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Lehi Irrigation Company v. Clarence T. Jones and Ed H. Watson : Brief of Amicus Curiae on Reply of State Engineer and Reply of Respondent Jones

Utah Supreme Court

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In the Supreme Court of the State of Utah

LEHI IRRIGATION COMPANY,

Plaintiff and Appellant

vs.

CLARENCE T. JONES and ED. H.
WATSON, State Engineer of the State
of Utah,

Defendants and Respondents

CASE NO.
7189

BRIEF OF AMICUS CURIAE ON REPLY OF STATE
ENGINEER AND REPLY OF RESPONDENT JONES

FILED

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FISHER HARRIS

Amicus Curiae

CLERK, SUPREME COURT, UTAH

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Amicus Curiae

(All italics or other indications of emphasis are ours)

Briefs in answer to that of Amicus Curiae have now been filed by Respondents, and this is our reply. We think it proper to so designate it, for, though filed subsequent to the briefs of the parties, our first was in the nature of an original brief in the cause on appeal, and raised and discussed only those

matters already raised by Appellant. It is true, however, that those matters were substantially elaborated and that they were presented in somewhat different light. It was therefore proper we think, but without offering our opinion as of any consequence, that Respondents were afforded opportunity to answer. That we should now reply seems equally appropriate; not only because of our situation relative to the cause, but also because of our relation as *Amicus Curiae*, which we trust we shall not forget.

Respondents have devoted considerable space and effort toward the limitation and definition of our "role and status." (Motion of Respondents as to *Amicus Curiae* and Reply of Respondent Jones, pages 7 and 9). It is said that we have presented "numerous new and controverted matters, both of law and fact"; that we purport to "represent Provo River Water Users Association, but speak also for the United States, the Public Interest, and also for other parties including the parties to this action." They ask by the motion to "be advised as to whether a new party has been now injected and is now being represented", and, in the Reply of Respondent Jones, urge that Provo River Water Users Association cannot become a party by reason of the fact that its Counsel has appeared as *Amicus Curiae*. "*Amicus Curiae* is restricted," it is said, "to suggestions relative to matters apparent on the record or to matters of practice. His principal function is to aid the Court on questions of law."

With this last, we are in perfect accord. The Respondent objects to Provo River Water Users' Association becoming or being considered as a party, and it accedes to the objection;

the objection is well, though quite unnecessarily, taken; and we shall endeavor to assist the court to the best of our ability.

As to the "numerous new and controverted matters, both of law and fact" presented by us: The Court may recall that at the oral argument Respondents were challenged to "name one", but that none were. There are none. We have insisted from the outset, and still do, that there is, and since the filing of the Jones applications, there never has been but one issue, viz: Have the statutory prerequisites to their approval been satisfied? The answer to the question depends, of course, upon the record made before the trial court; depends, of course, upon what is explicitly and implicitly in the record and upon the legal effects resulting—resulting as either immediately decisive of the ultimate issue or in effects upon which that issue in turn depends.

As for whom we speak: We happen to be Counsel for the Provo River Water Users Association, and, except for that fact, it is improbable that we should have noticed the case of Lehi Irrigation Company vs. Jones and Ed. H. Watson, State Engineer, or, if noticed, that we should have been troubled by its possibilities. But however that may be, we have noticed it, and we have been and are troubled by its possibilities; but our motivation is of no consequence. What may be of consequence is the validity of our analysis and reasoning, which, in result, is something quite impersonal. It is true as charged that we speak for the Provo River Water Users Association and the United States, and for the Public Interest as well. In our original brief we have expressed them interchangeably, regarding them, as we do, as practically identical

in their relation to this appeal. Nevertheless, what we have already said, and what we shall say, might as well have emanated from any other, for all of it is in support of the proposition that on the record no case for the approval of the Jones applications was made in the Court below—something which may properly be affirmed at any time and by anyone. As we put it in our original brief (pages 6-7):

“That no cause of action has been stated or, if stated, that none has been made by the evidence, may be brought to attention at any time, and the court may notice the fact in either case and act accordingly though it was not noticed or mentioned by parties or counsel; and no court would close its mind to these matters merely because reminded of them by a defeated litigant, or even by a stranger.”

It seems not altogether impossible that the difference between Respondents and Amicus Curia is wider in respect of the proposition just stated than it is as to the merits. This very clearly appears from Respondent's original brief (page 6) under “I. The point now presented is that Appellant cannot here for the first time raise the claim briefed”; and again from the Reply (Jones, page 11):

“ . . . but this is a private suit by one protestant and appellant claiming it would be aggrieved by the appropriations sought.”

And still again (page 13):

“In this case we had only to meet the claim, as alleged, of Appellant's diligence right. The trial court had only to

determine whether *that* claim required the Engineer to reject the application.”

This view that the case of Lehi Irrigation Company vs. Jones and Ed. H. Watson, State Engineer and others of its kind (all cases, for that matter) are private debates, to be decided on the basis of an oratorical contest, pervades the briefs of Respondent Jones. That they are regarded as involving no public interest is perfectly evident from the brief of the Special Assistant Attorney General (pages 3 and 9):

. . . it appeared by the pleadings simply to be a private dispute between two water users . . .”

“This case was presented to the State Engineer as a private dispute . . .”

This in face of the provisions of Chapter 3, Title 100, Utah Code Annotated, 1943—among others impelling an opposite view, that in the interest of the State and the administration of its water policies the State Engineer is not only a proper but an indispensable party to the trial *de novo* in the District Court.

