. With a minimum of 78 H.P., and for nine months, 284 H.P. per foot fall, the maximum which could be developed within this stretch of the river would be 8,660 H.P. during times of the least flow of the river, and 31,500 H.P. during nine months of the year.

It is the intention of the State of New Jersey, acting through its agency designated for that purpose, or by private enterprise, under the provisions of an act entitled "An Act to authorize the organization of corporations to construct dams in the rivers and streams within this state, or between this and any other state, for the purpose of generating, distributing and selling water power and electric power," P. L. 1897, p. 384, and of Chapter 243, P. L. 1912, entitled "An Act to authorize the State Water Supply Commission to have supervision over the erection and maintenance of dams on certain rivers and streams or reservoirs within this State or between this and any other State," that the power plants that will be developed in accordance with the State's plan will yield a profit to the treasury of the State from the operation of said power plants.

IV. The complainant, the State of New Jersey, has not made, and does not propose or intend to make, any application to the Federal Power Commission for any preliminary permit, license or otherwise under the Federal Water Power Act, because the acceptance by the State of any license which such Commission could

grant under said act would necessarily involve the abandonment by the State of substantially all of its rights to develop and utilize the potential water power at each of the points and places above mentioned, and likewise the right to grant to a licensee the right to develop and utilize the potential water power at any of the places herein enumerated.

V. The Legislature of the State of New Jersey, by Chapter 252 of the Laws of 1907, p. 633, enacted "An Act to establish a State Water Supply Commission, and to define its powers and duties, and the conditions under which waters of this State may be diverted" Under the provisions of this act a water-supply commission was created, charged with a general supervision over all the sources of potable and public water supply of the State, to the end that the same may be economically and prudently developed for the use of the people of this State. The act further provided that all plans for supplying water must be submitted to this commission for its approval, and after due hearing such order shall be made, and the approval of the Commission shall constitute the State's assent to the diversion of water and the construction and operation of the water-works in accordance with the terms of the decision and the plans filed therewith. The authority of the commission under the said act was over surface water supplies.

By Chapter 304, P. L. 1910, p. 551, entitled "A Supplement to an act entitled 'An act to establish a State Water-Supply Commission, and to define its powers and duties, and the conditions under which the waters of this State may be diverted,' approved June seventeenth, one thousand nine hundred and seven," the jurisdiction of the State Water-Supply Commission was extended over well, sub-surface or percolating water supplies now or hereafter furnished to the inhabitants of any municipal corporation.

In furtherance of the conservation policy adopted by the State, Chapter 318, P. L. 1912, was enacted, entitled

"An act to authorize the State Water-Supply Commission to acquire lands, water rights and interests therein for the purpose of appropriating or conserving the potable waters of the State to the general and common use of the inhabitants thereof, and to provide for the payment for the said lands, water rights and interests therein, and making appropriations therefor," under the authority of which the said Commission had power to acquire by gift, purchase, condemnation, or in any other lawful manner, any lands, water rights and interests therein whenever in its judgment it is advisable so to do, for the purpose of appropriating or conserving the potable waters of the State to the general and common use of the inhabitants thereof.

All of the powers under the above three acts were exercised by the Commission from the time of its appointment until the enactment of Chapter 241, P. L. 1915, wherein by authority of Section 5, the Board of Conservation and Development succeeded to and now exercises the rights and powers of the State Water-Supply Commission, except in so far as they are restricted by Section 22 of Chapter 71, P. L. 1916, which latter act created two water-supply districts in the State of New Jersey, known respectively as North Jersey Water-Supply District and the South Jersey Water-Supply District.

Under the authority of the said several acts, the State, through its agencies and by private enterprises, has been developing the potable water resources of the State, reservoirs being constructed, water works being built at an expenditure of many hundreds of millions of dollars, and the exercise of the authority and powers by the defendants and each of them, claimed by them under the said act, but which are not actually, lawfully or constitutionally conferred upon them by or under the Federal Water Power Act, jeopardize the conservation policy of the State of New Jersey over its potable waters, and the operation of the same within the State of New Jersey for

the purpose set forth in the said act, will work irreparable injury to the reservoirs and water works constructed, and in the future to be constructed, as well as deprive the State of New Jersey of the revenue derived and to be derived from the development and conservation of the water resources of this State.

VI. The State of New Jersey, under its sovereign powers, is the owner, by various grants and deeds of surrender, of lands lying under the waters of the Bay of New York, and of the Hudson River, and of the lands adjacent thereto at Kill von Kull, Newark Bay, Arthur Kill, the Raritan Bay and the lands lying under the waters of the Delaware River, opposite the State of Pennsylvania, together with the lands on the Delaware Bay opposite the State of Delaware, and has exercised its jurisdiction over the same by making grants and issuing leases convertible into grants, and subsequently, by act of the Legislature, issuing only long term leases; and from the year 1875 up to the present time, from the issuance of the said grants, has realized a revenue of $2,148,308.40, and the receipts from leases, which is a continuous source of income, amounting to approximately four million dollars. In addition thereto there are outstanding convertible leases into grants approximating two and a half million dollars, the revenue of which is dedicated as a trust fund, the income of which is to be paid for the support and maintenance of the free public schools by the Constitution of the State of New Jersey of 1844, as amended, and confirmatory legislation enacted; Article IV., Section VII, Paragraph 6 of the Constitution reading as follows:

> "The fund for the support of free schools, and all money, stock and other property which may hereafter be appropriated for that purpose, or received into the treasury under the provision of any law heretofore passed to augment the said fund, shall be securely invested and remain a perpetual fund; and the income thereof, except

so much as it may be judged expedient to apply to an increase of the capital, shall be annually appropriated to the support of public free schools, for the equal benefit of all the people of the State; and it shall not be competent for the legislature to borrow, appropriate or use the said fund, or any part thereof, for any other purpose, under any pretense whatever. The legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years."

By confirmatory legislation, Chapter 71 of the Laws of 1894, entitled "A Supplement to an act entitled 'An act to establish a system of public instruction,' approved March twenty-seventh, one thousand eight hundred and seventy-four," it was provided:

1. That all the lands under water belonging to this State be and the same hereby are irrevocably appropriated for the support of free schools in this State, and that all moneys hereafter received from the sales and rentals of such lands under water belonging to this State, shall be paid over to the trustees of the school fund, and appropriated for the support of free public schools, and shall be held by them in trust for that purpose, and shall be invested by the treasurer of the State, under their direction, in the same manner as the funds now held by them are invested, the same to constitute a part of the permanent school fund of the State, and the interest thereof to be applied to the support of public schools in the mode which now is, or may hereafter be directed by law, and to no other purpose whatever.

2. That all leases which have been made by this State or any board or officer of this State, in pursuance of the provisions of an act entitled

"An act to provide for the use of the proceeds of riparian sales, grants and leases," approved March nineteenth, one thousand eight hundred and ninety, of lands belonging to the State now or formerly lying under water, be and the same hereby are transferred to the trustees of the school fund of this State, to become a portion of the free school fund, and that the income arising from such leases shall be distributed by the said trustees for the support of free public schools in the same manner that other moneys are now distributed for that purpose.

By virtue of the constitutional provisions of the act herein set forth the Trustees for the Support of Public Schools are the custodians of the fund set apart for the support of public schools, free, by constitutional provision, from even the control of the Legislature, except in the designation of the mode in which the interest and dividends arising therefrom shall be applied for the support of public schools, and all lands under tide water belonging to the State of New Jersey are irrevocably devoted to the support of the free public schools.

Under the sovereign powers of the State the Legislature of the State of New Jersey enacted "An act to ascertain the rights of the State and of the riparian owners in the lands lying under the waters of the Bay of New York and elsewhere in the State," P. L. 1864, p. 681, together with the supplementary and amendatory legislation whereby a Board of Commissioners was appointed, known as the Board of Riparian Commissioners, whose duty it was to cause the necessary surveys and examinations to be made by competent surveyors of the lands lying under the waters of the Bay of New York, and of the Hudson River, and of the lands adjacent thereto, the Kill von Kull, Newark Bay, Arthur Kill, the Raritan Bay, and the lands lying under the waters of the Delaware River, together with the right to reclaim, which has not been granted by the State, and to

obtain all needful information from other sources in order to ascertain the present rights of the State in the same, and the value of said rights, and to fix and establish an exterior line in the said bays and rivers, beyond which no pier, wharf, bulkhead, erection, or permanent obstruction of any kind shall be permitted to be made, and to report to the Legislature the result of the information thus obtained, and the value of the said rights, together with the evidence upon which the same is founded, and to make recommendations of such plans and provisions for the improvement, use, renting or leasing of the said lands under water as they shall deem necessary for and most conducive to the interests of the State, to prepare maps of said lands, exhibiting the exterior line fixed and established by them in said bays and rivers, the lines of existing piers, wharves and bulkheads, and also showing any grants of lands under the waters of said bays and rivers which have not been occupied, and also the original shore line, as far as the same can be ascertained, accompanied with such field notes, measurements and elucidations as they shall deem necessary to a full exposition and understanding of the subject.

The Board was further invested by the said legislation and subsequent legislation, with the power to make grants and leases to the owner of the upland, or others desirous of utilizing the lands so owned by the State, and discharged its duties imposed by law upon it, and paid the revenue derived therefrom to the custodians of the perpetual school fund, under the provisions of the Constitution and the act aforesaid, until 1915, when, under the provisions of Chapter 242 of the Laws of 1915, entitled "An act creating a department to be known as the Board of Commerce and Navigation, investing therein all the powers and duties now devolved by law upon the Board of Riparian Commissioners, the Department of Inland Waterways, the Inspectors of Power Vessels, and the New Jersey Harbor Commission," a

board was appointed of eight members, by the Governor by and with the consent of the Senate, which board has continued to function and has exercised the powers and duties of the Board of Riparian Commissioners, and has continued to pay the income derived from that source to the custodians of the perpetual school fund.

