July 8, 1915.

Mr. William G. Henshaw,
Volcan Land & Water Co.,
Mills Building,
San Francisco, California.

Dear Sir:

I regret the delay in complying with your request for an opinion on the condition of the water rights of the Volcan Land and Water Company, but I have been involved in litigation affecting the immediate right of water users in the Imperial Valley to secure water which required my undivided attention and could not be postponed, hence my delay in applying myself to the Volcan question.

While you are undoubtedly personally very familiar with all the facts surrounding your system and the acquisition of its rights, yet in order that we may be able to apply here the legal principles to the facts involved it will be necessary for me to set out the facts as I understand them. I have secured this information partly by observation but mainly from reports of your representatives, and in so far as I may be wrong in my understanding of the facts this opinion might have to be modified.

In order that I might have the data presented in a concise form, I asked your representatives at San Diego to furnish me data under the following heads:

1. Copies notice of appropriation at all points of diversion, with date of filing and recordation.

2. Copies of contract with Escondido Water Co., together with all correspondence with Departments of the Federal Government with relation to rights of way across Indian Reservation.

3. Copies of report of Lippincott, O'Shaughnessy and Harroun on Volcan system.

4. General outline of system, with historical and other data, so as to give general understanding, without detail, of the system.

5. Warners Ranch Dam: Capacity; cost of dam; date of beginning of work; amount expended to date; number of men now employed and in what capacity; also give note as to continuity of employment and fluctuation in number of men, with reasons therefor.

   Similar information for other dam sites, conduits, and other portions of the system.

6. Additional information, showing relationship between the amount of water that can be impounded in various dam sites, at proposed heights, to total flow of river at said points.

   Likewise, relationship of quantity of water, if any, originating in the catchment area of each dam in excess of the capacity of such dam to

   a. Adjudicated claims below the point of such dam site
   b. Asserted claims.

7. Claims of every character, so far as known, on the streams involved adverse to the Volcan Co., with amounts, and such historical data as is available.

8. Information on Sawday Tunnel case.

9. Overhead expenses, (engineering, etc.)

10. Copies of contract and information bearing upon the negotiation with the City of San Diego, showing length of time involved.

Not all of this information has been furnished, but sufficient is at hand generally to determine the legal status.

1. HISTORICAL OUTLINE OF THE VOLCAN SYSTEM.

I am informed that the initial project of the San Luis Rey River was a power project of the Pacific Light and Power Company of Los Angeles proposing the Warners Reservoir and the first five miles of the present proposed Warners canal but continuing the same to a total length of 14 miles to a point above the Rincon Indian Reservation where a fall of 1600 feet was to be secured. Under this project riparian rights on the lower river were largely purchased. In December, 1910, your interests acquired the riparian holdings of the Pacific Light and Power Company and their quarter interest in the Warners ranch and also purchased the remaining three-quarter interest in this ranch owned by other people. Under this transfer you acquired the riparian rights below the proposed point of diversion on Warners ranch theretofore held by the Pacific Light and Power Company. A series of water filings were posted from March 16, 1911, to May 15, 1913.

During this time it was decided to make the waters of the Santa Ysabel a part of the project, and to that end you became the successor of the Linda Vista Irrigation District which was itself the successor of the Pamo Water Company. Thereby you acquired ownership of the Pamo Reservoir site and 80 acres in the Santa Maria Reservoir site together with certain construction mainly represented by a wagon road, about 6 miles long, costing about $7,000 and some exploration work at the Pamo dam site. The original surveys of the Pamo Water Company were secured from C. S. Alverson. Filings were made on the Santa Ysabel River on June 13, 1911, at

the Pamo dam site, and on December 14, 1912, at the Sutherland dam site on lands owned by yourself and on February 21, 1914, a filing was made at the Carroll dam site on public lands. On May 7, 1913, filings were made on the Black Canyon tributary of the Santa Ysabel.

The general plan was to impound the water of the San Luis Rey above the Warners dam, conduct it by way of the Warners Canal through the divide between the San Luis Rey watershed and the Santa Ysabel watershed dropping it into the Pamo Reservoir and utilizing the 1500 feet drop at that point, thence by way of the Pamo conduit the water was to be taken to the San Clemente Reservoir where it could be used upon the Linda Vista Mesa or conducted to the City of San Diego and surrounding territory. In your filings, however, the City of San Diego was not designated as a place of intended use. The waters impounded at the Sutherland Reservoir located upon the Santa Ysabel above the Pamo were to be taken either down the channel of the Santa Ysabel to the Pamo Reservoir and thence into the Pamo conduit for the uses above set out or conducted by the proposed Ramona conduit into the Santa Maria watershed, thence into the proposed Santa Maria Reservoir on that stream and thence into the Pamo conduit. The Carroll dam site, located on the Santa Ysabel River below the Pamo Reservoir, was to be utilized for impounding the waters of the Santa Ysabel River and thence by pumping such waters were to be taken upon the Linda Vista Mesa or through the proposed Carroll-University pipe line to the City of San Diego.

Your proposed system, therefore, may be considered to be made up of the following possible units:

a. Warners Reservoir, Warners conduit, Pamo Reservoir, Pamo conduit, San Clemente Reservoir.

This is the simplest unit that can be considered.

b. Warners Reservoir, Warners conduit, Sutherland Reservoir conveying the water by means of the natural bed of the Santa Ysabel to the Pamo Reservoir; Pamo Reservoir, Pamo conduit to San Clemente Reservoir.

c. Warners Reservoir, Warners conduit, Pamo Reservoir, Pamo conduit, Sutherland Reservoir, Ramona conduit, Santa Maria Reservoir to Pamo conduit thence to San Clemente Reservoir.

d. Warners Reservoir, Warners conduit, Pamo Reservoir, Sutherland Reservoir, bed of Santa Ysabel River to Pamo Reservoir, bed of Santa Ysabel River to Carroll Reservoir and the development from that point.

Only in this latter way, apparently, can the Carroll Reservoir be made to become a part ofyour main system entitling work to be done thereon to be considered work upon the entire system.