Entirely aside, however, from the public aspect of the matter before the Engineer or the trial court: Whatever it may be that the statute requires to exist as prerequisites to the approval of an application, those prerequisites must be found by one or the other. They must be found to exist within that degree of certainty and within that extent of finality determined by this court as satisfying the expressed intent of the legislature; and if they are not found within those limits, no case for approval has been made, and the statute, as well

as basic principles of law, require that an application be rejected.

In this view there is no sense in talking of the bringing in of new parties or in citing authorities to the effect that the interest of one not a party to a cause cannot be foreclosed by its result as between those who are parties. Neither is it at all helpful or relevant to multiply cases that the State Engineer is not a judicial officer and hence cannot adjudicate relative rights. So far as we know, no one claims or believes that he can. Respondents attribute such belief to us, but that is no more than one of a multitude of "straw men" held up to the court.

To say, however, that new parties may not be brought into a cause as parties, by testimony or findings, is not to say that attention may not thus be directed to them, or that, having been thus noticed, they may not be the objects of judicial solicitude, or even that the fact of the interest of one not a party may not be decisive against the claim of one who is. Suppose, for example, that in the instant case all the testimony had been that all the waters in question had been appropriated pursuant to all the requirements of law by the famous John Smith, and all were being put to beneficial use by him from one year's end to the other.

And to say that the interest of one not a party cannot be foreclosed by its result as between the parties, is quite different from a statement that his interest cannot be affected. For example, the *Whitmore of Whitmore vs. Murray City*, 107 Utah 445, was not a party to the proceeding before the

State Engineer in response to which Murray City was granted the right, as between it and the State, to move a point of diversion up stream. This Court held and declared in unequivocal terms that his rights relative to those of the City had not been foreclosed by the decision of the Engineer. But who will say they were not affected, or that they ought not to have been considered by the Engineers as decisively militating against the granting of Murray's application? Whitmore's rights were not foreclosed by the action of the State Engineer, but that action inevitably subjected him to trouble and anxiety and expense, and to the unfortunately unavoidable hazards of litigation which in the lower court went against him.

True also that the State Engineer is an administrative officer and cannot make any final adjudication of relative rights either of parties before him or of others. This court has said so sufficiently often, and has even so decided clearly enough to convince the most reluctant. But it doesn't follow from this, as seems to be supposed by Respondents, that the Engineer is not, or that a trial court on appeal from him is not, under obligation to examine and to make findings and decisions with consequences no different *as to the matter before him* than if he were a judicial officer and the parties affected were before him as the result of due process. The matter before him in common instance, and the matter before a trial court on appeal from him, is an application "to acquire the right to the use of . . . unappropriated public water", and his finding and his decision accordingly, that there is or is not "unappropriated water in the proposed source" and that "the proposed use will" or will "not impair existing rights", etc., is as final

and conclusive *as to that matter* as the finding and decision of any court from which there is right of appeal. If the application is approved "the applicant shall be authorized, on receipt thereof, to proceed with the construction of the necessary works and take all steps required to apply the water to the use named in the application and to perfect the proposed appropriation"; but "if the application is rejected, the applicant shall take no steps toward the prosecution of the proposed work or the diversion and use of the public water so long as such rejection shall continue in force", (Section 10, Chapter 3, Title 100, Utah Code Annotated, 1943) and, in the absence of appeal to the courts, that is the end of that.

Fugitive expressions of this Court, *misapplied and stripped of their context*, have lent color to the opinion that the office of State Engineer is little if anything more than one of record; that his obligations are otherwise perfunctory, and hence that the common practice of disclaimer in actions to which he is a party is entirely consistent with his official character. So also have they led to statements such as the following from the brief (pages 5-6 and elsewhere) of the Special Assistant Attorney General, and to similar statements in the original Respondent's brief to which he was a party.

"It is only where there is no probability that the application might be perfected that the State Engineer should deny the application. Such was the holding of the court in *Rocky Ford Irrigation Co. vs. Kents Lake Res. Co.*, 104 Utah 202, 135 P. 2d 108. See *Little Cottonwood v. Kimball*, *supra*; *Eardley V. Terry*, *supra*".

Such was not the holding of the Court in any of the cases

cited; neither is it the holding of any other case decided by the Supreme Court of Utah. If time will permit, we expect to demonstrate the validity of this statement of ours, and the careless inaccuracy of that quoted immediately above, as well as the following (Page 6 and elsewhere):

“The State Engineer should examine the application to ascertain the declared intent and, if there is any reasonable probability to believe (sic) that a right might be perfected, the State Engineer has been told by this Court that he should approve the application.”

We regret the necessity of this rather long introduction to the principal immediate purpose of this brief—a careful examination of the decisions of this court in relation to the duties of the State Engineer in rejecting or approving an application made “For the purpose of acquiring the right to use a portion of the unappropriated water of the State of Utah.” But, looking again at the Reply briefs, we are confirmed as to its necessity, and as to the necessity of still more, for never before have we seen such effort to avoid, so many “straw men” created and demolished, or so much within quotations marks that is not quotation.

It is not suggested that these things are of intrinsic importance. Most of them are not; a few may be. All, however, are entanglements or obstacles in the way of the clear view which we hope to present.

We quote first from pages 3 and 9 of the Reply of the Special Assistant Attorney General:

... It appeared by the pleadings simply to be a private dispute between two water users over the right to use *waters then running to waste.*"

"*At the time of the dispute the waters were running to waste.*" Now there isn't a scrap of evidence proving, tending to prove, or offered for the purpose of proving, that the "waters were running to waste." The State Engineer found as the applications allege, that they were tributary to Utah Lake. "A more serious question is raised by the fact that these waters are tributary to Utah Lake." The trial court found the same thing in finding Jones' land adjacent to Dry Creek, and that the drainage after use was into it. (Findings of Fact Nos. 5 and 6.)