The defendants above named are, and each of them is, claiming the right to exercise, and are exercising and threatening to continue to exercise in and against the State of New Jersey and its people, under the provisions of the Federal Water Power Act, the right over the riparian lands of the State of New Jersey for power purposes, claimed by them to be conferred, but which are not actually, lawfully or constitutionally conferred upon them by or under the said Federal Water Power Act; that the exercise of the said authority by the defendants deprives the State of New Jersey of its sovereign right, not conceded to the Federal Government, except for the purpose of navigation, over its riparian lands and waters, and will deprive the trust fund created under the Constitution of the State of New Jersey for the free schools of the said State, of the revenue derived from that source, dedicated by the Legislature of the State of New Jersey perpetually for free education.

VII. Said Federal Water Power Act provides (in and by section 4 (d) thereof) that said Federal Water Power Commission is thereby authorized and empowered to issue licenses to any State of the United States "for the purpose of constructing, operating and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation, and for the development, transmission and utilization of power across, along, from or in any of the navigable waters of the United States"; and said Federal Water Power Act (in and by section 6 thereof) further provides "that licenses under this act (said Federal Water Power Act) shall be issued for a period

not exceeding fifty years. Each such license shall be conditioned upon acceptance by the licensee of all the terms and conditions of this act and such further conditions, if any, as the commission shall prescribe in conformity with this act, which said terms and conditions and the acceptance thereof shall be expressed in said license."

VIII. Said Federal Water Power Act (in and by section 10 (c), (d) and (e)) provides "that the licensee shall maintain the project works in a condition of repair adequate for the purposes of navigation and for the efficient operation of said works in the development and transmission of power, shall make all necessary renewals and replacements, shall establish and maintain adequate depreciation reserves for such purposes, shall so maintain and operate said works as not to impair navigation, and shall conform to such rules and regulations as the commission may from time to time prescribe for the protection of life, health and property." "That after the first twenty years of operation out of surplus earned thereafter, if any, accumulated in excess of a specified reasonable rate of return upon the actual, legitimate investment of a licensee in any project or projects under license, the licensee shall establish and maintain amortization reserves, which reserves shall, in the discretion of the commission, be held until the termination of the license or be applied from time to time in reduction of the net investment. Such specified rate of return and the proportion of such surplus earnings to be paid into and held in such reserves shall be set forth in the license." "That the licensee shall pay to the United States reasonable annual charges in an amount to be fixed by the commission for the purpose of reimbursing the United States for the costs of the administration of this act; for recompensing it for the use, occupancy and enjoyment of its lands or other property, and for the expropriation to the Government of excessive profits until the respective States shall make provision for preventing excessive

profits or for the expropriation thereof to themselves, or until the period of amortization as herein provided is reached, and in fixing such charges the commission shall seek to avoid increasing the price to the consumers of power by such charges, and charges for the expropriation of excessive profits may be adjusted from time to time by the commission as conditions may require; provided, * * * That licenses for the development, transmission, or distribution of power by States or municipalities shall be issued and enjoyed without charge to the extent such power is sold to the public without profit or is used by such State or municipality for State or municipal purposes, except that as to projects constructed or to be constructed by States or municipalities primarily designed to provide or improve navigation licenses therefor shall be issued without charge."

IX. Said Federal Water Power Act further provides (in and by sections 13 and 14 thereof) that "in case the licensee shall not commence actual construction of the project works, or of any specified part thereof, within the time prescribed in the license or as extended by the commission, then, after due notice given, the license shall, as to such project works or part thereof, be terminated upon written order of the commission. In case the construction of the project works, or of any specified part thereof, has been begun but not completed within the time prescribed in the license, or as extended by the commission, then the Attorney-General, upon the request of the commission, shall institute proceedings in equity in the District Court of the United States for the district in which any part of the project is situated for the revocation of said license, the sale of the works constructed, and such other equitable relief as the case may demand, as provided for in section 26 hereof." Said Federal Water Power Act (in and by section 14 thereof) further provides "that upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any

license to take over and thereafter to maintain and operate any project or projects as defined in section 3 hereof, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the commission."

X. Said Federal Water Power Act (in and by section 27 thereof) further provides "That nothing herein contained shall be construed as affecting or intending to affect or in any way to interfere with the laws of the respective States relating to the control, appropriation, use or distribution of water used in irrigation or for municipal or other uses, or any vested right acquired therein."

XI. Said Federal Water Power Act purports to prohibit and has been construed by the said defendants who are members of the Federal Power Commission as prohibiting the construction or operation by the State of New Jersey of each and all of said proposed hydro-electric projects unless and until the State of New Jersey shall obtain licenses therefor issued by the Federal Power Commission in pursuance of said Federal Water Power Act. Said act also purports to provide and has been thus construed as providing that the construction and operation of any of such hydro-electric plants by the

State of New Jersey, without first obtaining such a license, is and will be a violation of said Federal Water Power Act.

XII. Said Federal Water Power Act (in and by sections 25 and 26 thereof) provides that any person who shall willfully fail or who shall refuse to comply with any of the provisions of said Federal Water Power Act, "shall be deemed guilty of a misdemeanor and on conviction thereof shall, in the discretion of the court, be punished by a fine of not exceeding $1,000, in addition to other penalties herein (therein) described or provided by law"; and that every month any such persons shall remain in default, after written notice from the Federal Power Commission, or from the Secretary of War, or from the Secretary of Commerce, shall be deemed a new and separate offense, punishable as aforesaid; and that the Attorney-General may, on request of the commission or of the Secretary of War, institute proceedings in equity in the District Court of the United States for the purpose of preventing any violation of the terms of said Federal Water Power Act, or for the purpose of remedying or correcting by injunction, mandamus or other proceeding any act of commission or omission in violation of the provisions of said Federal Water Power Act or of any lawful regulation or order promulgated thereunder.

XIII. The defendants intend and threaten to prevent the complainant, the State of New Jersey, from developing the construction of the aforesaid power projects without obtaining a license from the said Board, and the defendants intend and threaten to enforce against the complainant the provisions of the Federal Water Power Act for the purpose of thus preventing the State from constructing or operating such power projects, without first obtaining a license therefor from the Federal Power Commission. The defendants erroneously construe the said provisions of the said Act as being applicable to the State of New Jersey in the

development, construction and operation of its said power projects; whereas such provisions of said Act are not so applicable; and if the said provisions of said Act should be construed as being so applicable, then such provisions to that extent are unconstitutional and void; and the application thereof to the said situations of the complainant so as to prevent the construction and operation of said power projects would constitute a violation of the constitutional rights of the complainant.

XIV. Section 10 of the said Act of Congress of March 3, 1899 (ch. 425), entitled "An Act Making Appropriations for the Construction, Repair and Preservation of certain Public Works and Rivers and Harbors, and for other purposes," provides that "it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river or other water of the United States, outside established harbor lines or where no harbor lines have been established except on plans recommended by the Chief of Engineers and authorized by the Secretary of War; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or enclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to beginning the same." And section 12 of said Act of March 3, 1899, provides that every person and every corporation that shall violate any of the provisions of section 10 of said Act of March 3, 1899, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500, nor less than $500, in the discretion of the court; and that the removal of any structures or parts of structures erected in violation of the provisions of the said section

10 may be enforced by the injunction of any District Court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to that end may be instituted under the direction of the Attorney General of the United States.

The defendants, who are members of the Federal Power Commission, including the defendant, John W. Weeks, the Secretary of War, in the first annual report of said Commission (at p. 53 thereof), have construed the said Act of March 3, 1899, in connection with the said Federal Water Power Act, as having the effect of preserving the said prohibitory and penal provisions of sections 10 to 12 of the said Act of March 3, 1899, as still in force and to the effect that the permissive provisions of the said section 10 of the Act of March 3, 1899, are superseded by the Federal Water Power Act and are no longer in force; and the defendant, Harry M. Daugherty, Attorney General, intends and threatens, and if such construction of the said two Acts be the correct construction thereof it would be his duty to enforce the provisions of said section 12 against the State of New Jersey for the purpose of preventing the construction and operation of said power projects by the State of New Jersey.

XV. Such threatened action and proceedings by the defendants seriously and substantially impair the value of the said property and property rights owned by the complainant, the State of New Jersey, to its irreparable damage; and such threatened acts, proceedings and prosecutions, if taken by the said Harry M. Daugherty, Attorney General, would cause further irreparable damage to the complainant, the State of New Jersey, for which the complainant has no adequate remedy at law.

XVI. The defendants, their subordinates, agents and servants, are charged with the duty in their respective spheres of action of enforcing acts of Congress under the Constitution, and it is for the purpose of enjoining them from acting by an abuse of power, without lawful

and constitutional authority, or by wrongful and erroneous interpretation thereof, to enforce within the State of New Jersey the so-called Federal Water Power Act of June 20, 1920, or such titles and sections thereof as apply and are designed to give effect and carry out such provisions of the said act as interfere with the rights, powers and duties of the State of New Jersey and of the people thereof with relation to the waters, water powers and riparian rights of said State and other real property therein available for use in connection with such water powers, and as limit, impair, and interfere with the powers of economy and control of said State with relation thereto or in connection therewith, as well as the businesses, property and liberties of its people, to its and their irreparable injury, in which Congressional enactment aforesaid the defendants are officially charged with the enforcement of the provisions thereof. The restraint is sought because the provisions of the Federal Water Power Act if applicable to said power projects of the State of New Jersey are to that extent unconstitutional and void and not enforceable in the State of New Jersey, and because, whether such provisions of said Federal Water Power Act are to that extent void or not, or by its terms extend to or affect the said State or its citizens, there exists the intent on the part of said defendants wrongfully to so construe and hurtfully enforce and administer the said act, as to interfere with the rights, powers and duties of the State of New Jersey and of its said people, and pursuant to such intent defendants are threatening to administer the same. The rights and interests of the State of New Jersey and its people are involved in the premises, and therefore this suit, under the executive direction of the Governor of the State of New Jersey, is instituted both under the common law by the Attorney General of said State, and by him under the statutory authority in such case made and provided.

