

# Water Rights to the San Diego River: The Opinion of 1914

By John Martin

*“Supplying the city with water is a measure fraught with the weightiest and vital public interest.” San Diego Chamber of Commerce Resolution, 1894.*

*“The growth of the City of San Diego was clearly determined by its water development.” Water Committee Meeting, San Diego Chamber of Commerce, 1913.*

By late 1913 San Diego’s municipal water bureaucrats had reached another juncture in their effort to shape the hydrologic landscape of their city. Their quest for water self-sufficiency had moved from using wells and pumps and water from the San Diego Flume to the acquisition of several privately owned water systems, namely the San Diego Water Company and the Southern California Mountain Water Company. Increasingly the city came to rely on its fledgling water system but water experts also recognized its limitations as San Diego’s water driven growth approached a point of stasis.

Regional climatic conditions determined that water in San Diego was a perpetual dilemma. Indeed by the early twentieth century, the city had more hope than water. But water, not ambition, actuated growth. Civic pride, economic ambition, and the rivalry with Los Angeles to become the queen city of the southern coast fueled the municipal vision of the city fathers. This optimistic vision could only be sated with a stable water supply. So by necessity San Diego city water advocates assumed what historian Eliza Martin called the “growth

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**John Martin** is a frequent contributor to *The Journal of San Diego History* with his most recent article entitled “A Tale of the Cabrillo Statues,” Fall 2014, Vol. 60, No. 4. John specializes in San Diego’s military history and San Diego’s development in the early 1900s. He is presently doing research on the dams of western San Diego County and working on a history of the San Diego River.



*Local engineer E. S. Babcock completed construction of the original Lower Otay Dam in 1895. The reservoir served as a principle water source for the City of San Diego until the flood of 1916 destroyed it. Courtesy San Diego City Water History Archive.*

by the gallon” mentality of finding and using any water resource to facilitate municipal growth.<sup>1</sup> This philosophy forced San Diego’s city leaders to continuously ponder how best to consolidate the town’s water future with the resources available.

The majority of the earliest private entrepreneurial land development enterprises of Land and Water Company, the Mt. Tecate Land and Water Company, the San Felipe Desert Land and Water Company, and the Santa Maria Land and Water Company, all offered business opportunities and promoted growth possibilities to the aspiring city by combining land and water. These developers promoted the vision that water would “turn the parched land into vernal freshness.”<sup>2</sup> It was an uneven symbiotic relationship. Land was plentiful, but not so water. In practice, private corporations most often promised to deliver more water than was at their disposal—resulting in an unreliable supply when no municipal system existed.

While civic-minded San Diegans grappled with the water dilemma, they also accepted the



*Typical pumping station that took water from the riverbed of the San Diego River. Courtesy San Diego City Water History Archive.*

Progressive era notion that government should wield power in the public interest. This influenced their belief that the municipality should own and operate its water system as a community enterprise. The *San Diego Sun* admonished the city to follow the lead of Los Angeles and invest in its water infrastructure. In a 1912 article entitled "Future Growth of San Diego will Demand a Large Water Supply," S. R. Frazier, a local self-proclaimed water expert, argued that San Diego's water situation demanded that the city act immediately to secure an adequate water supply. Frazier declared that water was the cornerstone of municipal growth and the time was nearing when the city's limited water system could not provide for the city in a prolonged drought.<sup>3</sup>

Responding to the community clamor city administrators sought the creation of a comprehensive municipal water system independent of private concerns. Local newspapers badgered the same officials to "fight and fight without ceasing" for water to grow the city, and members of the influential Chamber of Commerce preached that the "future growth and prosperity" of the city hinged on an adequate city-managed water mandate that municipal expansion depended upon a reliable water supply from a city-managed system.<sup>4</sup> To this end a Chamber of Commerce spokesperson noted that the city was "digging and damming" and buying water as the demand required.<sup>5</sup> All parties realized that a serviceable owned system depended on tapping all the available water resources.

The city planners' agenda for an independent water system recognized that control of the San Diego River, the county's largest water resource, was the lynch pin. To solidify the city's claim to the river, a right that during the past decade had morphed from need to necessity, city legal pundits produced a position paper in early 1914 entitled *An Opinion on the Rights of the City of San Diego to the Waters of the San Diego River*. The document was another benchmark in the city's march toward water sustainability. The *Opinion* stated the city's presumptive right to the San Diego River and provided the legal framework and cogent talking points used in subsequent litigation to take possession of its waters.

## **The San Diego River**

Scarcity made water a valuable commodity in semi-arid San Diego as it added value to the land and impacted the potential of municipal growth. The county's river systems and topography combined with the prevailing hydrology to pre-determine the city would engineer a water solution through the construction of large conservation dams and reservoirs. In these pursuits the city and private corporations tapped the county's most available water for irrigation and domestic sources but left the San Diego River catchment largely undeveloped. Pumping



*The fifty mile long San Diego River was the largest underdeveloped water source in the county and the only river to pass through San Diego city limits. ©SDHC #1145.*

plants in the river basins fed off the subsurface water while the San Diego Flume conserved and distributed water from the lower river. In the annual rainy season and during flood episodes the bulk of the river water inexorably flowed, unused, into the Pacific Ocean. Then in 1914, civic leaders, the San Diego Common Council, prominent businessmen, private entrepreneurs, the members of the influential Chamber of Commerce, and the citizens Committee of Fifty accepted the necessity of establishing control of the entire San Diego River if their visions of municipal growth were to be realized.

