

1 BEFORE THE RAILROAD COMMISSION

2 OF THE

3 STATE OF CALIFORNIA.

4  
5 MILTON A. SMITH REALTY CO.,  
6 INC., a corporation, et al.,

Case No. 2059

7 Complainants,

8 vs.

9 SAN DIEGUITO WATER COMPANY,  
10 a corporation,

11 Defendant.

12 . . . . .

13 COMPLAINANT'S BRIEF AND ARGUMENT.

14 The question to be determined at this stage of the  
15 proceeding is simply whether or no the Defendant, the San  
16 Dieguito Water Company, is a public utility. The facts  
17 are, however, somewhat complicated by reason of the formal  
18 corporate separation and interlocking directorates of the  
19 several interested companies.

20 Because a consideration of the facts is necessary  
21 to any decision herein, it seems proper at this time to  
22 review them and outline a history of the water system  
23 from its inception to the present time.

24  
25 HISTORY OF THE COMPANY.

26 On the 24th day of February, 1914, H. Taylor recorded  
27 a notice of appropriation of all water flowing or thereafter  
28 to flow in the channel of the Bernardo River, otherwise known  
29 as the San Dieguito River or Santa Ysabel River, in the  
30 County of San Diego, at the point where his notice was posted,  
31 to the extent of 10,000 inches measured under a four inch

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LONG BEACH, CALIFORNIA

1 pressure of the continuous flow of the stream.

2 The purposes for which he claimed and appropriated  
3 the water were:

4 "For the irrigation of land in said County  
5 of San Diego, State of California, and for  
6 horticultural and agricultural purposes on  
7 said lands, and for domestic purposes."

8 The places of intended use of said waters were:

9 "On the Bernardo Rancho, San Dieguito Rancho,  
10 Agua Hedionda Rancho and Los Penasquitos  
11 Rancho, on lands included in the Linda Vista  
12 Irrigation District on lands in the City of  
13 San Diego, California, and on lands in frac-  
14 tional townships as follows:

15 Township 12 south, Range 4 west, Township 13  
16 south, range 4 west, Township 14 south, Range  
17 4 West, Township 14 South, Range 3 West, and  
18 Township 14 South, Range 2 West, San Bernardino  
19 Meridian."

20 The means by which said water was intended to be di-  
21 verted was by the construction of a dam across the channel of  
22 said River and by means of flumes, ditches and aqueducts.

23 On the 25th day of February, 1914, H. Taylor assigned  
24 and transferred to Ed Fletcher all his rights and privileges  
25 under said notice of appropriation.

26 In the year 1917, the interests of the assignees of the  
27 original appropriation of H. Taylor were pooled with the  
28 Santa Fe Land Improvement Company, a subsidiary corporation  
29 of The Atchison, Topeka and Santa Fe Railroad, and the owners  
30 of the rancho Santa Fe; the assignees of the appropriator,  
31 H. Taylor, putting in their water right, and the Improvement  
32 Company agreeing to put up the money for building a dam, on  
condition that they would hold all the stock of the San  
Dieguito Mutual Water Company, except the five qualifying  
shares, as security for repayment to them of moneys so

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LONG BEACH, CALIFORNIA

1 expended.

2 As a result of this agreement, the following incorpo-  
3 rators, E.O.Faulkner, W. E. Hodges, S.C.Payson, Wm. G. Hen-  
4 shaw and Ed Fletcher, signed the articles of incorporation  
5 of the San Dieguito Mutual Water Company on the 31st day of  
6 March, 1917.

7 The San Dieguito Mutual Water Company selling water  
8 to all those who might apply within the area served by its  
9 pipe lines, functioned from the year 1917 until July, 1924,  
10 when it sold to the Defendant, San Dieguito Water Company,  
11 for \$2,000,000.00

12  
13 22 Cal. Jur. 14.

14 "The question as to whether a utility or service is  
15 impressed with a public use is one of fact, and that the ex-  
16 istence or non-existence of the fact is to be determined in  
17 view of all the circumstances of the case."

18 In this case, several factors bear on the question  
19 as to whether or no there has been a dedication to public use.

- 20 1. Intention of the appropriator.  
21 2. Purpose of incorporation.  
22 3. Articles and powers of corporation.  
23 4. Acts of the corporation.

24  
25 1. INTENTION OF THE APPROPRIATOR.

26 The original notice of appropriation (Plaintiff's  
27 Exhibit No. 6), originally filed by H. Taylor, a son-in-law of  
28 Ed Fletcher, and by him assigned to Ed Fletcher, and later  
29 assigned to the San Dieguito Mutual Water Company and then to  
30 the defendant, and which forms the basis of the water rights  
31 of the San Dieguito Water Company, shows that it was the  
32

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LONG BEACH, CALIFORNIA

1 intention of the appropriator to form a public utility  
2 for the following reasons:

- 3 (a) They followed the form of notice of appro-  
4 priation used by public utilities in making  
5 filings, and it was the plan "to use the  
6 waters generally wherever they might be sold".

6 Testimony of Mr. Fletcher;  
7 Trans. page 73, lines 13-19  
8 page 74, lines 28-29.

8 "Q. There were no territorial limits defin-  
9 ing the area to be served, were there, or in-  
10 tended to be?

10 A. Only as outlined in that filing.

11 Q. Was it not your plan at the time you  
12 caused this notice of appropriation to be  
13 filed that these waters should be used gen-  
14 erally wherever they might be sold?

14 A. Wherever we could."

15 THE WITNESS: "Wherever we could dispose of the water  
16 to the best possible advantage."

- 16 (b) When the notice of appropriation was filed,  
17 it was the intention of those filing it to  
18 make it so that their powers under it would  
19 be as broad as possible and so that they  
20 would "be in a position to jump any way we  
21 wanted to, afterwards."

20 Testimony of Ed Fletcher;  
21 Trans. page 211, lines 7-8  
22 page 211, line 25,  
23 page 212, line 2.

23 MR. CARPENTER: "Q. Had you in mind forming a mutual  
24 water company when the notice of appropria-  
25 tion, Exhibit 6, was filed?

25 A. When we filed that notice, the impress  
26 of the Railroad Commission Act and its ---  
27 and the actions of the Commission as well  
28 as the Water Commission Act, was not gener-  
29 ally appreciated, and our intention was  
30 to make a water filing under the laws of  
31 the State of California to be in a posi-  
32 tion to jump any way we wanted to afterwards."

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LONG BEACH, CALIFORNIA

1                                   **2.     PURPOSE OF INCORPORATION.**

2                   In the determination of the question as to whether  
3 or not a corporation is a public utility, the purpose of the  
4 incorporators in forming a corporation, coupled with their  
5 own overt acts, are important factors.

6                   When the San Dieguito Mutual Water Company sold to the  
7 San Dieguito Water Company, the latter company took all said  
8 rights, franchises and properties impressed with a public  
9 use, for the reason that:

10                   (a)   The testimony shows that it was the inten-  
11                       tion of the incorporators of the San  
12                       Dieguito Mutual Water Company to form a  
13                       corporation for the purposes of selling  
14                       water at a profit to all to whom sales  
                         could be conveniently made, and that the  
                         waters should be used generally wherever  
                         they might be sold.   (Trans., page 73,  
                         lines 13-19, page 74, lines 28-29)

15                   (b)   The testimony and the admission of the com-  
16                       pany in their disclaimer (Application No.  
17                       10318 before the Railroad Commission)  
18                       shows that all of the capital stock of  
19                       the San Dieguito Mutual Water Company,  
                         except qualifying shares, was owned by  
                         the Santa Fe Land Improvement Company  
                         and that the purpose of the Santa Fe Land  
20                       Improvement Company was to increase transpor-  
21                       tation by rail, and to use the words of  
                         E.O.Faulkner, "And in order to make the  
22                       most money and get the greatest benefit  
                         out of it, they went into this water de-  
                         velopment, which was the first of its  
                         kind they had ever gone into.   (Trans.  
23                       page 477, line 16, to page 478, line 17).

24  
25                                   **3.     ARTICLES OF INCORPORATION.**

26                   The Articles of Incorporation gave the San Dieguito  
27                   Mutual Water Company power

28                        "To acquire by purchase, lease, appropria-  
29                        tion, development and by any other lawful  
30                        means, water, water rights, water bearing  
31                        lands, and to hold, own and use the same  
32                        for irrigation, domestic and other useful  
                          purposes of Stockholders of this corporation."

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1 "To acquire in all lawful ways, right of way  
2 sites and land necessary or convenient for the  
3 uses, purposes and works above mentioned, and to  
own, hold, use, buy or sell the same."

4 which powers were very broad and included the power of eminent  
5 domain under its power to "acquire by any other lawful means"  
6 and "to acquire in all lawful ways."