XVII. Complainant is advised and therefore avers that the power and authority of the Federal Government

are expressly limited under the provisions of the Federal Constitution, to such regulation and control of navigable waters of the State as may be necessary or proper for the specific purpose of navigation thereof; that all other interest in, and power and authority over such waters, including the rights of ownership, develpment and use of water powers, both sovereign and proprietary, belong to the State of New Jersey or to individuals, most of whom are citizens of the State; but notwithstanding such limitation of Federal authority, the Federal Water Power Act purports to, and the defendants in its administration threaten to invade and usurp the powers of the State and its people in the control, ownership and development of the water powers located in the State and the real property therein necessary or convenient for the development of such water powers, and such provisions of the Federal Water Power Act are null and void for all and singular the following reasons, to wit:

(a) The fundamental purposes of the Federal Water Power Act extend properly to the public lands and other properties of the United States, but certain provisions purport to create a Federal control of the water powers of said State and of their development and use, and such control would, if the provisions of said act are enforced, extend to water powers on practically all streams in the State, large and small, except brooklets, since such streams are now or have been heretofore used for navigation with vessels, boats, rafts or logs, and are navigable waters as defined by said Act. The said Act applies to all undeveloped water powers, and, in many cases, to developed powers of the State.

(b) The provisions of said Act were enacted for, and are declaratory of a dual purpose, to wit: Federal control of the water powers of said State, their development and use, securing an income therefrom payable to the United States, and transferring the ownership thereof to the United States, which is an unlawful and unconstitutional purpose; and incidentally in some cases pro-

viding for the regulation and control of waters on which such water powers are located for the purposes of navigation.

(c) The provisions of said Act purport to confer the power and duty upon the defendants who are members of the Federal Power Commission to take the water powers in the State, including the real property constituting the same and real property necessary or convenient for their development and use and valuable rights therein, and for the acquisition of the ownership thereof by the United States, notwithstanding such water powers are not required for purposes of navigation, and their regulation and control do not affect and are not in conflict with the regulation and control by the United States of the navigable waters, on which such water powers are located for the purpose of navigation, as a condition of consent by the United States to the exercise by the State and its people of their said inherent sovereign and proprietary rights respectively, which exercise of such rights in the absence of such consent is prohibited by law; such taking and acquisition to be in part without compensation for the property taken and in part on partial payment of the value thereof, although such taking and acquisition with or without compensation would be a violation of the Federal Constitution.

(d) The provisions of said Act purport to require, as a condition of the exercise of the right and authority of control and use by the State and its citizens, of their respective sovereign and proprietary rights in the water powers on the navigable waters of the State, the payment of a rental or income to the United States for the exercise of such rights, although the exercise of such right or rights and authority does not affect and is not in conflict with the regulation and control of such navigable waters by the United States for the purposes of navigation; and in the administration of such Act. The defendants who are members of the Federal Power Commission, threaten to control the development and

use of such water powers, although such water powers are not required for purposes of navigation, and such development and use do not affect and are not in conflict with the control of such waters for the purposes of navigation.

(e) If the provisions of said Act were valid and constitutional, they would largely deprive the State and its people of the natural advantages and resources of the water powers located in the State and impair the value of the ownership and control of the same to the State and its people by requiring the payment of a rental therefor, and income therefrom, by the owners of said powers to the United States, whether such water powers are required for purposes of navigation of the waters on which said water powers are located or not, and when the development and use thereof in no way interfere with navigation, thus increasing the cost of developing power to both producers and consumers and decreasing the value of the powers.

(f) The provisions of said Act as threatened to be administered, purport to and do deprive the State of New Jersey and its people of real properties in said State of great value, and transfer or provide for the transfer thereof and of the title thereto to the United States, and for the impairment of the value thereof, and for the establishing under Federal ownership of great industries for the production and distribution of electric power from water powers in the State, thus depriving the State of the right and power of taxation of such property except by the consent of the United States and depriving the State and its people of the benefit of the exercise of such rights by the State.

(g) That in so far as the acquisition or control of such water powers and of the title thereto under said Act by the United States is with the consent of or by the agreement of the owners of such powers, and whether the consent and agreement are voluntary or involuntary, and whether the real property involved therein is wholly

private property, in which the owner has the sole proprietary right including the title to the bed of the waters, or the right of control over the same and over such waters is vested in the State, the assumption or exercise of the right of control thereof or of the acquisition of the title thereto by the United States, is unlawful and is beyond its power under the Constitution, and the State not consenting thereto, is an invasion of the sovereign rights of the State.

(h) The provisions of said act, as so threatened to be administered, would deprive the State and the people of the said State of their lawful ownership of such valuable real properties and valuable interests therein and transfer, or provide for the transfer of the same, to the United States, without due process of law.

(i) The provisions of said act purport to confer upon the Federal Power Commission the right, power and duty in the cases specified in said act, to regulate and control rates for the sale of electric power developed from water powers in the said State, when such rates and sales are wholly intrastate and wholly unrelated to the regulation and control of navigation on the navigable waters of said State, or to interstate commerce, notwithstanding such control and regulation of rates or the absence thereof are wholly within the sovereign power of the State.

XVIII. And complainant further shows and alleges that the defendants who are members of the Federal Power Commission, by a wrongful and erroneous interpretation of the said Federal Water Power Act, claim, assert and threaten to exercise the right of exclusive and universal control over water power development on the navigable waters of the State of New Jersey, to the injury, of said State and its citizens, and under and pursuant to such interpretation, threaten to issue licenses and preliminary permits for the development of water power in said State embodying and containing the clauses required in such licenses under said act; and

there are now pending before the said Commission various applications from persons in the State of New Jersey for such licenses and permits, on navigable waters on the boundary and inland, on which the defendants who are members of the said Commission propose and threaten to act, according to their judgment in the premises, in issuing licenses and permits for the development of water power on such navigable waters under the conditions aforesaid; that the State of New Jersey has by law provided for the exercise of its right, power and authority, for and in its own behalf and in behalf of its people of control, development and use of water powers on its navigable waters, subject only to the paramount power of the Federal Government over navigation, and the members of the Federal Power Commission have no right under the provisions of said act or otherwise to interfere therewith.

That the defendants, Weeks, Work and Wallace, claim and have declared that the Federal Power Commission has jurisdiction: "Over all projects involving the construction, operation, and maintenance of dams, water conduits, reservoirs, power houses, transmission lines, or other project works for the development, transmission and utilization of power (except as noted in paragraph B below) which affect—'(a) Navigable waters of the United States, as defined in the Federal Water Power Act and in these regulations. (b) Other waters of the United States over which Congress has jurisdiction under its authority to regulate commerce with foreign nations or among the several States, when the commission finds that the interests of interstate or foreign commerce will be affected. Anyone proposing to build a project on waters over which he considers the jurisdiction of the commission doubtful should file a Declaration of Intention under Regulation 7. The commission will thereupon make an investigation and determine whether the proposed project will affect the interests of interstate or foreign commerce. If the

commission finds that such interests will be affected, the project comes under its jurisdiction and cannot lawfully proceed except under permit or license issued by the commission. If the commission does not so find, the act authorizes the project to proceed upon compliance with State laws. (c) Public lands or reservations, including lands for which patent has been issued with an express reservation therein under section 24 of the act, or for which location, entries, selections, or filings have proceeded to approval or patent under and subject to the limitations and conditions contained in section 24 of the act. Permits or valid rights of way granted prior to and existing on June 10th, 1920, remain in force unaffected by the provisions of the Federal Water Power Act, but any person, association, corporation, State, or municipality holding or possessing any such permit, right of way, or authority may apply for a license under said act, and thereupon the provisions of the act will apply to the applicant as a license thereunder." (Federal Power Commission Rules and Regulations, as amended by Order No. 11 of June 6th, 1921, page 5.)

"The requirements with respect to the approval of the project works, to their construction, maintenance, operation, and retirement and to the creation of necessary reserves are also made express conditions of any licenses issued. The ultimate responsibility for the enforcement of these requirements rests upon the Commission, and the act makes provision for such enforcement and for penalties for lack of compliance." (First Annual Report, Federal Power Commission, Fiscal Year ended June 30th, 1921, page 55.)

Wherefore, complainant upon behalf of itself and its people, for as much therefore as complainant is without adequate remedy at law and its only protection in the premises must arise from the powers of this Honorable Court in the exercise of its original jurisdiction, the State of New Jersey respectfully prays that there be granted a writ of subpœna issuing out of this Honor-

able Court, to be directed to the said Harry M. Daugherty, personally and individually and as Attorney General of the United States, John W. Weeks, personally and individually and as Secretary of War, Hubert Work, personally and individually and as Secretary of the Interior, and Henry C. Wallace, personally and individually and as Secretary of Agriculture, and John W. Weeks, Hubert Work and Henry C. Wallace as members of and constituting the Federal Power Commission, the defendants herein named, demanding of them and requiring them and each of them in their several capacities above named, to appear and answer hereto, but not under oath—answer under oath being hereby expressly waived.