The San Diego River, the only river to transit city limits, originated in the northeastern backcountry where seasonal rainfall and the resulting runoff generated its flow. As the tributaries fed the catchment, the river dropped almost 4000 feet as it coursed south and west fifty-two miles to the Pacific Ocean; but like all southwestern rivers the San Diego was a mercurial river. A long time resident characterized it as a “now you see it, now you don’t” river.<sup>6</sup> On occasion the river ran steady and smooth, quenching the townspeople’s thirst and watering their crops. Sometimes it ran dry and deprived and tormented them, and periodically

it raged downstream inundating the river valley, taking their lives, and destroying their property. It was a river that seemed to confound the people it helped sustain. Regardless of its characteristics, in 1914 the river remained the most consequential and largest underdeveloped water resource in the county.

River historian William Wright's sentiment that water in San Diego was the "precious thing that keen men went after; developing it if they could and trying to tie it up in their own names if they couldn't" aptly applied to the San Diego River.<sup>7</sup> By 1913 the notion of controlling the river waters had evolved from a serious consideration to a complicated necessity. Developing San Diego's eponymous river required civic vision to claim its waters. As city leaders struggled with these issues, they also

had to deal with an intractable tenant—local real estate and water entrepreneur Ed Fletcher. In the late 1880s the San Diego Flume Company dammed Cuyamaca Lake, placed a diverting dam at the confluence of the San Diego River and Boulder Creek, constructed a thirty-two mile long wooden flume, and started to transport the water to consumers in the El Cajon Valley. In 1910 Montana businessman James Murray, with Fletcher as a minority partner and designated manager, purchased the Flume and renamed it the Cuyamaca Water Company [CWC]. City officeholders and Fletcher held diametrically opposed views on controlling the river. Fletcher hoped to see the city grow, but the struggle for the river water was also a business matter, as more water and river developments increased the value of his water company and brought value to his east county lands. For the leaders of the aspiring municipality it was a visceral matter of acquiring a sustainable water source to insure continuity and expansion.

Soon after the CWC started operations several tangential river water affairs piqued concern in the city offices and gradually polarized the view of who would regulate the San Diego River. In 1911 W. B. Hamilton filed an application for



*Ed Fletcher (left) managed the Cuyamaca Water Company and led the battle to gain the paramount rights of the San Diego River for his company. Pictured with Fred R. Jackson. ©SDHC #12132.*



*J. W. Sefton was the owner of the San Diego Flume Company. His system gathered water in the Cuyamaca Mountains and transported it by a wooden flume from the upper San Diego River to the city. Fletcher Memoirs, 57.*

40 billion gallons per year of surplus river water for irrigation and domestic purposes. Working with San Diego Judge Lendel L. Boone, Hamilton planned to divert and store water on the El Capitan Grande Reservation lands on the lower river.<sup>8</sup> The scheme interfered with Fletcher's plans for the CWC, which compelled him to formally question the filing, which in turn ignited a long legal scramble. A 1912 report from Charles Lee, a CWC water engineer, addressed how the CWC's increased use of river water in the river basins could affect riparian users. Lee suggested that the company was drawing "too heavily" on the sub-surface basins and would probably deplete the supply to the point where the users could not withstand a three-year drought. The report concluded with a suggestion, in the city's estimation a threat, that the CWC should construct a surface storage reservoir

on the river to mitigate the potential problem.<sup>9</sup>

Another water episode, which originated in the 1890s, abetted the burgeoning rivalry between Fletcher and the city. The dispute had its roots in a conflict between San Diego Flume owner Joseph W. Sefton and John D. Spreckels and his Southern California Mountain Water Company (SCMWC) when they contested the right to supply the city water. This disagreement featured Spreckels, a strong advocate of using the majority of regional water resources for domestic applications and developing the city, with Sefton more concerned about backcountry consumers. When the city chose the SCMWC, Sefton unsuccessfully attempted to sell the Flume to the city for \$900,000. With ample water supplies available from the Spreckels concern, the city ignored the offer. Two years after Murray purchased the Flume, the CWC became entangled in that same rivalry. In the resulting newspaper war, the Spreckels' interests painted Fletcher as a profit-minded opportunist while suggesting that the civic-minded Spreckels would use his earnings to construct an eastern railroad route to assist in the growth of the city. Those who opposed Spreckels became labeled Socialists. Fletcher later stated that Spreckels' social and civic status, the intense public pressure, and his newspaper unduly exerted influence on the Common Council to purchase the SCMWC.

Fletcher later exacerbated the testy relationship with the city when he acquired

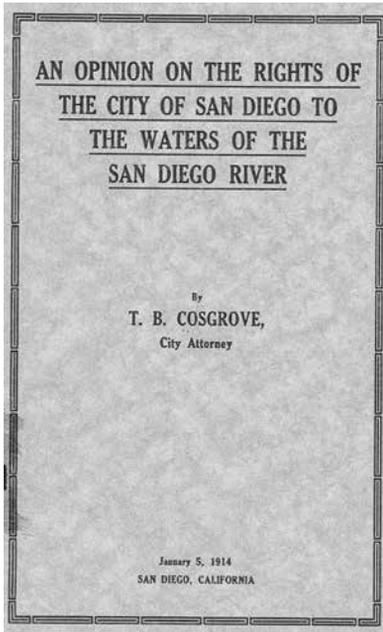


*In 1911 Ed Fletcher, through an intermediary, purchased a potential dam site on the San Diego River below El Capitan Mountain that would become the center of controversy for the next two decades. Courtesy San Diego City Water History Archive.*