7 (a) It held itself put to the public as being a  
8 public utility and whereas, in fact, it  
9 never condemned any lands under the power  
of eminent domain, it accomplished its  
ends by threatening so to do.

10 Testimony of E.W. Case,  
11 Trans. page 60, lines 2-11,  
page 60, lines 24-28  
12 page 62, lines 15-18.

13 "Q. Did you at any time tell Mr. Weller that  
14 if he did not settle amicably that the compa-  
ny would condemn and take the land?

15 A. I do not think so, sir.

16 Q. Are you sure about that?

17 A. I did not.

18 Q. Did you tell him that the company could  
do it?

19 A. That is possible, I would not say that I  
20 did say that part of it, but it was intimated  
that it was -- could be done.

21 Q. That is, it was intimated to Mr. Weller  
22 that that could be done?

23 A. Yes, sir; not by me, but by Mr. Ellis.

24 Q. In your presence? A. Yes, sir.

25 MR. CARPENTER:

26 "Q. You took Mr. Ellis with you? A. Yes, sir

27 Q. For the purpose of having negotiations with  
28 Mr. Weller to the end that the easement might  
be secured; isn't that correct? A. Yes, sir.

29 Testimony Lewis Weller,  
30 Trans. page 22, line 7, to  
page 23, line 8.

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LONG BEACH, CALIFORNIA

1 MR. CARPENTER:

2 "What other conversations, if any were had.  
3 Just state what you said to Mr. Fletcher,  
4 and what he said to you?

5 A. Well, after I virtually granted ---/...

6 A. After I granted the right of way, virtual-  
7 ly for the covered pipe line, Mr. Fletcher  
8 came to me and told me that the covered pipe  
9 line was impractical, they wanted the right  
10 of way for an open conduit. I objected to  
11 that, I did not want my ranch cut in two for --  
12 with that open conduit running thru it. We  
13 talked pros and cons and Mr. Fletcher told me--  
14 'well, you know, Mr. Weller, that I can con-  
15 demn your land, and put this conduit thru  
16 there and fence my conduit line, and you  
17 cannot get from one side of your land into  
18 the other'. 'Well', naturally, I told him,  
19 'Well, go to ---, I will see you in a warmer  
20 place than this before you get a right of way  
21 that way'. But at the same time Mr. Fletcher  
22 and I had been old acquaintances and friends,  
23 virtually, and I did not want to fight Fletcher,  
24 I know that he was a scrapper from hell, as we  
25 call it; well, I considered myself somewhat of  
26 a scrapper, too. I says, 'Look here, let us  
27 try and get this on a reasonable basis. Fig-  
28 ure what is right, and give me such terms that  
29 I can utilize my ranch to the best advantage'--  
30 at that time I had no idea of selling or sub-  
31 dividing, or anything like that, I wanted this  
32 ranch, as I had built it up to my best advantage.  
Well, at the same time this idea that he has  
the right to condemn my land and fence me out  
from going across this conduit, naturally in-  
fluenced my position in granting the right of  
way. Eventually, we came to an agreement, tho,  
and I granted the right of way -- sold him the  
right of way."

23 This testimony shows that the reason why the right of  
24 way was granted by Mr. Weller, after conversation with Ed  
25 Fletcher and Mr. Case, chief construction engineer of the  
26 Lake Hodges Dam, and Mr. Ellis, was, in the words of the  
27 witness, "This idea that he has the right to condemn my  
28 land and fence me out from going across this conduit, natu-  
29 rally influenced my position in granting the right of way."

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ATTORNEY-AT-LAW

SUITE 410 FARMERS & MERCHANTS BANK BLDG.  
LONG BEACH, CALIFORNIA

1                                    **Testimony of Lewis Weller,**  
2                                    **Trans. Page 24, line 24, to**  
                                      **page 25, line 8.**

3           **"Q. Before you signed, did Case say anything to**  
4           **you about condemning the land?**

5           **A. Mr. Case told me if I did not make the agree-**  
6           **ment they had the right to condemn and fence their**  
7           **right of way.**

8           **Q Did he say they would?**

9           **A. No, sir, he did not, but he said they could.**

10          **Q Fletcher told you they would, did he?**

11          **A. I would not say that; he said 'we can con-**  
12          **demn your land and fence our right of way and**  
13          **prevent you from crossing our conduit'.**

14          **Q That was that the San Dieguito Mutual Water**  
15          **Company could condemn,           A. Yes, sir.**

16          **Q And he was talking to you as President of that**  
17          **Company?           A. Yes, sir."**

18          **As was said by the Court in**

19                               **Allen vs. Railroad Commission of**  
20                               **California,**  
21                               **179 Cal. 68**  
22                               **175 Pac. 466,**

23          **in speaking of the Articles of Incorporation of the Lake**  
24          **Hemet Water Company,**

25               **"It is not without significance that there is**  
26               **omitted therefrom the declaration of the right**  
27               **to acquire by condemnation, which right runs**  
28               **only with a public service; and of similar sig-**  
29               **nificance is the fact that when this applicant, in**  
30               **the course of its activities, needed to acquire**  
31               **and did acquire certain rights of way, it did**  
32               **not undertake to do so by condemnation, but ef-**  
              **fectuated its purpose by purchase."**

**I would also like to call your attention to the case of**

**Clear Lake Oil and Gas Co. vs.**  
                                  **Fort Smith,**  
                                  **330 S.W. 897,**  
                                  **(Sup. Ct. Ark. 1921)**

**where it was pointed out in the opinion of the Court that the**  
              **evidence was entirely convincing that the Gas Company was**

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**SUITE 410 FARMERS & MERCHANTS BANK BLDG.**  
                                  **LONG BEACH, CALIFORNIA**



1 making preparations to exercise the right of eminent domain  
2 for the purpose of obtaining a right of way for its pipe line,  
3 As to the effect of this preparation, the Court said:

4 "The acquisition by appellant of franchises in  
5 several towns and cities, while not shown to be  
6 within the actual knowledge of appellees, were  
7 matters of such common notoriety as appellees  
8 are presumed to have known of them. When these  
9 facts are considered in connection with the po-  
10 tent fact in the case that appellant was prepar-  
11 ing at that time to exercise its power under the  
12 statute as a public service corporation, the  
13 conclusion is irresistible that these contracts  
14 were intended as preferential ones, and all  
15 rights under them must yield to the superior  
16 rights of the public to regulate such corpora-  
17 tions."

18 The Supreme Court, in the case of

19 WILLIAMSON et al. vs. RAILROAD  
20 COMMISSION,  
21 1923 Cal. 22,

22 in their analysis of the articles of incorporation of the  
23 Natomas Water Company, stated that,

24 "While it is true that purposes avowed in  
25 articles of incorporation do not fix the char-  
26 acter of the corporation in its future activi-  
27 ties as being a public service corporation,  
28 as stated in Allen vs. Railroad Commission,  
29 supra, and that the additional act of dedica-  
30 tion is necessary to the creation of a public  
31 use, it is also true that when the original  
32 appropriators of water from a stream, having  
declared by broad terms that its purposes are  
to secure the commodity for a consumption or  
use which cannot be otherwise than to supply  
a general public use, organize a corporation,  
which in its articles of incorporation declare  
its purposes to be that of utilizing water thus  
acquired for sale, for manufacturing, mining,  
mechanical, chemical, agricultural, and for  
general domestic purposes to be conducted by  
means of canals, flumes, aqueducts, reservoirs,  
pipes and other necessary conduits to a vast  
area of gold-bearing regions, agricultural  
lands, and to inhabited districts and commu-  
nities widely separated from each other, and  
to all other places lying adjacent to the  
route of its main system and lateral branches,  
and when such corporation proceeds under such  
declared purpose, and does establish a distrib-  
uting system, and actually furnishes water for  
mining, irrigation and domestic purposes in

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ATTORNEY-AT-LAW

SUITE 410 FARMERS & MERCHANTS BANK BLDG.  
LONG BEACH, CALIFORNIA

1 large quantities thru a period of many years  
2 to thousands of consumers indiscriminately,  
3 and without refusal to any one who made appli-  
4 cation or request for the use of its water  
5 for any purposes whatsoever, at rates to be ad-  
6 justed to the uses to be made of the water, and has  
7 apparently held itself in readiness to comply with  
8 its declaration of purposes as rapidly as the  
9 growth of the communities to which it extends  
10 would permit or has required, it must be held that  
11 substantial evidence of such a carrying into ef-  
12 fect of the originally declared purposes of the  
13 original appropriators of such water and of the  
14 corporation formed by them has been presented as  
15 would suffice, in the absence of countervailing  
16 facts, to justify a finding that the water thus  
17 acquired and utilized by such a corporation had  
18 from its inception been dedicated to a public  
19 use and that such corporation was a public utility."