1. That the defendants, John W. Weeks, Hubert Work and Henry C. Wallace, their subordinates, agents, servants and their successors in office and each of them be permanently enjoined from preventing the complainant, the State of New Jersey, from developing, constructing and maintaining any of the water power projects herein set forth, or in any wise interfering with the conservation policy of the State of New Jersey over its potable waters, or its sovereign control over the riparian rights possessed by it, by applying the provisions of the Federal Water Power Act to the State of New Jersey and to its people.

2. That the defendant, Harry M. Daugherty, his subordinates, agents, servants and successors in office be permanently enjoined from beginning any prosecution against any officer, subordinate, agent or servant of the State of New Jersey, pursuant to the penal provisions of the Acts of Congress for the purpose of preventing the construction and operation of any of said power projects by the State of New Jersey or by its people.

3. That the defendants, John W. Weeks, Hubert Work and Henry C. Wallace, and each of them, be permanently enjoined from granting or demanding any permit, license, franchise or from imposing any tax or

from collecting any revenue or fees from the State of New Jersey, its officers, subordinates, agents or servants or from any of its people for the use or development of any water power project within the State of New Jersey.

4. That all the defendants be permanently enjoined from enforcing the Federal Water Power Act of 1920 so as to interfere with the rights, powers and duties of the State of New Jersey and of the people thereof with relation to the water powers of said State and other real property therein available for use in connection with such water powers, and limiting, impairing and interfering with the powers of economy and control of said State with the relation thereto or in connection therewith, as well as the businesses, property and liberties of its people.

5. That the Federal Water Power Act of 1920 be declared unconstitutional, null and void in so far as it purports to apply to the aforesaid power projects of the complainant, under the Commerce Clause and the fifth, ninth and tenth amendments of the Constitution of the United States.

6. That this Honorable Court shall issue writs of mandamus, certiorari and prohibition is warranted by the principles and usages of law to the defendants herein and to whomever else as may be necessary or proper parties, ancillary to the jurisdiction hereinbefore invoked.

STATE OF NEW JERSEY,
By THOMAS F. MCCRAN,
Attorney General.

WILLIAM NEWCORN,
First Assistant Attorney General.
Solicitor and of Counsel with the Complainant.

STATE OF NEW JERSEY, }
COUNTY OF MERCER. } *ss.*

THOMAS F. MCCRAN, being duly sworn, deposes and says: I am the Attorney General of the State of New Jersey, duly qualified and acting as such and one of the people of the complainant herein. I have read the foregoing complaint and I know the contents thereof; the same is true to my own knowledge except as to those matters therein stated to be alleged upon information and belief, and to those matters, I believe it to be true.

THOMAS F. MCCRAN.

Subscribed and sworn to before me this 16th day of October, nineteen hundred and twenty-three.

JOSEPH LANIGAN,
Master in Chancery of N. J.

EXHIBIT 1.

[PUBLIC—No. 280—66TH CONGRESS.]

[H. R. 3184.]

An Act To create a Federal Power Commission; to provide for the improvement of navigation; the development of water power; the use of the public lands in relation thereto, and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a commission is hereby created and established, to be known as the Federal Power Commission (hereinafter referred to as the commission), which shall be composed of the Secretary of War, the Secretary of the Interior, and the Secretary of Agriculture. Two members of the commission shall constitute a quorum for the transaction of business, and the commission shall have an official seal, which shall be judicially noticed. The President shall designate the chairman of the commission.

EXHIBIT 3

Plaintiff's Brief in Reply, *United States v. West Virginia*,
No. 17 Original (U.S. filed Apr. 27, 1935)

No. 17, Original

In the Supreme Court of the United States

OCTOBER TERM, 1984

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

THE STATE OF WEST VIRGINIA, DEFENDANT, AND ELECTRO-METALLURGICAL COMPANY, NEW-KANAWHA POWER COMPANY, AND UNION CARBIDE AND CARBON CORPORATION, DEFENDANTS

PLAINTIFF'S BRIEF IN REPLY TO THE BRIEFS OF THE DEFENDANTS IN SUPPORT OF THEIR MOTIONS TO DISMISS

INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 17, Original

THE UNITED STATES OF AMERICA, PLAINTIFF

v.

THE STATE OF WEST VIRGINIA, DEFENDANT, AND Electro Metallurgical Company, New-Kanawha Power Company, and Union Carbide and Carbon Corporation, defendants

PLAINTIFF'S BRIEF IN REPLY TO THE BRIEFS OF THE DEFENDANTS IN SUPPORT OF THEIR MOTIONS TO DISMISS

JURISDICTION

This is an original action by the United States against a State and three corporate defendants, brought under Article III, Section 2, clauses 1 and 2 of the Constitution of the United States.

QUESTIONS PRESENTED

Two motions to dismiss the Bill of Complaint are before the court, one by the State of West Virginia and the other by the three corporate defendants.

Among the questions raised by these motions are the following:

(1) Does the Bill of Complaint allege a justiciable controversy between the United States and the State of West Virginia?

(2) Does this court have original jurisdiction in a case by the United States against the State of West Virginia and the three corporate defendants under Article III, Section 2, clauses 1 and 2 of the Constitution of the United States? One of the corporate defendants is a company organized under the laws of the State of Kentucky and owns all of the capital stock of the others. The other two are corporations of the State of West Virginia. There is no controversy between the State and any or all of the corporate defendants or between any of the corporate defendants. All of the defendants are on the same side of the issues tendered by the Bill.

(3) Is the United States required to sue the corporate defendants in the matters presented by the plaintiff's Bill in the District Court of the United States for the Southern District of West Virginia under Section 26 of the Federal Water Power Act (Act of Congress June 10, 1920, Chapter 285, Section 26, 41 Stat. 1076) when the State of West Virginia is also a party?

(4) Does the prayer of the Bill seek a declaratory judgment and if so will this court pronounce a declaratory judgment on the issues tendered by the Bill?

CONSTITUTION, STATUTES, AND EXECUTIVE ORDER INVOLVED

Constitution of the United States, Article III, Section 2, clauses 1 and 2.

Judiciary Act of 1789 (Act of Sept. 24, 1789, Chapter 20, Section 13, 1 Stat. 80).

Act of March 1, 1911 (Weeks Act, Chapter 186, Sections 4, 5, 10; 36 Stat. 962; 16 U. S. C. 513, 519).

River and Harbor Act of March 3, 1899 (33 U. S. C. 401–403).

Federal Water Power Act, June 10, 1920 (16 U. S. C. 791–823).

Act of May 15, 1928 (45 Stat. 538, 33 U. S. C. 702j).

National Industrial Recovery Act (approved June 16, 1933, 48 Stat. 195).

Act of June 14, 1934 (Chapter 512, 48 Stat. 955, Judicial Code, Section 274d).

Water Power Act of the State of West Virginia (Act of 1913, Chapter 11 as reenacted and amended by the Act of 1915, Chapter 17, Barnes Code Chapter 54b).

Act of the State of West Virginia, March 10, 1933, Chapter 115, Regular Session 1933.

Executive Order of the President No. 6251, approved August 19, 1933.

STATEMENT

On June 11, 1934, plaintiff filed its Bill of Complaint in the District Court of the United States for the Southern District of West Virginia entitled "*United*

States of America, plaintiff, v. *The Electro Metallurgical Company, the New-Kanawha Power Company, and the Union Carbide and Carbon Corporation, defendants*, in equity No. 3398." The State of West Virginia sought to intervene by petition and answer at the instance of the Attorney General of the State upon the request of the Governor. The United States did not consent to be sued in that proceeding by the State and the case was dismissed on the Government's motion (*Schillinger* v. *United States*, 155 U. S. 163). The petition for intervention and answer have been attached to the Bill herein for reference.

In the instant case the defendants, the Electro Metallurgical Company and the New-Kanawha Power Company, corporations of the State of West Virginia, are wholly owned subsidiaries of the defendant, the Union Carbide and Carbon Corporation, a Delaware company. All of the rights which the three defendant corporations, or any of them, claim in the construction and operation of the Hawks Nest Project flow from a license which the defendant, the New-Kanawha Power Company, applied for and obtained from the Public Service Commission of West Virginia, the agency empowered to grant such licenses by the State. All of the rights under the said license and all of the property interests of the New-Kanawha Power Company were assigned under legislative authority by the New-Kanawha Power Company to the Electro Metallurgical Company.

It is obvious, therefore, that there is not and cannot be any "controversy" between the State and any one

or all of the corporate defendants, or between any of the corporate defendants. They are all defendants on the same side of the issue tendered, and while their positions are not identical they are not in conflict and are integrated.

The Bill of Complaint, in brief, alleges that New River is an interstate stream and navigable waters of the United States, and the New and Kanawha Rivers constitute one continuous stream and are navigable waters.

The defendant the New-Kanawha Power Company filed its Declaration of Intention under Section 23 of the Federal Water Power Act with the Federal Power Commission, May 10, 1927, to construct and operate an hydroelectric project at Hawks Nest on New River, West Virginia. The Commission made an investigation and issued findings on January 26, 1934, "that the interests of interstate commerce would be affected by such proposed construction" (1934 Annual Report of the Federal Power Commission). While the Commission was making its investigation the New-Kanawha Power Company, learning in advance that the report of the District Engineer of the War Department to the Chief of Engineers would recommend that the project would affect an interest in interstate commerce, sought to withdraw its Declaration of Intention. It applied to and was granted a permit by the Public Service Commission of West Virginia to construct and operate its project on December 8, 1928 (Bulletin No.