lands at a dam site in Mission Gorge and when he purchased a potential El Capitan dam site on the river. The city likewise stirred the contention when it acquired lands below Old Mission Dam in Mission Gorge. The need to improve the city's water system prompted city officials to sponsor several special water bond elections. On October 21, 1913, the electorate passed a \$645,000 bond issue to improve the city system, \$200,000 for an emergency system for pumping water from the bed of the San Diego River, and \$75,000 to extend the city distribution system. In January 1914 the voters again approved the \$645,000 for improvements and this time \$60,000 for a filtration plant.<sup>10</sup> But these actions were improvements not resolutions. By late 1913 the Common Council, harboring the belief that the growth of the city hinged on controlling the river waters, opened a campaign to assert the city's right to the river.

### **The Opinion on the City's Rights to Water of the San Diego River**

The river skirmishes between the city and the CWC set the tone and established the strategic legal benchmarks for the next fifteen years. City civil servants operated under the implicit assumption that the city possessed the right to all the waters of the river. In light of this assumption Fletcher and the CWC



The title page of the Cosgrove's "An Opinion on the Rights of the City of San Diego to the Waters of the San Diego River."

and east county water consumers worried that the city would reach a population point where its domestic need would deprive them of a water source they had used for the past thirty years. It was a delicate balance. When the CWC pressed the city on river rights, the city deflected the pressure with feigned insouciance; when the city pressed Fletcher he responded with feigned confidence. All the while the status of the river remained uncertain.

Determined to resolve the impasse, on November 3, 1913, the members of the Common Council—Henry N. Manney, O. M. Schmidt, Herbert R. Fay and Daniel K. Adams with Percy J. Benbough absent, passed City Resolution #15534, which directed City Attorney Terence Cosgrove to investigate the city's right to the waters of the San Diego River. The Council specifically wanted a

document that would both delineate the city's position and establish its claim to the river. To do this Cosgrove systematically perused Spanish and Mexican colonial historical records, documents, and laws, and pertinent court decisions. Cosgrove presented his response, "An Opinion on the Rights of the City of San Diego to the Waters of the San Diego River," to the City Council on January 5, 1914, which the five members promptly adopted.<sup>11</sup> Years later Shelley Higgins, a member of Cosgrove's staff in 1914 and a future city attorney, wrote that the *Opinion's* quest for the river was a product of the persistent fear of drought and "public agitation and necessity."<sup>12</sup> The Council's motivation clearly reflected the views of municipal boosters who believed control of the river would mitigate civic apprehensions about an adequate water supply and stimulate growth.

To create historic perspective, Cosgrove researched colonial records and applied the concept of judicial notice, which allows an attorney to introduce facts that



City Attorney Terence B. Cosgrove authored the document that would serve as the basis for the city's arguments to secure the San Diego River. R. Puroude, *Gold In the Sun*, p. 228.



*Shelley Higgins succeeded Cosgrove as City Attorney and represented the city through years of hearings and courts cases. From Higgins, *This Fantastic City San Diego*, foreword. ©SDHC #1923UT People.*

experts have authoritatively attested to be true. Cosgrove asserted that when the respective Spanish and Mexican governments organized the pueblo of San Diego as a colonial institution, those governments also determined that the pueblo would grow alongside but separate from the mission and share in the protection the presidio accorded. The crux of the contention declared that the colonial laws guaranteed the pueblo the right to claim water for the use of the citizens and that right superseded those of the mission and the presidio. While the governments did not award specific water grants to the pueblos, government officials framed the right to use water as a natural entitlement that was implicit in pueblo lands rights for the use of its inhabitants. Those rights of property transferred to the new American town. Cosgrove also outlined how upon achieving statehood in 1850, the San Diego Trustees petitioned and won control of the Pueblo Lands and the associated water rights for municipal use.<sup>13</sup>

In the document Cosgrove also considered if the city had in any manner forfeited its pueblo status. In the answer Cosgrove imposed rhetoric over reason and brashly averred that given the facts and citations of his research it was “beyond question or quibble” that anyone with “intelligent judgment” could dispute



Mayor Charles F. O'Neill recommended that the city secure the El Capitan dam site. ©SDHC 91:18564-1753.

that San Diego was the pueblo successor. As to the question of adverse possession, he argued that the city had continuously accessed the river waters so there was not hiatus of use and that the unbroken title to property and water held by a city that was the successor to a pueblo could not be lost in that fashion.<sup>14</sup>

Cosgrove buttressed his arguments with the precedents of recent legal decisions. He specifically described the *Vernon Irrigation Company v The City of Los Angeles* case of 1895 where attorney John Godfrey, lead council for the City of Los Angeles, applied the pueblo theory to gain that city exclusive water rights to the Los Angeles River. Cosgrove also examined Godfrey's argument in *Feliz v The City of Los Angeles* where the city successfully claimed the use of all of the waters of the Los Angeles River. Godfrey held that no entity could interfere with the city's right to use the river and "the city could take the water from any point on the river wherever at will."<sup>15</sup> When the state and federal courts upheld *Vernon*, Cosgrove was confident that with the application of the same strategy San Diego would likewise attain the "prior and paramount right" to the San Diego River.<sup>16</sup>

