

# COUNCIL MINUTES, MARCH 9, 1914

Pursuant to the call of the Mayor, the Common Council of the Town of Flagstaff met in the Town Hall, Monday morning, March the 9th, A. D. 1914 at 9 o'clock.

Present Mayor Treat, Councilmen Black, Francis, Sult, Switzer and Wilson. Town attorney Doe. Clerk Fleming. Absent Councilman McGonigle.

This meeting was called for the purpose of authorizing the execution of a certain contract between the Town of Flagstaff and the Atchison, Topeka and Santa Fe Railway Company and Santa Fe Land Improvement Company.

The following resolution was presented and read.

"Be It Resolved, that J. R. Treat, as Mayor of the Town of Flagstaff, Coconino County, Arizona, and Geo. A. Fleming, as Clerk of said Town, are authorized and directed to make, execute and deliver in triplicate, a contract whereof the following is a true copy.

This Indenture, Made this 3rd day of March, 1914, by and between the Town of Flagstaff, a municipal corporation, of the State of Arizona, hereinafter called "Town" first party, The Atchison, Topeka and Santa Fe Railway Company, a Kansas corporation, hereinafter called the "Railway Company," second party, and the Santa Fe Land Improvement Company, a California corporation, hereinafter called the "Improvement Company," third party;

Witnesseth, That

Whereas, an action is now pending in the District Court of the United States for the District of Arizona, between the Town, plaintiff, the Railway Company and the Santa Fe Pacific Railroad Company, a corporation, defendants, involving certain lands and certain water rights at and near the Town; and

Whereas, the parties hereto desire that said litigation shall be settled and discontinued, and that a larger supply of water may be secured, both for the use of the Town and of the Railway Company;

Now, Therefore, This Indenture Witnesseth:

## ARTICLE I.

1. The Railway Company shall, as hereinafter provided, at its own cost, construct a storage reservoir (hereinafter called the "New Reservoir") of fifty million (50,000,000) gallons capacity, on a suitable tract or parcel of land to be acquired by the Improvement Company near the Town in Coconino County, Arizona.

2. The Railway Company shall, at its own cost and expense, lay an additional pipe line from at or near Jack Smith Spring to the New Reservoir, upon the same grade and along the same right of way on which is laid the existing pipe line from said Spring to the Town's present reservoir (hereinafter called the "Old Reservoir") diverging from said right of way only at such point as may be found necessary in order to reach the New Reservoir; such additional pipe line to be made of vitrified sewer pipe to be not less than eight inches in diameter, except that on the sharper grades a pipe seven inches in diameter may be used where it grades; and shall repair said existing pipe line, and repair and improve the head works near said Spring; and shall connect up the Old Reservoir with the New Reservoir and connect each with the existing pipe line running from the Old Reservoir to the Town so that either or both Reservoirs may be drawn from at the same time.

3. All the work done under the foregoing Sections 1 and 2 shall be done in accordance with plans and specification which shall first have been approved by the Chief Engineer of the Railway Company and by an engineer selected for the purpose by the Town. If the two engineers cannot agree, they shall select a third, who shall harmonize the differences of the parties in such a way as to accomplish as nearly as practicable, at a cost of approximately One Hundred Sixty-two Thousand Dollars (\$162,000.00), the purposes of the parties as outlined herein. The work shall then be done in accordance with such modified plans and specifications.

4. The Railway Company shall begin the preparation of plans for the New Reservoir and the additional pipe line and other works provided for in Sections 1 and 2 of this Article I, immediately after the execution hereof, and will begin such work promptly thereafter.

