S & G

November 19, 1954

C O P Y

Securities Exchange Commission,
Washington, D. C.

In re: Arrowhead and Puritas Waters Inc.,
a California Corporation

Gentlemen:

In connection with the Registration Statement filed with you by the corporation above named, and any amendments to said statement that may hereafter be filed, the undersigned, Ralph E. Swing, of Swing and Gillespie, 313 Central Building, San Bernardino, California, hereby consents to the use, in such statement or amendment, by the corporation above named, of an opinion by the undersigned, dated August 24, 1953, relating to the right of Arrowhead and Puritas Waters, Inc., to take and use water from Waterman Canyon, Strawberry Canyon, and from springs on Arrowhead Springs property, in the County of San Bernardino.

Very truly yours,

RALPH E. SWING
OF
SWING AND GILLESPIE

RES/as

June 18, 1958

J. Phillip Nevins, Esq.
Lawler, Felix & Hall
Standard Oil Building
Los Angeles 15, California

Re: Arrowhead and Puritas Waters Inc.

Dear Phil:

I have received your letter of June 11 on this matter, together with the enclosures.

As quickly as I can, I will attempt to review this material and dig out the information you have requested.

With reference to the December 31, 1953 letter to which you refer, to the best of my recollection, it was never used although copies were made and distributed. I believe that Mr. Herbert E. Hall never indicated his concurrence. However, we will attempt to find the assignment you refer to.

You will be hearing from me.

Very truly yours,

W. E. Johns

WEJ:cph

cc H. W. Druehl, Esq.
Ralph E. Swing, Esq.

Rec'd 6-20-58
Copy made for LB

Aug. 31, 1934.

California Consolidated Water Company
1545 East Washington Street
Los Angeles, California

Gentlemen: Attention of Mr. A. O.
Vice-President

Referring to the agreement between yourselves and ourselves, dated September 26, 1931, which dealt with the distribution of Arrowhead water in bottles not exceeding capacity of one quart per bottle and as carbonated water in syphons, and to our recent conversations relative to the same subject, it is our understanding that Arrowhead Springs Corporation, Ltd. intended to and did, in fact, grant to California Consolidated Water Company by said agreement the exclusive use of the trade-mark or trade name "Arrowhead" in connection with the sale of carbonated Arrowhead water in syphons.

It is our further understanding that by the said agreement, we have had, since said September 26, 1931, the right to sell and distribute carbonated Arrowhead spring water in bottles other than syphon bottles, up to and including one quart, in the States of Washington, Oregon, California, Idaho, Utah, Nevada, New Mexico, Arizona, Montana, Wyoming, Colorado, Texas, and Oklahoma and not otherwise, and to use the Arrowhead trade-mark in connection with such sale and distribution, but that the right to sell and distribute such water in bottles in sizes up to and including one quart in said States and the right to use the trade name and trade-mark "Arrowhead" in connection therewith shall not be exclusive.

Yours very truly,

ARROWHEAD SPRINGS CORP.

By C. M. Rice
Pres.

The above confirms our understanding.

Dated: Aug. 31, 1934.

CALIFORNIA CONSOLIDATED WATER COMPANY

By A. Orlo Janes

Vice-President

2/14/29

COPY

San Bernardino, California

February 14, 1929.

California Consumers Company,
California Consolidated Water Company,
Los Angeles, California.

Gentlemen:

The undersigned for more than sixty years last past has been familiar with the valley of San Bernardino, California, for fifty-five years has been a practising attorney in the locality, and for more than twenty years has been attorney for the owners of the property commonly known as Arrowhead Hot Springs.

The writer has been furnished the tentative draft of the description of the San Bernardino County property contemplated to be conveyed by Arrowhead Springs Corporation to California Consumers Company or its successor, California Consolidated Water Company, which, for precision, is quoted as follows:

1. A perpetual right and easement to maintain and repair all reservoirs, pipe lines, tunnels and collecting basins now used by the company in producing and developing water for shipment, distribution and sale by the water department of the company, together with the easement to enter and go across other property of the company in order to maintain and repair such facilities; and also a perpetual easement to erect, maintain and repair additional reservoirs, pipe lines, tunnels, collecting basins and similar facilities as may be hereafter needed by the purchaser or its successor; a correct legal description of the particular parcels of real estate over which such easements are to run to be embodied in the deeds of conveyance after survey of said property has been made.

2. All subterranean waters in Waterman Canyon, (also known as West Twin Creek), and in Strawberry and Cold Water Canyons, (also known as East Twin Creek), belonging to the company, including all waters now being developed and produced by the company, together with such additional subterranean waters as the purchaser or its successor may hereafter desire to develop, together with necessary rights-of-way for pipe lines to convey such water to the reservoirs of the purchaser and the right to go

upon the premises of the company and erect necessary tunnels and collecting basins for the development of such water; excluding, however, all water of the company from surface streams and hot springs; also all pipe lines, pipe racks and loading facilities for the transportation of water from the existing collecting basins and tunnels of the company to Pacific Electric Railway, or elsewhere, and also all reservoirs and tanks of the company now being used by it in the development and distribution of its water.

3. Also, whatever rights and interests ARROWHEAD SPRINGS CORPORATION owns and possesses in water flowing from Indian Springs.

4. Also, in the event of emergency creating a shortage in the supply of water available to Purchaser from the above sources of supply, the right and privilege on the part of Purchaser to take hot water from any of the springs or other sources of supply owned or controlled by the Corporation in such amounts and at such times as will not interfere with or interrupt the hot water uses and services of the Corporation.