Cosgrove believed that the historical facts, the decisions of the state, and the arguments presented in the *Opinion* clearly affirmed that the city had the prior and paramount right to use the waters for the general public and for all municipal purposes. Allowing his literary enthusiasm to flow, Cosgrove concluded that the city's right was for the "entire river from bed rock to surface, and from the tiny rivulet that trickles down from the rim of the great watershed, to the shimmering sands where the bed of the San Diego meets the sea."<sup>17</sup>

The public response to the *Opinion* was surprisingly subdued. Cosgrove later admitted that on the day the newspapers printed the announcement it just seemed like a routine news item. On January 5, the *San Diego Sun* wrote that Cosgrove declared in thirty typewritten pages of often "flowery phrases" that the city had "first call" on the river water. The *Sun* explained Cosgrove's research and the use of historical records as the basis for his conclusion, but downplayed the implications of the piece and instead noted how Cosgrove ignored "bewildering, ponderous" legal terms and inserted some human nature into his opinion.<sup>18</sup> *The San Diego*

*Union* relegated the news to page five and the next day modestly noted that the “Oldest Records Show City’s Right to San Diego River.”<sup>19</sup> In his annual message to the city on January 6, Mayor Charles O’ Neill included a recommendation to secure the El Capitan dam site, but made no mention of the *Opinion*.<sup>20</sup> It appeared that the issuance of the *Opinion* was not a moment appreciated at the time.

Fletcher, on the other hand, sharply rejoined through a series of newspaper interviews that he was ready to “go on the war path” to protect his interests on the river. Respective headlines declared he was willing to “Fight for River Water Rights,” and believed the “Rights of City to Water a Joke.” Fletcher pointed out that the Flume wondered why the city had waited until now to acknowledge its claim to the river.<sup>21</sup> In Fletcher’s estimation the *Opinion* was an adversarial attempt to squelch his river enterprise.

The Common Council held no illusions about the *Opinion’s* intent. The Council served notice of the municipality’s paramount right to the river waters with City Resolution #17382 in May 1914. The resolution stated that because “certain persons, individuals and companies” were contemplating further development of the San Diego River, the Council and the city Board of Water Commissioners were compelled to reassert the city’s prior right to the river waters.<sup>22</sup> While the Council’s statement was more precedential than legal it clearly stated the city’s position regarding the river and set the parameters for the ensuing protracted legal struggle. The council also created a Citizens Advisory Water Committee to consult with the city attorney and city hydraulic engineer in future water investigations for acquiring additional water for the city, a move Fletcher no doubt perceived as another city incited irritant directed at his interests.<sup>23</sup>

Public administrators used the *Opinion* to establish the municipal right to the river and generate a defensible legal position. Along with the city’s claim to the waters the *Opinion* also manufactured a blueprint of evidential documentation to defend against the anticipated litigation. Prior to 1914 the city’s strategy to control the river, and deflect private designs, was implied rather than stated. With the *Opinion* the city abandoned its passive stance, stated its new philosophy, and



*City Hydraulic Engineer Hiram N. Savage was an advocate of placing a dam on the San Diego River in Mission Gorge. Courtesy of the Hoppe Family.*



San Diego River Gorge, 1930. ©SDHC #11451-5.

initiated administrative action. Cosgrove's conclusions became the city's manifesto to defend its water right and develop the river for municipal purposes. The city's change in strategy and new course of action was timely. In Higgins' view the city had been "sleeping" on those river rights far too long and needed to assert its hegemony over the river. In a tangible display of the Common Council's appreciation of Cosgrove's efforts that body approved an immediate increase in his salary.<sup>24</sup>

The revelations of the *Opinion* also tangentially spawned a prolonged debate over the location of a dam to conserve the river waters once the ownership question was resolved. Fletcher owned a site in

Mission Gorge and the El Capitan site, while the city also possessed a Mission Gorge locale. The city became so consumed and divided with the debate over where to construct a dam that the Common Council finally resorted to submitting the question to a public vote in the fall of 1924. Fred Heilbron, the majority of the Common Council, City Manager Fred Rhodes, and City Attorney Higgins joined forces against City Hydrologist Savage, Mayor John Bacon, Fletcher, and the majority of the Chamber of Commerce to defeat a ballot measure to fund a gorge dam. On September 10, 1924 the electorate endorsed by a 3-1 margin the site at El Capitan and a November ballot reconfirmed their intention with the passage of a \$4,500,000 bond issue to construct the El Capitan Dam and Reservoir. Politics aside, it was another seven years before the courts decided where the dam would be and who would control the river.

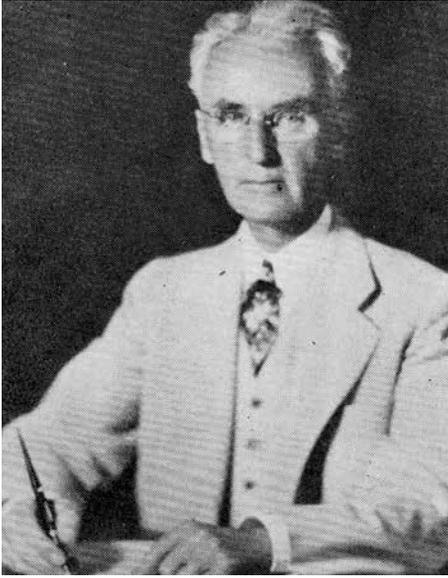
### The Pueblo Water Rights Theory

The core of the *Opinion* was the legal stratagem called the pueblo water rights theory. Los Angeles attorney John Godfrey contrived the theory as a strategy for the 1895 *Vernon* case. Historian Norris Hundley suggested that Godfrey manufactured the theory and stressed the rights of the community over the individual, a philosophy the Progressive minded judiciary appeared willing to accept to assist municipal development. In Hundley's estimation, the theory was counter to the basic water principles of appropriation doctrine and riparianism,