5. Beginning from the time that the Railway Company shall commence to receive water from the New Reservoir, it will pay the Town Seventy-five Dollars (\$75.00) per month so long as the Town shall continue to reduce its now existing bonded indebtedness, at the rate of not less than Two Thousand Five Hundred Dollars (\$2,500.00) per year, until the extinction of such indebtedness, if this contract shall remain so long in force and the Town shall continue to maintain and operate such water system. And the Town agrees to use such said payments exclusively in payment of such indebtedness and in the maintenance of that part of its water works plant which lies between the springs that are the source of supply down to and including said reservoirs. Provided, however, that inasmuch as it may be necessary for the Improvement Company to pay out in acquiring said parcel of land certain moneys, which purchase was not contemplated when estimates of cost of said works were made, it is agreed that, instead of paying said Seventy-five Dollars (\$75.00) per month to the Town, the Railway Company may pay the same to the Improvement Company until it shall, in that manner, have reimbursed the Improvement Company, the actual amount so paid out by it, with interest thereon at five per cent. (5% per annum from date such expenditure was made until paid.

## ARTICLE II

1. The Town shall permit the Railway Company, at any time within ten (10) years from the date hereof, to construct on said tract of land another reservoir (hereinafter called the "Railway Reservoir") for the exclusive use of the Railway Company, and in case the overflow from the New Reservoir and from the Old Reservoir the Railway Company may conduct into the Railway Reservoir and may have and retain such overflow for its own use, paying, however, to the Town for all water that it uses from the said Railway Reservoir at the rate of three (3) cents per thousand gallons, payable monthly, and no provision of any other section of this agreement limiting or fixing the amount of water which the Railway Company shall be entitled to take, shall apply to or effect the Railway Company's right to such overflow water.

2. As soon as the Railway Company shall have turned water into the New Reservoir through the new pipe line to be constructed by the Railway Company, the Railway Company shall forthwith deliver and the Town shall receive and take possession of all said works and shall thereafter manage, control and operate the same and maintain the same in good repair at all times, except that the Railway Company shall, at its own expense, repair any leak which may develop in the New Reservoir before August 1, 1915, except leaks resulting from Acts of God, and provided that in no event shall the Railway Company's duty to repair leaks extend to leaks developing more than thirty (30) days after the date on which the water in the New Reservoir shall first reach the amount of approximately forty million (40,000,000) gallons. If the Railway Company shall at any time give notice in writing to the Mayor of the Town that the water in the New Reservoir has reached such amount, and within thirty (30) days after the giving of such notice the Mayor shall not have disputed such notice, then the statements in said notice contained shall be taken as true.

Forthwith upon the delivery of the works aforesaid, either party hereto shall have the right, at its option to discontinue the suit hereinafter described without cost to either party as against the other, and each party hereby consents irrevocably to such discontinuance upon the happening of said event.

3. The Town shall promptly pay when due, all taxes, assessments and charges lawfully levied or assessed upon the entire waterworks system which is the subject of this agreement, including all lands used in connection therewith, or any part thereof, but shall not be required to pay any such taxes or assessments levied or assessed after the conveyance provided for in Section 6, Article III hereof shall have been forfeited and defeated as therein provided.

4. The Town agrees that all water which it may distribute from said reservoirs to consumers (except Coconino County under the contract hereinafter mentioned) after July 1, 1914, shall be accurately metered, so that the amount delivered to each and every user may be

accurately known, and further agrees that all rates in effect after July 1, 1914, shall be meter rates, all flat rate being discontinued, except those specified in that certain contract dated July 28th, 1898, between the Town and the County of Coconino, providing for the furnishing of water for two fire hydrants on Block 32 of said Town and for public buildings on said Block; and the Town further agrees that if in any case it shall make rates to any consumer less than fifteen (15) cents per thousand gallons, it will, while any such rates remain in effect, allow the Railway company to take, free of charge, two hundred and fifty thousand (250,000) gallons a day, instead of two hundred thousand (200,000) gallons, as hereinafter provided.

5. The Town shall keep books of account showing the amount of water furnished by it, and to whom, and such books shall be open at all times during business hours to the inspection of the Railway Company, or its duly accredited representatives. The Town shall also install in the main pipe connecting directly with the Old and New Reservoirs, an accurate meter or meters and keep the same in order and repair, registering the total amount of water taken from those reservoirs, and such meters shall be open to the inspection of the Railway Company at all times.

6. While the work which the Railway Company is hereby obligated to perform is in progress, water for the camp and the construction work shall be furnished free of charge from the Old Reservoir and pipe line, and the Railway Company, or its employes or the persons engaged in doing said work, shall have the right of ingress to and egress from the site of said work over any lands of the Town.