As applicable to the part of the Arrowhead Springs property styled "Waterman Ranch", an important action in the Superior Court of the County of San Bernardino was instituted on the 3rd day of December, 1892, by West Twin Creek Water Company, a corporation, plaintiff, against the then owners of the Waterman Ranch and other owners of lands situated north and upstream of West Twin Creek above the Waterman Ranch, which action had for its object adjudication of the rights of all said parties in and to the waters of West Twin Creek. On the 14th day of June, 1894, a stipulated judgment, approved by all parties to the action, was duly rendered in said action, by the terms of which judgment the rights of all the parties to said action in and to the waters of West Twin Creek were determined and set forth, which judgment is referred to and made a part of this opinion.

By the terms of said judgment the present owner of the Waterman Ranch (Arrowhead Springs Corporation) is protected by injunction, ample in form and substance, perpetually to guard the water rights of the owner of that property in its right to use the waters of West Twin Creek, together with the right to developments and exportation and sale of the waters therein mentioned. Said decree and judgment is very explicit and is drafted with

special reference to said protection of the present owner in the enjoyment of said water rights, specifically set forth in said judgment. So far as the parties impleaded are concerned, this judgment bonds and controls the stream and watercourse of West Twin Creek, both surface and sub-surface water thereof. Since the rendition of that judgment there does not appear to have occurred any litigation affecting the water rights of West Twin Creek.

It will be noted that said judgment provided that defendant Sather Banking Company (the predecessor in interest of Arrowhead Springs Corporation) "has the right to develop hot or cold water upon said premises for any use and may sell the same without restriction, provided, however that such developed water, or such sale thereof, either of hot or cold water, shall not diminish the volume of water which would flow to the channel of the creek from the sources of such hot or cold water without such development". It appears that the development and sale of water by Arrowhead Springs Corporation and its predecessor, pursuant to such portion of the judgment, has not diminished the volume of water which would flow to the channel of the creek from the sources of such water without such development; and it is therefore my opinion that the continuance of such use is not likely to be prevented by the proviso above quoted from said judgment.

With respect to East Twin Creek, there have in the past been several actions brought concerning this watercourse, but none has reached any adverse decision and the rights of Arrowhead Springs Corporation as the present owner are not at all affected nor jeopardized, and no such actions are now pending. Consequently, the rights of Arrowhead Springs Corporation, as the present owner, to the waters of East Twin Creek, remain entirely unlitigated and based upon the common law, unassailed, and the use by prescription has been added to the riparian right.

My attention has been called to the appropriation and use by the owner company and its predecessors of that certain water right emanating from the construction and use of the tunnel situated 1047.4 feet having bearing of North 26° 9' West from the northeast corner of Section 11, Township 1 North, Range 4 West, San Bernardino Base and Meridian and commonly known as "Indian Springs", the title to the water developed in said tunnel appears to be vested in the present owner by virtue of construct-ing of such tunnel under the existing laws of California by appropriation made more than thirty years ago by the predecessors in interest of the present owner to a continuous use of said

D

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water flowing from such tunnel, continuously and adversely, since the construction of such tunnel to the extent of the full flow of the water therefrom which water has continuously and adversely been used therefrom by such owners and its predecessors in interest by means of the pipe line extending therefrom to the places of use by such owner to the present time without interruption, interference, let or hindrance from any person whatsoever against which there seems to be no adverse claims made by any person, or interruption of such use in any respect whatsoever, hence the title to the waters thus flowing seems to be perfect in the present owner, to-wit: Arrowhead Springs Corporation.

From my familiarity with the properties and my examination of the judgment and decree abovementioned and other court records of San Bernardino County, and my examination of the records of San Bernardino County, it is my opinion that said Arrowhead Springs Corporation has good, valid and sufficient title to the water rights which it proposes to convey to California Consumers Company, or its successor, California Consolidated Water Company, pursuant to said agreement of December 4, 1928; and that said water rights, when so conveyed, will be sufficient to enable the grantee to continue to conduct, and to make reasonable expansions in, the water business heretofore and now conducted by said Arrowhead Springs Corporation.

Yours very truly

(signed) Byron Waters

RE: ARROWHEAD & PURITAS WATERS INC.

Estoppel - Of Grantor

from 15 Cal. Jur. 2d, p. 608.

Every grant of an estate in real property is conslusive against the grantor and against everyone subsequently claiming under hi, except purchasers or encumbrancers who are within the protection of the recording laws. A party is estopped by his deed; he is not permitted to contradict it. Accordingly, a grantor is estopped by his deed to question the power of his grantee to take the title the instrument purports to convey. Similarly, he is estopped to deny that at the time of execution of the instrument he had the title it purports to convey. So too, he is estopped to assert that his deed, if its terms are sufficiently comprehensive, did not convey his entire estate in the land described, including appurtenances, and he cannot subsequently claim title thereto.

RE: ARROWHEAD & PURITAS WATERS INC.

In De Wolfskill v. Smith, 5 Cal. App., 175, on 181 the Court says:

" 'Where percolating waters collect or are gathered in a stream running in a defined channel, no distinction exists between waters so running under the surface or upon the surface of land.' (Cross v. Kitts, 69 Cal. 217, (58 Am. Rep. 558, 10 Pac. 409).) Water passing through the soil, not in a stream but by way of filtration, is not distinctive from the soil itself; the water forms one of its component parts. In this condition it is not the subject of appropriation. When, however, it gathers in sufficient volume, whether by percolation or otherwise, to form a running stream, it no longer partakes of the nature of the soil, but has become separate and distinct therefrom and constitutes a stream of flowing water subject to appropriation."

Re: Arrowhead Puritas Water

Stratton v. Mountain View Water Co., 94 Cal. App. 188.

On page 189, the Court says:

"Defendant further specifically alleges that by a certain deed dated November 7, 1896, it purchased from the Sycamore Water Development Company the water right on, in and under the said lands, and defendant further pleads an estoppel by an open and notorious user of waters from these lands since November, 1896, under a claim of right, and because they have expended said large sums in the development of water thereon.