Next from page 4 of the same brief:

"The State Engineer thinks it would be unfortunate if the issues raised by the Amicus Curia^e were to be decided upon their merits here."

In the first place, the State Engineer thinks nothing of the sort. He knows nothing at all of the case. The unfortunate fact is that, though the State Engineer knew, both personally and officially, of the claims and rights of the United States and the Provo River Water Users Association, the Special Assistant Attorney General either did not know or forgot about them. We take it, however, that the views of the State Engineer, if he had any, will not be quite decisive as to what issues this Court will decide. That same brief contains a number of the Court "ought" to do this, and the Court "ought" to do that.

In the state of the confusion we are seeking to order and quiet, it is necessary to make some further comment upon this attempt at avoidance. The issue raised by Amicus Curiae in no real sense is raised by him at all. *It is the statute that raises the issue.* It is the elementary and fundamental rule of law that raises it. We merely notice and call attention to it. If in urging that the issues should not "be decided on their merits here" is meant that this court ought not to make a final adjudication on the merits of the rights of the United States and the Provo River Water Users Association, we agree. No more should a final adjudication on the merits be made in this than in any other case by the State Engineer or, on appeal from his decision, by the District Court. On the other hand—*no less*. In every case in which application is made "to acquire the right to the use of any unappropriated public water in this state" the Engineer is required to determine that there is or is not "unappropriated water in the proposed source" and whether "the proposed use will" or will "not impair existing rights." It is the statute (Section 8, Chapter 3, Title 100, Utah Code Annotated 1943) that requires him to make such determination. Of unavoidable necessity his determination must be based upon the supply of the source and the nature and extent of the already existing rights to utilize it. To urge as does the Reply Brief above and as it does at greater length elsewhere (pages 13-14) is to argue that the Engineer's determination can be only one way. To paraphrase: "An application may be approved, because that result involves no adjudication of relative rights; but it may not be rejected because it does."

To continue: Reply of Respondent Jones, page 5:

"Certainly, neither of these objecting parties can appropriate his (Jones) property for swamp storage of their water, if any they have."

No one wants to. Neither the United States nor the Provo River Water Users Association has the slightest objection to the drainage from the Jones' lands of the waters they are entitled to use. On the contrary, the drainage of the Jones swamp is precisely what they wish. It is interference with the free flow of "Deer Creek" waters into Dry Creek and thence into Utah Lake to which they object.

Jones Reply, pages 5-6:

"In our first brief, we supported by direct authorities, three propositions. These were:

"1. That the issue raised on appeal as to Government filings on the Weber River could not, with any pleadings below, be raised for the first time on argument here.

"2. That the objection based on possible claims by a third party stranger to the action, is not available to appellant here.

"3. That on the merits, appellant's claims, whether arising under this or under its diligent creek right, as pleaded, did not justify rejection of these applications.

"Amicus Curiae supports our statement that the issue was not raised by the pleadings below, and appellant makes no reply and no contention that it was. On the claim that was pleaded by it below, Amicus Curiae says that it is 'conceded by appellant' that the waters claimed have not been appropriated by it. (A.4); that it was established that appellant had no

right (A.5); and refers to it later as 'a defeated litigant' (A.7).

"Our second point, as briefed and supported, is not contested at all, and the authorities cited (O. 8-12) are not challenged. These seem to entitle respondent to an affirmance of the judgment here.

"The third point, on the merits as it relates to the appellant having no right to object to the approvals under its claim, as pleaded, is not questioned by it, and is endorsed and enforced by amicus curiæ."

Here we have a something indeed. All of Respondent's propositions "supported by direct authorities" have either been expressly admitted, have not been contested, or have been "endorsed and enforced" by us. Were it not for the austerity of the court we should reply to this with a simple and appropriate expletive.....! As it is, however, we are restrained to something more nearly classical, by Macaulay. "A wise man might talk folly like this at his fireside; but that any human being, after having made such a joke, should write it down, and copy it out, and transmit it to the printer, and correct the proof sheets, and send it forth into the world, is enough to make us ashamed of our species."

The complaint on appeal from the State Engineer alleged (Par. 5):

"5. That plaintiff further alleges that there are no unappropriated waters arising from springs or spring areas tributary to said Dry Creek, within the areas as claimed by the defendant, Clarence T. Jones, or otherwise, *and* that the whole of said waters within said areas have been, and now are being put to a beneficial use by plaintiff here."

This seems amply sufficient to raise the issue of "unappropriated water in the proposed source." But sufficient or not as to that, the case before the District Court is that which was before the State Engineer. It is to be tried de novo, and the issues are those made by the statute. But since attention is directed to the pleadings, we notice that the answer of Respondent Jones contains no allegations of unappropriated water in the proposed source or that the proposed use will not impair existing rights. Nothing, however, can be made of that, because the sole purpose of the so-called "complaint" is to bring the application before the District Court, which determines on trial de novo precisely those issues made by the statute and in the first instance determined by the State Engineer. *Eardley vs. Terry*, 94 Utah 367.

The principal effort of Respondent Jones is one in avoidance. The rights of Lehi Irrigation Company are not affected by approval of the application, and that is the end of the matter; never mind the statute. That is the sum of Respondent's contentions. "... but this is a private suit by one protestant and appellant claiming it would be aggrieved by the appropriations sought. No one but the parties hereto is, or can be, affected by this law suit and it must be decided upon the claims and record made by the parties hereto" (Jones Reply, page 11); and (we add in paraphrase) "the decision must go to the winner of the debate between them, no matter how deficient that record may be. The statute has nothing to do with it."

