

October 9th, 1898

F. Burbridge,  
Manager, ect.

Kellogg, Idaho.

Dear Sir:

A year or two ago Mr. Bradley addressed me a letter asking me to give an opinion upon the precise question contained in yours of yesterday, as to the right of your company to use the additional waters made by your workings in the mine since the Last Chance appropriation of the waters of Milo creek, and since the suit of that company against us in 1892. I have a copy of the opinion then given which covers all the points in your letter. I suppose the original was blown up with your other papers. There may be difficulty in apportioning the amount which came from the Reed Tunnel when the old case was ~~settled~~ decided, but you will have to allow that much to go to them, and are entitled to the remainder. They will no doubt bring proceedings for contempt of the former decree, but if you permit the quantity to run to them which it gave them, your defense will be perfect.

34 Cal. 451

11 Cal. 153.

I herewith enclose copy of the opinion furnished Mr. Bradley. I think it was in 1896, but my copy bears no date.

Yours truly,

Subject:

Right of Bunker Hill Company to water  
which it draws out of the mine.

Bradley, Manager.

Dear Sir:

The subject of your right to water which is the result of your workings in your mine, is one that engaged my attention to some extent in the suit that we ~~had~~ had with the Last Chance in 1892, and also in my letter to you last summer.

The matter now comes to me on your present statement in a little different form than heretofore.

The general rule is that any increase in the flow of water in a stream where the right to its use has been lawfully acquired, cannot be interfered with by those above, but the courts have held both in England and this country that although a man had acquired the right to use water which was procured by the workings of a mine, could not compel the mine owner to keep up the supply, nor would there be any obligation of any sort to the adjoining claimant to transmit the water to him.

Water rising on one's land is a part of the land. The owner of the land is its proprietor, with the absolute right to use it as he sees fit, except that he has no right to turn it on his neighbors land to his injury, but once he suffers it to flow away from his own land, he cannot reclaim it. This was one difficulty in the suit of the Last Chance Company vs Bunker Hill, 1892, we had permitted the water to flow away from the place designated for its use, into the general stream, and the court held it to have been abandoned to those below and we could not after they had acquired a right to it, reclaim it. I have always doubted the correctness of that ruling, but now I suppose that the question is settled against us. But the present case is different. Do not allow

ing the increase of water to become a part of the stream and diverting it on our own ground, though if left alone it would run into that stream it does not become any part of that stream, and we can maintain our right to its use. As to the right to use it on our own land before it leaves it, there is no possible question. Can we take it by artificial means to other points and use it, is the question. I think we can. We have as much right to take the water in our land out of it, and transmit it, for sale or use, as we have to dig the ore out and sell or use that.

The Last Chance suit was based on a different state of facts. There, we first appropriated the waters of Milo creek at a point above the concentrator, and after its use, turned it back into the channel. The Last Chance then appropriated this running stream and when we diverted it by our ditches at a point above the place where they had located, it was held an unlawful diversion. But in this present case the water never was any part of the stream; it is distinctly derived from another source and rising in our own land (created there in fact by our own labor) forms no part of the stream which was appropriated by the Last Chance. And it has been held by the courts with almost perfect uniformity that the right to water flowing streams and water derived from underground sources is entirely different.

Acton vs Blundell 12 M. & W. (English Exchequer)

Wheatley vs Baugh 25 Pa. St. 528.

Angell on Water Courses, Sec. 113-114.

Although I think if you undertake to divert this water you will probably have a contest over it, as the value of it is likely, as you increase your work in depth, to be of much importance to you, and I would exercise the right to take it. In order to advertise your claim to it and make your purpose clear, I would, if you want to take it at the mouth of the Reed Tunnel put up a notice at that point, stating that the water flowing out of that tunnel was water that was developed

by the workings of the mine, and that it was appropriated for such purpose as you may designate, and giving the point to which you proposed to take it. The statute will furnish you directions as to the form of the appropriation, and the work necessary to be done to make the location effectual. My impressions on this subject, when I wrote you last summer were different from what I now advise, but the facts are not the same as I then understood them, and my investigations lead me to the conclusion above stated.

Yours respectfully,

*James M. Smith*