"On the issues thus presented trial was had and judgment was rendered for the defendant company; the judgment of the trial court being, in part, as follows:

"'That the defendant, Mountain View Water Company, is the owner of the sole, exclusive and perpetual right to develop, collect and take any and all water that is now, or hereafter may be on, in or under the real property described ... and that in the exercise of said right, said defendant is entitled, and owns the right to bore wells, run tunnels, lay pipe lines, dig ditches, and do anything reasonable and proper for developing, collecting and taking water from said real property, all of which rights are paramount to any right of the plaintiff, in said real property.'"

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RE: ARROWHEAD & PURITAS WATERS INC.

In the case of Duckworth v. Watsonville Water, etc., 158 Cal., 206, on 216, in the concurring opinion of Justice Shaw, he says:

"Perhaps something more should be said regarding the effect of a conveyance, by the owner of riparian land, of his riparian right therein, to another for non-riparian use. The court below seems to have been of the opinion that the riparian right consisted of the ownership of a definite quantity of the water of the lake, a quantity equal only to the amount which could be beneficially used on the riparian land concerned, and that the conveyance merely transferred to the grantees that quantity from the lake, leaving the riparian grantor free to take thereafter an equal or greater quantity therefrom and use it on the identical land, provided only that he must leave enough to furnish to the grantees the definite quantity which, by this theory, was conveyed, or, if the grantees were using less, then enough to provide for their actual use from time to time. This was not the legal effect of the conveyance. The riparian right exists solely because the land abuts upon the water. It is parcel of the land. It extends to all the water which may be reached from the land, and not to any specific particles or definite quantity or area of it. It is the right to make reasonable use and consumption of the water on the adjoining land and to a reasonable use of the water, in place, in connection with and for the benefit of the land. The water cannot be severed from the land

and transferred to a third person so as to give him the title and right to remove it, as against other riparian owners. The grantor alone will be estopped by such a conveyance. The estoppel against him, with respect to the use and consumption of the water, or diversion from its natural position, must be as complete and extensive as was the right he conveyed. The McKinlay deeds conveyed the entire right to use this water for irrigation on these lands to the defendant's predecessors and it now belongs to the defendant and not to Duckworth. A man may not eat his cake and have it. A man who sells a right to do a thing cannot thereafter exercise the right himself, except by permission of the buyer, and it is immaterial that the buyer may not be using or exercising it. If the water company had obtained similar deeds from the owners of all the lands abutting upon the lake and its tributaries, it would have obtained a complete estoppel against such landowners which would have prevented them from interfering with any use it saw fit to make of the water, and such estoppel would undoubtedly extend to all the water of the lake. If, having this right of estoppel, it chose to use only a part of the water, or none of it, this neglect to use it would not give any of the owners the right to take that which the company suffered to remain unused. A judgment which purported to give such owners the unqualified right to use the water on their respective tracts, as against the company, would operate to deprive the company of the property which it had bought and paid for and to return that property to the person who sold it and received payment of the price. The same principle must apply when the estoppel has been

obtained as to one, only, of the riparian owners. He is absolutely estopped to use any part of the water on the land, except as specified in the deed by which he is bound. These propositions are fully established by the following authorities: (citing cases) "

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obtained as to one, only, of the riparian owners. He is absolutely estopped to use any part of the water on the land, except as specified in the deed by which he is bound. These propositions are fully established by the following authorities: (citing cases) "

"The easement having been acquired by deed, no length of time of mere nonuser will operate to impair or defeat the right. (Washburn on Easements, 640.) This is consonant with the rule of our code which provides for the extinguishment of servitudes by 'disuse' only when acquired by enjoyment. (Civ. Code, secs. 806, 811, subd. 4; Smith v. Worn, 93 Cal. 212, (28 Pac. 944).)"

Gardner v. San Gabriel Valley Bank
7 Cal. App. 106 at 111

Estoppel--Of Grantor.

from 15 Cal Jur 2d - p. 608

Every grant of an estate in real property is conclusive against the grantor and against everyone subsequently claiming under him, except purchasers or encumbrancers who are within the protection of the recording laws. A party is estopped by his deed; he is not permitted to contradict it. Accordingly, a grantor is estopped by his deed to question the power of his grantee to take the title the instrument purports to convey. Similarly, he is estopped to deny that at the time of execution of the instrument he had the title it purports to convey. So too, he is estopped to assert that his deed, if its terms are sufficiently comprehensive, did not convey his entire estate in the land described, including appurtenances, and he cannot subsequently claim title thereto.

Release, Abandonment and Nonuser.

"(1) The owner of the easement may formally release or surrender his right, as by a quitclaim deed to the owner of the servient tenement. (Westlake v. Silva (1942) 49 C. A. 2d 476, 121 P. 2d 872; Rest., Property Sec. 500 et seq.) (2) An easement may also be lost by abandonment or intentional relinquishment, which may be evidenced by conduct of its owner. (Rest., Property Sec. 504; see Watson v. Heger (1941) 48 C. A. 2d 417, 120 P. 2d 153 (no intention to abandon found).) Where a public utility abandons its public purpose, an easement of right of way, e.g., a pipe line, is terminated, whether it was created by grant or eminent domain. (Slater v. Shell Oil Co. (1940) 39 C. A. 2d 535, 549, 103 P. 2d 1043.) (See also Pol. C. 4041 1 (county may abandon easements of light and air, etc., when no longer required for public use).) (3) Disuse or nonuser must be distinguished from intentional abandonment. An easement by prescription is lost by mere nonuser for the same period as that required for its acquisition (the prescriptive period of five years). (C.C. 811(4).) But an easement obtained by grant cannot be lost in this manner. (Vallejo v. Scally (1923) 192 C. 175, 219 P. 63; see Griffin v. Parker (1932) 124 C. A. 701, 13 P. 2d 403.)"

from Witkin's Summary of California Law,
page 560.