Our answer is that the prerequisites to the approval of the Jones applications were not affected by the protest of Lehi Irrigation Company. It is usually, though not always, easier

to obtain judgment on default, but the prerequisites to judgment do not increase or diminish in ratio to the number of contestants or the intensity of opposition. An application for right to use water is addressed to the State of Utah, acting by its State Engineer, and is to be rejected or approved by him in response to the obligations devolving from act of the legislature. As a practical matter, Lehi Irrigation Company may not have received it, but *it and its rights would have been entitled to the same consideration had it not appeared before the Engineer, or, the applications having been brought before the Court, had it not been a party there.*

It is not uncommon that the State Engineer is the sole party, in form defendant, on appeal from his decision. Suppose the Jones applications had been denied without protest by or knowledge of them by Lehi Irrigation Company; that Jones had appealed, and, on the trial de novo before the District Court, the waters had been found to be and always to have been tributary to Dry Creek the entire flow of which Lehi Irrigation Company was entitled to use, and for those reasons the court had held the application properly denied. Would Jones be heard here—for long—to urge that a *second party* had improperly been brought into the case; or would he receive serious attention if he argued that the rights of the Irrigation Company had not been pleaded, and so must be ignored; or that the application ought to have been approved anyway, because approval is always “subject to prior rights”; and because “an application is not an appropriation”; and because the State Engineer “has no judicial power” and the District Court on

appeal from him cannot adjudicate water rights?!!! "Let 'em sue me."

Here is another Straw Man (Jones Reply, page 10):
 "The brief erroneously assumes that the approval of these applications 'subject to prior rights', will have some far reaching or destructive effect upon the whole plan of reclamation in the State. That water rights are thereby adjudicated or concluded."

"The Brief" assumes none of that, and no one can reasonably assert that it does. Approval would confer the right to "take all steps required to apply the water to the use named in the application and to perfect the proposed appropriation." The statute (Section 10, Chapter 3, Title 100) says so. *To acquire the right to do that is the very purpose and necessity of the application.* The doing of that which would be authorized would prevent the water from reaching the place at which it is to be stored and measured. It would be inconsistent with and would "impair existing rights" of the United States and the Provo River Water Users Association. Surely, we think, it is no sufficient or proper answer that they may have recourse to litigation. Aside from that, however, it is *certain* that the claim, or the fact, if it were such, that "no one will be hurt" is not sufficient answer to the allegation that there has been a failure of proof.

Here is another plea in abatement (Jones Reply, page 14): "As further indicating the great number of questions that may be raised if the court were to attempt to *litigate* the alleged claims, as suggested by Amicus Curiae . . ."

Who ever suggested that this court *litigate* any claims! So far as the rights of the Deer Creek Division of the Provo River Project are concerned, Respondent has already "litigated" them in the sense of having established the fact of their existence.

Another Straw (Jones Reply page 17):

"Another matter of misconception in this connection is the reference to the language in the quoted statutes (A. 10) as to 'unappropriated water in the proposed *source*.' (Jones' italics) From this, it is argued that the 'proposed source' here is Weber River."

It is not so argued, either "from this" or otherwise, and to assert that it is, is strangely unreasonable.

And still another (Jones Reply, page 22):

"... it is confidently asserted that the United States does intend to reclaim this seepage, apparently directly. And, if this is true, then, of course, to reclaim it on the lands of every farmer where seepage may appear from increased irrigation."

It is confidently asserted that the United States intends to reclaim this seepage. It is asserted with that degree of confidence naturally resulting from knowledge of a fact well known as such to everyone who knows anything of the Provo River Project. It is a fact of public notoriety. It is a fact known in more intimate relationship by the users of water from Utah Lake and their several counsel. It is, of course, *not* true, nor is it "apparently" true that the seepage is to be reclaimed "directly" "*on* the lands of every farmer where seepage may appear from increased irrigation." But even if

recovery of the seepage could not be accomplished except as Respondent says we say is intended, what of that? Practical difficulty of perfecting an appropriation is no ground for denial of the right to do so. Some of the cases cited by him are clear to that effect—the often cited Little Cottonwood Water Company vs. Kimball, 76 Utah 243, among others.

We might go on and on with these, for there are many, many more of the same sort; but time presses, and so we will close this part of our brief with statement of a curious fact. The Jones Reply purports to give several excerpts from our original brief, but few of them are entitled to quotation marks. Even quotation of the statute is not accurate in every instance.

It is our hope that sufficient time will be available to permit a brief and analysis of all the cases cited by Respondents. Those, with a few in addition, we believe will include most, and perhaps all, of the decisions of this court defining the obligations of the State Engineer in relation to an application addressed to him “for the purpose of acquiring the right to use a portion of the unappropriated water of the State of Utah.” It occurs to us, however, that counsel, engrossed in their own business, too often forget that it is no more than a very small part of that imposed upon the court. Mindful of that tendency and the court’s burden of many other cases, we shall re-state the essential facts and issues to which the decisions to be reviewed are applicable, and, although that may sufficiently appear from what has been said above, we shall also re-state the contentions of counsel for all parties and our own as *amicus curiæ*.