20 The proposition that property may have been held to have  
21 been devoted to a public use by implication from the acts  
22 of its owners and their dealings in relation to such property  
23 has been frequently recognized by the Courts of California,  
24 as is shown by the following citations from among the many  
25 cases upon this point:

26 **Franscioni vs. Soledad Land and**  
27 **Water Co. (1915)**  
28 **170 Cal. 221.**

29 Here dedication to public use was implied by the Court  
30 from an application to the Board of Supervisors to fix water  
31 rates.

32 **Camp Rincon Resort Co. vs.**  
**Eshleman (1916)**  
**172 Cal. 561.**

Voluntary telephone communication with another summer  
camp held sufficient to raise the implication of dedication.

**Palermo Land & Water Co. vs.**  
**Railroad Commission (1916)**  
**173 Cal. 380.**

Dedication implied from facts that water service con-  
tracts called for service "at such rates as may be fixed by  
law" and voluntary submission to jurisdiction of Railroad  
Commission.

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SUITE 410 FARMERS & MERCHANTS BANK BLDG.  
LONG BEACH, CALIFORNIA

1 Producers Transportation Company  
2 vs. Railroad Commission (1917)  
3 176 Cal. 499.

4 Dedication implied from use of eminent domain.

5 Traber vs. Railroad Commission (1920)  
6 183 Cal. 304.

7 Dedication implied from fact that corporation was in-  
8 corporated under a statute constituting its public utility,  
9 and also because it had always served all who applied within  
10 its territory with no attempt to pick favored individuals.

11 Van Hoosear vs. Railroad Commission  
12 (1920)

13 184 Cal. 553.

14 Dedication implied from application to Railroad Commiss-  
15 ion for leave to abandon service, the Court saying:

16 "The test to be applied is whether or not the pe-  
17 titioner held himself expressly or impliedly, as  
18 engaged in the business of supplying water to  
19 all of the public, as a class, not necessarily  
20 to all the public, but to any limited portion  
21 of it, for example, as could be served from his  
22 system, as contradistinguished from his holding  
23 himself out as serving or ready to serve only  
24 particular individuals, either as a matter of  
25 accommodation or for other reasons peculiar  
26 and particular to them."

27 Brewer vs. Railroad Commission (1922)  
28 64 Cal. Dec. 457.

29 Dedication implied from contract for service at  
30 "the legal rates", and acquiescence in rates fixed by an  
31 earlier Railroad Commission order.

32 Williamson vs. Railroad Commission (1924)  
67 Cal. Dec. 83.

Dedication implied from the acts of the Company for  
many years serving water to communities for agricultural,  
mining and domestic uses.

The criterion under the theory of the Thayer and  
Allen cases was the conscious retention on the part of the  
seller of a free choice as between purchasers, as contrasted

1 with an offer to sell to all who may apply within the area  
2 in question.

3 In none of the cases quoted above was there any direct, posi-  
4 tive declaration of dedication to public use, and in fact,  
5 such a declaration would seldom be found. The business  
6 itself is of such a nature that the acts of its operators  
7 in carrying it on are the best evidence of such intent.

8 In the present instance, the evidence shows that this  
9 water company served all whom it could conveniently serve,  
10 the criterion being whether or not they were near the pipe  
11 line, not whether or not they were stockholders.

12 The actions of the operators speak louder than their  
13 words, for,

14 "although the public profession is often enough  
15 made in express terms, it is also not infrequently  
16 left to implication from the general course of  
17 the business in question." (Wyman on Public  
18 Service Corporations, Vol. 1, Sec. 200, pp.167,168)

19 and

20 "acts indicate the intention, and upon the intention  
21 clearly expressed by open acts and visible con-  
22 duct the public and individual citizens may act."  
23 (Indianapolis vs. Kingsbury, 101 Ind. 200, 213)

#### 24 4. ACTS OF THE CORPORATION.

25 The corporation in furtherance of the powers given to  
26 it by its Articles of Incorporation, acted in the capacity of  
27 a public utility corporation, in the following respects:

- 28 (a) It sold water to all whom it could con-  
29 veniently supply, whether they were stock-  
30 holders or not, the only criterion being  
31 whether or not the consumer was near the  
32 pipe line of the corporation."

CLAY CARPENTER  
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SUITE 410 FARMERS & MERCHANTS BANK BLDG.  
LONG BEACH, CALIFORNIA

1           In the consideration of the testimony one should bear  
2 in mind that Ed Fletcher was the President of the San Dieguito  
3 Mutual Water Company and its Manager, from its incorpora-  
4 tion until the sale of the corporation to the San Dieguito  
5 Water Company, and was, at the same time, the agent of  
6 the Santa Fe Land Improvement Company, directing to whom  
7 water should be supplied.

8                           Testimony of Ed Fletcher,  
9                           Trans. page 218, lines 17-20.

10       "Q. You acted then for a period of three or  
11       four years as president and manager of the  
12       San Dieguito Mutual Water Company, and as  
13       agent for the Santa Fe Land Improvement Com-  
14       pany?"

15       A. Sort of a dual capacity."

16                           Testimony of W.D. McFadden,  
17                           Trans. page 427, line 12, to  
18                           page 428, line 3.

19       COMMISSIONER SEAVEY:

20       "Q. I would like to ask Mr. McFadden, just what  
21       the procedure was in the matter of supplying  
22       water. You say no applications were made to  
23       you; upon what record did you furnish water to  
24       a consumer and upon what record did you bill  
25       a consumer for that water?"

26       A. I simply had Colonel Fletcher's orders to  
27       lay out a distributing system for a certain  
28       tenant, and I submitted an estimate of cost for  
29       that distribution; when approved by Colonel  
30       Fletcher the line was installed and automati-  
31       cally got water. It was put there for that pur-  
32       pose and I assumed when the line was there and  
33       the tenant was on the ground he was ready for water  
34       and I billed it to him.

35       Q. How did you know that a tenant was being served  
36       water?"

37       A. Well, I simply relied on Colonel Fletcher's  
38       knowledge of the creation of those areas.

39       Q. And then Colonel Fletcher -- you laid out  
40       the distributing system?"

41       A. Yes, sir.

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44                           SUITE 410 FARMERS & MERCHANTS BANK BLDG.  
45                           LONG BEACH, CALIFORNIA

1 "Q. According to the plans furnished you by  
2 Colonel Fletcher?

3 A. Yes, sir.

4 Q Then you were furnished a notation as to a con-  
sumer coming onto the line? A. Yes, sir

5 Q By Colonel Fletcher? A. Yes, sir.

6 Testimony of Ed Fletcher,  
7 Trans. page 214, line 27, to  
8 page 216, line 28.

9 "Q Did the Santa Fe Land Improvement Company  
sell water to any other land than its tenants?

10 A. Yes, sir.

11 Q What lands?

12 A. To lands owned by Mr. Henshaw and myself.

13 Q To what acreage of lands for Mr. Henshaw?

14 A. Three or four hundred acres, possibly. An  
15 undivided one-third interest in that certain  
tract and in other tracts that he and I owned  
16 jointly.

17 Q. How much land of yours?

18 MR. STEVENS: You mean jointly owned lands?

19 MR. CARPENTER: His individually owned lands.

20 MR. STEVENS: I think he said owned jointly.

21 A. Owned jointly by Mr. Henshaw and myself, and  
then several other hundred acres of my own.

22 MR. CARPENTER: Do you recall how many hundred acres?

23 A. Oh, small patches here and there on three or  
24 four hundred acres.

25 Q You say you only had one share of stock?

26 A. That is all.

27 Q. The Santa Fe Land Improvement Company sold water  
to tenants on all your lands, is that a fact?

28 A. Yes, sir.

29 Q. Was it for any amount desired? A. Yes, sir.

30 Q Was it at the usual charge of four cents per  
31 hundred cubic feet?

32  
CLAY CARPENTER  
ATTORNEY-AT-LAW

SUITE 410 FARMERS & MERCHANTS BANK BLDG  
LONG BEACH, CALIFORNIA

1 "A. We charged them all alike.

2 Q Was that charge --

3 A. Three or four cents, I don't remember which.

4 Q Did the Santa Fe Land Improvement Company  
5 sell water to any other lands? A. Yes, sir.

6 Q To whom? Whose lands were these?

7 A. Mr. Harry Payne Whitney and Payne Whitney.

8 Q Harry Payne Whitney of New York City?

9 A. Yes, Payne Whitney and Harry Payne Whitney, both.

10 Q. Yes.

11 A. They each had about a one-third interest in about  
12 1500 acres.

13 Q How many acres of their land were put under water?

14 A. Jointly about three to five hundred acres.

15 MR. STEVENS: Pardon me. Did I understand the witness to  
16 include with the Whitneys, Mr. Henshaw?

17 A. No. He asked me how much Mr. Henshaw owned.

18 Q I mean when you spoke about those lands, when  
19 you said owned jointly?

20 A. Owned jointly by Messrs Henshaw, Payne Whitney  
21 and Harry Payne Whitney.

22 Q Undivided interest? A. An undivided one-third  
23 interest each in about 1500 acres.

24 MR. CARPENTER: Those were not the lands which you de-  
25 scribed as the Henshaw lands in answer to a former  
26 question? A. No.