26 Cal. Jur, Section 419, page 214; Sayre pp

"~~Transfer of "All Rights" in Stream.~~ - A transfer of all the grantor's rights in a watercourse is binding as between the parties and their successors or assigns, and gives the grantee a right not only to water which he has already taken thereunder, but also, as against the grantor, to all water which he may thereafter divert and apply to a beneficial use."

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26 Cal. Jur, Section 419, page 214:

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RE: ARROWHEAD & PURITAS WATERS INC.

The following are all from 56 Amer. Jur. under WATERS

Sec. 102. "Subterranean waters are usually divided into two principal classes, namely: (1) underground bodies or streams of water flowing in known and defined or ascertainable channels or courses, and (2) waters which ooze, seep, or percolate through the earth, or which flow in unknown or undefined channels, generally referred to as 'percolating waters.' " page 585. & Corp. page 2 par III

Sec. 103. "It is well settled that unless it appears that underground water in a given case flows in a defined and known channel, it will be presumed to be percolating water, and that the burden of establishing the existence of an underground stream rests upon the party who alleges such fact." page 586.

Sec. 105. [illegible]

"Rights in respect of subterranean waters, springs, and wells may be controlled by contract or deed. A right to the use of water from a spring or well is subject to grant. Such right may also be reserved by the grantor in a conveyance of the land. An easement to take water from a spring or well upon other land, if appurtenant to land granted, will pass with the grant of the land." page 588.

Sec. 107. "The view taken in some cases is that the grant of a right to take water from a spring conveys a right in the land itself which is something more than easement, partaking of the nature of a profit a prendre that may be granted as a right in gross or a right appurtenant, and is in either case assignable or devisable. In other cases, a right or license to take water from the well of another has been held to be merely an easement, and not a profit in prendre. While the reservation of a right to take water from a spring or well may be in such form as to render such right assignable, it has been held that a reservation merely to the grantor is not assignable, and terminates upon his death." page 589

Sec. 107. "A grant of a spring or well carries the land covered or occupied thereby, and such appurtenances as are reasonably necessary to its enjoyment; and a license to use water from a spring or well usually includes such rights or easements in the land as are reasonably necessary for such purpose, in the absence of any specific provision on the subject." page 590.

Sec. 111. "Percolating waters may be defined generally as those which ooze, seep, filter, or percolate through the ground under the surface without a definite channel, or in a course that is uncertain or unknown and not discoverable from the surface without excavation for that purpose. The fact that such waters may, in their underground course, come together, so as to form veins or rivulets, does not destroy their character as percolating waters. Holdings with respect to

the character and status of waters as percolating waters in particular instances and situations are noted in a prior section. (102) Percolating water is usually regarded as constituting a part of the land in which it is found." page 593.

Sec. 112. "It is not questioned that a land owner has an unqualified right to extract and use percolating water found on or underlying his premises, where there is no claim that the rights of other persons will be adversely affected thereby. Where the rights of other persons are or may be affected, there are several distinct doctrines or theories in respect of the right to the abstraction and use of such water, one called the 'common-law' or 'English' rule, and others referred to as the doctrines of 'reasonable use' and 'correlative rights,' or the 'American' rule. Percolating waters are usually regarded as constituting a part of the land in which they are found, and the title to them while there is not affected otherwise than by acts or transactions which affect the title to the land." page 594.

In Vineland Irr. Dist. v. Azusa Irr. Co. 126 Cal., 486, on 494 the Court says:

"These findings are unhappy in using the phrase 'percolating waters,' a phrase of well-defined meaning within the law in a manner apparently not justified by the facts. Percolating waters are a part of the soil, and belong to the owner of the soil. He may impound them at will, and the proprietor of lower lands injuriously affected cannot be heard to complain. (Hanson v. McCue, 42 Cal. 303; 10 Am. Rep. 299; Cross v. Kitts, 69 Cal. 217; 58 Am. Rep. 558; Painter v. Pasadena Land etc. Co., 91 Cal. 74.) It is essential to the nature of percolating waters that they do not form part of the body or flow, surface or subterranean, of any stream. They may either be rain waters which are slowly infiltrating through the soil, or they may be waters seeping through the banks or bed of a stream which have so far left the bed and the other waters as to have lost their character as part of the flow."

On page 495, the Court says:

"We therefore hold it to be the law, and we think it to be a moderate and just exposition thereof, that one may, by appropriate works, develop and secure to useful purposes the subsurface flow of our streams, and become, with due regard to the rights of others in the stream, a legal appropriator of waters by so doing."

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"These findings are unhappy in using the phrase 'percolating waters,' a phrase of well-defined meaning within the law in a manner apparently not justified by the facts. Percolating waters are a part of the soil, and belong to the owner of the soil. He may impound them at will, and the proprietor of lower lands injuriously affected cannot be heard to complain. (Hanson v. McCue, 42 Cal. 303; 10 Am. Rep. 299; Cross v. Kitts, 69 Cal. 217; 58 Am. Rep. 558; Painter v. Pasadena Land etc. Co., 91 Cal. 74.) It is essential to the nature of percolating waters that they do not form part of the body or flow, surface or subterranean, of any stream. They may either be rain waters which are slowly infiltrating through the soil, or they may be waters seeping through the banks or bed of a stream which have so far left the bed and the other waters as to have lost their character as part of the flow."

On page 495, the Court says:

"We therefore hold it to be the law, and we think it to be a moderate and just exposition thereof, that one may, by appropriate works, develop and secure to useful purposes the subsurface flow of our streams, and become, with due regard to the rights of others in the stream, a legal appropriator of waters by so doing."

RE: ARROWHEAD AND PURITAS WATERS, INC.