The Carroll Reservoir was filed on early in 1914 mainly, I understand, because of the possibility of interference and prior construction presumably by the City of San Diego at this site. The Volcan Company having no water right below the site of the proposed Pamo dam, the water from the area between the two dams

could be used to shut off this Company from a market at San Diego or other points desiring water that could be furnished from such catchment area. In December, 1913, the City of San Diego informally, and soon thereafter formally, through its Water Commission made overtures to your Company looking to the purchase of your holdings. You issued an option on May 14, 1914. A report jointly to the City and your Company was prepared by Mr. R. E. Harroun on the value of the property. A few month ago Messrs. O'Shaughnessy and Lippincott were asked by the City to report on the value of the property and they have so reported, but such reports have not been furnished to me. However, their consideration will not be necessary in determining these legal questions.

The proposition of the City modified to a certain extent the original plan of the Company. It consisted of building that portion of the Warners conduit to the divide, pouring the water into the Santa Ysabel and excluding the Pamo Reservoir, to allow the water to flow down the natural channel to Carroll Reservoir. At this point a pumping plant was to be erected for the purpose of delivering the water to the City. The City's desires in this matter were largely dictated by the water shortage which has now been relieved. These negotiations, however, and the attendant uncertainty as to the final construction which your proposed purchaser would desire has had the effect of delaying your construction.

It is important, in my opinion, to consider separately your status on the San Luis Rey and the Santa Ysabel.

Above the point at which the Warners dam is to be constructed your Company owns the large Warners ranch, and the Federal government is the only other riparian owner of consequence above this point. The physical conditions of the country make it unlikely that anyone hereafter using riparian water to which such one is entitled by reason of riparian ownership above the Warners dam should at all interfere with your impounding water at this point, or should to any appreciable degree diminish the supply possible to be impounded in Warners Reservoir by using this water on lands owned by them above this point. Below the Warners ranch there are the Indian Reservations, the Escondido diversion and the City of Oceanside. In my opinion your arrangements below the Warners dam on the San Luis Rey River are such that you need fear no interference with your right to impound all the water that can be impounded at that point unless you should, without protest, permit someone to divert water below Warners ranch for five years and appropriate the same to some beneficial purpose. The contest of the City of Oceanside, in my opinion, will amount to very little. Your problem, therefore, below Warners Reservoir is simple, as far as the San Luis Rey River is concerned, so long as you prevent rights growing up now or in the future conflicting with your right to impound, which by prescription may become effective against you. Warners Reservoir being upon private lands and the water being controlled by you by riparian ownership, it follows that you may, as far as the right here to impound is concerned, defer any action indefinitely. Such right could only be affected by the provision of the Water Commission Act decreeing that the failure of a

riparian owner to use water for ten years shall be deemed conclusive against his need for such water. If this provision is constitutional you would have 10 years from the time of its passage within which to begin your work. However, it was my opinion when this Act was drawn and still is that this provision is unconstitutional and beyond the power of the Legislature to enact.

It should be clearly understood that in discussing your right to impound the water at Warners Reservoir and to prevent others from taking the water from this stream system, I am in no wise discussing your right to use rights of way over government land below this point which may be necessary to make your right to impound this water at the Warners Reservoir of any value.

I have not in setting out my conclusion with reference to your Warners Reservoir analyzed the facts surrounding the amount of water to which the Indian Reservations, the Escondido Company and Oceanside are entitled. These are mere questions of fact of an engineering nature, and you cannot withhold at Warners water to such an extent that these uses may not be served. However, your plan contemplates recognizing these rights. Your contract with the Escondido Company will not permit these users to go beyond the terms of that contract in the development of water. Likewise,from discussion with your engineers and reading the correspondence between your Company and those representing the Indian service, I am of the opinion that no complications

will arise in this direction. The City of Oceanside cannot interfere with you if the engineering facts are as your engineers state.

Your rights to impound water on your own land at the reservoir sites owned by yourself are the same on the Santa Ysabel as on the San Luis Rey. Always, of course, those rights are affected by the rights below the point of impounding. Your rights to conduct the water when impounded over government land, however, are rights that will vest or divest in accordance with your compliance with the Federal statutes and the conditions of your permits. It is necessary, therefore, that we go further into the facts with relation to your condition on the Santa Ysabel River at the various dam sites and as regards your required conduits.

Warners Conduit.

Surveys were made of the Warners conduit by W. S. Post for the Pacific Light and Power Company in 1905 and 1906 and also in 1911. From March 12th to April 29th, field surveys were made on this conduit at a cost of about $800. From March, 1912, to July, 1913, Mr. Hawgood was engaged in the preparation of right of way maps and in securing their acceptance by the Interior Department. During this period, Mr. W. L. Huber, District Engineer of the Forest Service, under date of April 19, 1912, reported to the Forester on the right of way of Warners Canal and Pamo Canal. Also during this period Mr. Hawgood placed a party in the field and resurveyed certain portions of the line securing additional topography. The cost of this work has not been given me. On April 1, 1913, a camp was established near the fifth mile of the Warners conduit

and work started upon the construction road one mile in length to connect the county right of way with the portal of the long tunnel. This was prosecuted until July 8th when the workmen were transferred to Warners dam tunnel. The total expenditure for constructing roads in connection with the Warners conduit to date has been $2268 without overhead. On November 17, 1913, work was begun on the excavation of the first mile of the Warners conduit. This was completed on March 5, 1914. The total expenditure was $2960. Since that time no work has been done directly on the Warners conduit except on the Warners dam tunnel.

Your Company attempted to secure a right of way by way of the Warners conduit for power as well as for irrigation and domestic uses. However, due to the fact that such right was not granted before 1911 when the State Water Power bill was passed, a protest was lodged with the Forest Service against your being granted a right of way for power service and your application was modified and you finally received a permit for a permanent right of way for irrigation and domestic uses only.

Pamo Dam.