27 Q Mr. Henshaw had some three or four hundred acres  
28 under water in addition to these Whitney lands?

29 A. Partly under water, most of it not.

30 Q And in addition you had some three or four hundred  
31 acres under water? A. Yes.

32 Q Did either of the Whitneys have any stock in the  
Mutual Water Company?

A. Not that I know of.

Q Do you know whether they did or not?

A. The records are the best evidence.

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LONG BEACH, CALIFORNIA

1 MR. CLARY: We will stipulate they did not.

2 MR. CARPENTER: You say that you had no mutual  
3 company stock, and that for four or five  
4 years the Santa Fe Land Improvement Company  
5 sold water to those lands at the same price?

6 A. Yes, sir.

7 Trans. page 226, line 17, to  
8 page 227, line 9.

9 MR. TAYLOR: Yes, I am not thru yet, Mr. Commissioner.  
10 Are you able to give any estimate of the number  
11 of consumers supplied with water by the Santa Fe  
12 Land Improvement Company?

13 A. Yes, sir.

14 Q. During the period of time that you were  
15 connected with that company?

16 A. Yes, sir.

17 Q. Approximately how many.

18 A. I should say somewhere between 50 and 75  
19 different consumers.

20 Q. Do you know whether or not any of those  
21 consumers were stockholders in either the  
22 Santa Fe Land Improvement Company, or the  
23 San Dieguito Mutual Water Company?

24 A. None of them excepting myself.

25 Q. Would you say that water was supplied by the  
26 Santa Fe Land Improvement Company to any one  
27 desiring it? A. No.

28 Q. Whose land is located in that vicinity? A. No.

29 Q. What are the conditions upon which it was  
30 supplied to them by the Santa Fe Land Improve-  
31 ment Company? In other words, what determined  
32 with the Santa Fe Land Improvement Company  
whether they should supply water to people  
applying for it?

A. The location of our pipe lines and its  
proximity to our lands that we own or control  
is a general answer.

Q. That was the only distinction?

A. I should say so.

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ATTORNEY-AT-LAW

SUITE 410 FARMERS & MERCHANTS BANK BLDG.  
LONG BEACH, CALIFORNIA



1                   **Testimony of Ed Fletcher,**  
2                   **Trans. pages 93, et seq.**

3                   Ed Fletcher testified that during the time he was  
4                   president of the company, water was sold to Santa Fe Land  
5                   Improvement Company and by it sold to the Del Mar Water, Light  
6                   & Power Co., who collected their own revenue, and that the Del  
7                   Mar Company sold to the hotel and garage.

8                   Page 102:

9                   "Mr. Clary, we will stipulate that the Santa  
10                  Fe Land Improvement Company sold water to  
11                  Ed Kincaid; I do not recall the date, I will  
12                  introduce the date."

13                                   **Testimony of Ed Fletcher,**  
14                                   **Trans. page 102, line 9, et seq.**  
15                                   **to line 16.**

16                   **MR. CARPENTER: "Q. During the period -- during any**  
17                   **period of existence of the San Dieguito**  
18                   **Mutual Water Company and the San Dieguito**  
19                   **Water Company?**

20                   **A. Yes, I have already testified that they**  
21                   **sold to 30 or 40 people of the Santa Fe**  
22                   **Land Improvement Company.**

23                   **Q. Ed Kincaid was one of them?           A. Yes, sir**

24                   **Q. Was George Wood?           A. Yes.**

25                   **Q. And a farmer named Bennett another?   A. Yes."**

26                                   **Testimony of W. W. Wilson,**  
27                                   **Trans. page 164, line 24,**  
28                                   **page 165, line 2.**

29                   **"Q. You have lived on this Fletcher land for**  
30                   **five years?           A. Yes, sir.**

31                   **Q. And had water all that time from the Hodges**  
32                   **Reservoir?           A. Yes, sir.**

33                   **Q. Do you own any stock in the San Dieguito**  
34                   **Mutual Water Company?   A. No, sir.**

35                   **Q. Have you at any time?   A. No sir**

36                                   **Testimony of G.W. Doss,**  
37                                   **Trans. pp. 168, 169, 170.**

38                                   **CLAY CARPENTER**  
39                                   **ATTORNEY-AT-LAW**

40                                   **SUITE 410 FARMERS & MERCHANTS BANK BLDG.**  
41                                   **LONG BEACH, CALIFORNIA**

1 Mr. Doss testified that he lived at the present time  
2 in Pacific Beach, and obtained his water from the La Jolla  
3 main, which is Lake Hodges water. That he used to ranch up  
4 north of Del Mar, farmed about 130 acres, 30 acres being under  
5 irrigation.

6 Trans. page 170, lines 11, to line 1, p. 171.

7 "Q. Where did you get the water you used for  
8 irrigation?

9 A. I got it from the Santa Fe Land Improvement  
10 Company from Lake Hodges.

11 Q. Lake Hodges water. With whom did you have ne-  
12 negotiations for the water?

13 A. Mr. McFadden, he supplied me with the water,  
14 and I paid for it to him.

15 Q. To whom were your checks payable?

16 A. Santa Fe Land Improvement Company,

17 Q. All of the time? A. Yes, sir.

18 Q. Was that 30 or 40 acres within any irrigation  
19 district? A. No, sir.

20 Q. It was not? A. Not at that time.

21 Q. Did you own stock in the San Dieguito Mutual  
22 Water Company? A. No, sir.

23 Q. During what years did you get the water?

24 A. Well, I got the water from, I think it was  
25 '20, it was put on there.

26 Q. Sir? A. From 1920, I think, until '23.

27 Q. The years 1920 and 1921?

28 A. It was either '19 or '20 they put the water  
29 on the land.

30 Doss further testified (trans. page 176) that water  
31 was put on his land as soon as the Hodges Reservoir was  
32 completed and water piped from there and (trans. pages 178,  
179), that water was delivered to other lessees, Mr. Ward,  
Mr. Wilson and a few Japs, about four or five  
who leased about 20 acres each.

CLAY CARPENTER  
ATTORNEY-AT-LAW

SUITE 410 FARMERS & MERCHANTS BANK BLDG.  
LONG BEACH, CALIFORNIA

1 Mr. G. M. Ward testified that he leased land from the  
2 Fletcher Syndicate and that (trans. page 187, lines 17-28)

3 "Q. How much were you farming?

4 A. All the way from 15 to 25, some years I did  
5 not have quite so much, some years I had more.

6 Q. Was that leased from the Fletcher Syndicate?

7 A. Yes.

8 Q. Did you have water on it all the time that  
9 you were farming it? A. Yes.

10 Q. From 1920 on? A. Yes.

11 Q. And it was not within an irrigation district,  
12 any irrigation district, was it? A. No.

13 Q. Did you own any stock in the San Dieguito  
14 Mutual Water Company? A. No.

15 Q. Never at any time? A. No."

16 Testimony of Ed Fletcher,  
17 Trans. page 228, lines 3-7.

18 "Q. Was water ever supplied by the San Dieguito  
19 Mutual Water Company to McClure's land and  
20 Crummer's land?

21 A. To whose land?

22 Q. To McClure's land or the Crummer land?

23 A. Water was put on McClure's land.

24 Testimony of E.O. Faulkner,  
25 Trans. page 478, line 18,  
26 page 481, line 16.

27 "Q. Now, Mr. Faulkner, you testified at the  
28 previous hearing that water was never sold to  
29 any tenant or any lands except the Santa Fe  
30 Ranch and the Henshaw-Whitney Syndicate, did  
31 you not?

32 A. Excepting in one instance.

Q. What was that, please?

A. Well, I testified that there was one instance  
where the water was given to a piece of land which  
was adjoining the Henshaw-Fletcher Syndicate lands,  
and that is the McClure land. You spoke of it  
before.

CLAY CARPENTER  
ATTORNEY-AT-LAW

SUITE 410 FARMERS & MERCHANTS BANK BLDG.  
LONG BEACH, CALIFORNIA

1 "Q. Yes? A. Yes.

