

MEMORANDUM OF LAW

DATE: August 27, 1991

TO: Milon Mills, Jr., Water Utilities Director

FROM: City Attorney

SUBJECT: San Diego River Water Use, Fashion Valley Center

You requested that this office review a May 24, 1991, letter from Martha Wiley Environment Co. which proposed the pumping of approximately 1500 gallons of water per week from the San Diego River to irrigate ornamental plantings in and around Fashion Valley Center.

Our review of the letter poses two legal questions:

1) Does The City of San Diego have rights to the San Diego River water; and 2) If such rights exist, can the City permit or approve the use of San Diego River water by Fashion Valley Center?

WATER RIGHTS

The Wiley letter states "we are aware that the water in the river at that point belongs to the City of San Diego." A water right is a usufructuary right. That is, it is a right to the use of the water as opposed to a right in the corpus of the water itself. The corpus of the water is the property of the people of the State of California. Water Code section 102. Hence, any right the City has to the river water is to its use.

Certain California cities, including San Diego and Los Angeles, have been held by the courts to have a kind of municipal water right to serve the needs of their inhabitants. These prior and paramount rights are based on the concept of Spanish and Mexican law in establishing settlements ("pueblos") in California before its admission to the Union. Such a pueblo right extends to all natural water, surface and underground, of the stream systems flowing through the original pueblo, including tributaries, from its source to its mouth, as that water is needed for pueblo purposes. *City of San Diego v. Cuyamaca Water Company*, 209 Cal. 105, 151 (1930).

Therefore, the City of San Diego has a prior and paramount pueblo right to the use of the water in the San Diego River. Unlike other kinds of water rights, pueblo rights are never lost but are available for use whenever the City is ready to exercise them. *City of L.A. v. City of Glendale*, 23 Cal. 2d 68, 74-80 (1943). Thus, unlike riparian or appropriative rights, pueblo rights cannot be abandoned, forfeited, or appropriated under Water Code section 1241, if unused.

Use of San Diego River Waters

The City's pueblo rights extend to all the water that is:

Reasonably necessary to give an ample supply for the use of its inhabitants and for all municipal uses and purposes for which the city may require water. This right is measured by the necessity, and if the needs increase in the future the right will expand to include all that the needs require.

City of Los Angeles v. Pomeroy, 124 Cal. 597, 620 (1899).

"The pueblo right has always been measured, and therefore circumscribed, by the needs of the city. It thus insures a water supply for an expanding city with a minimum of waste by leaving the water accessible to others until such time as the city needs it." City of Los Angeles v. City of Glendale, 23 Cal. 2d 68, 75 (1943). When not so used by the city, the water may be used by others. Id.

A December 4, 1929, City Attorney Opinion addresses a similar problem posed by Arthur L. Glone's request to pump water from the San Diego River at Old Town. The opinion concludes that:

The right of the City is only to the water when the City actually needs it, itself. It would appear to me that in view of the City's doubtful rights in the matter, that except where the necessity is apparent the City should not refuse to grant such petitions. The City of Los Angeles still permits pumping in the San Fernando Valley, notwithstanding the fact that at one time it obtained an injunction against such pumping, and the City of Los Angeles has not cancelled such permits because of the present near drought. In any event, the City's legal rights will be in no way impaired by the granting of such permit.

Op. S.D. City Att'y 198 (1929).

It appears, therefore, that the City of San Diego may permit the pumping of San Diego River water which the City does not reasonably need in supplying its own inhabitants, and may do so without harming its prior and paramount pueblo right.

A portion of Section 1 of the San Diego City Charter ("Charter") provides that:

The municipal corporation now existing and known as 'The City of San Diego' . . . may own and acquire property within or without its boundaries for either governmental or proprietary, or any municipal purpose . . . and may sell, lease, convey, exchange, manage and dispose of the same as the interests of said City may require (emphasis added).

An opinion rendered on February 8, 1945, by J. F. DuPaul, then City Attorney, stated that: "We are satisfied that this language means but one thing, and that is that the City cannot dispose of its property

without a valuable and legal consideration." Op. S.D. City Att'y 40 (1945). Though the question presented in that opinion was whether The City of San Diego could convey any of its priority rights to Colorado River water obtained by contract between the City and the United States Department of the Interior, it would appear that a similar right, the pueblo right, is at issue here. Hence it is the opinion of this office that pueblo rights may not be "sold, leased, conveyed, exchanged, managed and disposed of" without valuable and legal consideration.

In addition, Charter section 53 states that "all revenues of the Water Utility shall be deposited in a Water Utility Fund." Over the years, this office has consistently opined that current Charter section 53, as well as its predecessors, evidence the philosophical concept of a fiscally self-sufficient and self-sustaining Water Utility Department, (see Op. S.D. City Att'y 177-182 (1932); Op. S.D. City Att'y 362-363 (1932); Op. S.D. City Att'y 526-531 (1933); Op. S.D. City Att'y. 98-100 (1947); Op. S.D. City Att'y 23 (1965); Op. S.D. City Att'y 157-165 (1966); Op. S.D. City Att'y 37-40 (1966); Op. City Att'y 83-87 (1980)) and that no asset of the Water Utility may be disposed of without receiving full value.

Much like real property, which has been acquired in the past for a water related purpose, is considered an asset of the Water Utility, so too is San Diego River water, which may be necessary for municipal use, an asset of the Water Utility. The sale of either asset, real property or water, generates revenue which must be placed in the Water Utility Fund.

Should a determination be made that the 1500 gallons per day of San Diego River water requested by Martha Wiley Environment Co. are not necessary to the City, then such water may be sold pursuant to Charter sections 1 and 53, for valuable and legal consideration to the Wiley firm. Be advised that this permission may be withdrawn should the City later find that it needs the water to provide an ample supply of water for its inhabitants.

JOHN W. WITT, City Attorney

By

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Deputy City Attorney

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