"~~ALL~~" -
whole
"The ~~xhx~~ degree, quantity, extent, duration, amount, quality, or degree of; the whole; the whole number of, taken either collectively or distributively; any whatever; every; as, all the wheat; all the year; (etc) . . ."

Webster's New International Dictionary
1922 Edition.

"The mineral rights and easements reserved by the deed of 1878 were not lost by nonuser (secs. 806 and 811, Civ. Code). 'The easement having been acquired by deed no length of time of mere non-user will operate to impair or defeat the right.' (Gardner v. San Gabriel Valley Bank, 7 Cal. App. 106 (93 Pac. 900).)"

Foss v. Central Pac. R.R. Co.
9 Cal. App. (2d) 117 at 121

RE: ARROWHEAD AND PURITAS WATERS INC.

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In Cohen v. La Canada Land and Water Company, 151 Cal., 680, on 682:

"The court found that the springs referred to in the complaint were situated, two of them, in or near the thread of the canon and two on the steep mountain-side thereof, which springs, for convenience' sake, may be designated as springs numbers 1, 2, 3, 4. And it may also here be mentioned that the tunnels involved are designated upon the plat filed in evidence as tunnels 2, 3, 4, 6, 7. The area of the watershed of Snover Canon is about three fourths of a mile square; the area above the tunnels the construction of which are involved here amounting to about two hundred acres. Relative to the springs, it was found that as they existed in 1896, the waters therefrom, if not diverted, would flow in a small stream upon the lands of the plaintiff for a short distance, but that since 1897 there had not been sufficient water issuing from said springs during the irrigating seasons to form a stream, or flow over and upon the lands of plaintiff, and that no stream had flown thereon, and aside from the waters of said springs no stream would flow, or has flowed, down said canon except a temporary flow caused by rainfall; that the predecessor of plaintiff appropriated the waters of said springs in 1891 and 1892, and in the early part of the irrigating season of 1893 conducted said waters to the extent of one and three-quarters inches to a reservoir constructed by her, but from said date, owing to the effects of fire and of drouth and other natural causes, the flow from said springs steadily diminished, so that at the time the defendants and their predecessors began the work of constructing tunnels in said canon in 1898 one of said springs had entire ceased to flow, others had greatly diminished, and the total amount supplied by said springs had been reduced to less then one-half inch of water, miner's measurement, constant flow; that the tunnels constructed by respondents were constructed by and with the consent of the owner of said forty-acre tract, upon which said springs were found; that by means of said tunnels certain waters were developed near and at the end or face of said tunnels; that all of the waters so found and developed were and are percolating waters which issue from the seams and fissures of the granite dyke, or wall, in which the same were found, and none of said tunnels intercepted any known stream of water running in any defined channel; that said tunnels were run in the vicinity of and at points below the plane of said springs, and one of said tunnels is at one point near its mouth directly under one of said springs, on the side of the canon, but said tunnel is seventy-five feet long, and is in granite strata, and the waters therein are found within eight feet of the face thereof; that neither of the other tunnels is under a spring; that the said tunnels are

run nearly at right angles with and away from the thread of the canon, and the water which issues from said tunnels was found in granite dykes which cross said canon, the strata and main seams of which stand almost perpendicular; that said springs were not and are not, nor is either of them, fed by any known stream running in a defined channel; that no part of said waters which were developed or found in said tunnels would, if said tunnels were not there, issue from said springs or either thereof, or feed or support the same in any way, and no part of said waters found or developed in said tunnels would, if said tunnels were not there, find its way into the Snover Canon so as to feed or support in any way any stream, either surface or subflow, in said canon, but said waters of said tunnels would, except for said tunnels, disappear into the crevices of the mountains and be lost; that said springs have not, nor has either of them, been destroyed by the defendants or any of them; that the amount of water found or developed in said tunnels upon said forty-acre tract was about 1.50 of an inch of water measured under a four-inch pressure, and the said flow of said tunnels has not increased during the irrigating seasons since the construction thereof; that the lands upon which the defendants have used the water of said tunnels are not riparian, and do not abut or adjoin the lands upon which said springs and tunnels are situated, or the lands of plaintiff, or the lands upon which the waters from said springs would naturally flow.

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On page 690 the Court says:

Now, as to tunnel number 2. It is contended by appellant that because this tunnel commenced on her land the waters brought through it by respondents belonged to her. It is not claimed that the construction of this tunnel affected the water supply of any spring claimed by appellant. Her position is that as the tunnel commenced on her land, and is cut through it for a distance of eighty feet till it runs into the land of respondents, and respondents conduct throughtit for the distance water developed upon their own land, that appellant is entitled to said waters, notwithstanding they are not found anywhere within the eighty feet of tunnel through her land, but wholly on that of respondents. Counsel for appellant content themselves with the assertion that appellant is entitled to said water, but refer to no principle of law upon which their claim is based, and of course cite no authority which supports any. Whatever appellant's claim may be against respondents for trespass upon her land in the construction of said tunnel, and their right to maintain a pipe-

line through it, certainly the fact of such trespass and the use of the eighty feet of tunnel as a conduit, did not give appellant the right to the waters developed on respondents' own land. The right of respondents to this water follows from their development of it on their own premises, and control and conduct of it through their pipes. It is immaterial to anu question of ownership of the waters that respondents are trespassing upon the lands of appellant in conveying them from the point of development on their land through her land to their pipes at another point. Respondents may be guilty of trespass to the extent claimed by appellant, but the penalty for such trespass is not to deprive respondents of their ownership of waters taken from their own property. In its decision the trial court gave appellant all the waters which might percolate into the tunnel along the eighty feet of its construction on her property, and, so far as ownership of waters developed by the construction of this tunnel was concerned, this was all to which she was entitled. She was not entitled to have it adjudged that waters developed on respondents' land belonged to her, from the mere fact that it was piped through her land without her permission.