Three applications of Respondent Jones for right to use

unappropriated water were brought before the Fourth Judicial District Court by appeal from the decision of the State Engineer. Upon the trial de novo the actions were consolidated. The waters involved were those "arising from springs and spring areas upon the lands" (Finding 5) of the applicant "during approximately the last three years." (Finding 7). (The findings are dated January 30, 1948). They would naturally drain into Dry Creek, a tributary of Utah Lake (Findings 4 and 5 and the applications themselves). They are waters "from increased flow in a spring and spring area due to increased seepage from an enlarged canal and extensive increased irrigation at higher levels from waters stored at Deer Creek Reservoir on the Provo River, and which waters so used and so seeping and arising in defendant's land are substantially all waters diverted from the Weber River Irrigation System to the Provo River and to Deer Creek Reservoir." (Finding 6).

To this we add the following from our original brief (pages 8 and 9):

"Those facts, supplemented and explained by something additional, are the basis of the conflicting claims of the parties. They have been enlarged upon by the supplying of a context in explanation of the expressions "an enlarged canal," "Deer Creek Reservoir," "waters diverted from Weber River System to the Provo River and to Deer Creek Reservoir."

The result of the enlargement is such that the facts the effect of which is to be determined are these:

Long before the appearance of the waters in question in the spring and spring area mentioned in Finding No.

6, the United States acting through its Bureau of Reclamation had acquired the right to divert water from the Weber River system, transport it to the Provo River, store it in a reservoir constructed by the United States known as "Deer Creek Reservoir," and distribute it from there for irrigation and domestic use upon lands and to communities in Utah and Salt Lake counties. The project is popularly known as the "Deer Creek Project." It is being constructed by the United States for the immediate benefit of and under contract with the Provo River Water Users Association. The project plan includes "an enlarged canal," the enlargement of the Provo Reservoir Canal, and the distribution through it of a part of the project water brought from the Weber River and stored in the reservoir on the Provo.

The rights of the United States have been exercised, and that part of the project plan just mentioned has been carried out; it has diverted water from the Weber River system, has transported it to the Provo River, has stored it in Deer Creek Reservoir, has enlarged the Provo Reservoir Canal and through it has distributed a part of the stored water upon lands at higher levels than the lands of Respondent Jones. It is as the result of all this that the waters sought to be appropriated by Jones have accrued to the "spring and spring area" mentioned in the finding.

If the context of the expressions of Finding No. 6 were of decisive import under pleadings essential to the cause, it might be said that, aside from facts proper to be judicially noticed, it had not been supplied. But there

is no issue of that nature. Instead it is plain from the record as well as from the briefs of counsel that references to and discussion of the Deer Creek Project, the Deer Creek Reservoir, the Project water rights (except as to one matter of interpretation) and the Reclamation project generally of which they are all a part were taken by counsel and by the trial court as matter of course, as requiring no proof, as within the knowledge and understanding of all concerned. It is our opinion that the Provo River Project of the United States Bureau of Reclamation—both the Deer Creek and Aqueduct Divisions—its principal physical features, its scope, its basic outline and plan—is judicially known. But in the brief statement of fact above we need not rely upon that....but we take it that we may rely upon the context of facts found to be such, at least to the extent it has been supplied by both court and counsel.”

Every other statement made by us has been the object of critical comment either in the “Reply of State Engineer to Brief of Amicus Curiae” or in “Reply of Respondent Jones To Amicus Curiae Brief,” but that just quoted is not questioned. On the contrary, the Reply said to be that of the State Engineer assumes the facts to be as we now and originally stated them, while that of Respondent Jones questioning at length (pages 18-21) our stand that the “Deer Creek Project” is Judicially known, as well as everything else, makes no mention of this. Those, then, are the facts, settled and agreed upon as effectually as upon an agreed statement.

Our conclusions from the facts was originally (pages 12-13) and is now stated in the following language:

"Now it seems clear to us that Respondent, so far from having sustained the burden of showing any facts in response to which he may "acquire the right to the use of any unappropriated public water in this state," and that "there is unappropriated water in the proposed source," has established the very opposite, that there is none. Appellant alleged that there was no "unappropriated water in the proposed source" because it had already been appropriated by Lehi Irrigation Company, and Respondent, in order to disprove this, established that there was no "unappropriated water in the proposed source" because, not Lehi Irrigation Company, but the United States had already appropriated the waters the subject of the application for the benefit of the Deer Creek Division of the Provo River Project."

Respondents answer this and the conclusion of the same effect urged by Appellant, by calling attention to the fact (and it is) that Appellant did not so much as mention the Provo River Water Users' Association or the United States in the "Complaint and Application for Review" by which the propriety of granting or rejecting the Applications was brought for trial de novo before the Fourth District Court. The issue, and the only issue, to be decided at that trial, he contends, was that made by the claim of Lehi Irrigation Company that the waters the subject of the Applications had been appropriated by it. The effect of regarding any rights of Provo River Water

Users' Association, he urges, is to interject a third party into a private controversy between Jones on one side and Lehi Irrigation Company on the other. That is to say, as Respondents' original and Reply briefs so often do, "this is a private law suit between two small water users" and is of no concern to any one else. Also, even if the United States and the Provo River Water Users' Association have prior rights to the use of the water in question, the application should nevertheless be approved because all approvals are expressly subject to prior rights, and, in any event, an application is not an appropriation, and its approval cannot be inconsistent with existing rights. The *result* of it may be, but in such case recourse may be had to the courts. Again, the waters were going to waste, anyway, and so were open to appropriation.

And still again, in order to give effect to any rights the United States may have would require an adjudication of water rights, and the State Engineer having no judicial powers may not accomplish that. Finally, the showing of the rights of the United States to the use of the waters in question is not inconsistent with approval of the applications because, whether those rights derive from its approved Weber River applications or from its approved Application No. 12144, they are both no more than *applications*, and an application isn't an appropriation. The result is that the establishment of those rights does not establish that there is no "unappropriated water in the proposed source."