115, case No. 1863–64). This permit was subsequently transferred to the defendant the Electro Metallurgical Company on April 19, 1933, together with the physical properties connected with the project.

Plaintiff having filed its Bill of Complaint in the District Court the corporate defendants (the same as in the instant case) filed their respective answers denying that New River was navigable waters or that the New and the Kanawha taken together were navigable waters. They denied that the Federal Power Commission had any right to require them to take out a license to construct or operate the said project. They asserted that the license from the Public Service Commission of the State of West Virginia gave them exclusive right to construct and operate said project; that the construction and operation would not affect an interest in interstate commerce, that it did not and would not interfere with any navigable waters and that the defendant, the Electro Metallurgical Company, did not intend to take out any license from the Federal Power Commission.

In the lower court the State of West Virginia asserted a right superior to that of the United States to use and license the use of the waters of the New and Kanawha Rivers for production and sale of hydroelectric power. It denied the right of the United States, through its agent, the Federal Power Commission, to require a license from the defendant, the Electro Metallurgical Company, to construct and

operate the Hawks Nest Project in accordance with the provisions of the Federal Water Power Act. It asserted that the attempt of plaintiff to require such a license constituted an invasion of the sovereign rights of the State of West Virginia. It further denied the claim of the United States that New River is navigable waters or that the New and the Kanawha taken together are navigable waters of the United States, and it challenged the constitutionality of the Federal Water Power Act.

Plaintiff, having dismissed the case in the District Court, brings this action under the original jurisdiction of the Supreme Court. It avers that if the construction and operation of the Hawks Nest Project is not under the control of the Federal Government it will interfere with, injuriously affect, and retard the improvement of navigation on the New and Kanawha Rivers as contemplated, undertaken and partially completed by plaintiff; that it does affect an interest in interstate commerce on the New and Kanawha Rivers; that it will modify the channel and affect the pools behind the dams already constructed by the Government, or being constructed by it on the Kanawha River. It alleges that the construction and operation of the said project without the consent or approval of the plans by the Chief of Engineers, U. S. A., the consent of the Secretary of War, or a license from the Federal Power Commission violates the Act of March 3, 1899 (33 U. S. C. 401), and the Act of June 10, 1920 (16 U. S. C. 791–823), and

interferes with the Government's work under many other Acts of Congress.

The plaintiff prays that the defendant the State of West Virginia be forever enjoined from asserting any estate, right, title, or interest in the New and Kanawha Rivers superior and adverse to the rights of the plaintiff and that the other defendants be enjoined from constructing or operating the Hawks Nest Project until such time as they have secured a license from the Federal Power Commission to construct and operate said project in accordance with the provisions of the Federal Water Power Act.

SUMMARY OF ARGUMENT

The respective motions of the State of West Virginia and the corporate defendants to dismiss the Bill of Complaint should be denied.

(1) The Supreme Court has original jurisdiction in a case by the United States against the State of West Virginia and the corporate defendants. The controversy involves a State and the United States. It therefore comes within the language of opinions of this court interpreting its original jurisdiction under Article III, Section 2, paragraph 2 of the Constitution.

(2) There is a justiciable controversy between plaintiff and the defendant the State of West Virginia and between plaintiff and the corporate defendants. The controversy includes the question of whether the New and the Kanawha Rivers are navigable waters of the United States and whether the State of West Virginia has the exclusive right to the control

of these rivers for the purpose of producing hydroelectric power therefrom or licensing others to do so and excluding the United States from licensing others to create hydroelectric power on these streams.

A justiciable controversey between plaintiff and the corporate defendants is conceded.

(3) There is no misjoinder of parties in the inclusion of the corporate defendants with the State of West Virginia in the instant case. The State is an indispensable party. All the rights of the corporate defendants flow from permits issued by the State. The rights of the State and the corporate defendants dovetail and are integrated but are not in any way in conflict. A decree in the instant case supporting the prayer of the petition with respect to the State alone will strike down many of the defenses of the corporate defendants but would not compel them or any one of them to take out a license from the Federal Power Commission without another court proceeding. They are, therefore, necessary parties not in conflict with the State or each other but adverse to plaintiff. Thus, there is no misjoinder of parties.

(4) The original jurisdiction of the Supreme Court does not exclude the corporate defendants under the exceptions in the Judiciary Act of 1789. No limitation has been put upon the type of parties defendant if the United States should bring a suit under the original jurisdiction of this court. In the case of a State, under the Judiciary Act of 1789 (Act of September 24, 1789, Chapter 20, Section 13, 1 Stat. 80),

original jurisdiction is limited by two exceptions. The first is where there is a controversy between a State and its citizens. That condition does not exist here. The second is where there is a controversy between a State and citizens of other States. That exception does not apply here. Therefore, the corporate defendants being integrated with the State are within the original jurisdiction of this court under its equity powers.

(5) This court has entertained original jurisdiction in controversies between a State and the Federal Government where private parties were joined. It has taken jurisdiction in controversies between States where the United States intervened or was made a party and there were private parties.

(6) In original proceedings brought by a State against a State in the Supreme Court other defendants have been joined. The fact that this court has assumed original jurisdiction in some cases between States where the Federal Government has intervened and the rights of private interests have been determined, without their being made parties, does not exclude the corporate defendants in the instant case.

(7) The Supreme Court is not called upon in the instant case to render a declaratory judgment. Plaintiff maintains that there is a justiciable question presented by the Bill and therefore the question of a declaratory judgment need not be considered. The language of the Bill is broad enough, however, to include a declaratory judgment and there being a

controversy presented, the court could if it were necessary, grant a decree under the Federal Declaratory Judgments Act (Act June 14, 1934, Chapter 512, 48 Stat. 955; Judicial Code Section 274–d). This Act is for the purpose of regulating procedure and not limiting the exercise of original jurisdiction.

(8) Section 26 of the Federal Water Power Act granting jurisdiction in the District Court in equity to pass upon violations of that Act does not deprive the Supreme Court of original jurisdiction in the instant case. The purpose of Section 26 of the Federal Water Power Act is to provide machinery for enforcement under the Act where a person has taken out a license from the Federal Power Commission. The issues presented by the Bill of Complaint are much broader and far more inclusive than the conditions laid down in said Section 26. Moreover, the controversy here is between parties over which the District Court does not have jurisdiction unless by consent, if at all.

ARGUMENT

I

THE SUPREME COURT HAS ORIGINAL JURISDICTION IN A CONTROVERSY BETWEEN THE UNITED STATES AND THE STATE OF WEST VIRGINIA AND THE CORPORATE DEFENDANTS

It is well settled that the jurisdiction of the Supreme Court under the Constitution extends to suits by the United States against a State, as in the instant case.

United States v. *Texas* (1892), 143 U. S. 621.
United States v. *Texas* (1896), 162 U. S. 1.

United States v. *Michigan* (1903), 190 U. S. 379.

Kansas v. *Colorado* (1907), 206 U. S. 46.

United States v. *State of Utah* (1931), 283 U. S. 64.

II

THERE IS A JUSTICIABLE CONTROVERSY BETWEEN THE PLAINTIFF AND THE DEFENDANT, THE STATE OF WEST VIRGINIA, AND BETWEEN THE PLAINTIFF AND THE CORPORATE DEFENDANTS

The Supreme Court having jurisdiction of the controversy between plaintiff and the defendant, the State of West Virginia, the sole question to be determined, so far as the State is concerned, is whether there is a justiciable controversy.

The motion to dismiss admits the following averments of the Bill.

New River is an interstate stream that is navigable waters of the United States. New River and the Kanawha River together constitute one continuous stream and are navigable waters. Below the Hawks Nest Project, on the Kanawha River, the Government has spent approximately $25,000,000 in improving and developing navigation since 1874. Congress authorized the deepening of the channel on the Kanawha from six to nine feet, and the construction of the London and Marmet Dams for this purpose in response to recommendations made by the Chief of Engineers of the U. S. Army (House Document 190, 70th Congress, first session) which stated in substance that by constructing power plants at said

dams, revenue could be realized through hydroelectric production that would pay in part for their construction. Congress has authorized, and the Government is building, other dams on the said river and on the Ohio below to take the place of lower dams that will be torn out. It proposes to pay for this improvement through the sale of power produced at the new dams. It has entered into a contract for the production and sale of power at the London and Marmet dams, by others, the income therefrom being based on the power produced.

The Government has spent large sums of money in purchasing lands under the Weeks Act (36 Stat. 962) (16 U. S. C. 513–519) for the purpose of reforestation on the headwaters of the New and Kanawha Rivers to prevent erosion and the deposit of silt in the channels of the said rivers for the purpose of improving the navigability of said rivers.

Congress appropriated from 1876–1886 the sum of $112,000 for the improvement of navigation on New River above Hinton, West Virginia. New River has been recommended to Congress for improvement (1870–77) after investigation under its authority by connecting the New and the Kanawha Rivers with the James River by means of a canal joining the Greenbrier, a tributary of the New River, with the Jackson River, a tributary of the James River, near Covington, Virginia.

The construction and operation of the Hawks Nest Project unless under the control of the Government

131152—35——3

will interfere with, injuriously affect, and retard the improvement of navigation on the New and Kanawha Rivers as contemplated, undertaken, and partially completed by plaintiff. It will affect an interest in interstate commerce on the New and Kanawha Rivers. It will modify the channel and affect the pools behind the dams already constructed by the Government or in the act of being constructed by it on the Kanawha River.

The New-Kanawha Power Company filed its declaration of intention with the Federal Power Commission pursuant to Section 23 of the Act of June 10, 1920 (41 Stat. 1063, 16 U. S. C. 817), for the Hawks Nest Project. The Commission found that the "interests of interstate commerce would be affected by such proposed construction."