The water filing at the Pamo dam was posted June 13, 1911. The land on which the notice was posted was owned by the Linda Vista District, subsequently transferred to your Company. About October of the same year a camp was placed at the dam with a foreman and two men who made exploration pits at the dam site. This foreman and never less than one man have remained constantly at work on this dam until date. In March, 1912, in addition to

the men already mentioned, an engineering party was engaged in the survey of the dam site and the location of the Pamo conduit. These surveys were completed about May 1, 1912. Soon after this date the application for rights of way, including 40 acres in this reservoir site, was filed but was not granted until July, 1913. In the months of May and June, 1913, the foreman employed about six men in the exploration for bed rock in the stream channel at two different sites. In November, 1913, a core drill was installed with a gang of six men which made complete exploration of the dam site. This work continued to May, 1914. In 1913, the construction road originally built by the Linda Vista Irrigation District was repaired and extended, and has been maintained in 1914 and 1915. During the entire period a resident hydrographer was maintained at Pamo dam site, and the proportionate share of hydrographic expense for this station from February 11th to date has been about $30.00 per month. At present $4.75 per day is being expended at this dam site.

Pamo Conduit.

Certain surveys were made on this conduit in February and March, 1911. In July, 1911, J. B. Lippincott was employed to prepare the application to the Department of the Interior for rights of way of the Warners and Pamo canals, the surveys for this purpose being practically completed from the former surveys purchased and additional field work of February, March and April, 1911. This work and expense of this application continued through July, August, September and October, 1911. From September 11th to

14th a field survey was made to secure further data for the application. On November 13, 1911, a field party was organized to locate the Pamo conduit, take cross-sections and prepare estimates of yardage and plans for structures. This continued until February 1, 1912. The total expenditure made was approximately $4000. Work on the repair of the construction road parallel to the first five miles of this conduit was carried on in the fall of 1911 and the spring of 1912. The right of way application was filed early in 1912 and was granted in July, 1913, after which latter date little work has been done on the Pamo conduit. In April and May, 1915, work was done in the repairing of the construction road and the placing of additional culverts.

Sutherland Reservoir.

About 160 acres and the dam site at Sutherland were purchased in the fall of 1912 and the water filing made December, 14, 1912. Previous to this time Dessery and West, for Mr. Hawgood, had made a survey of the reservoir site. In February, 1913, survey and clearing was commenced upon the Ramona conduit leading from the Sutherland dam and a hydrographer employed who visited Sutherland every week. An automatic register was installed and the average and continuing expense chargeable to Sutherland dam water measuremert has been about $30.00 per month. No other construction work was done upon the dam until April 13, 1915. At this time road work was started for a connection with the main highway necessary for the hauling in of the materials for the

dam. This outfit consisted of eight men and six mules and they have been working continuously to date at a daily expense of $33.50. No information has been furnished me concerning the application for or granting of a permit for the Sutherland Reservoir. I, however, assume that application for permit for this construction was made in connection with the application for permit to construct the Ramona conduit,as that has been the custom followed in other applications. If such be the case, and I shall assume it to be, permit was received in July, 1914 for this construction.

Ramona Conduit.

This conduit begins at the Sutherland dam and is designed to carry the water from this dam a distance of 4 miles into the drainage basin of the Santa Maria Creek, thence it may follow the natural channel of this Creek to the Santa Maria Reservoir and thence by feeder back to the Pamo Canal. It is also possible from the end of the Ramona conduit to deliver the water by direct route either to the Cuyamaca flume or by pipe line to the City of San Diego, or by pipe line to the San Clemente Reservoir. In February, 1913, a survey for the right of way was made by W. S. Post. An application was made to the United States Department of the Interior asking for a right of way for the main purpose of irrigation. During the entire time of the preparation of this application one laborer was employed at an expense of $2.00 in brushing or trail cutting along the line. In addition to this expense was a hydrographic expense of about $30.00 a month continuing during this period. Upon the filing of the application

with the Interior Department the work of the laborer was discontinued because the application is within a Forest Reserve in which event work is not required while an application is pending. This application was filed in June, 1913, and was granted in July, 1914, for an irrigation right of way, stipulating that if power use were desired an additional application would be required to be made. Since July, 1914, no construction work has been done directly on this conduit aside from the hydrographic work already mentioned, a small amount of grading about April 5, 1915, on the conduit itself and the construction of the road, already mentioned under the Sutherland dam, now in progress.

Carroll Dam.

The filing at this dam site was made February 21, 1914, on unsurveyed public land. All private lands in the reservoir are now owned by the Company with the exception of the Bernardo Rancho in the upper portion of the basin which is in litigation. 40 acres of surveyed public land in the site were purchased by scrip, and the dam site 40 acres were purchased by unsurveyed scrip. The patent cannot issue to this 40 acres until the United States'survey is made. A few acres of public land remains and an application for easement under the laws of 1891 has been made to the Interior Department in connection with the right of way for Carroll-University pipe line. The survey for this application was begun April 11, 1914, and completed May 12, 1914. Further survey was made later on the canal line leading from the dam.

The application for easement was filed November 9, 1914, and is still pending. Late in May, 1914, core drilling parties were placed on the site and drilling for bedrock continued until September 15, 1914, after which a caretaker who did brushing, etc., was employed during September, October, November and December, 1914. On January 1, 1915, a foreman and two men were put on and they are working to date at a daily expense of $10.75.

Carroll-University Pipe Line.

In connection with the Carroll dam this pipe line would supply by pumping the Linda Vista Mesa and the City of San Diego. As already stated in connection with the Carroll dam, an application was made to the Interior Department for a right of way, and the same is still pending. A survey was made in August and September, 1914, locating this line, but no further work has been done.

San Clemente Reservoir Site.

All lands within this site are owned by the Company. There are no water rights involved and there are no complications with reference to the right of this Company to build this dam and store water therein.

Santa Maria Reservoir.

No water filing has been placed on the Santa Maria Creek by the Company. 120 acres, including the dam site, are in the

ownership of the Company. Surveys were prosecuted in February and March, 1912. In November, 1912, hydrographic records were taken, the amount chargeable to this station being $15.00 per month. In 1913 an automatic gauge and shelter were placed at an expense of about $100. No work aside from hydrographic records is being done on this site. The site is entirely upon private land.

Santa Maria Feeder.

This feeder is about one mile long and is planned to put the water of Santa Maria Creek into the Pamo conduit. It was surveyed in March, 1912, and became part of the United States right of way application which was filed about May, 1912, and granted about January 16, 1913. No work has been done on this feeder.