This disposes of all matters relative to the construction o said tunnels, or their effect upon the springs.

We come now to the last point made by appellant. It will be noticed that the court found that the land upon which the respondents have used the waters from said tunnels are not riparian to and do not abut or adjoing the lands upon which said tunnels are situated, and it is insisted by appellant that thoug the waters developed by said tunnels were not part of the waters supplying said springs, or waters which would have reached Snover Canon by percolation or otherwise, nevertheless the respondents were only entitled to use such waters upon the lands where they were developed; that the waters could be applied and used by respondents upon their forty-acre tract, where they were developed, and could not be taken for use to other lands.

In support of her position the broad proposition is contended for that percolating waters can never be taken away from the land where they exist, although adjoining proprietors are not injured or damaged thereby, and it is asserted this rule finds support in the decisions of this court in Katz v. Walkinshaw, 141 Cal. 116, (99 Am. St. Rep. 35, 70 Pac. 663, 74 Pac. 766); McClintock v. Hudson, 141 Cal. 275, (74 Pac. 849); Southern California I. Co. v. Wilshire, 144 Cal. 68(77 Pac. 767); Montecito Valley Co. v. Santa Barbara, 144 Cal. 478, (77 Pac. 1113); and Gutierrez v. Wage, 145 Cal. 730, (79 Pac. 449). But these cases do not lay down the doctrine as

broadly as appellant contends for. They law down t
that waters of a stream or percolating waters cannc
away from the lands on which they flow or from land
which they are found for use elsewhere, where the
such taking would be to injuriously affect adjoini
owners. The principle which enters into this rule
tection to be given the superior natural rights o
property-owners to the flow and use of such water
however, there can be no injury worked to such ad
owners by the taking and use elsewhere of such wa
limitations should be placed upon the right of o
them as to their use.

In the case at bar the waters which were s
construction of these tunnels of respondents we
which but for their interception would have rea
stream in Snover Canon, or which would have re
supported any of the springs in question in th
They were not waters which would would follow
watershed of the canon and have trended down i
canon by way of the springs or otherwise. The
trending through the fissures of the granite
the direction of the natural watershed of Sno
would never have reached it nor reached the s
tion, but, if uninterrupted in their flow, w
ued down through the strata in which they we
and in their natural flow would, as the expe
the court found, have passed down into the c
mountains and been lost. Under these circu
waters developed by the tunnels were not wa
have trended towards or supported or affect
flowing by the land of appellant, nor any
the waters of which she had any claim or i
injured as an adjoining proprietor or as a
and hence could not complaintor insist upo
of the rule announced in the cases cited
ents from taking such developed waters to
they might see fit to conduct them. For
this proposition we cite Hansen v. McCue,
Am. Rep. 299); Gould v. Eaton, 111 Cal.
Rep. 201, 44 Pac. 319); and Montecito et
bara, 144 Cal. 585, (77 Pac. 1113).

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RE: ARROWHEAD & PURITAS WATERS INC.

Roberts v. Krafts, 141 Cal., 20 (Oct. 1903)

APPEAL from a judgment of the Superior Court of San Bernardino County and from an order denying a new trial. D. K. Trask, Judge presiding.

The facts are stated in the opinion of the court.

Curtis & Curtis, and E. R. Annable, for Appellants.

The contract for the development of the water on defendants' land was an actionable wrong against the zanja-owners, and could not confer a right. (citing cases) Improper damages were allowed for the loss of crops. (citing cases)

Byron Waters, James Hutchings, and Waters & Wylie, for Respondent.

There was a development of water as contemplated by the deed and contract, and within the right of appropriation of developed water. (citing cases) The defendants were estopped by their deed and contract from disputing plaintiff's rights. (citing cases. The damages to the orchard were properly allowed. (Mabb v. Stewart, 133 Cal. 559.)

LORIGAN, J. - This is an action to recover damages for breach of a covenant relative to certain water-rights. Plaintiff obtained judgment for nine thousand dollars, and defendants appeal from the judgment and from the order denying their motion for a new trial. The general features of the case, as gathered from the findings, are that prior to 1887, and up to the commencement of this action, plaintiff was the owner of one hundred acres of land in San Bernardino County, in proximity to a stream known as Mill Creek, which tract was, to a large extent, set out in orchards, and plaintiff and his family resided upon the premises.

Mill Creek is a natural, innavigable stream of water in said county, rising in the San Bernardino Mountains, and flowing through and emerging from Mill Creek Canyon upon a portion of the San Bernardino Valley, until it empties into the Santa Ana River. The bed of said creek, where the same emerges from said canyon, which is about a mile above a certain forty-acre tract through

referred to), is composed of sand, gravel, and boulders, extending down a considerable depth, and is at all times capable of a ready flow of water through the same underneath the surface of said creek, and said stream from the point where it emerges from said canyon, until it empties into the Santa Ana River, has a surface and subterranean flow, constituting a watercourse, having a known and well-defined channel and continuous flow of water therein.

On August 19, 1892, the defendants granted to plaintiff the right to enter upon said certain forty-acre tract of land,- the S.W. 1/4 of the N.W. 1/4 of Sec. 13, T. 1 S., etc.--below the point of diversion hereafter referred to, "and develop any and all water thereon by means of cuts, tunnels, or otherwise." Prior to said grant plaintiff had entered on said tract and appropriated six and three-fourths inches of water of the subterranean flow of said stream (to which he had a acquired a prescriptive right), and by means of a pipe-line, conveyed it onto his said one-hundred-acre tract, and used it for irrigation, household and domestic purposes.