2 Q. You knew that Ward and Bennett paid for water  
3 for several years, did you not?

4 A. Only by name, yes.

5 Q. Did you know they were tenants on the  
6 McClure land when they were paying for that water?

7 A. I did not.

8 Q. You knew that Nakamoto and two or three other  
9 Japs were buying water from time to time, did you not?

10 A. Only as the bills came in and I had to approve  
11 them every month. I did not know Nakamoto from  
12 Hirasai.

13 Q. Did you not know that they were leasing land  
14 from Margaret McClure?

15 A. I did not. I had no evidence of that.

16 Q. You have been down to the Reservoir known as  
17 the McFadden Reservoir, have you not? A. Yes.

18 Q. You know where it is?

19 MR. CLARY: What Reservoir is that?

20 MR. CARPENTER: The McFadden Reservoir.

21 A. We call it Lockwood Mesa Reservoir No. 1.

22 Q. It is commonly called the McFadden Reservoir,  
23 it is where your caretaker lives.

24 A. McFadden's home is along side of it.

25 Q. You have been there frequently?

26 A. Yes, a great many times.

27 Q. When was the McFadden Reservoir built, about?

28 A. The McFadden Reservoir -- well that reservoir  
29 was built at the time that we entered into the con-  
30 tract with Henshaw and Fletcher for the La Jolla water.

31 Q. About 1919? A. No.

32 Q. 1920?

A. 1921 probably.

Q. Are you not aware that for a great many years the  
land around that reservoir was used by these Japs  
for raising winter vegetables?

CLAY CARPENTER  
ATTORNEY-AT-LAW

SUITE 410 FARMERS & MERCHANTS BANK BLDG.

LONG BEACH, CALIFORNIA

1 "A. Well, I know from the latter part of 1919; there  
2 were only five or six in 1919; from that time on I  
3 knew that the land around about there was being put  
4 into vegetables because I saw them.

5 Q. Weren't you aware that since 1919 that land  
6 has been owned by Margaret F. McClure?

7 A. I don't know when she bought it; all that I  
8 know is that afterwards -- after she got water on  
9 it, or the tenant, rather -- now we did not know  
10 Margaret F. McClure or anybody else in connection  
11 with that, because all we knew was the name of the  
12 party that got the water.

13 Q. Yes. Well from whom did you get a deed for a  
14 right of way for a pipe line for the McClure  
15 property?

16 A. From Ida Gundrum.

17 Q. In what year was that?

18 A. That was in 1917 and it was always called the  
19 Ida Gundrum land for that reason.

20 Q. Is that your main pipe line thru to the Coast?

21 A. Well, it does not go to the Coast. That was  
22 the main -- but that was the main pipe line at that  
23 time, main distributing line. We only had one.

24 Q. Are you sure that deed did not run from Margaret  
25 F. McClure?

26 A. I don't think so, I am pretty sure it did not,  
27 because the name is so firmly fixed in my mind as  
28 "Ida Gundrum", and "Margaret F. McClure". I did not  
29 know there was a woman by that name until today.

30 Q. You did not know that that main pipe line runs  
31 very nearly a mile thru the McClure property?

32 A. If the McClure property is the Gundrum property,  
then, yes, but I did not know, as I told you, anything  
about McClure when we got that right of way thru the  
Ida Gundrum piece. I knew afterwards that it was  
McClure's land, or Mrs. --- Well, I don't know, I  
suppose Mrs. McClure's land, but the water for it was  
always supplied in the name of the tenant, that was  
in every case, all the tenants paid for the water direct.

Q. When did you say you found out that it was the  
McClure land?

A. Well, when the question came up about the water  
that was delivered on it.

Q. When was that?

CLAY CARPENTER  
ATTORNEY-AT-LAW

SUITE 410 FARMERS & MERCHANTS BANK BLDG.  
LONG BEACH, CALIFORNIA

1 "A. I do not remember, in fact, I am not sure  
2 as to what particular tenant was on the McClure  
land.

3 Q But you said a moment ago, Mr. Faulkner, that  
4 you did find out that water was supplied to the  
McClure land? A. Yes.

5 Q When did you find that out?

6 A. Very shortly after the first delivery of  
7 water, very shortly after.

8 Q Then you did not know that water was being sup-  
plied to the McClure land?

9 A. Well, I did not know it was McClure land until --  
10 at the time, but I knew it very shortly after the  
first delivery of water on the land."

11 Testimony of Lewis Weller,  
12 Trans. page 38, line 14, et seq.

13 "Q Do you know of any personal persons having  
14 been supplied with water by the San Dieguito  
Mutual Water Company outside of irrigation  
districts at any time? A. Yes, sir

15 Q. Who?

16 A. There were some Japs in what we called at that  
17 time the Lockwood Mesa; there were white farmers  
that I personally know of.

18 Q Who were the white farmers?

19 A. Amongst others was George Ward, Ed Kincaid,  
20 W. Wilson and a Mr. Doss."

21 Testimony of Ed Fletcher,  
22 Trans. page 91, line 2-11

23 COMMISSIONER SQUIRES: "Q. To whom did the Santa Fe  
Land Improvement Company sell water?

24 A. Oh, to many people.

25 Q Anybody who chose to buy?

26 A. On lands adjacent to the pipe line thru proper-  
27 ties which we controlled. When I say 'we' I am  
speaking as individuals, Mr. Henshaw, the Santa Fe  
Land Improvement Company and myself.

28 MR. CARPENTER: Q. How many customers were sold water,  
29 do you know?

30 A. Oh, during the four or five years, 30, 50 or  
31 60, but Mr. McFadden, the superintendent, is better  
32 able to testify to that.

CLAY CARPENTER  
ATTORNEY-AT-LAW

SUITE 410 FARMERS & MERCHANTS BANK BLDG.  
LONG BEACH, CALIFORNIA

1 Mr. Faulkner (Trans. p. 350, line 5; page 351, line 1)  
2 in trying to explain the actions of the Santa Fe Land Improve-  
3 ment Company and to show that they had limited sales of water  
4 to tenants on the Rancho Santa Fe, then called the San Diegui-  
5 to Ranch, and to the Henshaw-Whitney Syndicate lands and to  
6 no other outsiders, except in one single instance, testified  
7 at a later hearing (trans. p. 489, lines 2-20), that Mr. Hen-  
8 shaw had no stock and merely a contingent interest in the  
9 property of the Company, depending upon whether or not the  
10 Santa Fe Land Improvement Company got back the \$328,000.00  
11 which it had invested plus 6% interest.

12 In view of this fact and the fact that Mr. Clary,  
13 Attorney for the Defendant, stipulated that the Whitneys owned  
14 no stock (trans. p. 216, lines 20-24) water sold to the  
15 Henshaw-Whitney Syndicate lands was not water sold to a  
16 stockholder.

17 The fact that sales were made to non-stockholders,  
18 and the acquiescence in this use of the San Dieguito Mutual  
19 Water Company by the stockholders resulted in a dedication  
20 of this system to public use.

21 Fresno etc. Co. vs. S.P. Co.  
22 135 Cal. 202.

23 Southern C. Ry. Co. vs. Clauson,  
24 138 Cal. 322

25 Katz vs. Walkinshaw,  
26 141 Cal. 136,

27 Crescent Canal Co. vs. Montgomery,  
28 143 Cal. 248,

29 Newport vs. Temescoal Water Co.  
30 149 Cal. 531

31 Barton vs. Riverside Water Co.,  
32 155 Cal. 509

Gurnsey vs. No. Cal. Power Co.  
160 Cal. 709

CLAY CARPENTER  
ATTORNEY-AT-LAW

SUITE 410 FARMERS & MERCHANTS BANK BLDG.  
LONG BEACH, CALIFORNIA

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Burr vs. MacLay,  
160 Cal. 260

Miller & Lux vs. Enterprise etc. Co.  
169 Cal. 415, 423-430

So. Pac. Co. vs. L.A. Mill Co.  
177 Cal. 395, 403,

N.W. Pac. R.R. Co. vs. Humboldt Mill Co.  
32 C.A.D. 673.

(b) The same charge was made for water whether the consumer owned stock or not.

Testimony of Ed Fletcher,  
Trans. p. 224, lines 3-9.

MR. CARPENTER: "Q. That may be. Did the Santa Fe Land Improvement Company charge all alike who used water to put on lands owned or not owned by the stockholders of the San Dieguito Mutual Water Company?