Plaintiff under Sections 4 and 17 of the Federal Water Power Act (16 U. S. C. 797, 810) and Section 10 of the Act of May 15, 1928 (45 Stat. 538, 33 U. S. C. 702 J), and other acts of Congress and pursuant to the orders of the President issued under the authority of the National Industrial Recovery Act, approved June 16, 1933 (chapt. 512, 48 Stat. 955, Judicial Code, section 274-d), has caused studies to be made of the development of the New-Kanawha River system for the purpose of developing a scheme of navigation, flood control, prevention of soil erosion, development of water power, and other public uses of said rivers. These plans necessitate and contemplate a coordination of control by plaintiff either by ownership or by license under the Federal Water Power

Act. If the project of the defendant, the Electro Metallurgical Company, is not under license or control of plaintiff it will interfere with said plans.

One of the projects in said plans which has been approved and recommended to Congress by the Chief of Engineers, U. S. A., is the construction of a large dam at Bluestone on New River above Hinton, West Virginia, with a capacity of 581,400 acre feet. It is estimated that the annual flood-control benefits from said reservoir will be $740,000. The regulation of the flow from the dam will increase the flow of New River from that dam from a minimum of 600 feet per second to 2,000 cubic feet per second. Such improvement in flow will benefit the Hawks Nest plant in dry seasons. The license of the Federal Power Commission would call for the payment to the Federal Government from the Electro Metallurgical Company for fees commensurate with said improvement in the flow of said streams effecting an increase in production of power at the Hawks Nest Project.

The conclusion from these averments is that the construction and operation of said Hawks Nest Project without the consent or approval of the plans by the Chief of Engineers, U. S. A., the consent of the Secretary of War, or a license from the Federal Power Commission violates the Act of March 3, 1899 (33 U. S. C. 401) and the Act of June 10, 1920 (16 U. S. C. 791).

The State in its answer in the District Court controverted the position of the United States in

the following respects: (1) That New River, and New River and the Kanawha River were not navigable waters; (2) that the construction and operation of the Hawks Nest plant would not interfere with the navigability of said rivers or plans for the improvement of navigation on these rivers; (3) that the construction and operation of the Hawks Nest plant would not affect an interest in interstate commerce on said rivers and impair the commercial value of the Kanawha River for navigation purposes; (4) that the Federal Government did not have the right to create and sell power at any dams already constructed or to be constructed on the New or Kanawha Rivers or to license others to create and sell power at said dams and in particular at the London and Marmet Dams; (5) that the purpose of the Federal Water Power Act was not to coordinate navigation with water power and other beneficial uses; (6) that the Federal Water Power Act as the Federal Power Commission sought to apply it to the Hawks Nest Project was not constitutional; (7) that plaintiff did not have a right superior to the State to license the corporate defendants, or one of them, to construct, control, and operate the said Hawks Nest Project and to derive income therefrom; (8) that the Federal Power Commission did not have the right by license under the Federal Water Power Act (Sec. 10–f, 16 U. S. C. 803 f) when a reservoir or other improvement was placed above the Hawks Nest Project to compel the corporate defendants to reimburse the owner of such improvement or reservoir for the benefits resulting to the Electro Metallurgical Company from this reservoir; (9) that the Federal Power Commission could not assess similar charges against the Electro Metallurgical Company if the United States built such a reservoir or improvement; (10) that under Section 10, par. (e), the Government could not require a reasonable annual charge by the Commission to reimburse the United States for the cost of the administration of the Act.

Had the petition for intervention in the court below been granted and the State upon intervening been successful in sustaining the averments of its answer, plaintiff's control under the Federal Water Power Act would have been annulled, both over the Hawks Nest plant and any other plants constructed and operated on the New and Kanawha Rivers. Moreover, the effect would have been to have eliminated the control of the Chief of Engineers and the Secretary of War over the character of the plans or the necessity for such a project on these rivers as provided in paragraph (d), Section 4 of said Act.

In the case of *United States* v. *Utah*, 283 U. S. 64, where the issue raised was the right of the Federal Government or the State of Utah to license parties desiring to drill for oil in the bed of the Colorado River in the State of Utah and the title of the State or the Federal Government turned on whether the Colorado River was navigable, this court took jurisdiction and determined the question of navigability.

The Government maintains that the controversy in the instant case is so similar as to make the Utah

case a precedent in the matter of jurisdiction. As in the Utah case the question was whether the United States or the State had the right to license others to drill for oil or gas so the question here is whether the Federal Government has the right to license others to construct and operate a hydroelectric project on a river, which in the instant case, is averred to be a navigable interstate stream, and hence must be a highway of commerce.

The State has sought to contest the position of the United States not only with respect to this particular project on New River but the right of the Government to sell power generated at all other projects whether constructed or to be constructed on the New and Kanawha Rivers, and asserts that the State has the exclusive right to license others to construct and operate such plants.

Counsel argue (brief 21) that the Bill does not state a justiciable controversy because it does not allege that overt acts were committed or threatened by the State of West Virginia causing injury to any property or right of the United States. While it is not understood from the decisions of this Court, and particularly in *United States* v. *Utah* (*supra*), that it is necessary to allege overt acts, nevertheless there were many such as has already been indicated.

One of the rights claimed by the Federal Government is that it may receive an income from hydroelectric power created at dams built to improve navigation. Thus the State's position has raised a controversy as to whether the Government can ask Con-

gress for funds to build higher dams, thereby producing a deeper waterway, and refund the same from income derived from power generated at these dams. This would involve the amount of the income to be determined by the method, manner, and effect on the operation of the dams of the Government and the pools behind them, in the river below, by the operation of the Hawks Nest Project. Plaintiff maintains that this is a property right of the United States which the State has sought to contest and destroy.

The State insists that it has the exclusive right to license plants creating power on the New and the Kanawha Rivers and to derive income therefrom. The Government maintains that it has a right superior to that of the State to construct and operate such power projects or to license others to do so where income from the power plants may be used to improve navigation or make navigation possible.

The Government further maintains and the State denies the right of the former to be reimbursed by licensees for the *supervision and regulation of these power projects* in improving navigation or flood control, from the income derived from the power plants connected therewith. Plaintiff also insists that it has the right to have projects on these rivers regulated, by license, even if the particular part of the river in question were not navigable, but the operation of the project would affect interstate commerce and the Government's investment in the improvement of navigation below.

The State of West Virginia has declared its right of control over the development of electric power on its rivers both by legislative act and executive action. The Water Power Acts of the State of West Virginia (Acts of 1913, Ch. 11, as amended and reenacted by the Act of 1915, Ch. 17, Barnes Code, Ch. 54B) declared that "all water streams within the State capable of developing electricity or other energy or power shall be under the control and supervision of the State." The Act of 1915 also provided for the licensing of domestic corporations under State regulation to build and operate dams across its streams. This Act expressly declared the authority of the State over all its streams. It provided for the creation of the Public Service Commission and authorized it to issue licenses.

Moreover, the Act of March 10, 1933, of the State Legislature (Chapt. 115 Regular Session 1933) ratified all the Acts of the Public Service Commission in licensing the New Kanawha Power Company and the transfer of this license to the Electro Metallurgical Company. These legislative Acts, together with written declarations on the part of the Governor of the State to the Federal Power Commission and the Acts of the State in the dismissed case with respect to the Hawks Nest Project, have produced an indivisible injury to the United States in which all the defendants are linked (*Wyoming* v. *Colorado*, 259 U. S. 419–468). In addition to this it has set up, as shown in the Bill, a continuing and public nuisance on an interstate highway, which plaintiff maintains should be

controlled in this original proceeding by bringing the Hawks Nest Project under a federal license.

Pennsylvania v. *Wheeling & Belmont Bridge Company et al.*, 13 Howard 518.

North Bloomfield Gravel Mining Company v. *United States*, 88 Federal 664.

Georgetown v. *Alexandria Canal Company*, 12 Pet. 91.

The State (brief 30) asserts that the Bill lacks an averment that the United States has licensed anyone to make use of the New River at any point in its course. This is true but the reason for it is that the State, by its action, has advised the corporate defendants that it is not necessary to have a license from the United States. It has done this in the dismissed case where the United States was attempting to compel them to take out a license. By intervening it sought to prevent a license from being taken out.

The State argues (brief 31) that in the absence of any act committed by it in violation of the federal statutes or any threat to violate such statutes there exists no controversy between the State and the United States. But the State among other things has sought to have others violate the Federal Water Power Act by proclaiming that a license from the Federal Government is not necessary.

The State asserts (brief 31) that the injunction prayed against West Virginia to enjoin it "from asserting any estate, right, title, or interest in any dams or hydro-electric plants in connection there-

with, and the production and sale of hydro-electric power thereat on the New and Kanawha Rivers superior and adverse to the rights of the plaintiff, * * * and from in any manner disturbing or interfering with the possession, use, and enjoyment of said right by the plaintiff, * * * goes far beyond the limits set by this Court for injunctive relief." The Court, however, will note that the language complained of is a practical paraphrase of the language used in the prayer by the United States in the Utah case (*supra*).

Again, the State (brief 32) argues that the prayer seeks to prevent the State entertaining a mere opinion in conflict with the opinions of representatives of the national government. The controversy tendered by the petition and answer in the dismissed case constitutes more than an expression of opinion. At least, the State so thought when it sought to intervene and to file its answer.

The conclusion is inescapable that the State there placed its claim of sovereignty over these rivers against the sovereign control of the Federal Government and challenged the right of the Federal Government to supervise, improve, and control these rivers and their commerce by inviting prospective licensees to reject a license under the Federal Power Commission. It is maintained that such a challenge and its effect set up a justiciable controversy.