which Californians accepted. In retrospect legal historian Peter L. Reich argued that in defense of the theory state judges favored municipalities, ignored the traditional legal tenets, and knowingly adjudicated rulings counter to the original Spanish and Mexican law.<sup>25</sup> Water rights expert Wells Hutchins thought the pueblo water rights theory rested on a series of judicial notice presumptions and called the treatment of the Spanish and Mexican laws in the California cases “sketchy” and based on a “very narrow foundation.” He also supported the adverse possession saying the theory supplanted the rights of private interests that had exercised beneficial use to consumers for many years.<sup>26</sup> For the judges to accept the pueblo rights theory, the city legal team had to prove to the court’s satisfaction that San Diego was the successor to the original Pueblo of San Diego established in 1769. The date of 1769 applies to the founding of the mission since the Pueblo was not founded until 1834. Conversely Fletcher’s mission became one of dissuasion.

The pueblo water rights theory was the most applicable and persuasive argument available for the city to gain control of the San Diego River. The city’s history, the location of the river within city boundaries, and the earlier legal success of the City of Los Angeles under similar circumstances, gave San Diego an advantage. Also the city’s rising status with the navy and the federal government predicated on San Diego’s strategic harbor overriding the opposition’s compelling arguments, provided the city a strong position. This remained true even when the La Mesa, Lemon Grove, and Spring Valley Irrigation District became involved in the fray which pitted two municipalities as contestants. Without the pueblo water rights, California’s traditional riparian and appropriative rights concepts, and lacking an Owens Valley option, the city might have purchased the CWC, certainly a quicker and less expensive option. It also could have acquired the North County’s San Dieguito system earlier and pursued the Colorado River resource more aggressively. The civic leaders, however, comfortable in their pueblo strategy, and despite Fletcher’s anti-pueblo optimism, remained committed to the San Diego River option.

In the context of the time the *Opinion* appeared to favor San Diego’s quest for the river. As Reich suggested, Progressive era courts and state and federal government agencies supported municipal growth. In 1915 when the city prepared to submit its application for the El Capitan dam site to the Land Office Committee, and to the U. S. Congress in the form of HR #11540, Secretary of Interior Frank Lane, who earlier ruled for the city in the Hamilton Affair, read the application, and freely suggested several changes regarding maps, right-of-ways and payment to the Indians on the Reservations lands. Cosgrove incorporated Lane’s recommendations, which included compensation for the natives and the provision



Charles Crouch was a close friend of Fletcher and the lead attorney for the Cuyamaca Water Company. Fletcher Memoir, p. 386.

that the waters were not exclusively for San Diego and its distribution affiliates and the Council quickly approved the revised document. The amended bill advanced to the committee level in Congress and Cosgrove traveled to Washington to defend it in May 1916. In July the commissioner for the Land Office in Los Angeles dismissed an appeal from the CWC against the city's application for condemnation of the El Capitan lands.

In applying the principles of the *Opinion*, by 1916 the city had staked its claim to the river and appeared poised to capture the dam site that was the key to developing the river. The civic notion that water was tied to population increase appeared also flatlined at

approximately 71,000 citizens. The arrival of the US Navy and the infusion of the military facilities after 1919 tipped the economic balance and gave the city its economic niche and growth incentive. Civic leaders and residents recognized the importance of developing the San Diego River but spent another fifteen years securing the river and deciding where to conserve its waters.

Years before the case reached the courtroom Fletcher's defense team anticipated tactics to counter the city's pueblo driven strategy. In the early 1920s CWC Attorney Charles Crouch hired A. A. Gottesburen, a self-proclaimed expert on colonial institutions, to gather historical data to contradict the theory. But even as Gottesburen researched, some of the defense team doubted his capacity to cull authentic and authoritative materials from pertinent historical documents and library collections. Indeed Crouch worried that some of the materials were not "sufficiently comprehensive and authentic to meet our needs."<sup>27</sup> Nevertheless the team formulated Gottesburen's information to create a 172 page loose-leaf notebook to serve as a trial exhibit to prove that rather than being a "successor of a pure or agricultural pueblo" San Diego was the successor to the presidio that was established to protect the pueblo. In this scenario Fletcher's lawyers argued that the King of Spain granted the land and all waters to the inhabitants within the San Diego Mission not the town.<sup>28</sup> The defense believed the pueblo water rights theory was vulnerable because the city had "no support in the

Laws of the Indies and none under California Supreme Court decisions.” In Fletcher’s mind, the city’s case was not well founded and his defense team would “knock out” the pueblo concept in the courtroom.<sup>29</sup> When the city filed in March 1923, a compatriot of Fletcher cavalierly remarked that he was surprised the city had so much faith that the CWC would prevail in the court.