## ARTICLE III.

1. The Railway Company shall have and forever retain, and there is hereby reserved in perpetuity to it, the right to take and to use at said Town or elsewhere, free of charge, of the waters of said springs two hundred thousand (200,000) gallons a day, the same to be taken from the Town's pipe at the point where it is now delivering water to the Railway Company, or at the Railway Company's option, at any point on the Railway Company's property reached by Town mains. It is agreed that, if by voluntary act of the Railway Company less than two hundred thousand (200,000) gallons be so taken in any one day, the full amount being available, then an amount greater than two hundred thousand (200,000) gallons may be taken in other days, so as to make up an average of two hundred thousand (200,000) gallons a day, but not to exceed six million two hundred thousand (6,200,000) gallons in any one calendar month; said limitation to six million two hundred thousand (6,200,000) gallons in a calendar month shall not however include water taken to make up for deficits arising under the provisions of Section 5 of this Article, which may be cumulated from month to month. Provided, however, that whenever and as long as the Railway Company may be entitled to take two hundred and fifty thousand (250,000) gallons a day under the provisions of Section 4 of Article II hereof, it is understood and agreed that if by voluntary act of the Railway Company less than two hundred and fifty thousand (250,000) gallons be so taken in any one day, the full amount being available, then an amount greater than two hundred and fifty thousand (250,000) gallons may be taken in other days so as to make up an average of two hundred and fifty thousand (250,000) gallons a day, but not to exceed seven million seven hundred and fifty thousand (7,750,000) gallons in any one calendar month; said limitation to seven million seven hundred and fifty thousand (7,750,000) gallons in a calendar month shall not include water taken to make up for deficits arising under the provisions of Section 5 of this Article which may be cumulated from month to month.

2. The Town shall at all times maintain gauges on the Old and New Reservoirs, which shall plainly show to the observer the approximate amount of water contained in each of said reservoirs at any given time.

3. In addition to the water which, under the foregoing provisions, the Railway Company takes without charge, it may, at any time, take additional water from the Town's pipe, paying therefor eight cents per thousand gallons, payable monthly, provided that it shall take no such additional water when the gauges aforesaid show that there is less than thirty-three million (33,000,000) gallons in the Old and New Reservoirs.

4. The Railway Company shall, at its own cost, install and maintain meters for the measurements of all water taken by it under this agreement, and such meters shall at all times be open to the inspection of the proper officers of the Town.

5. Whenever and so long as the water stored in the New Reservoir shall be less than ten million (10,000,000) gallons, the Town may limit the total consumption of water therefrom and from the Old Reservoir to five hundred thousand (500,000) gallons per day or less, in which case, during the time that the total consumption may be so limited, the Railway Company shall have the right to take and to have for its own use forty per cent. (40%), and no more, of the permitted total consumption, whenever and so long as the water stored in the New Reservoir shall be less than five million (5,000,000) gallons, the Town may limit the total consumption therefrom to an amount of two hundred thousand (200,000) gallons per day or less, in which case, during the time the total consumption may be so limited the Railway Company may have the right to take and have for its own use thirty (30) per cent., and no more, of such total consumption. But at all times the Town may use any amount of water necessary in the extinguishment of fires, and no water so used shall be reckoned as part of the limited consumption provided for in this section.

The foregoing provisions as to use of water in times of shortage are made in recognition of the necessity of water for domestic purposes and for protection against fire, and shall not be deemed to impair the rights of the Railway Company to two hundred thousand (200,000) gallons per day, or to two hundred and fifty thousand (250,000) per day, as the case may be, and any deficit in the Railway Company's daily supply of two hundred or two hundred and fifty thousand gallons, arising under the provisions of this section, shall be made good to the Railway Company, without charge, on its demand from time to time whenever sufficient water is available.