A. Yes, to the best of my knowledge.

Q. They charged the same rate to every one whether they owned stock or not. That is correct?

A. To the best of my knowledge. Yes.

(c) When the San Dieguito Mutual Water Company sold out to the San Dieguito Water Company it submitted to the jurisdiction of the Railroad Commission by filing with the Commission Application No. 10318, for permission to make said transfer and sale, which was a direct admission by the officers and agents of both corporations, as the application was signed by the officers of both, that both of said corporations were public utilities, for the following reasons: (Trans. p. 109, lines 6-9)

(1) The Application (Paragraph VI, states:

"That all of the capital stock, except qualifying shares, of the San Dieguito Mutual Water Company, is owned by the Santa Fe Land Improvement Company, which company purchased the same for the money used in the construction of said Lake Hodges Development; that said construction was for the primary purpose of supplying water to The Atchison, Topeka and Santa Fe Railway Company

CLAY CARPENTER  
ATTORNEY-AT-LAW

SUITE 410 FARMERS & MERCHANTS BANK BLDG.  
LONG BEACH, CALIFORNIA



1           "in that part of San Diego County to increase  
2           transportation by rail; that the transfer of  
3           the legal title to said properties of the San  
4           Dieguito Mutual Water Company to the San Dieguito  
5           Water Company will result in a more efficient  
6           use of the waters of the San Dieguito River, by  
7           reason of the complete unification of all of said  
8           properties."

9           which clearly states a public utility purpose, that of de-  
10          veloping lands tributary to the Santa Fe Railroad for the  
11          purpose of increasing transportation by rail.

12          (2) The Application, (Paragraph VI) second edition,  
13          contains a disclaimer clause to the effect that neither of  
14          said corporations wish to be considered public utilities,  
15          but submission to the jurisdiction of the Railroad Commiss-  
16          ion was a confession of judgment that both were public  
17          service corporations.

18          The Courts of California have, in the following  
19          cases, held that the submission to the Railroad Commission  
20          of a controversy arising under what would otherwise be a  
21          private contract, resulted in a converting of the private  
22          right into a public use.

23                   Francioni vs. Soledad Land & Water Co.  
24                   170 Cal. 221,

25                   Palermo Land & Water Co. vs. Rail-  
26                   road Commission,  
27                   173 Cal. 380.

28                   Van Hoosear vs. Railroad Commission,  
29                   184 Cal. 553,

30                   Brewer vs. Railroad Commission,  
31                   64 C.D. 457.

32                   22 Cal. Jur. 16.

          "Intention to dedicate is also inferred from acts  
          which amount to a submission to the provisions of law which  
          have been enacted for the regulation of public utilities --

CLAY CARPENTER  
ATTORNEY-AT-LAW

SUITE 410 FARMERS & MERCHANTS BANK BLDG.  
LONG BEACH, CALIFORNIA

1 as for example, an application by the proprietor to the  
2 constituted authorities to have rates fixed, or to discontinue  
3 service or contracts with patrons and consumers that rates shall  
4 be such as are fixed by law. And a conclusion that a business  
5 or enterprise is a public utility is very plainly indicated  
6 by the fact that the proprietor is a corporation which orga-  
7 nized under a statute relating to public utilities, or which  
8 has exercised the power of eminent domain."

9 (d) Assessments made by the San Dieguito Mutual Water  
10 Company were carried by the Santa Fe Land Improvement Company  
11 as mere book transactions.

12 Mr. Faulkner testified (trans. pages 332-333) that he  
13 was vice-president of the Santa Fe Land Improvement Company  
14 and Secretary-Treasurer of the San Dieguito Mutual Water Com-  
15 pany and that the expenses of the Mutual Water Company were  
16 taken care of by assessments levied on the Santa Fe Land Im-  
17 provement Company in the following manner:

18 Testimony of E.O. Faulkner,  
19 Trans. page 334, line 2,  
page 335, line 7.

20 "Q. Can you state from your own knowledge how  
21 the expenses of the Mutual Company were met?

22 A. By assessments.

23 Q. Have you a record of those assessments?

24 A. I have.

25 Q. Do they appear in that book which you have,  
that minute book?

26 A. They do.

27 Q. Have you taken from that minute book a list  
28 of the assessments?

29 A. I have.

30 Q. Will you state what they were, please, giving  
the date and the amount of each assessment, and  
31 the parties who paid it?

32 A. And what?

CLAY CARPENTER  
ATTORNEY-AT-LAW

SUITE 410 FARMERS & MERCHANTS BANK BLDG.  
LONG BEACH, CALIFORNIA

1 Q. The amount of each assessment and the payment  
2 of it, if it was paid?

3 A. The first assessment, marked "Assessment No.1"  
4 was declared on November 18, 1920.

5 MR. TAYLOR: November, Mr. Faulkner.

6 A. November 18, 1920, for \$30,000, and was paid  
7 by the Santa Fe Land Improvement Company shortly  
8 after the notice was served on it. Assessment  
9 No. 2 was made September 13, 1921, for \$18,000,  
10 and was paid in just the same way.

11 Q. By whom?

12 A. By the Santa Fe Land Improvement Company, in  
13 each case by the Santa Fe Land Improvement Com-  
14 pany. Assessment No. 3 was made December 28,  
15 1922, \$42,000.

16 Q. I did not get that date, Mr. Faulkner.

17 A. December 28, 1922, \$42,000. and paid by the  
18 Santa Fe Land Improvement Company. Assessment  
19 No. 4, made December 27, 1923, for \$16,000, and  
20 paid by the Santa Fe Land Improvement Company.  
21 Assessment No. 5 was made December 16, 1924,  
22 for \$17,000, and was paid by the Santa Fe Land  
23 Improvement Company."

24 MR. CLARY: "Are those all the assessments that have  
25 been levied in the history of the Company?"

26 A. Those are all the assessments and in each  
27 case have been made at the end of each year,  
28 excepting that 1920 was the first one."

29 On Cross-Examination, testified that assessments levied  
30 by San Dieguito Mutual Water Company were paid by the Santa Fe  
31 Land Improvement Company out of the general fund of the Santa  
32 Fe Land Improvement Company.

Testimony of E.O.Faulkner,  
Trans. p. 364, line 1,  
p. 365, line 1,

BY MR. CARPENTER: "Q. Mr. Faulkner, relative to the  
assessments which you stated were levied and  
paid by the --- assessments which were levied by  
the San Dieguito Mutual Water Company, those  
were paid by the Santa Fe Land Improvement Com-  
pany, were they not?"

A. They were."

CLAY CARPENTER  
ATTORNEY-AT-LAW

SUITE 410 FARMERS & MERCHANTS BANK BLDG.  
LONG BEACH, CALIFORNIA

1 "Q. All of them? A. Yes, sir.

2 Q From what funds?

3 A. From its own funds.

4 Q From its own funds. How were payments made?

5 A. By voucher.

6 . . . . .

7 Q They were not drawn on the San Dieguito  
8 Mutual Water Company fund, that is, from  
9 moneys received from the sales of water,  
were they?

10 A. They were not.

11 Q But were paid from the general fund of the  
12 Santa Fe Land Improvement Company?

13 A. That is so."

14 Testimony of E.O.Faulkner,  
15 Trans. p. 373, line 17,  
16 p. 374, line 1.

17 BY MR. MAC KALL:

18 "Q. Now in regard to the assessments you spoke  
19 of, Mr. Faulkner, that were paid by the Santa  
20 Fe Land Improvement Company each year, do those  
21 correspond in any manner to the amounts of water  
22 which were delivered to the Santa Fe Land Im-  
23 provement Company each year?

24 A. They had no bearing whatever with the water.  
25 Those assessments were based on the total amount  
26 that the Mutual Water Company had paid out for  
27 repairs, maintenance and taxes of its system  
28 during the year. The auditor made out a state-  
29 ment at the end of December of each year, and  
30 we had a directors' meeting and authorized an  
31 assessment and the legal notice was served on  
32 the Santa Fe Land Improvement Company and they  
paid the voucher, but it had no reference what-  
ever to the delivery -- to the amount of water  
that we received."

Testimony of E.O.Faulkner,  
Trans. p. 474, line 21, to  
p. 476, line 14.

MR. CARPENTER: "Mr. Faulkner, in your direct examination  
you testified that those assessments were paid  
by check. That was not a fact, was it?

A. I so testified, and with the consent or appro-  
val of the Commission and the gentlemen here, I  
would like to make a correction.

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1 "Q. Will you just explain that, please?

2 A. I stated that the assessment was made  
3 and the amount paid by the Santa Fe Land  
4 Improvement Company on a voucher. At the  
5 time I made that statement I was fully under  
6 that opinion but when I went back to the office  
7 and called for the vouchers the auditor brought  
8 it to my attention, which I noticed in a moment,  
9 that the Water Company had no floating capital,  
10 no working capital, rather, and each month,--  
11 instead of the Santa Fe Land Improvement Com-  
12 pany advancing a year's operating expenses to  
13 carry it through the year and then levying an  
14 assessment for the exact amount at the end of  
15 the year, the Water Company-- the Santa Fe  
16 Land Improvement Company advanced each month to  
17 the Water Company sufficient money to carry it  
18 along and pay all its operating and maintenance  
19 bills; that advance was made by voucher and  
20 charged against the Water Company in a memo-  
21 randum book; then at the end of the year in  
22 the month of December the auditor would ad-  
23 vise me what the total operating and maintain-  
24 ing expenses of the Water Company amounted to  
25 and we would then call a meeting of the directors  
26 of the Water Company and levy an assessment in  
27 the way directed by the law and notify the  
28 Santa Fe Land Improvement Company -- notify  
29 the stockholders to that effect and they would --  
30 the Santa Fe Land Improvement Company would then  
31 pay the assessment by crediting against the ad-  
32 vances the amount of that assessment and, in that  
way, wipe out the monthly charges by the payment  
of the assessment at the end of the year.