Black Canyon Feeder.

The purpose of this feeder is to divert the water of the Black Canyon, a tributary of the Santa Ysabel having a watershed of 17 square miles, into the high water line of the Sutherland Reservoir. The water filing was posted on May 7, 1913. On July 22, 1913, survey was commenced for this feeder and completed within two weeks thereafter. An application was made for a temporary permit or special use permit to the Forest Service. On September 24, 1913, a special use permit was issued covering that portion of the survey about two miles in length upon Forest Reserve lands. The upper half mile of this ditch and the intake are

upon the Indian Reservation. Permit has not been issued for this portion of the conduit. The water notice also is placed on an Indian Reservation. No further work has been done on the Black Canyon feeder since the granting of the temporary permit. A stipulation in the permit states that construction work shall begin within one year and be completed within two years, and also that the permit is not transferable (Section 3737 U.S. Revised Statutes), and shall terminate upon breach of any of the conditions or at the discretion of the Forest Service. A gauging station has been established since February, 1913, at an approximate expense of $15.00 per month. I understand the theory of the Company to be that the Black Canyon feeder is to be considered as a part of the Sutherland dam and Ramona conduit, and therefore no effort has been made to perform work directly on this feeder.

At all the dam sites of the system water filings have been made and recorded in accordance with the provisions of the Civil Code and in each instance apparently easily equal to if not in excess of the amount which you would be permitted to impound.

2. THE LAW INVOLVED.

With this survey of the facts it is possible for us to apply the legal principles that have already been established.

In a construction such as here contemplated there are three interests other than the owners that may conflict with his rights,

a. Private owners.
b. The United States.
c. The State of California.

a. Private owners.

As regards the private owners, of course, there is no question both on the San Luis Rey and the Santa Ysabel that the rights that have vested must be recognized. The rights that have vested are of two kinds,

(1) Those that are the result of riparian ownership of lands,

(a) Above, and

(b) Below the point of construction of the reservoir.

(2) The rights by appropriation validly made.

As far as the first class of owners is concerned, that is riparian owners above the dam site, it is well established that they could not protest against your construction. Bathgate vs. Irving, 126 Cal. 135.

As far as the riparian owners below the point of construction are concerned, their rights, as I have said, will have to be recognized and all of your construction made in contemplation thereof. The same is true as to the second class of vested rights below the dam site, namely, those who have made valid appropriations.

It is unnecessary to discuss in detail this aspect because it only remains to determine what the total requirements below the respective dams are, and so much will have to be turned out. This, as I have already said, is an engineering question upon which your engineers must advise you; the only legal question involved being the necessity of your preventing rights to become vested by prescription against you which do not now exist.

On the San Luis Rey, as I have already stated, from a study of the engineering reports and from my knowledge of your ownership and those asserting claims to the water, I am of the opinion that your right to make the construction at Warners dam that you contemplate cannot be questioned.

As regards your rights upon the Santa Ysabel, they of course will be strictly limited to that which you may take either under your right as a riparian owner or your right as an appropriator of that which is in excess of the needs of the others having rights. At your highest proposed reservoir, namely, the Sutherland Reservoir, any riparian owner below or any owner who has received valid rights to an appropriation would have a right to enjoin you from the construction if it could be shown that such construction and impounding would at all subtract from his rights, and the same is true at the Pamo Reservoir, the Carroll Reservoir and the Santa Maria Reservoir. My only advice to you on this subject is that you make your construction in full contemplation of this aspect of the law, and that you must have engineering data upon which you are willing to rely and upon the faith of which you are willing to expend your money, which will indicate that after all the rights below are recognized there will be sufficient water which you may impound to justify your expenditure. This, of course, will have to be modified in the case of the Pamo Reservoir if it is to be considered merely as a reservoir to hold back that which is sent in from the Warners Reservoir and to act as a supplemental storage from the San Luis Rey, but I understand that there will be no sufficient reason for its construction unless you intend to impound

additional water at this point from the Santa Ysabel watershed.

You should have in mind the fact that government permits, both from the Federal and the State government, have no effect whatsoever upon the rights of the riparian owners or those who already have a vested appropriation right. Permission from the State and the Nation cannot go further than to work a waiver of the State's and Nation's rights, but they can in no event give you a right which the State or the Nation does not have. Having this in mind, which is so very often forgotten by those dealing with thissubject, it will be understood that the right to impound a million square feet given by the State or Nation will not give you a right to impound any water whatsoever if by so doing you interfere with private rights. It should also be understood by you that you have a right to build any kind of structure which you desire upon your own land whether it be a dam or anything else so long as by so doing you do not interfere with the rights of other people. Therefore, your right to construct any of these dams upon your own land and to impound water above these dams is not dependent upon a State or Federal permit, provided you do not actually submerge State or Federal lands by such construction, and the only interest that can complain at your withholding the water at any particular point is the private interest which has the right to use the same, so long as this is done upon your own property. However, this right becomes relatively unimportant if you must acquire rights of way for which you must go either to the State or the Nation, because if the assent of either the State or the Nation is required for you to secure a necessary right of way

then that authority can impose whatever conditions the law does not prohibit both upon your reservoir construction and your conduit construction over such right of way. The law of the Forest Service and the extent to which the Federal officials may go in imposing conditions in their permits is not determined. The departments of the Federal government involved take the position that the language in the Act of 1891 preventing the interference with the proper occupation by the government of its reservations and similar language in the other statutes empowers those representing these departments to make restrictions of various sorts.

It is this aspect of the law, and this alone, which makes it important to determine, first, what permits are necessary from the State and Federal government, and, second, in how far you are complying with the conditions in such permits. We may eliminate then from our inquiry all reservoir sites owned by yourself and all rights of way upon your own land or secured over private lands.

Under these circumstances we may leave the conflict with private rights and go to the consideration of your relationship to the United States and to the State of California. If it is desired, however, I will be glad to analyze and give you my opinion, based on the engineering data, as to the rights that probably could be asserted by any of the private claimants on the Santa Ysabel or its tributaries in antagonism to yours.

b. <u>The United States</u>.