Those two paragraphs state, we think, every single contention made by Respondents, and we believe they state each of

them as fully and fairly and as clearly as they have been by Respondents themselves. All of them have been answered in our original brief and have been and will be again in this.

The contention that this is a private controversy, limited in its scope to determinations of the relative rights of the applicant and the person who brought the application before the District court, and hence that the interests and rights of no others may be considered, is something which, in view of the statute and the nature of the proceeding, we are compelled to regard as utterly and obviously frivolous, and, in a sense, unworthy. So also is that which seeks to exclude consideration of the rights of others on the ground that to do so involves a judicial determination of those rights. It might as well (or as ill) be argued that for such reason, no regard can properly be given to the rights of the person who brought the Application before the court, or for that matter, who has appeared before the State Engineer. As to an approval being subject to prior rights, that is merely in accentuation of the fact that, while the Engineer is expressly charged with the duty to make a determination, his determination is not final in the sense that one actually injured by it may not bring it in question by appropriate action in the courts. As to an applications not being an appropriation: neither is a Certificate of Appropriation or a Decree. All of them, however, authorize an appropriation. As to the waters running to waste: it might as well be said that all waters up stream from points of diversion or storage are running to waste.

We have noticed before, and shall probably again call attention to the fact that the major, almost the entire, effort

of Respondents is directed to an avoidance of a decision on the merits—not a final decision on the merits of any vested or claimed to be vested water rights, but a decision as to merit of our contention that Respondent Jones has made no case for the approval of his applications; that, so far from satisfying the requirements of Section 8 of Chapter 3 of Title 100 Utah Code Annotated, he has established affirmatively that those requirements have not been satisfied.

Now, however, we shall brief and analyze the cases cited by Respondents and seek to determine, as best we can, their application to the facts, as well as to the several results claimed by Respondents to follow from them.

Sowards vs. Meagher, 37 Utah 212

“The appellants, plaintiffs below, filed an application with the state engineer for the appropriation of waters of the East fork of Lake fork of Green river. By reason of such application, they claim to have initiated a right to the use of three hundred second feet of water of such stream for irrigation purposes. Upon a protest filed for the respondents, the defendants below, who also filed applications for an appropriation of the same waters, plaintiffs’ application was rejected and the respondents’ approved by the state engineer. The plaintiffs then brought this action in the District Court of the Fourth Judicial District against the defendants to adjudicate the questions involved.”

The application of Plaintiff appellants were filed with the State Engineer subsequent to those of Defendant Respondents. They were “*rejected by the state engineer on the sole ground that their application is in conflict with prior applications*” of Defendant Respondents.

Appellant contended that their application, though filed after those of Respondents, ought not to have been rejected, because "all of said water applied for" by Respondents "and the lands proposed to be irrigated" by them were within an Indian Reservation not yet open to entry when their applications were filed, and so that the State of Utah had no jurisdiction over the waters or the lands, and hence the applications were void.

It was held by this court "that unappropriated public water on a reservation or on the public domain is subject to appropriation, and may be appropriated for a beneficial purpose, though the appropriator has not, when his application is filed with the state engineer, a present right in or to the lands along the stream from which the water is proposed to be diverted, or in or to the lands proposed to be irrigated by him."

The opinion precedes this by several pages and follows it with seven; but the paragraph just quoted is all that was decided.

This case is cited by the Special Assistant Attorney General as follows: (Reply page 6) "In *Sowards vs. Meagher* the Court held that an application to appropriate was nothing more than a "preliminary notice of intent." Something like that was "said," but it was not "held." A great deal else was also said, including reference to "the *appropriation* was applied for," "the application was made to *appropriate*," etc., etc. So much was said that, fifteen years later, the writer of the opinion cited the case as authority opposed to the decision of this court in *Deseret Livestock Company vs. Hoopiania*, 66 Utah 25. But the facts and decision of *Sowards vs.*

Meagher are as we have given them above and as better expressed by Justice Thurman, pages 45-6 of 25 Utah.

But in any event, this case neither decides nor says anything concerning the prerequisites to the approval of an application. It is, however, a case in which an application was "*rejected by the state engineer on the sole ground*" that it was "*in conflict with prior applications.*"

Counsel follows immediately with this: "The State Engineer should examine the application to ascertain the declared intent, and if there is reasonable probability to believe that a right must be perfected, the State Engineer has been told by this Court that he should approve the application."

Where and when has this Court told the State Engineer that or anything like that? It is an almost necessary inference that Counsel asserts it to have been in *Sowards vs. Meagher* on January 22, 1910. The fault with the statement is that it omits all context—"reasonably probability" in view of what? From what counsel says, one might judge that the matter is to be determined from an examination of the application.

Yates vs. Newton, 59 Utah 105

The waters of Pole Canyon, including certain tributary springs had been appropriated long prior to the application before the court, but "It appears that the gorge or ravine leading from this canyon is gravelly and that after June 15th, or thereabouts, the waters which run from the springs are not sufficient in volume to reach the mouth of the canyon, but sink into the sand and disappear. It evidently was the intention of the engineer, who is an experienced and capable man in his pro-

fession, that possibly by the expenditure of money and the gathering together of the waters of this canyon they could be prevented from sinking or disappearing into the ground and thereby be put in a beneficial use both in irrigation and in the production of power. It is quite evident that it was not the intention of the engineer to in any way disturb the rights of respondents to the use of the waters as they have been used for many years. If such were the intent, it was clearly beyond his power or authority to grant such right."