Q. They were mere book transactions?

A. Mere book -- mere advances of cash to carry  
the Water Company along rather than -- which I  
think is customary in other Mutual Water Compa-  
nies -- they levy an assessment in advance to  
apply on operating expenses and in that way the  
Water Company always had sufficient money to  
carry it along and it was cleared off in an  
assessment account at the end of the year.

Q. But no money was in fact paid on the assess-  
ment at the time the assessments were levied,  
merely a credit was made on the books?

A. A credit was made on the books because the  
assessment had practically been paid in monthly  
installments.

MR. WRIGHT: And in advance?

A. In advance, yes.

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1 MR. CARPENTER: "And the Land Company's money, the Santa  
2 Fe Land Improvement Company's moneys were all  
3 kept in the treasury at Topeka, as I understand  
4 it?"

5 A. No, we had a treasury, a branch treasury  
6 here, and while the main books were kept in  
7 Topeka, yet we had an assistant secretary here  
8 and an assistant treasurer here and at times  
9 two vice-presidents here, one Mr. Hodges and  
10 the other myself, and then we had, in the bank  
11 in Los Angeles and also in San Diego, the Santa  
12 Fe Land Improvement Company carried an account  
13 for taking care of local receipts and expendi-  
14 tures".

15 Mr. Faulkner, when recalled after a subpoena duces  
16 tecum for the checks and records had issued and was served  
17 on him, on Cross-Examination, testified that he was mistaken  
18 when he previously testified that the assessments levied by  
19 the San Dieguito Mutual Water Company were paid by the check  
20 of the Santa Fe Land Improvement Company, and that in truth  
21 and in fact, they were all mere book transactions, mere cash  
22 advances to carry the water company along, and that the ac-  
23 count was carried in Topeka, Kansas, where the Santa Fe Land  
24 Improvement Company had its Home office along side of and close  
25 to its parent, The Atchison, Topeka and Santa Fe Railroad.

26 That the Atchison, Topeka and Santa Fe Railroad was  
27 more than an interested spectator is shown by the following  
28 testimony of E.O. Faulkner.

29 Trans. page 477, line 4, to  
30 page 478, line 17.

31 MR. CARPENTER: "The Railway Company was the Company I  
32 asked, just as I intended, Mr. Clary.

33 A. Which stock did you mean the Railway  
34 Company owned?

35 Q. In the Santa Fe Land Improvement Company?

36 A. Oh yes, they owned all of the stock of the  
37 Santa Fe Land Improvement Company, I beg your  
38 pardon, I thought you --

39 MR. CLARY: We stipulated that in the beginning.

40 CLAY CARPENTER  
41 ATTORNEY-AT-LAW

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1 "A. I thought you meant the stock of the Mutual  
2 Water Company.

3 MR. CARPENTER: And the shares of stock of the San Dieguito  
4 Mutual Water Company were held by the Santa Fe  
5 Land Improvement Company?

6 A. That is right, sir, that is correct.

7 Q. Now the San Dieguito Mutual Water Company and  
8 the Santa Fe Land Improvement Company occupied  
9 the same offices here in Los Angeles, did they not?

10 A. Yes.

11 Q. And the officers were practically the same  
12 except as to the president of the Water Company,  
13 that is true, is it not?

14 A. The men acted in a double capacity.

15 Q. Yes.

16 A. I was secretary-treasurer of the Water Com-  
17 pany and vice-president of the Land Company,  
18 and Mr. Maxwell, for a time was auditor of the  
19 Water Company and assistant auditor of the Land  
20 Company, and then Mr. Olmstead succeeded to his  
21 duties. It was for the purpose of economy.

22 Q. What other business is the Santa Fe Land Im-  
23 provement Company engaged in.

24 A. Well, anything that will help the benefit  
25 of the Atchison, Topeka and Santa Fe Railway Company.

26 Q. And I take it that was the reason the money  
27 was advanced to the Water Company was to increase  
28 transportation by rail for that Company, was it not?

29 A. They bought the stock of the Water Company for  
30 that purpose.

31 Q. Yes.

32 A. Oh, I suppose there was a double purpose; it  
benefited the country and in benefiting the  
country, it benefited the Santa Fe.

Q. The primary purpose was to increase their trans-  
portation by rail, isn't that correct?

A. Well, they had the Santa Fe Ranch, the Rancho  
Santa Fe, on their hands that they had bought for  
planting eucalyptus trees for the purpose of raising  
ties, and it was not a success, and then they had  
to do something with the San Dieguito Ranch.

Q. Yes.

A. And in order to make the most money and get the  
greatest benefit out of it they went into this water

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1 development, which was the first of its kind  
2 they had ever gone into.

3 And Mr. Faulkner further testified (trans. page 482,  
4 line 9, to page 483, line 11) that the money for building the  
5 Hodges Dam and La Jolla pipe line came from the Santa Fe  
6 Land Improvement Company, and that he never worried where the  
7 Land Company got the money as long as his drafts were honored.

8 (e) The San Dieguito Mutual Water Company never  
9 refused to sell water to any owner or tenant  
10 within the area served by its pipe lines.

11 Testimony of Ed Fletcher,  
12 Trans. p. 231, lines 5-10.

13 MR. TAYLOR: "Q. Did any one else ever apply and were  
14 refused?"

15 A. I don't remember of any.

16 Q. Had there been you would have known of it?

17 A. Yes, sir.

18 Q. The applications would have been made to  
19 you, would they not? A. Yes, sir."

20 In the Thayer and Allen cases relied upon by the  
21 defendants in their contention that the defendant company  
22 was not a public utility, there were special facts which in-  
23 fluenced the Court's decision, facts no counterpart of which  
24 are present in the case before your Honors. Thus, in the  
25 Thayer case, the Court found a clear intent to sell only to  
26 certain selected purchasers, and to refuse to sell to other  
27 persons within the area generally served. No such fact ex-  
28 ists here, for it seems to be admitted that service has al-  
29 ways been rendered to any and all persons who have ever occu-  
30 pied lands within the area served, with no attempt to pick  
31 out certain individuals and refuse service to others. Again  
32 in the Allen case, in addition to the company's retention of  
choice as between purchasers, it received a valuable

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1 consideration for contracts at stipulated rates, whereas,  
2 in this case there is no evidence that this company ever  
3 received a premium of any character in connection with its  
4 sale of water, but served all alike at the same rate, whether  
5 they were stockholders or nonstockholders.

6 (f) Water was furnished the City of San Diego  
7 and the Del Mar Water, Light & Power Com-  
pany as a public utility service.

8 (1) Water was furnished to the City of  
9 San Diego.

10 Testimony of Ed Fletcher,  
11 Trans. page 218, line 22,  
page 219, line 1.

12 "Q. Now did you sell water to the City of San  
13 Diego in addition to those other contracts?

14 A. Mr. Henshaw and I purchased water from the  
15 Santa Fe Land Improvement Company and sold it  
16 ourselves to the city under a contract.

17 Q. How much was paid by the city to you?

18 A. Ten cents a thousand gallons delivered to  
19 the city limits.

20 Q. How much per day, if you recall.

21 A. Run around two million gallons a day,  
22 \$200 a day on the average.

23 (2) Water was furnished to the Del Mar  
24 Water, Light & Power Company and by them  
25 furnished to the Atchison, Topeka and  
26 Santa Fe Railroad.

27 The articles of incorporation of the Del Mar Water,  
28 Light & Power Company authorized it to act as a public utility,  
29 (Plaintiff's Exhibit 10).

30 The testimony of S.D. Fraser, superintendent of the  
31 Del Mar Water, Light and Power Company, showed that there  
32 were 64 consumers and that 94 meters were installed, (Plain-  
tiff's Exhibit 12).

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1 Trans. page 508, line 25 et seq.

2 "A. This list covers consumers of the Del Mar  
3 Water, Light & Power Company, a corporation,  
4 as of July 1, 1925, There are 64 consumers  
5 and 94 meters installed."

6 He further testified that the "Stratford Inn", one of  
7 the consumers, had six meters which served concessions operated  
8 by the Stratford Inn Corporation (trans., page 509, lines 4-10).