6. When and as soon as the town shall have begun delivering water to the Railway Company from the new reservoir and said action shall have been dismissed, the Railway Company shall deliver to the Town a good and sufficient deed of conveyance, executed by the Improvement Company, for all the present right, title and interest of said Improvement Company, of said Railway Company and of the Santa Fe Pacific Railroad Company, in or to the Section numbered 27, in Township 23 North, Range 7 East of the Gila & Salt River base and Meridian, on which said Jack Smith spring rises, and of the parcel of land described in Section 1 of Article I hereof, and also all the present right, title and interest of the said companies, and of any of them, in or to the waters of said spring, whose waters are now used in whole or in part for supplying the Town, and also all the present right, title or interest of said companies and any of them in or to the lands within said right of way; but the deed so delivered by the Railway Company shall contain a condition whereby all the right title and interests of said Town in or to said lands, properties and rights shall be forfeited and said lands, properties and rights shall revert to the Improvement Company, its successors or assigns, if the Town shall in any respect fail to keep and perform any of the covenants and agreements hereof by it to be performed, after sixty (60) days notice of default and demand of performance shall have been given it by the Improvement Company, its successors or assigns, which notice shall be deemed to have been duly served and given if a copy thereof shall be delivered in person to or left at the office of the Town Clerk and a copy shall be published once a week for two consecutive weeks in a newspaper published in said Town, if any, and a copy thereof posted upon the front door of the town hall; and it is further agreed that upon such default and after sixty (60) days' notice so given the Town shall surrender and the Railway Company, its successors or assigns, shall have and thereafter retain possession of all the lands, properties, and rights described in said deed from the said Improvement Company to said Town, and of all the then existing pipe lines from the springs to the old reservoir and of the old reservoir and of all head works and other works at and near said springs, and shall thereafter have, hold and operate the same free and clear of all claims and obligations whatsoever, except as hereinafter provided, and thereupon, on demand, the Town will make, execute and deliver to the Improvement Company, or its nominee or assignee a good and sufficient deed of conveyance, conveying unto the Im-

provement Company, or to such nominee or assignee, all the right, title and interest of said Town in and to all springs, head works and pipe lines down to said reservoirs, and the said reservoirs and the sites thereof, and in and to the waters flowing from said springs; and if there shall be any doubt as to the power and authority of the Town to make a valid conveyance as aforesaid, the Town, upon the demand of the Railway Company, agrees that it will forthwith use its best endeavors to obtain at the earliest possible moment, such legislative or other action as may be necessary to validate, ratify and confirm such conveyance; the purpose and intent of the parties being that so long as the water works shall be in the possession of and operated by the Town, the Town shall be the sole legal owner of all rights and properties pertaining to said water works, and that when and so long as the Improvement Company, or its nominee or assignee, shall be in possession of and operating said water works, the Improvement Company, or such nominee or assignee, shall be the sole legal owner of all rights and properties pertaining thereto. But it is expressly agreed that, in such event, the Railway Company, its successors and assigns, shall deliver to the Town, at the New and Old Reservoirs, such quantity of said water as the Town may desire, not exceeding three hundred thousand (300,000) gallons per day, the Town paying for the same at the rate of fifteen (15) cents per thousand gallons, payable monthly, and shall have the right to take for its own use the entire supply of water over and above such three hundred thousand (300,000) gallons per day, taking the same either at the place and in the manner hereinbefore provided, or otherwise, as it may elect. Provided, however, that such option may not be exercised in case the failure to maintain in repair shall consist in failure to repair great and serious damage by act of God, and the Town shall be actively proceeding to repair such damage as rapidly as the means which it may have, or with reasonable diligence can obtain, permit. The deed to be delivered by the Railway Company to the Town shall be substantially in the form hereto attached, marked "Exhibit A," and made a part thereof.