On August 22, 1892, the defendants, who were the owners in fee of the forty-acre tract above referred to, subject to said right of plaintiff to develop water thereon, and the plaintiff, executed an agreement, the material portions of which are: "That, whereas, the party of the second part (plaintiff) is the owner of certain water-rights, and the right to develop water on" said forty acres, "and the parties of the first part (defendants) contemplate diverting the flow of the water of the stream known as Mill Creek," in or near sections 13 and 14 in said township "by diverting said water from the natural channel of said stream, at or near the upper end of the stone ditch built and owned by the owners of Mill Creek Zanja, and running the same through said stone ditch. Now, in consideration of," etc., "the said parties of the first part do hereby covenant, promise, and agree to and with the party of the second part that, if by the diverting of said water of

Mill Creek, as aforementioned by them, or their successors, or assigns, the water-right now belonging to the party of the second part, or any water that he may hereafter develop on the said 'forty-acre tract,' is diminished within seven years from date hereof, that they will furnish him with a perpetual water-right, conveying an amount of water equal to the amount so diminished, and deliver the same into his pipe-line, flume or ditch," on said forty-acre tract, "provided, that the total amount to be furnished under this agreement shall not exceed ten inches of water. In consideration of the above agreements . . . the party of the second part promises and agrees that he will not hinder, impede, or delay the changing of the course of the water as herein contemplated." When said agreement was executed defendants claimed to own the right to divert the waters of said Mill Creek, in the manner and at the points indicated in it, below said forty-acre tract, and convey the full flow to a point oven a mile below said forty-acre tract, and in December, 1892, conveyed such ownership or right to divert said water to the Redlands Electric Light and Power Company, a corporation; that between August 22, 1892, and June 1, 1896, plaintiff, by means of cuts, ditches, and tunnels, made and excavated on said forty-acre tract, about the middle thereof, developed and intercepted a large quantity of the subterranean flow of said water, and of the water percolating through the sand, gravel, and boulders of said tract, from both the surface and subterranean flow of said creek to the extent (with the six and three-fourths inches theretofore appropriated) of fifty-four and three-fourths inches, and conveyed the same to his hundred-acre tract, and beneficially used it for agricultural, domestic, and household purposes; that in 1893, by virtue of the conveyance from defendants, the said electric company entered upon the creek at the northeast corner of said forty-acre tract, and above plaintiff's cuts, ditches, and tunnels, and by means of a pipe-line constructed in its bed, diverted all

the surface water flowing in said creek, and conveyed it about a mile below said forty-acre tract, to a point some four hundred and fifty feet lower in elevation than said tract, and used it for electrical purposes; that in 1896, after all of the plaintiff's developments were made, the company extended its pipe some thirty-six hundred feet farther up stream, and took all the surface water from this last point for the use above indicated; that before the construction of said pipe-line in 1893, oor its extension in 1896, and from time immemorial, the surface flow of said creek was sustained by a saturated mass composed of sand, gravel, and boulders beneath it, and that said surface flow had always wasted and been diminished by wastage into said sand, gravel, and boulders, and constituted a subterranean stream, which, to the extent of upwards of a hundred inches, flowed in said subterranean channel between the points of diversion by the company and the location of plaintiff's tunnels, shafts, and ditches, down and through said forty-acre tract; that none of the water developed and used by plaintiff had been theretofore appropriated or used by any person whatever, but had theretofore been allowed to run to waste and percolate through the soil until developed and saved from waste and devoted to a useful purpose by plaintiff; that the diversion by the company had so diminished the subterranean flow in said forty-acre tract that the amount of water developed by plaintiff was reduced forty-four inches and upwards and that the flow thereof is but 4.94 inches; that in 1889 plaintiff demanded, under the said agreement, that the defendants deliver him said ten inches of water agreed for, which they refused to do. The court found, in addition to the above facts, that the one-hundred-acre tract of plaintiff was practically arid land, and his orchard of little value without irrigation, and that by the failure of defendants to furnish the water as agreed, the fruit-trees in said orchard were injured and the fruit thereon was rendered valueless, for which special damages

of one thousand dollars were awarded, in addition to eight thousand dollars, which the court found was the value of the perpetual flow of ten inches of water.

As grounds of reversal, appellants insist that no water was developed on the forty-acre tract, as provided in the contract; that no water was diverted by them, or their successors, at the place, and by the means, described in the contract, and that improper damages were allowed.

Defendants also insist that the court erred in striking out parts of their amended answer.

While in the transcript, it appears that specifications concerning the insufficiency of the evidence to sustain certain of the findings are made, no point in regard to any of them is urged in appellants' brief, and we take it, that reliance is placed solely upon the grounds above indicated, and we shall limit ourselves to a consideration of them alone. Disposing first of the alleged error in striking out portions of the amended answer; In this answer which was offered during the trial of the case, it is set up that when the grant to plaintiff was made by them, and the contract entered into with him was executed, the surface waters of Mill Creek were, and for a long time had been, diverted through a certain ditch, known as the Mill Creek Zanja, and that the Redlands Electric Light and Power Company made the diversions complained of through the permission of the owners thereof.

We cannot see how this would constitute any defense under the contract. There is no question but that the electric company succeeded to the rights which the defendants claimed to possess, to divert these waters for electrical purposes, when the contract was executed. The contract did not provide that the plaintiff was to establish his right against all claimants to the waters he might develope under defendants' grant, and the right to do which was confirmed by recital in the agreement, before he could have a right

of action against defendants upon it. Under the terms of the contract it is of no moment whether the zanja-owners, or defendants, had the better right to appropriate the water. Defendants claimed to own the right, and recited in the contract that they contemplated diverting the waters of the zanja, and to run the same through that ditch. They contracted that if a diversion by them, or their successors in interest, damaged plaintiff, they would indemnify him in the way provided for in the contract. It was not a matter under the contract as to how the company acquired the right to divert the stream - whether from defendants or some third person, or from both - but whether, in exercising its right of diversion, plaintiff was damaged. If he was so damaged, defendants are bound by their contract as it is written, and in accordance with the fact, and the defense interposed could not avail them.