The State (brief 37) quotes from *Muskrat* v. *United States*, 219 U. S. 346, to the effect that where a claim was made under the Constitution and laws of the

United States the term "judicial power" implies "existence of present or possible adverse parties whose contentions are submitted to the court for adjudication." The attempt to intervene on the part of the State and the language of its answer in the dismissed case below would certainly indicate that it was an adverse party acting on the authority of its legal representatives in an official capacity. This contention is supported by the assumption of control of water power development under the Water Power Act of the State of West Virginia of 1915 relating to navigable waters in the State (Acts 1915, Ch. 17, Barnes Code, Ch. 54B).

The State refers to *New Jersey* v. *Sargent* (269 U. S. 328). An analysis of the opinion in that case shows that a justiciable controversy was lacking in the following respects:

(1) There was no showing that the State was engaged in or about to engage in operations contrary to the Federal Water Power Act.

(2) It was not interfering with or about to interfere with the operations of the Federal Government on a navigable river, as at the London and Marmet Dams, and as at the Hawks Nest Project where the State granted a so-called exclusive license to the corporate defendants and as parens patriae sought to prevent plaintiff from securing a license from them, nor was the State in its own right seeking to prevent it from requiring a license from corporate defendants, thus possibly putting navigability and commerce on its rivers in jeopardy.

All of the essentials presenting a justiciable controversy that were absent in *New Jersey* v. *Sargent* are present on the face of the Bill in the instant case.

III

THERE IS NO MISJOINDER OF PARTIES IN THE INCLUSION OF THE CORPORATE DEFENDANTS WITH THE STATE OF WEST VIRGINIA IN THE INSTANT CASE

It is conceded by all the defendants that there is a justiciable controversy between plaintiff and the corporate defendants. It is maintained by plaintiff that the Bill presents a justiciable controversy between the State and plaintiff. If this is true, then, is there a misjoinder of parties in this original proceeding when the three corporations are included with the State as defendants? It was pointed out earlier in this brief that there is no controversy whatsoever between the State and any one or all of the three defendants and that the defendant, the Union Carbide and Carbon Corporation, a Delaware company, owns all of the capital stock of the Electro Metallurgical Company and the New-Kanawha Power Company, both of whom are West Virginia corporations.

An analysis of the Bill shows that a decree might be entered holding that New River, separately and the New and Kanawha Rivers taken together, are navigable waters of the United States; that plaintiff has the right to construct hydroelectric plants or license others to do so and sell the power created at the London and Marmet Dams or the other dams

that are now or may be constructed on these rivers for the purpose of improving navigation either directly or by regulating the flow through flood control; that the rights of the State of West Virginia are subordinate insofar as the construction and operation of projects on these two rivers are concerned.

If such a decree were allowed it would strike down many of the defenses that were set up by the corporate defendants in the dismissed case in the court below, but it would not compel the corporate defendants, without another legal proceeding, to take out a license from the Federal Power Commission.

As pointed out before, these corporations derive all of their alleged rights to create power on these rivers from the State. The State, on the other hand, by legislative enactment has declared its control over the creation of power on all of its rivers. By legislative enactment it has created and authorized the Public Service Commission of that State to issue licenses and has granted such a license to the defendant, the Electro Metallurgical Company for the Hawks Nest Project. The rights of the State and the corporate defendants dovetail and are integrated (*Wyoming* v. *Colorado*, *supra*, p. 468). It would thus appear from the Bill that the corporate defendants are both proper and necessary parties.

If the State's position is the law then the Supreme Court would be divested of original jurisdiction in a controversy between the United States and a State where private persons were joined as necessary or indispensible parties either on the side of the State or

the United States. All that would be necessary to create such a condition would be to show that private parties were necessary or indispensable. This might result in a serious limitation upon the original jurisdiction of the Supreme Court such as has not been placed there either by the Constitution, Acts of Congress, or any decisions of the Supreme Court that we have been able to discover.

There is, therefore, a controversy here between the Government, and the State and the corporate defendants such as did not exist in the case of *Muskrat* v. *United States*, 219 U. S. 346. Moreover, the controversy is not only one of serious magnitude but it is imminent as the Bill sets forth (*Alabama* v. *Arizona*, 291 U. S. 286) and justiciable rights of the plaintiff are being affected prejudicially (*Texas* v. *Interstate Commerce Commission*, 258 U. S. 158–162).

IV

THE ORIGINAL JURISDICTION OF THE SUPREME COURT DOES NOT EXCLUDE THE CORPORATE DEFENDANTS UNDER THE EXCEPTIONS IN THE JUDICIARY ACT OF 1789

The pertinent provisions of the Constitution and the Judiciary Act to be considered are as follows:

The second section of Article III of the Constitution:

> SECTION 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; to all cases affecting Ambassadors, other public Ministers and Consuls; to all Cases of admiralty and maritime Jurisdiction; to Controversies to which the United States shall be a party; to Controversies between two or more States; between a State and Citizens of another State; between citizens of different States; between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens, or Subjects.
>
> In all Cases affecting Ambassadors, other public Ministers and Consuls, *and those in which a State shall be Party*, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make. (Italics ours.)

The Judiciary Act of 1789 (Act September 24, 1789, C. 20, Sec. 13, 1 Stat. 80), provided (and essentially the same provisions now constitute Section 233 of the Judicial Code):

> The Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a State is a party, except between a State and its citizens; and except also between a State and citizens of other States, or aliens, in which latter case it shall have original but not exclusive jurisdiction.

In *United States* v. *Texas*, 143 U. S. 621, this court included the United States as a party over

which it would entertain original jurisdiction where there was a justiciable issue.

It thus placed it in the category with a State, as in the second paragraph of Section 2 of Article III, except that no restriction or limitation has been put upon the United States as to opposing parties either by statute or by decisions of this court in an original proceeding.

The Act of 1789 states that this court shall have exclusive jurisdiction of all controversies of a civil nature where a State is a party. If we add the words "or the United States" after the word "State", then the court would have jurisdiction over the instant case, since the controversy is of a civil nature between the United States and a State.

There are, however, two exceptions applied to the State in the statutory declaration of 1789. The first is a controversy between a State and its citizens. There the United States Supreme Court does not have jurisdiction. The next exception is where there is a controversy between a State and citizens of other States and in this instance this court has jurisdiction, but it is not *exclusive*.

Do the facts averred in the Bill in the instant case bring the controversy within either one of the exceptions? The answer is in the negative as to the first exception, for there is not here a controversy between the State of West Virginia and any of its citizens, as has already been pointed out, and there is no limitation put upon the United States as to parties if equity needs their presence. As to the

second exception, the answer is also in the negative because there is no controversy between the State and citizens of other States. Moreover, this exception does not apply to the United States.

Thus, under the Judiciary Act of 1789 there is here a controversy between the United States and a State over a matter of a civil nature to which has been added other parties who have no controversy with the State, but do have with the United States. It will be noted that it is not asked here that the phrase "or United States" be included in the language covering the exceptions, for this court has not applied the exceptions stated in the Judiciary Act to the United States when it brings a suit under the original jurisdiction of this court.

Counsel for the corporate defendants rely heavily on the case of *California* v. *Southern Pacific Co.*, 157 U. S. 229. The facts there, on which this court passed, were totally different from those in the instant case. In the former case the State of California brought an action against the Southern Pacific Company which was a Kentucky corporation. This court determined that the City of Oakland and the Oakland Water Front Company were indispensable parties. The City of Oakland was a municipality of California. The Oakland Water Front Company was a California corporation. Both bodies held positions adverse to the Kentucky corporation. Thus there was a controversy between the State of California, a citizen of Kentucky, and citizens of

California. This would, of course, bring the controversey within each of the exceptions set forth in the Judiciary Act of 1789. But in the instant case all of the corporate bodies are on the same side as the State in the issues tendered. Moreover this is also a controversy between the United States, a state, and private parties.

V

THIS COURT HAS ENTERTAINED ORIGINAL JURISDICTION IN CONTROVERSIES BETWEEN A STATE AND THE FEDERAL GOVERNMENT WHERE PRIVATE PARTIES WERE JOINED

A State may sue another State within the original jurisdiction of this court and join private corporations. Why then may not the United States sue a State in this court and join private corporations? Certainly the United States as a sovereignty is on an equal basis with the State before this court.

Kansas v. *Colorado*, 206 U. S. 46.
Wyoming v. *Colorado*, 259 U. S. 419.
New York v. *Connecticut*, 4 Dall. 1.
Louisiana v. *Texas*, 176 U. S. 1.
Missouri v. *Illinois and the Sanitary District of Chicago*, 180 U. S. 208.

The case of *Minnesota* v. *Northern Securities Company*, 184 U. S. 199 (corporate defendants' brief 28) does not apply for the same reason as in the case of *California* v. *Southern Pacific Company* (*supra*). In the *Minnesota* case the controversy was between a State and a corporation of another State. There were indispensable parties who were citizens of Minnesota who also occupied a position adverse to the foreign

corporation. Being indispensable adverse parties the case was brought within the exception of the Judiciary Act of 1789.

VI

IN AN ORIGINAL PROCEEDING BROUGHT BY A STATE AGAINST A STATE IN THE SUPREME COURT OTHER DEFENDANTS HAVE BEEN JOINED

The Supreme Court has taken jurisdiction in cases between the United States and a State when other parties were joined.