7. It is further agreed that, provided the said works and lands shall not have reverted to the Santa Fe Land Improvement Company, under the provisions of Section 6 of this Article, before the end of twenty-five (25) years from date hereof, or at any time thereafter, said works and lands not having reverted, the Town shall have and retain the option to purchase, take over, and terminate all rights of the Improvement Company and of the Railway Company hereunder upon paying unto the Railway Company a sum equal to whatever expenditures the Railway Company shall have theretofore made under the provisions of this agreement, excepting said monthly payments of seventy-five dollars (\$75.00); and excepting any expenditures made by said Railway Company on account of maintenance. In case the Town shall exercise said option and make such payment, it shall thereafter furnish to the Railway Company two hundred thousand (200,000) gallons of water per day, with deduction in case of shortage as hereinbefore provided, at the rate of fifteen (15) cents per thousand gallons, payable quarterly yearly, which price is declared to be a part of the consideration for such purchase; and, provided further, that in no event shall the Town charge the Railway Company a higher rate for water than the lowest rate which it contemporaneously makes to any other consumer.

In order to have a fixed basis for the exercise of such option, the Railway Company shall submit to the Town, within sixty (60) days after the completion of any works by it hereunder, a full, itemized statement of the cost thereof, allowance for overhead expenses to be ten per cent. (10%) on the work done by the Railway Company's employes and on materials furnished by the Railway Company for work done by its own employes. If within thirty (30) days after such admission of any such statement, the Town shall not have notified the Railway Company of its objections thereto, then such statement shall stand accepted; but if the Town shall so notify the Railway Company of objections, and if the Town and Railway Company cannot, within sixty (60) days after such notice, agree upon the amount, then such objections shall be promptly settled by arbitration, the Town choosing one man, the Railway Company another, and these two a third.

8. It is understood that the Improvement Company is a corporation whose stock is held and owned by the Railway Company, and said conveyance is to be made by it solely in order that the title to said properties and rights conveyed to said Town may be free from any incumbrance by virtue of trusts for mortgages upon the property of the Railway Company.

9. All payments that shall be made to the Town by the Railway Company or by the Town to the Railway Company, under the terms of this contract, shall be made in Gold Coin of the United States of the present standard of weight and fineness.

10. It is agreed that, in case any provision or provisions of this contract shall be held invalid and not enforceable, this contract shall nevertheless stand as to all other provisions, and such invalidity or non-enforceability shall not effect the validity of any remaining portion of this contract; the parties hereto declaring that they would have entered into this agreement irrespective of the fact that any one or more of the provisions thereof may be invalid and non-enforceable.

11. It is agreed that the Railway Company shall not sell or otherwise furnish water to any firm, person or corporation in the town, nor to any firm, person or corporation within five miles thereof, without the assent of the town.

12. It is finally mutually agreed that after the execution of this agreement the Railway Company shall be furnished water by the Town substantially as provided in that certain agreement between the Town of Flagstaff and Santa Fe Railroad Company (The Atchison, Topeka and Santa Fe Railway Company being the successors of the said Santa Fe Pacific Railroad Company), dated July 1, 1898, and that forthwith upon the delivery of the works to be constructed by the Railway Company hereunder to the Town, as provided in Section 2 of Article II hereof, said agreement of July 1, 1898, shall be and is hereby cancelled and abrogated.

13. This agreement shall inure to and be binding upon the successors and assigns of the respective parties hereto.

In Witness Whereof, the parties hereto have duly executed this agreement in triplicate the day and year first above written.

TOWN OF FLAGSTAFF,

By [Signed] J. R. TREAT,  
Its Mayor.

ATTEST:  
[Signed] GEO. A. FLEMING, Its Town Clerk.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY CO.

By \_\_\_\_\_  
Its \_\_\_\_\_

ATTEST:  
Its \_\_\_\_\_ Secretary.

SANTA FE LAND IMPROVEMENT COMPANY,

By \_\_\_\_\_  
Its \_\_\_\_\_

ATTEST:  
Its \_\_\_\_\_ Secretary.

STATE OF ARIZONA } ss.  
COUNTY OF COCONINO. }

This instrument was acknowledged before me this 9th day of March, 1914, by J. R. Treat, as Mayor of the Town of Flagstaff, Arizona and by Geo. A. Fleming, Clerk of the Town of Flagstaff, Arizona, whose names are subscribed to the foregoing instrument.

[Signed] M. I. POWERS,  
Notary Public, Coconino County, Arizona.

My commission expires Feb'y 29, 1916.

(Continued on page 8)