It is the asserted position of the United States that it is not to be treated as the proprietor of the water upon the public lands inasmuch as by the Act of 1866 and acts amendatory thereto it has given to private users the right to go upon the public lands and initiate the lawful use of water. The Federal government does however, as already noted, require anyone desiring to use the public domain for rights of way purposes to comply with certain rules of the two departments involved, namely, the Department of the Interior and the Department of Agriculture. The Federal government, under the California doctrine, is merely a riparian owner and it has by statute waived its rights against others desiring to take the water and it is limited therefore to the restrictions that it may place as an owner of land over which rights of way are to be acquired. In your case those restrictions you will find in your permits that have already been granted, and while I have not had an opportunity to look over these permits I assume that they have the usual reservation of entry by the representatives of the Federal government, limitations to the uses for which the permits are granted, etc.

c. <u>The State of California</u>.

The State of California has no right to any water except that water which it may control as a riparian owner of its own lands. This is inconsiderable, and as I understand it there are no State lands over which you desire to pass. The State has

attempted to exert a much greater control than its ownership of water would justify. Ever since the adoption of the Constitution of 1879 there has been a strong conflict over the powers of the State with reference to water. It is my opinion that except as a sovereign the State of California has no right to regulate the use of water, except in those cases where, as I have already said, as an owner of lands it becomes a proprietor. Its power as a soveriegn to impose conditions upon the use of water would be referable to its governmental power to control and regulate under its police power, but it goes no further. However, one may think on this subject as a matter of public policy, it is no longer an open question in this State and the declaration in the Civil Code that water belongs to the public, and in the Water Commission Act to like effect, in my opinion, has no effect except upon the water which the State itself may own as a proprietor of public land. This has been established in a great number of cases, but finally by the Supreme Court of the State in the case of Palmer vs. Railroad Commission, 167 Cal. 163. Therefore, in considering the conditions which the State may impose we need only consider the power of the State over franchises and under its police power.

The effect, however, of a protest by the State, which it does or does not have the right to make, is shown by its protest against your power permit under the San Luis Rey diversion upon the Federal government. It is very likely that the Federal Government will continue as it has in the past to make its permits for rights of way contingent upon your compliance with State laws and the Forestry Service or others having control of permits will

not investigate the power of the State to impose the restrictions it asserts its right to impose but will probably grant or withhold its assent to privileges which you desire in accordance with your compliance or lack of compliance with restrictions of the State. One always must face this situation when he is dealing with one who does not have to give, and so long as the power of the Forestry Service is as unrestricted over permits as it now seems to be those desiring to carry through a water project will probably be required to submit to conditions and become bound by such submission that could not be imposed except by such consent. In short, the Federal government could not force you to take a permit burdened with conditions you do not like, but unless it is prevented by law from imposing such conditions your acceptance of them carries with it the legal necessity of complying therewith. This, however, is not a matter of important concern to yourself because you already have your permits and the conditions therein are the only ones that can be imposed, and so long as you comply with such conditions you will be protected.

As far as information has been furnished me, your rights of way have been acquired or applied for under the statute of 1891 (26 Stat. L. 1095). This statute, as far as applicable, reads as follows:

> "Sec. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of the ground occupied by the water of the

reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or dithh: Provided, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories."

"Sec. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such rights of way. . . . . "

"Sec. 20. . . . . Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: Provided, That if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture."

This Act was supplemented May 11, 1898, as follows:

"That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the Act entitled 'An Act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, and subsidiary to the main purpose of irrigation."

The language in the Act referring to the interference with the proper occupation by the Government of such reservations and that it shall not be construed to interfere with the control of water for irrigation and other purposes under the authority of the respective states or territories has been the cause of the imposition by the Federal government of conditions in the permits and the asserted right of the states over water rights. In states following the Colorado doctrine this latter provision has been very important in that it has permitted the states entirely to control the vesting of rights in appropriators, riparian rights being repudiated. In California, however, and in states following the California doctrine, this reservation in the Federal statute is of small importance, except, as already suggested, it leads the representatives of the Federal government to give ear to protests by the state when dealing with rights of way.

3. <u>APPLICATION OF THESE PRINCIPLES TO YOUR CONDITION</u>.

In perfecting your enterprise you have sought to acquire your rights by purchase of private rights and by securing rights from public authority. Concerning the acquisition of private rights nothing more need be said. Concerning your condition with reference to rights acquired from public authority we are now interested.

In compliance with the State statute you have made your water filings and recorded the same. Under the provisions of the Civil Code you are required to begin actual construction

within 60 days after the posting of yournotice and thereafter prosecute your work diligently and uninterruptedly to completion, unless "the place of intended diversion or any part of the route for the intended conveyance of water is within any national park, forest reservation or other public reservation." In this event you have 60 days after the grant of authority from the proper Federal officer within which to begin your work. But you must proceed in good faith and with diligence to secure such permit, and after securing the same must proceed to the completion as before set out.

It has long been established in this State, however, that failure to follow the Code does not interfere with a right of appropriation when perfected. In Wells vs. Mantes, 99 Cal. 583, the court says:

> "We think the scope and purpose of all the provisions of the chapter upon water rights was to establish a procedure for the claimants of the right to the use of water, whereby a certain definite time might be established as the date at which their title should accrue. In this connection we quote again from De Necochea v. Curtis, 80 Cal. 397, wherein the court, speaking of this question, said (In this provision we begin to see the purpose and object of the legislature which, in our opinion, was merely to define with precision the conditions upon which the appropriator of water could have the advantage of the familiar doctrine of relation upon which it had always been held before the statute, that one who gave sufficient notice of his intention to appropriate, and followed up his notice by diligent prosecution of the work, was upon its completion to be deemed an appropriator from the date of his notice, and was, therefore, prior in time and stronger in right than an intervening appropriator.'"

Unless the amendments to the Code made in 1911 and the passage of the laws in 1913 have modified this rule it is still in full force and effect, and it is my opinion that it has not

been modified by such enactments.