9 With reference to the service of water to the Atchison,  
10 Topeka and Santa Fe Railroad Company, he testified as follows:

11 Trans. page 509, lines 14-26.

12 "Q. You serve, also, do you not, in addition to  
13 those named in this list, the Atchison, Topeka  
14 and Santa Fe Railway Company?

15 A. We have no records on our books, I understand  
16 we are now serving them.

17 Q. The water is without charge to the Railroad  
18 Company?

19 A. Without charge to the Railroad Company.

20 Q. And is delivered to the Railroad Company at  
21 Del Mar? A. It is.

22 Q. Through your system, and that is water from the  
23 Lake Hodges Reservoir, is it not?

24 A. Yes, sir.

25 Q. Is all the water supplied by the Del Mar Water,  
26 Light & Power Company from Lake Hodges Reservoir?

27 A. Lake Hodges is our only source of supply.

28 (3) The San Dieguito Mutual Water Company received  
29 additional income and revenue from the fishing  
30 and boating privilege on Lake Hodges.

31 This, according to the testimony of E.O. Faulkner, amounted  
32 to only \$50.00 a year, but in the report of the San Dieguito  
Water Company to the City of San Diego (Plaintiff's Exhibit  
13), it was enumerated as a valuable asset of the com-  
pany and therein stated to be worth \$6000.00 a year.

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MR. TAYLOR: "Did the San Dieguito Mutual Water Company  
at any time have any other source of income?"

A. They got a few dollars from Colonel Fletcher for leasing the fishing and hunting privilege on Lake Hodges, whatever he could get out of people, and he issued more passes than anything else. Whatever he could get from people that were fishing on the lake he gave the Mutual Water Company 25 per cent.

Q. What would be the approximate yearly average of that amount received by the company for that privilege?

A. Until the middle of 1922 he had reserved those rights, in the earlier transactions, those rights to himself, but -- and Mr. Henshaw, the two of them, -- but in 1922, in May, I think it was, they relinquished those rights and then the Mutual Water Company made a contract with Fletcher that he could go ahead and handle it, stand all the expenses, provide boats and everything else and give us 25 per cent., and -- well it would not go very far, what we got at the end of the year, because the Colonel himself did not get very much. I don't think we got \$50 a year out of it".

In looking over Plaintiff's Exhibit 13, it is interesting to note that among the revenues from the varied activities of the Defendant Company, the following items are listed:

Pipe line rentals, per annum.....	\$1500.00
Rental of pipe line from Del Mar to La Jolla by City of San Diego, .....	19800.00
Hunting and fishing privileges, first year.....	6000.00
Rental from use of land, first year .....	6000.00

The corporate separation of the Santa Fe Land Improvement Company and the San Dieguito Mutual Water Company was merely formal, and was a pure fiction.

The San Dieguito Mutual Water Company functioned and was merely the legalized Water Department of The Atchison, Topeka and Santa Fe Railway Company, thru its subsidiary, Santa Fe Land Improvement Company.

The San Dieguito Mutual Water Company was mutual in name, only, and its mutuality was but a masquerade, adroitly

1 devised to conceal the fact that it was a public utility.

2 All of the evidence of the Defendant Company, both  
3 oral and documentary, consists of recitals that it is not  
4 and does not intend to be a public utility, but these dis-  
5 claimers and protestations are of small avail in the face  
6 of the positive evidence of the overt acts of dedication to  
7 public usage.

8 An honest man does not need proclaim his honesty, nor  
9 an innocent man his innocence. Only the guilty seek to  
10 alibi themselves.

11 III Hamlet, II.

12 "The lady doth protest too much, me thinks".

13  
14 In the present instance, we submit that ample evidence  
15 has been presented to Your Honors to constitute a basis for  
16 a conclusion, and to justify a finding that there had been  
17 a dedication of this water system to public use.

18 The testimony shows that the corporation was formed  
19 "to acquire by purchase, lease, appropriation, development,  
20 and by any other lawful means, water, water rights, water  
21 bearing lands, and to hold, own, maintain, operate and use the  
22 same for all useful purposes;" that the sale of water to non-  
23 stockholders was contemplated, and that the company actually  
24 sold to non-stockholders from its existence and has ever con-  
25 tinued so to do; that it never attempted to pick out particu-  
26 lar individuals, but sold to all who appeared and applied,  
27 within the area within which its service was rendered, and  
28 that the company's stock was never treated as representing or  
29 entitling its owners to any particular amount of water, and  
30 that there has never been any corresponding relation between  
31 the number of shares held and the water consumed by any  
32

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1 individual.

2 All these circumstances justify the conclusion that  
3 this water system was dedicated to the public use within the  
4 area within which its service was rendered, and that it is  
5 subject to public regulation.

6  
7 There are several distinct classes of water use and  
8 distribution which have been recognized by law:

- 9 1. Private use by the owner of the water on his  
10 own land ( WHICH THIS COMPANY IS NOT)
- 11 2. Mutual Water Companies, - use in common by  
12 the co-owners of the water or distributing  
13 system ( WHICH THIS COMPANY IS NOT.)
- 14 3. Private distribution under contract, as in  
15 the case of Allen vs. Railroad Commission,  
16 179 Cal. 68 ( WHICH THIS COMPANY IS NOT)
- 17 4. Private distribution by distinct intent, as  
18 in the case of Thayer vs. California Develop-  
19 ment Company, 164 Cal. 117 (WHICH THIS COMPANY  
20 IS NOT).
- 21 5. Public utility water service (WHICH WE BELIEVE  
22 THIS COMPANY MUST BE HELD TO BE).

23 In the words of the Railroad Commission, in the case of

24 Los Molinos Citrus Farms Co. et al., vs.  
25 Coneland Water Company, Decision 2742,  
26 Sept. 4, 1915,  
27 S C.R.D. 24,  
28 P.U.R. 1915 F, 563.

29 "If the arguments which are being urged before the  
30 Railroad Commission to show that this and that and the other  
31 corporation is not a public utility, are carried to their  
32 logical conclusion, almost every utility in this state can  
withdraw itself from public regulation, at least, with ref-  
erence to service to new customers, by the simple device  
of refusing to serve any new customers unless the customer  
signs a contract, and then claiming by this device the

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1 utility has withdrawn itself with reference to such custo-  
2 mer from public regulation. To the argument that the company  
3 under its articles of incorporation, is a public utility,  
4 the answer would be made that the articles of incorporation  
5 are not conclusive and that they simply give the corporation  
6 the power, if it desires to exercise the same, of engaging  
7 in a public utility business. To the argument that the corpo-  
8 ration has secured a franchise authorizing it to serve the  
9 territory in question, the answer would be made that this  
10 franchise simply confers a right which the utility may or may  
11 not exercise as it sees fit. To the argument that the corpo-  
12 ration has held itself out as being a utility and has in  
13 the most positive way, in its relations with the public au-  
14 thorities, admitted that it is a public utility, the answer  
15 would be that admissions count for nothing, and that, not-  
16 withstanding admissions and holdings out, the question must  
17 be inquired into to ascertain whether there has been some  
18 dedication in addition to these other facts and apart from  
19 the provisions of the Constitution and Statutes of this  
20 state. If these arguments are to prevail, it will not only  
21 be possible for each existing water, gas, electric and tele-  
22 phone utility to withdraw itself from regulation with refer-  
23 ence to new customers, but it will also be possible for each  
24 new water, gas, electric and telephone utility to withdraw  
25 itself entirely from public regulation, by refusing to serve  
26 any one who does not sign a contract, and then urging that by  
27 insisting upon the signing of contracts, the company has  
28 exercised a right of selection, which is inconsistent with  
29 public utility obligation."

30  
31  
32  
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1            "That the Railroad Company cannot consistently take  
2 any such position unless compelled to do so by a final  
3 ruling of the Courts to the effect that the constitutional  
4 and statutory provisions under which it is exercising its  
5 authority, are in violation of rights conferred by the Federal  
6 Constitution, is, of course, clear.

7            In conclusion, the evidence presented to Your  
8 Honors conclusively proves that the defendant, the San  
9 Dieguito Water Company, is not now and never has been a  
10 mutual water company.

11           For all of the above and foregoing reasons, I re-  
12 spectfully submit that the defendant, the San Dieguito Water  
13 Company, should be by your Honorable Board, adjudged a  
14 public utility service corporation.

15  
16    Respectfully submitted,

17  
18        
19    Attorney for Complainants.  
20  
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# Ed Fletcher Papers

1870-1955

MSS.81

Box: 46 Folder: 11

**Business Records - Water Companies - Volcan  
Land and Water Company - San Dieguito System  
- San Dieguito Mutual Water Company - Before  
Railroad Commission: suit: Milton A. Smith  
Realty Co., Inc., vs. San Dieguito Water Company**



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