*Ed Fletcher, James Morse, Frank Rhodes, and Fred Jackson. Fletcher Memoir, p. 291.*

Fletcher’s team attempted to create an opposing historic precedent to discredit the *Opinion’s* historical base. Crouch specifically referred to a 1773 letter to Father Junípero Serra his researchers found in the Bancroft Library. The document called for Serra to move the mission from a site near Presidio Hill into Mission Valley and construct a dam on the river. The water from the dam would be for the benefit of all people who may reside within the jurisdiction of the Mission for perpetuity. Further, the waters of the San Diego River were withheld from the settlement of San Diego when the government secularized the missions. Crouch argued that the government withheld the water rights of the river from the pueblo, then, with secularization, the water rights passed to the State of California, not the city. In Crouch’s interpretation of the letter the government never intended for San Diego to become a pueblo and the local landowners should garner the rights to the river. In this interpretation the pueblo water rights argument was moot. Using this line of reasoning, Crouch challenged the city to incontrovertibly prove that the Spanish intended San Diego to be a pueblo and that the water rights passed to individual landowners, not the state.

Rather than becoming a defining piece of evidence, questions arose about the Serra letter’s provenance and validity. Where was it from 1773 to 1923 and how did the Bancroft come to possess it? Why was the document not cited in any of the early basic histories of San Diego? Fletcher donated the letter to the Serra Museum in 1950, noting that one of his attorneys had procured it in 1923.<sup>31</sup> It was later declared a fraud. The Diocesan Historical Commission examined the letter for the Cause of the Beatification of Fray Junípero Serra and declared it and another Serra document as fake. Diocesan experts agreed with the “scholars and evaluators” that it was a clear case of forgery and “hence spurious and valueless.”<sup>32</sup>

In a final note of desperation, Crouch failed in efforts to compensate the respected University of California Professor Herbert Bolton to testify as an expert witness in support of the document.

As the prospect of a legal confrontation loomed, the focus of the contesting parties polarized on supporting or refuting the *Opinion's* pueblo water rights theory that San Diego was the successor to the colonial original pueblo as Cosgrove advocated in the *Opinion*.

### **Ed Fletcher and the *Opinion***

For almost twenty years the struggle for the river pitted the John D. Spreckels business coterie and his supporters on the Common Council, which represented the city in water matters, against Fletcher and the CWC. Over the course of time the sides debated the type of dam to be constructed and its location, but in 1914 the core issue centered on who would control the river.<sup>33</sup> City officials appreciated the implicit threat Fletcher and the CWC posed with their designs on the river and hence to the city's water future. Fletcher left no doubt he planned to continue taking water from the upper river and damming and improving the CWC system. Fletcher campaigned that improvements would aid the city, but as San Diego historian Theodore Strathman has argued, the businessman also understood the additional water delivered to the east county would add value to his personal real estate holdings.<sup>34</sup> If city administrators only tacitly directed the *Opinion* at Fletcher and his CWC interests, their river claim formalized the rift and in fact initiated a more strident posture when dealing with him.

In Spring 1914, during talks between the Common Council and Fletcher over the charges the CWC would levy for water, the council passed a resolution that emphasized that the talks could not be construed in any way to "impair or prejudice" the city's rights to the river. City administrators wanted to be perfectly clear that purchasing water from the CWC did not in any way present a stipulation in the city's claim to the river.<sup>35</sup> The foundations of the legal struggle between the city and Fletcher over the river were based on vested interest. The city leaders represented a municipality with designs for growth and expansion. Fletcher was a businessman looking to profit. This is not to say that Fletcher was opposed to civic growth, which would tangentially enhance his interests, but in the early decades of the 20th century his managerial association with the CWC was premised as an entrepreneurial enterprise.<sup>36</sup>

Fletcher rightfully considered Cogrove's *Opinion* a provocative statement. The city directed the document at individuals or groups who took or intended to take river water for business purposes. The *Opinion* essentially preempted any use by



Rufus Choate, San Diego banker and President of the Chamber of Commerce, was a constant advocate for an independent city water system. Fletcher Memoir, p. 634.

other individuals or agencies. The target of the implication was clear. Aside from private landowners the CWC was the only water enterprise on the river. Fletcher argued through the newspapers and the public meetings that the *Opinion* was the city's first indication it was claiming rights to the river. The San Diego Flume had operated since 1888 and the CWC since 1910, so why had public officials waited until 1914 to initiate action? Fletcher observed, not coincidentally, that the *Opinion* came when the CWC directors were considering the El Capitan project and other upper river improvements. The *Opinion* was for the "sole purpose of annoying, vexing and harassing" him and hindering the development of the CWC.<sup>37</sup>

A tangential wrinkle appeared when the La Mesa Irrigation District offered to purchase the CWC. As Fletcher quarreled with the city, he recognized

that in selling the company he could avoid becoming consumed in expensive and protracted litigation. He was ready to sell. The city skeptically eyed the transaction, worried that the District as a municipal entity would be a stronger antagonist than Fletcher. The matter eventually found its way before the State Railroad Commission where Fletcher demanded \$1,000,000 plus an additional \$350,000 for what he termed the system's strategic value. The Commission members balked. In 1913 the Commission ruled that the system should be rebuilt, believing that in its current state, the system would last no more than four years, and it also established a market value of \$745,000 for the system. The District attempted to close the deal at the Commission's valuation but Fletcher demurred. The District later filed suit with the Commission to force the sale, but a State Court denied the request.<sup>38</sup>