In the case of *Kansas* v. *Colorado* (*supra*) the United States intervened in the original proceeding before this court. In the statement of the case preceding the opinion the parties are described as "the three principal parties, Kansas, Colorado, and the United States." In addition to these parties the Colorado Fuel and Iron Company and the Arkansas Valley Sugar Beet and Irrigated Land Company were defendants. This court took jurisdiction and entered a decree. In the decree it dismissed as to the United States.

Counsel for the Corporate defendants argue (brief 30–34) from the decisions in *Oklahoma* v. *Texas*, 252 U. S. 372 and 258 U. S. 574, and *United States* v. *Utah* (*supra*) that the policy of this court is not to permit joinder of private parties in a controversy between the United States and a State in an original proceeding. The facts in the case of *Oklahoma* v. *Texas* are that the suit was originally brought by Oklahoma against Texas in this court. Subsequently, the United States intervened and on its application a receiver was appointed to take possession of a part

of the river bed, the title to which was in dispute and to control or conduct all necessary oil and gas production therein. After the receivership was appointed the opinion states that

> Numerous parties have since intervened for the purpose of asserting rights to particular tracts in the receiver's possession and are seeking to have the same and the net proceeds of the oil and gas taken therefrom surrendered to them. Many of these claims conflict with one another and all are in conflict with the claims of one or more of the three principal litigants.

Thus it will be seen that numerous parties intervened after the appointment of the receiver and the court took jurisdiction over them and decreed as to their rights. Undoubtedly the court acted here under its broad equitable powers when assuming original jurisdiction, just as it is maintained that it should do in the controversy in the instant case where private parties claim certain rights under one of the parties to the suit.

In *United States* v. *Utah* (*supra*) no other parties intervened and the question of the right to such intervention was therefore not raised. No doubt these parties who were drilling for oil in the bed of the Colorado River were willing to abide by a decision of this court as to which sovereign had the title to the bed of the stream. When this fact was decided by the Supreme Court they would know from whom to take a license for the right to drill for oil and gas.

The fact that there was no such issue raised between private parties and the Federal Government in *United States* v. *Utah* is not determinative of the jurisdictional question here in the instant case.

VII

THE SUPREME COURT IS NOT CALLED UPON IN THE INSTANT CASE TO RENDER A DECLARATORY JUDGMENT

The State asserts that the prayer and body of the Bill call for a declaratory judgment; that the Supreme Court has not looked with favor upon such judgments and that one rendered under the Federal Declaratory Judgments Act (June 14th, 1934, 48 Stat. 955; Judicial Code, Sec. 274d) would not aid plaintiff's Bill. The State depends particularly upon the case of *Arizona* v. *California*, 283 U. S. 423. The difference between that and the instant case is apparent. There the Court said there were no definite physical acts on the part of the Federal Government interfering with the exercise by Arizona of its right to make further appropriations by means of diversions above the dam. In fact, the dam was not constructed. Here, however, a dam has been constructed under the State's authority. The dam is interfering with navigation above and below, is affecting an interest in interstate commerce, and threatens to affect the rights of the Federal Government in the operation of its dams and navigation below. Furthermore, there has been an attempt at legal interference through the action of the State's

answer filed in the suit that was dismissed. Moreover, in the Arizona case the Act in question "interposed no legal inhibitions with the projects in question." Here, however, the Federal Water Power Act interposes legal conditions.

The case of *Pennsylvania* v. *West Virginia*, 262 U. S. 553, quoted by the State (brief 51) sustains the position of plaintiff. There the question was (1) whether the threatened withdrawal of natural gas from interstate commerce was an interference with such commerce forbidden by the Constitution and was a judicial question; (2) the threatened withdrawal of West Virginia an act sufficient to warrant judicial interference and relief; and (3) whether the plaintiffs were suing to protect their own property rights as well as those of their inhabitants. Here the controversy is over an interstate river where the project, now almost completed, cuts off the possibility of boats ever going up and down the river across state lines. The action of the State and the acts of the corporate defendants in response thereto, both physically and through legal process and legislative action, have been sufficient to interfere with the plans of the Federal Government and should warrant judicial relief. Finally, the State appears not only in its own right but substantially as parens patriae representing the alleged property rights of the corporate defendants as well as the interests of the other inhabitants.

Plaintiff while maintaining that it does not pray for a declaratory judgment herein, nevertheless sub-

mits that if such a judgment were asked for in the prayer that the language of the Bill is sufficiently comprehensive to include such a judgment. It furthermore maintains that if a declaratory judgment were decreed it could be so granted under the Federal Declaratory Judgments Act (Act June 14, 1934, Chapt. 512, 48 Stat. 955, Judicial Code, Section 274d). That Act allows for judgments by the courts of the United States where there is an actual controversy set forth in a Bill of complaint. It does not exclude such judgments from the original jurisdiction of the Supreme Court. If this legislation does not add to or take away from this original jurisdiction then it is maintained that such a judgment could be granted by the Supreme Court. In *Florida* v. *Georgia*, 17 Howard 478, this Court expressed the view that Congress may regulate the procedure of the Supreme Court in the exercise of its original jurisdiction. It is maintained that the Declaratory Judgments Act is a regulation of procedure and does not limit or expand the original jurisdiction of the Supreme Court.

It is not absolutely necessary for a decree of this Court to contain injunctive relief or any other relief other than to determine the rights of the respective parties.

United States v. *Utah*, 283 U. S. 64.
Nashville C. & St. L. Ry. v. *Wallace*, 53 U. S. 348.
Louisiana v. *Mississippi*, 202 U. S. 1.
Arkansas v. *Tennessee*, 246 U. S. 158.

VIII

SECTION 26 OF THE FEDERAL WATER POWER ACT GRANTING JURISDICTION IN THE DISTRICT COURT IN EQUITY TO PASS UPON VIOLATIONS OF THE ACT DOES NOT DEPRIVE THE SUPREME COURT OF ORIGINAL JURISDICTION IN THE INSTANT CASE

The State (brief 35) insists that Section 26 of the Federal Water Power Act requires an action against the corporate defendants to be brought in the United States District Court under Section 26 of the Federal Water Power Act. That Section declares that—

> The Attorney General may, on request of the commission or of the Secretary of War, institute proceedings in equity in the District Court of the United States in the district in which any project or part thereof is situated *for the purpose of revoking for violation of its terms any permit or license issued hereunder*, or for the purpose of remedying or correcting by injunction, mandamus, or other process any act of commission or omission in violation of the provisions of this chapter or of any lawful regulation or order promulgated hereunder.

It is directory and not mandatory. Moreover, this controversy involves not only an effort on the part of plaintiff to compel a corporate defendant to take out a license where it has not done so but loss and damage to Government property already located in the river, the supervision of an interstate highway, the effect on an interest in interstate commerce, the interference with and prevention of the carrying out of plans

under numerous Acts of Congress partially completed, and others recommended by Acts of Congress for the improvement of navigation, the abatement of a nuisance, and the constitutionality of the Federal Water Power Act.

Defendant refers to cases (brief 36–38) in which a motion was made to dismiss the Bill on the ground that the suit was one to set aside or suspend an order of the Interstate Commerce Commission. It should be noted here that there was no order of the Federal Power Commission in question. The Commission does not issue *the order* where, as in the instant case, a Declaration of Intention was filed. The Commission makes a finding and if the finding holds that an interest in interstate commerce will be affected then *the statute* requires the applicant to take out a license. There is, thus, no relation between the instant case and those referred to in this connection.

In all the cases cited by counsel (brief 39–41) the State consented to be sued in a lower court of the United States. In *United States* v. *Louisiana*, 123 U. S. 32, it is pointed out that the United States by statute has set up the Court of Claims as a forum where it can be sued in actions based upon the Constitution, contract, etc. In *Ames* v. *Kansas*, 111 U. S. 449, the action was commenced by the State in one of the State courts. The question was whether there could be a transfer from the State to the Federal Court. The jurisdictional questions were wholly dissimilar to those in the instant case. *Railroad Company* v. *Mississippi*, 102 U. S. 135–141, was

another instance of the right to transfer from a state court to a Federal Court. In *Georgia* v. *Jesup*, 106 U. S. 458, the State refused to become a party to the suit.

In *Starin* v. *New York*, 115 U. S. 248, the State was not involved. It was the City of New York. In *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, the question was a controversy between a railroad company and state officers in which the State of South Carolina never became a party.

In *Brewer-Elliott Oil and Gas Company* v. *United States*, 260 U. S. 77, the United States appeared on behalf of itself and as a trustee for certain Indians against the Oil and Gas Company to quiet title to certain oil lands and leases. Oklahoma intervened by leave of the court. No question was raised as to whether the State could be made a party, the State having intervened voluntarily and the United States having consented to be sued.

In *United States* v. *Ladley*, 51 F. (2nd) 756, the United States brought an action as trustee for Indian tribes in the State of Idaho to quiet title to certain property. The State of Idaho intervened. This court held that the State could be sued in the United States District Court when the United States is a party "*and consented to be sued there and has not expressed its consent to be sued elsewhere.*" A reading of the petition and answer in the dismissed case in the lower court clearly reveals it not simply as a defendant but as a sovereign, proposing a controversy with the United States much as a litigant

does when filing a cross bill in an equity proceeding. Under these circumstances and because of the nature of the controversy the United States refused to join issue with the State in the court and had that proceeding dismissed on its motion.

CONCLUSION

For the foregoing reasons the motion of the State of West Virginia and the motion of the corporate defendants should be overruled.

Respectfully,

STANLEY REED, *Solicitor General,*
HARRY W. BLAIR, *Assistant Attorney General,*
HUSTON THOMPSON,
Special Assistant to the Attorney General.

U. S. GOVERNMENT PRINTING OFFICE: 1939