Coming now to the merits of the appeal:--

It is insisted, first, that there was no water developed by the plaintiff, as provided in the contract. We do not discover the slightest ground for this claim. That the plaintiff did, by means of tunnels and cuts, concentrate and accumulate the waters diffused through the saturated mass of sand, gravel, and boulders constituting the sub-surface flow of Mill Creek, and convey them to his home premises for general use, there can be no question. This was not only a development, but it was the exact method of development, and the waters to which it should apply, as specified in the conveyance of August 19, 1892, by the defendants to plaintiff, of the right to enter the land, and "develop any and all waters thereon by means of cuts, tunnels, or otherwise." It was equally this development which all the parties had in mind, when, in the agreement of August 22, 1892, they recited that the plaintiff was the owner of certain water-rights, and the right to develop water on this forty acres. And it was the possible loss of the waters so developed, by the diversion of Mill Creek, that they had in mind.

They certainly could have had no other, because there is no pretense that any other waters existed on the tract, except this subterranean flow.

It was equally a development, as generally understood, with reference to procuring, controlling, and appropriating subterranean water. In Vineland Irr. Dist. v. Azusa Irri Co., 126 Cal. 495, the court says "We therefore hold it to be the law, and we think it to be a moderate and just exposition thereof, that one may, by appropriate works develop and secure to useful purposes the sub-surface flow of our streams, and become, with due regard to the rights of others in the stream, a legal appropriator of water by so doing. . . . If, upon the other hand, one can be development obtain subterranean waters without injury to the superior rights of others, clearly he should be permitted to do so." (citing cases) Under this same head counsel for appellants discuss, quite generally, the proposition that the subterranean waters so developed by plaintiff were not subject to development or appropriation, as they were part of the Mill Creek stream, which many years before plaintiff entered on this forty-acre tract at all, had been diverted and appropriated some distance below it, through a ditch, and was still being diverted and used. Assuming this to be true, still under the terms of the deed and agreement between defendants and plaintiff we cannot see how any advantage can be taken of that fact. This is only under another phase of the question attempted to be presented under that portion of the amended answer stricken out, and what was said concerning it applies here. Aside from the finding of the court that the appropriation by plaintiff was the only appropriation made of these waters (which under Vineland Irr. Dist. v. Azusa Irr. Co., 126 Cal. 495, he could make) still, aside from this, the defendants, by their deed and agreement, are estopped from asserting that plaintiff did not have title to the waters developed by him. They granted him the right to develop, but which belonged to some one else. They

cannot go behind their deed to attack the right to these waters, which they purported to convey, and the ownership of which in the contract they recognized in the plaintiff.

Appellants' second point is, that no water was developed at the place and by the means described in the contract. Their particular claim is, that the diversion of which plaintiff complains was not made at the upper end of the stone ditch mentioned in the contract, but at a much farther point up the stream. We do not think the particular point of diversion is of controlling or any importance. The fact is, that the first diversion made by the Electric Light and Power Company, as successors to the defendants, was above the upper end of the stone ditch, and the diversion farther up the stream was not made by it until 1896. In insisting on this point we think appellants are attempting to place too strict and literal a construction on the contract, one which certainly is not in harmony with its general terms, or its particular object, or the purposes they had in view, and which is calculated to substitute the manner or means of diversion for the fact of diversion, which was the important matter in the contract. While the recital in the agreement is, that the defendants contemplate diverting the flow of the water of Mill Creek "by diverting said water from the natural channel of said stream at and near the upper end of the stone ditch . . . and running the same through said ditch," this is, nevertheless, only a recital and not part of the covenant. It is simply the declaration of a general purpose to be accomplished near a certain point, in a certain way. The covenant which follows this recital, and upon which plaintiff's rights are based, provides that "<u>if by the diversion of said water of Mill Creek, as aforementioned</u>, by them or their successors, or assigns," the water now belonging to plaintiff, or to be developed, "is <u>diminished</u>," etc., etc. This covenant embraces the purpose and object the parties had in view when they contracted, and does not apply to any particular place or method. The general

purpose they had in view was to divert all the waters of the stream, and it was this general diversion which they recognized might injure the plaintiff's acquired rights in developed water, and against which he was to be protected by the contract. And this is further apparent from the covenant on plaintiff's part not to "hinder, impede, or delay the changing of the course of the water." The gist of the covenant was the diversion of the water of Mill Creek by the defendants, not to be interfered with by the plaintiff. Under the terms of that contract, as it was a matter of more particular interest to them, the defendants accorded themselves wide discretion in determining where, or how, the diversion should be made, a discretion which the plaintiff covenanted not to interfere with, and which covenant he faithfully kept, and for which non-interference the defendants covenanted that he would be protected against any damage, which the exercise of that discretion on their part should result in to him.

As to the amount of damages. This only applies to the one thousand dollars which the court found the plaintiff had suffered as special damages for injuries to trees, and the fruit crop thereon, by reason of the defendants' failure to furnish the water as agreed. It is insisted by appellant that such damages are remote and speculative. The court found that, when the contract between the parties was made, the defendants knew that the ten inches of water contracted for had a peculiar value to plaintiff, inasmuch as his land and orchard were of little value without it. The orchard was in bearing when the breach of the covenant was committed, and there was no other source from which plaintiff could obtain water for irrigation. There is no question but what the amount of damages awarded was suffered, and we think that under the facts as found the court was warranted in making the award. (Mabb v. Stewart, 133 Cal. 559.)

The judgment and order appealed from are affirmed.
McFarland, J., and Henshaw, J., concurred.
Hearing in Bank denied.
Beatty, C. J., dissented from the order denying a hearing in Bank.