Even as Fletcher considered the ramifications of the *Opinion*, he moved forward with plans to develop the river. In 1914, two years after the city chose the Spreckels-owned Southern California Mountain Water Company over the CWC as its principal water supplier, Fletcher acquired 160 acres that belonged to Mrs. William J. Kehner and some acreage on the El Capitan Indian Reservation lands,

including a dam site below Mt. El Capitan. Fletcher had local rancher George Sawday purchase the river land for him in order to “not arouse suspicion.”<sup>39</sup> At the time of the transaction the directors of the CWC would now have “to deal with Fletcher.”<sup>40</sup>

As predicted, the control of this dam site dovetailed into a city-Fletcher confrontation. A disgruntled former CWC employee, C.T. Sackett, apparently purloined some CWC survey documents and then convinced his friend W.B. Hamilton to file for land on the Indian Reservation that included the dam site. Watching the affair unfold and sensing the gravity of controlling the city’s interest on the river, Chamber of Commerce President Rufus Choate entered a protest with the Department of Interior in October 1914 arguing against any future actions by Fletcher, Hamilton, or any other city or corporation that desired to secure control of any reservoir sites on the El Capitan Indian Reservation.

In the end, the Department of Interior, acting through the Los Angeles Land Office, rejected Hamilton’s request. Hamilton and his associate local Judge Boone then offered the filing to the city. Boone informed the Common Council of the value of these lands and urged the members to immediately act on the transfer to “secure the greatest advantage” for the city.<sup>41</sup> The council agreed and when the city became the assignee, Cosgrove re-filed a motion with the Secretary of Interior for supervisory power over the matter and petitioned for a hearing at the Land Office in Los Angeles. The Land Committee reconsidered the case and overturned Hamilton’s rejection and Secretary of Interior Frank Lane quickly approved the city’s submission. With the decision, as Fletcher put it, “the fight was on.”<sup>42</sup>

The aggressive rhetoric of the *Opinion* certainly enhanced the possibility of litigation between the city and private interests. The reigning city political leaders believed the waters of the river belonged to the city and were prepared to litigate to protect his investment. To enhance his investment, and in compliance with the mandates of the 1912 State Railroad Commission, Fletcher improved the CWC to make it a more efficient system. Businessman Fletcher saw the improvements as an opportunity to enlist additional consumers and increase users’ rates. He saw the future of the backcountry in the domestic expansion of the east county and wanted to reap that potential, but he irritated some river riparian owners when the CWC sold water to the city for a lower rate than to the ranchers.<sup>43</sup> Faced with the ramifications of the *Opinion*, Fletcher, who undoubtedly had a personal animus motivating his actions, would not allow the matter to go uncontested. Confident the courts would expose and reject the myth of the so-called pueblo water rights theory, Fletcher gathered his legal team and prepared the litigation.<sup>44</sup>

The CWC was an older yet functioning system, so as he proceeded, Fletcher must have pondered why city administrators deflected his overtures to sell them

the system. Fletcher rightfully linked the rejection of his sales offers to the belief of city officials that the municipality already owned the river water. In effect, any recognition the CWC's position potentially mitigated the city's stance. Fletcher reiterated this sentiment during the 1918 Congressional hearings before the Committee on Public Lands when on the witness stand he testified that he was told (he never identified by whom) that Cosgrove opposed the sale of the CWC to the city because it "might be recognizing the Cuyamaca Water Company's right of ownership to the waters of the San Diego River."<sup>45</sup>

It is important to appreciate that the conflicting agendas of Fletcher and the confrontation. A third party observer suggested there was a modicum of merit to Fletcher's belief that the City Council opposed him. There were misunderstandings that exacerbated the relationship, but it appeared that the Council did not approach the sales offers with "trustful enthusiasm." It seemed that the Council and Fletcher functioned in an atmosphere where each worried that one party was always trying to "put one over" on the other.<sup>46</sup> It was small town politics personified.

### **The *Opinion* Postscript**

References to the *Opinion* arguments reappeared over the next fifteen years whenever the litigants contended over the rights to the San Diego River. Fletcher actually came within a breath of winning the first court confrontation. Judge Perry J. Wood presiding in the San Diego Superior Court in 1922 rejected the city's pueblo theory as "contrary to law and justice." Nevertheless, when Fletcher's attorney Charles Crouch failed to submit pertinent paperwork within the required time frame, the city's legal team managed to withdraw the case before the court rendered

a decision. Had Crouch submitted the papers expeditiously, the court would probably have found for Fletcher and dealt the theory at least a temporary setback. When Fletcher and Cosgrove faced off in the 1918 House Congressional hearings on the "Conservation and Storage of Water," and in the courtroom thereafter, much of the argument centered on the tenets of the *Opinion*.

In the 1918 Congressional hearings, San Diego Congressman William Kettner set the tone of the meeting with a statement explaining the city's need



*Congressman William Kettner, San Diego resident, outlined the city's need for an increased water supply in congressional hearings of 1918.*  
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for an increased water supply. Fletcher testified that the city's agenda was to gain control of the CWC, secure the El Capitan site at a minimal price, and that congressional approval would negatively affect the El Cajon Valley consumers and inhibit the CWC's continued improvement. Throughout Fletcher claimed adverse possession and blasted the "mythical" pueblo water rights theory. Cosgrove benignly offered that the city was looking to conserve water for the city's inhabitants and control flood events. During the proceedings, Cosgrove leaned on the *Opinion* for substance and clearly attempted to create the impression that Fletcher and the CWC were focused on private gain rather than civic improvement.<sup>47</sup>