In relation to the duty of the State Engineer, the Court said, "It is only in the event that the engineer finds unappropriated water that applicants may obtain rights to the use of water in this state." But here, as the court found, there was unappropriated water. It was that which sank into the sand and disappeared "after June 15th, or thereabouts." The court was of opinion, based on the record, that effort to save it "must ultimately prove a failure," but there was no occasion to prevent the attempt. The case was remanded with direction to the District Court to retain jurisdiction to make such order as might be necessary if it appeared that the effort to save the lost water did interfere with the rights of the prior appropriator. This last was proper under the facts, but we think it would have been still more appropriate to have limited the approval to the non-irrigation season.

We cannot agree with the Court's theory of the facts, for it seems clear that the sands and gravels into which the spring waters disappeared were not lost, but went to fill the underground reservoir contributory to the prior appropriator's stream, and that if withdrawn they would necessarily have to be made

up next season. We should have concluded, therefore, that the "lost" waters had been appropriated. One might as well apply for the right to use waters which might be "saved" by driving a tunnel into the canyon walls of Big Cottonwood and of saving from loss that which is stored there but which does not reach points of diversion during late summer and all winter months. However, as the facts were made to appear, the decision is the same in principle as that of Little Cottonwood Water Company vs. Kimball, 76 Utah, where the unappropriated water was that lost in carriage through an open ditch.

The case is cited (page 6) to this: "In Yates vs. Newton . . . the Court said that no order of the State Engineer can disturb vested rights in water." The Court did say that, but, though the Engineer cannot disturb the rights, the frequent necessity of saying so evinces clearly enough that he can and often does "disturb" their owners. That fact and the fact that rights may be *interfered* with and *affected* is one of the several reasons for the provisions of Section 8, Chapter 3, Title 100 of the code.

Robinson vs. Schoenfeld, 62 Utah 233

Plaintiff, who had made no application to the State Engineer since 1903, and who had made no appropriation before that date, brought an action to prevent interference with their using springs by a person who had made applications, then in good standing, for the right to use their waters. It was held that "the fact that defendant had filed his applications, and that those filings were in good standing could be offered in evidence in defense against the claim for an injunction against

defendant to restrain him from in any way interfering with the waters of the springs."

The Court said " * * * the filing of an application in the State Engineer's office" does not "in and of itself amount to an appropriation of water. It at most gives to the applicant a right to complete the appropriations."

This case is cited (page 7) to the following: "The Utah court has, time and again, said that an application to appropriate is not a completed appropriation." Robinson vs. Schoenfeld doesn't decide that, true as it is; but one might answer: who ever thought that an application to appropriate is a completed appropriation? The statute expressly states, however, that when approved it confers the right to complete an appropriation. An application to appropriate is not a completed appropriation and neither is a Certificate of Appropriation, nor is a "Decreed Right." All, however, within varying limits, give or attest *the right to appropriate*.

This is something to which we shall return when we discuss the invalidity of Respondents' contention that the existence of rights of the United States and Provo River Water Users Association, being founded on approved applications, which when exercised exhaust the proposed source, are not inconsistent with there still being "unappropriated" in that source, because "an application to appropriate is not a completed appropriation." It's a queer state of mind, indeed, that will permit the use of inexact and careless expressions as the basis of a conclusion meticulously pedantic, as well as one opposite to the physical facts.

Deseret Livestock Company vs. Hoopiania, 66 Utah 25

The facts and decision of the court as to the procedure necessary to the acquisition of a water right sufficiently appear from the following from the opinion of Chief Justice Gidion:

"We are of the opinion, and so hold, that the Legislature of Utah, by the act of 1903, intended to limit the method of acquiring any rights to the unappropriated public waters of the state to the method or means prescribed in that act. The rights attempted to be acquired by respondent Hoopiania by actually diverting the water and applying the same to a beneficial use must therefore be held to be subject to the right of appellant who will acquire the first right by completing its appropriation initiated by its application filed in the state engineer's office on April 25, 1918." The court held the statute to mean just what it said.

This case is cited to the effect that "an application to appropriate is not an appropriation," etc., followed by this: "*Therefore*, so long as there are only applications on a stream, *all* of the waters thereof are unappropriated and new applications ought not to be rejected. It is not anticipated that this principle of law will be seriously controverted." It won't be, or at least it won't be "seriously," for it can't well be seriously considered.

To say that "an application to appropriate is not an appropriation" is to state a fact of the same quality as to state that "an application for employment is not an employment," which is fairly obvious. An *approved* application is not an appropriation either, but approval confers the right to appropriate, and

must be founded on a finding that there "is unappropriated water in the proposed source" and that "the proposed use will not impair existing rights." Nothing in that sentence is the result of any reasoning process; the first part is axiomatic and the last two parts are statements of the statute — Chapter 3, Title 100. Now the Attorney General follows that "an application to appropriate is not an appropriation" with "There is no appropriation of water until a Certificate of Appropriation issues" and then goes on with the "*therefore*, so long as there are only applications on a stream *all* of the waters thereof are unappropriated and new applications ought not to be rejected." What is the use of saying that "there is no appropriation of water until a Certificate of Appropriation issues" when every one knows that approval of an application authorizes an appropriation, and that no Certificate will issue *until* an appropriation has been made and proved as required by Section 16? What is meant, we suppose or, as we are impelled to believe, what Respondent *ought* to have meant is something as easily said; that, as between an applicant and the State of Utah, approval by it of an application confers the right to appropriate, but it confers no right which may not be terminated by failure to do within time what has been authorized.

Falkenberg vs. Neff, 72 Utah 258

Action for damages for wrongful destruction of a dam and diverting works.

Both Appellants and Respondents had "uncompleted applications for appropriations for irrigation purposes of definite quantities of water therein pending before the State Engineer."