The only advantage gained by following the provisions of the Code is that one so doing is entitled to date the initiation of his right from the posting of his notice. In its original application, the law on this subject had no bearing except upon appropriation made on public land and between such appropriators, and as to such it unquestionably was controlling on their rights. Latterly, however, when the appropriation of water upon private lands began to be common, whereby one because of his ownership of riparian land and his consequent ability to have access to the stream, would cut the stream banks and conduct the water either to his riparian lands or beyond such riparian lands to other lands and devote the water to a beneficial use thereon, conflicts arose between those who were thus taking water from the stream, and the same rule of priority was applied in determining the rights of such parties as had theretofore prevailed in determing the rights of those appropriating water upon public lands. A failure to recognize the distinction between these two so-called appropriations has led to a great amount of confusion. The State has absolutely no power to permit the initiation of a so-called appropriation on private land. It cannot be made except by the owner of the land and no one has a right to trespass upon lands to make such an appropriation. Vestal vs. Young, 147 Cal. 715; Jamison vs. Kirk, 98 U.S. 453. And it has been held that a permit from a state engineer or from the Secretary of the Interior cannot permit him so to do. Baldridge vs. Leon, 20 Colo. App. 518; Vanderwork vs. Hewes, 110 Pac. 567. Only the landowner may take

this course, and rights initiated by him while good against those initiating rights subsequently in no wise prevail against other riparian owners. They may, however, ripen into a right against such riparian owner by prescription. Heilbron vs. Water Company, 75 Cal. 117; Strong vs. Baldwin, 154 Cal. 150.

Having this view of the law, I am of the opinion that so long as your storage and diversions are upon your own land, your compliance or failure to comply with the provisions of the Civil Code in no wise affects your right except against, first, others who do so comply; and, second, because of influence upon the Federal government in granting or withholding permits.

Do not understand, however, that I advise you to disregard these State statutes. Caution would dictate that you do everything whether certainly necessary or doubtful to protect your rights, but I desire to assure you your failure to use what would be called diligence under the State statute under the condition of your property here, in my opinion, is of small consequence.

The Water Commission Act of 1913 provides, as I think would unquestionably be the law without such provision, that vested rights shall not be affected by such Act. Therefore, your permits granted by the Federal government before that time are specifically excluded from the operation of such Act because you have a vested right in such permits which is only affected by your failure to comply with the conditions thereof, and under the terms of the statute you have five years from the granting of such permits within which to complete your enterprise. Not having seen these permits and not knowing the conditions that may have been imposed

by the Federal officers granting them, I do not know what their provision is with reference to diligence, but the statute of 1891 under which they were granted, seems to require nothing except that the enterprise be completed within five years of the time of the granting of the permit. As already stated, I shall assume that no conditions have been added other than those specifically required by this statute under which the permits were granted.

Section 1410 of the Civil Code, as amended in 1911, provides:

> "All water or the use of water within the State of California is the property of the people of the State of California."

A similar provision was incorporated in Section 4 of the Water Power Act passed at the extra session of 1911.

The Supreme Court of this State has already determined the effect of such provision. In the case of Palmer vs. Railroad Commission, 167 Cal. 163, at page 172, the Court says:

> "The appropriator under the code obtains no title at all by his appropriation, as against any one except the state and the United States. Such right as he obtains from these he receives because of the fact that by the law of 1866 and by the provisions of the code, the United States, and the state, respectively, have consented that he shall thereby obtain the rights pertaining to any public land over which the stream may run, and not because of any existing dedication of such waters to public use, or because of the fact that they are held by the United States or by the state for general public use. As against all other persons then interested in the riparian lands or in the water of the stream, he must acquire the right he claims in some other way than by the mere appropriation in compliance with the code. He may do so by purchase and grant from such other claimants and owners, or he may do so by prescription, that is, by adverse use for the period of five years without interruption by the real owner. The only aid which his appropriation notice will afford him in establishing title by prescription against the

> riparian owner is that it may be admissible as evidence tending to show the date of the beginning of his hostile diversion. In suits against others as mere appropriators, it establishes the date of the inception of his right."

I conceive from this and many other expressions of the Court, the true California doctrine to be that compliance with the Code merely tends to fix the relationship between appropriators either upon public land where the appropriation is permitted by the Federal and State statutes, or between so-called appropriators diverting the water on their own private lands and carrying it beyond their riparian lands, who enter into controversies between themselves. In other words, it in no wise affects the relationship which exists between the appropriator who even upon his own land make a diversion of the stream and other riparian owners. His right against them must ripen into prescription and is not helped or aided by compliance with the provisions of the Code.

In the same case, in its decision denying a rehearing, the Court referred to Section 1410 of the Civil Code, as amended in 1911, and said:

> "The section formerly read as follows: 'The right to the use of running water flowing in a river or stream or down a canon or ravine may be acquired by appropriation.' By the amendment this was prefaced by the following declaration: 'All water or the use of water within the state of California is the property of the people of the state of California.' This, it is claimed, is contrary to the doctrine declared and followed in the opinion of this court herein. This section was not cited in the briefs upon which the case was submitted. We refer to it now solely in order to show that it has no application to the case. All the water-rights which were in dispute in the case arose and were acquired by and under appropriations made long before the passage of the amendment aforesaid. It ought not to be necessary to remind any one that a law of this character is not retroactive, or that it can

not operate to divest rights already vested at the time it was enacted. The amendment may possibly be effective as a dedication to general public use of any riparian rights which the state, at the time it was enacted, may still have retained by virtue of its ownership of lands bordering on a stream, rights in the stream which it would in such cases have in common with owners of other abutting land. It could not affect the riparian rights of the other owners, nor the rights of any person or corporation claiming under them, nor rights previously acquired from riparian owners by prescription, nor rights acquired from the state prior to that time by appropriation under the code, in reliance upon the implied offer of the state to allow its riparian rights to be acquired in that manner, as indicated in the opinion."

Although my opinion is as just stated with reference to compliance with the State statutes, it may be well to inquire just what is the condition with reference to such compliance, whether necessary or not.