In the 1923 court proceedings Shelley Higgins used the arguments in the *Opinion* to establish the city's case but also offered the testimony of long-time residents to create an element of precedent. Through the witnesses Higgins established the city's use and reliance on the river waters to buttress the pueblo theory. For example, Crouch asked one witness, Mrs. Willeta Benton, if to her knowledge anyone had ever mentioned the idea of the city having paramount rights before 1914. Benton, according to Higgins' recollection and to Crouch's chagrin, answered that indeed there were men who lived in San Diego for many years who "took it that the pueblo had a right to the waters of the San Diego River." Several other old-timers voiced similar points of view.<sup>48</sup>

As the affair labored through hearings and courtrooms, Fletcher, frustrated with his attempts to sell to the city over the past decade, considered the time and expense involved in further litigation and decided to offer the system to the La Mesa Irrigation District. The District approved a \$2,500,000 bond and purchased the CWC in January 1926. After the sale Fletcher ruminated that had he known the city would pursue the paramount rights agenda he would never have invested in the enterprise. For years the District and the city engaged in talks over control of the river, but both accepted that the courts would settle the matter.

After multiple trials, Judge Conkling declared the city's position valid. Throughout the city, legal pundits presented a history of San Diego supporting the pueblo water right and the opposition countered the pueblo argument and claimed adverse possession. Conkling's decision granted twenty-seven cubic feet of water per second to the Irrigation District because the city had not challenged the District's right to divert water in the past and because many of the east county communities were dependent on that water. The city had paramount rights but the court did not specify the quantity of water it could withdraw. With neither side satisfied, the Chamber again offered to mediate a settlement to develop the river, but the only progress was the march toward an appeal.

The court finally ended the years of controversy in March 1930 when a seven-

member superior court panel rendered a decision on the appeal. The members accepted the Pueblo Water Rights concept and declared that the La Mesa Irrigation District, the CWC and the landowners were riparian users of the river and as such had no title to it. The question was about the right to the water not the amount taken.<sup>50</sup> When the U.S. Supreme Court refused to hear the case, the river belonged to the city.

In December 1931 the city and the La Mesa Irrigation District reached an agreement that truly ended the legal imbroglio. The District retained Cuyamaca Dam, the El Monte Pumping Station, wells along the river, and the right to store and distribute water through El Capitan and received two million gallons of water per day. The city took store and access to 5000 acre feet of water from the Murray Reservoir. Both the Irrigation District's attorney Albert J. Lee and City Attorney Buyers pressed their respective clients to immediately sign the "peace terms" and end the litigation. When city and district representatives agreed to jointly construct additional distribution lines the parties signed papers.<sup>51</sup> In the end the Irrigation District, and vicariously the CWC, lost the decision but won the water.

## **Conclusion**

The perpetual dilemma of creating a reliable water supply to facilitate an expanding municipality was an ubiquitous predicament in San Diego's civic psyche. Having tapped the most accessible water sources and still confronted with a water-driven growth impasse, in 1913-1914 city officials turned their attention to the under-developed San Diego River, a source they believed offered a tangible resolution to their dilemma.

The water landscape on the river, however, was an unsettled environment. Specifically there could not be two masters on the river. After the assumption of the San Diego Flume Company, the Cuyamaca Water Company, under the aggressive management of Ed Fletcher, proposed to improve and expand its operation on the upper river and increase supply to east country consumers. Fletcher viewed the relationship between the CWC and the city in light of the old western water aphorism that suggested it was better to be upstream with a shovel and a ditch than downstream with a decree. And that is how the city officials reacted. Since city officials were reticent to solve the issue with the purchase of the CWC, the only viable alternative was to devise a legal strategy to counter the CWC's physical presence on the river. Thus, perceiving boosters considered proprietary and indispensable, the Common Council authorized City Attorney Terence Cosgrove to author a document to clarify and protect the city's right to the river waters. In stating that right, *Cosgrove's Opinion of 1914* also supported

the city's paradigm of municipal expansion.

The *Opinion* was a salient document if for no other reason than it contained the water rights theory that became the basis of the city's claim to the San Diego River. Cosgrove's iteration of the Pueblo Water Rights theory, a tactic a Los Angeles legal team used to secure the Los Angeles River for that city, was the most applicable and compelling argument available. Historical precedent emphasizing community need became the core of the city's legal engagement. Significantly the Progressive era judiciary also accepted the notion that the public need took precedent over private corporations and that a water utility system was a municipal service franchise that should be city operated and controlled. Even when the contest became between two municipalities, the court appeared to favor the domestic water use in urban areas over the agricultural needs of a rural community.

The *Opinion* offered the template legal counsel utilized in the hearings and court sessions over the next decade and a half to gain the river and served the purpose for which it was intended. But it should be noted that winning the river was a transitory victory. San Diego's water woes persisted as the area's expanding population continued to outstrip the gallons available, which forced the city to seek water resources outside the region.

Years after the city won the paramount case, Shelley Higgins, who succeeded Cosgrove as City Attorney and served as the city's lead legal counsel at the later court proceedings, recounted that he had read and studied the document in his preparations for the case. In his view the *Opinion* was a "notable contribution to the City's legal foundations" and the theory was correct in the "minutest detail."<sup>52</sup> Bias aside, the *Opinion* exerted a salient influence on the final legal decision to grant San Diego the control of the river and promote the viability of regional and metropolitan growth.

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