At the Warners dam a filing was posted by Arthur H. Nelson on the 15th day of March, 1911, and recorded the day after. On the same day William S. Post also made filing for the water at this point, which was recorded March 17, 1911. On May 20, 1911, G. V. Lull filed upon the water at this point, which was recorded on May 23rd; and on the same day Lew B. Mathews also made a filing at or about the same point, which was also recorded May 23rd. On March 15, 1913, W. J. Isbel made a filing at this point, which was recorded March 21, 1913. Before the time of any of these filings work had been done at this point, and although there have been periods of intermission, work has been done continuously either upon the dam or upon the conduit, which unquestionably is a part of the same enterprise. Up to the present time whether or not this work has been carried on with due diligence is a question of fact upon which I do not express an opinion, but there can be no question

that the work here has shown a bona fide intention to avail yourself under the State law of whatever rights are conferred by the filing of such notices.

On June 13, 1911, Ethel Fowler made a filing upon the waters of the Santa Ysabel River at the Pamo dam site, which was recorded on the next day. Before this time, negotiations had been made concerning the acquiring of the rights of the Linda Vista District, which owned this dam site. In September of the same year a camp was placed there which has been maintained to date, and here too continuous work in good faith could be shown as indicating a compliance with the provision of the Code.

On December 14, 1912, a filing was made by J. E. Gerish at the Sutherland dam site. While it does not appear that work was done within 60 days thereafter, yet it appears that an application was made in February, 1913, and because the right of way for the Ramona conduit, in conjunction with which I have assumed this application was made, was through a Forest Reserve no work was necessary pending such application. Since the granting of such application, however, no construction work of any considerable amount has been done, and certainly unless the Sutherland dam site and the Ramona conduit are to be benefitted by work done on other portions of this system, the work here has not been sufficient to protect you under the State law.

The permit for the Black Canyon feeder, being a special use permit and not being assignable, and requiring that construction be completed within two years, has lapsed under the Federal statute regardless of your situation under the State statute.

No filing has been made at the Santa Maria Reservoir, and therefore you have necessarily acquired no rights under the State law and must rely entirely upon your ownership and your Federal permit for the Santa Maria feeder, if it can be construed to cover this reservoir, if you have any rights other than the rights you have as a private owner, which would appear under the circumstances to be sufficient as far as either the Federal or State government is concerned.

Your permit at the Carroll dam has not yet been granted, but it would appear that by reason of your survey and your work begun in May, 1914, that you have probably protected your filings under the State law.

It would appear to me, therefore, that you are weakest under the State law at the Sutherland dam site and the Black Canyon feeder. As to the latter, I feel that your rights are of small consequence either under the Federal or State law.

As to the Sutherland dam site and the Ramona conduit, work done upon the remainder of the system, if it be construed by the authority ruling to be one system, would be necessary in order to protect your rights under your filings. However, I apply the test here that I would apply if I were deciding this matter myself, and there can be no question of the bona fides of your development, and I have no doubt whatsoever that any reasonable tribunal would look to the entire project in determining your laches; and even though you were entirely at the mercy of the State authorities I do not believe under present conditions your rights would be in serious jeopardy. Particularly do I consider this

true when we have in mind what the record shows concerning your dealings with the City of San Diego and the uncertainty as to the final construction necessary. But, as I have already indicated, I do not consider that your rights are seriously affected or substantially determined by compliance or lack of compliance with the State statutes. My opinion is that this would become more serious if you found it impossible, as may be the case, to complete your enterprise within the time allowed by the Federal permits, in which event an extension of time would be required and could be granted by the Federal government, provided such extension did not affect rights that had grown up between the granting of the permit in question and its expiration. In this event a protest on the part of the State to the effect that you had been lax in complying with the State statute might be important in appealing to the discretion of the Federal officers in granting your extension. However, under the circulars that have already been issued, the condition of your water rights would not be seriously considered in granting rights of way as to the original permit, and I see no reason why they should be as to an extension thereof. In a circular of the Land Office, approved June 6, 1908, in discussing rights of way under the act here involved, it is said:

> "While this act grants rights of way over the public lands necessary to the maintenance and use of ditches, canals and reservoirs, the control of the flow and use of the water is, so far as this act is concerned, vested in the states or territories, the jurisdiction of the Department of the Interior being limited to the approval of maps granting the right of way over the public lands. If the right of way applied for under this act in any wise involves the appropriation of natural sources of water supply, or damming of rivers or the use of lakes, the maps should be accompanied by proof that the plans and ...

purposes of the projectors have been regularly submitted and approved in accordance with the local laws or customs governing the use of water in the state or territory in which such right of way is located. No general rule can be adopted in regard to this matter. Each case must rest upon the showing filed."

But in the recent rules issued by the Forest Service it is said:

"Occupancy and use of national forest lands is the sole privilege granted under a water power permit. In the issuance of such permits no attempt will be made to adjudicate water rights since water rights are acquired under state laws and adjudicated by the courts. Therefore, no protest against the granting of an application if based upon alleged lack of water rights will be considered; nor in general will any allegation that the time of beginning or completion of construction has been or is delayed by litigation over water rights be accepted as sufficient reason for granting any extensions of time." (Regulation L. 5 of the New Forest Service Use Rules).

Before leaving this subject and going to our final conclusion, I desire to call to your attention one thing that seems to have been overlooked. I understand that all of these rights of way were acquired under the Act of 1891. This is certainly true of your Warners conduit and dam, and my opinion is that it applies to all except the Black Canyon feeder.

You have been dealing with the City of San Diego and that municipality has been dealing with you on the assumption that it was able, under the present conditions, to take over your rights and avail itself of them. However, if your rights of way from the Federal government are derived through the Act of 1891 then they are for irrigation uses mainly. To be sure the amendment of May 11, 1898, provided that subsidiary uses of a public nature are permitted, yet it has been held that even under this amendment irrigation must be the primary object. I am aware that the Land Department has taken different positions on this

subject, but it has been held several times that under a permit for a right of way acquired under the provisions of the Act of 1891, irrigation must be the main use and only such domestic uses as were subsidiary thereto would be allowed. The Secretary of the Interior has refused to approve filings of companies seeking to build canals for electric lighting, water power or city water supply for domestic purposes (20 Land Decisions 154, 464). (32 " " 461) I know no reason why the department granting your permits could not grant all that is permitted under any statute applicable if you apply therefor, but if you only apply for an irrigation right of way I have very serious doubts if the City of San Diego would be permitted to use the same solely for municipal and domestic purposes without securing an additional permit allowing such uses. I do not intend to be understood as suggesting that there would be any difficulty in so doing, but I think it is only proper that I give you my ideas on this subject.

To sum up:

You have certain dam sites mainly upon your own land, and you have had granted you certain rights of way by the Federal government, all of which rights of way have a considerable time yet to run. You have sought, in addition, to comply with the State statutes with reference to the acquiring of a right by appropriation. You have made what appears to be a substantial compliance with these statutes, except in the case of the Sutherland dam, the Black Canyon feeder and the Ramona conduit. As to the Sutherland dam and the Ramona conduit it may be urged that

work upon the other portions of the system apply upon them. You acquired no rights by compliance with the State law or by your Federal permit against riparian owners in these streams or prior appropriators. You have a right to cut the banks of these streams upon your own lands and divert the water by private rights of way or by the rights of way granted under the permits to any places of possible use whether such be the places of intended use in your notices or not. By so doing you secure no rights against other owners in the stream except in the case where after five years of use a prescriptive right has grown up. You have acquired, and in most instances have in private ownership, all of the important dam sites on these streams. On the San Luis Rey, in addition, you have secured the riparian rights and by arrangements with users below the Warners dam site are entirely protected at this point for an indefinite time, and are in a position to restrain, by reason of your riparian ownership, any diversion of water of substantial amount from this watershed. You are in a position on the Santa Ysabel which renders it improbable that any one, even though they could legally, would be inclined to interfere with you because of your practical control of all of the places of storage. But you are likewise limited in your own operation to the water which may be impounded without injury to various riparian owners on this stream. You are subject at the Carroll dam site, and as far as that is concerned as to all of your system, to condemnation proceedings on the part of the City of San Diego or any other agency having the power to condemn. If such

proceedings should be brought, any unit of your system could be taken separately from the rest by the payment for its value and such severance damanges as could be shown, to be determined by a jury. Of course no agency would have the power to tear your system apart and take that which it desired leaving the remainder valuless without paying you for that which was taken and for the attendant damages by reason of the severance.

You have asked me for my opinion, from a legal standpoint, as to what is proper to do to protect your rights. I have tried to go into this matter in more or less detail so as to indicate as well as possible the broad principles involved. After you have read this it might be well to discuss the matter further.

While in my opinion no tribunal would question your good faith up to the present time and no private individual is in a position to interfere with you so long as you do not subtract from his rights, still it is very evident that it will be necessary to "speed up", as it were, in order to complete your project within the time allowed by the permits. I think it would be a very serious thing to take a chance on these permits lapsing and having proceedings brought by the government to cancel them. At your present rate of construction it would take 30 years to finish the Warners dam and 66 years to complete the Carroll dam, and a like condition will be found to exist at most of your other points of construction. My opinion is that by reason of the rains this year and the difficulty of getting the municipality to do anything, you will put yourself in serious jeopardy if you defer your action much longer in waiting for the City of San Diego to do something.

It would be extremely advisable for you to get some of the water under your control put to a beneficial use. It would seem that the completion of the Warners dam and the Warners conduit and the attendant increase of the flow of the Santa Ysabel, which increase would belong to yourself, could be utilized temporarily at least at the Carroll dam for storage purposes without any conflict with rights upon the Santa Ysabel River, and enable you to pump from this point upon the Mesa for the use of lands in that vicinity. I know this is what your local representatives in San Diego feel should be done, and it would appear that although if we capitalize the cost of pumping the capital investment would ultimately be high, yet the actual expenditure in present construction would be less under this scheme than any other which could be utilized to put water to a beneficial use. As I indicated to you when we were discussing this matter when examining the Carroll dam site, you could subsequently, if you desired, build the Pamo dam and by means of the Pamo conduit make a delivery from that point.

Any use which you can make of the waters of the San Luis Rey will not be subject to the possible litigation attendant upon use of the Santa Ysabel. Your rights are so secure on the San Luis Rey and so problematic as far as the quantity of water is concerned on the Santa Ysabel, and so sure to lead to litigation or at least contract arrangements with the other users upon this stream, that it would seem to be unwise to jeopardize your Warners conduit right of way by involving it with your Santa Ysabel difficulties. After you have put this water to a beneficial use through this conduit, you will still be in the same position of advantage

on the Santa Ysabel, as far as such advantage results from your ownership and control of all of the available dam sites. But you cannot afford, in my opinion, to permit your rights of way, particularly your Warners and your Pamo, which are the keys to your system, to lapse. I would advise you by all means to take the necessary steps to complete these rights of way within the time allowed in your permits, and I do not believe any difficulty will be encountered from any governmental agency in the building of any dams that you may subsequently desire to build.

You are in a position to control indefinitely the Sutherland dam site, likewise the Pamo dam site. You are not in a position to control indefinitely the Pamo conduit. Just what construction will be necessary at the Pamo dam site to enable you to avail yourself of the Pamo conduit, I do not know, but the things that should be done are, the construction of the Warners dam to the height necessary to enable you to use beneficially the Warners conduit; the construction of the Warners conduit; the construction of the Pamo conduit and whatever must be done at the point of the dam site to enable you to utilize it. If you abandon the idea of delivering to the City of San Diego it might be very well to withhold a decision as to building the Carroll Reservoir, but as a means of quick delivery or as a means of holding this market open it also should be developed.

In conclusion I can see no chance of trouble from the City except in the event you allow your Federal permits to lapse. I do not believe you are in substantial default up to the present time, but unquestionably you must in the very near future determine upon your permanent plan of construction and take steps to carry it out either upon the line here suggested, or upon some other lines, to the end that before your Federal permits for rights of way have lapsed you will have so utilized such rights of way for use for the delivery of water for beneficial purposes that your rights will become finally vested.

Respectfully submitted,

JOHN M. ESHLEMAN.

Ed Fletcher Papers

1870-1955

MSS.81

Box: 51 Folder: 5

Business Records - Water Companies - Volcan Land and Water Company - San Dieguito System - Warner Dam (Lake Henshaw) and associated projects - Opinion: John Eschleman to Henshaw re Sutherland

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