Appellants' was prior in time. Both had been approved. "Neither . . . had been perfected." Respondents "constructed a diverting dam across the creek to a point above the Appellants' proposed point of diversion and thereafter diverted a quantity of water from the stream through a flume, and were using it to aid in the construction of a ditch." Appellants destroyed the dam. At the time they had "constructed no diverting works in the stream, and had no ability to make, and had made no diversion or use of any of the water flowing therein."

Appellants sought to justify their action on the ground that their approved application for 30 cubic feet per second of water, being prior to that of respondents, entitled them to the uninterrupted flow at that rate to their proposed point of diversion, even though they had no present use for it.

The lower court charged the jury that if they "found that Respondents' dam and diversion of the water in no way lessened the supply of the water which Appellants could and would then use, Appellants had no right to interfere with or remove the Respondents' dam."

Held that the charge was unobjectionable.

This case is cited Page 8-9 of the Attorney General's reply. "There is another factor which indicates that the waters in question are unappropriated. The Supreme Court said in Falkenberg vs. Neff . . . that where the plaintiff and defendant both held approved applications and the defendant's was prior in time, the defendant had no right to complain of the diversion of water by the plaintiff if the defendant was not then in a position to use it. That at such times as an appropriator is not

using the water . . . it is subject to appropriation and use by others." This is amplified on the same pages, and that following, where it is said, "whether or not the Provo River Water Users Association can later reassert the right to capture this water is foreign to this law suit."

Now we ask, with all respect possible under the circumstances, how can *Falkenberg vs. Neff* and that comment be thought to be applicable here? It all appears under the heading: "Waters Running to Waste are Unappropriated Waters." No one, so far as we know, questions it. Suppose that in *Falkenberg vs. Neff* the Appellants' dam and diverting works had been completed and their irrigation project was in operation, and that *then* Respondents had constructed a tight dam above, with such effect that the 30 second feet to which Appellants were entitled wouldn't reach their dam. If *those* had been the facts, and the court had still decided against Appellants, the case could have been properly cited here. And suppose in such case that Respondents had sought to justify their withholding above on the ground that the waters appeared to be going to waste . . . "they were just running down stream." Surely they were running down stream; were running and, except for their diversion above, would have run into Appellants' reservoir.

It would be idle, and worse, in such case, to talk of waters running to waste; and so is it here. The Deer Creek Division of the Provo River Project cannot be likened to the irrigation project of Appellants in *Falkenberg vs. Neff*. The United States, under its Weber River applications, has long since *appropriated* water from that river and has transported it to

the Provo, has stored it in the Deer Creek Reservoir, has distributed it on lands under the project and, unless interfered with by diversions inconsistent, it will recapture and restore and reuse it again. All this was established by Respondent Jones in response to his successful effort to show that Lehi Irrigation Company had no right to the use of the waters sought to be appropriated by him. No question is made of this; but it is said to be all irrelevant and immaterial; that the rights of Provo River Water Users Association are "entirely foreign to this law suit."

"Foreign to this law suit" because (pages 9-10) "This case was presented to the State Engineer as a private dispute between an irrigation company and a landowner on whose lands waters arise by seepage. Each claimed a superior right to use the water. At the time of dispute the waters were running to waste. The State Engineer, by approving the application, simply intended to settle the immediate dispute between those two users and to recognize in Jones a superior right of use because he had filed on it, and Lehi Irrigation Company had not. The approval order was expressly made 'subject to prior rights.' Certainly, under the cases cited next above, there was a sufficient showing to justify the approval of the application."

"The cases cited above" are Falkenberg vs. Neff and Adams vs. Portage Irrigation Reservoir & Power Company 95 Utah 1. Mention of the latter (except as limited on rehearing) is something we regard as approaching the indelicate. It is cited "to the same effect" as Falkenberg vs. Neff. It isn't at all, as anyone who can read it through ought to

perceive with less than "half an eye." But the Attorney General seems to like it, especially the "air and the winds and the sunshine" part which he appropriates to his own use on page 13.

Returning to the paragraph of quotation next but one above. If that and the many other expressions of identical effect from both Respondents are accurate as to what the State Engineer actually did, and it is what he ought to have done—then we are as wrong as can be, and our labor in this matter is all for nothing, because, in that event, it has been occasioned by a complete misapprehension of the duties of the State Engineer as fixed by the legislature and the decisions of this court. But if we are not mistaken—if the obligation of the Engineer is as we have defined at pages 9-10 & 16-17 above, and as this court has defined it in *Eardley vs. Terry*, *then we urge that this case be remanded regardless of the rights of the Provo River Water Users Association*—that is to say, without consideration of them or their legal effect. We urge this, in that event, because the trial court did precisely as Respondents say the State Engineer did and ought to have done. (See Finding of Fact No. 7). And what is that! It is the regard and consideration of the case entirely as a private dispute with no consideration or regard whatever of the statute. What each—the trial court and the Engineer—"intended to settle" and so all that either did settle was "the immediate dispute between those two users and to recognize in Jones a superior right of use because he had filed on it, and Lehi Irrigation Company had not," as though the case had been that presented by *Robinson vs. Schoenfeld*.

As Counsel for Provo River Water Users Association, and as Amicus Curiae also, we feel that the case should be remanded with direction to reject the Jones application, but, as Amicus Curiae alone, we suggest that it be remanded in any event, so that, at least, there shall be some approach to compliance with the real essence of the law. As it is, all that was done or attempted to be done is what is reflected in Finding No. 7.

"The waters thus and here involved have arisen during approximately the last three years, and the appropriation and use of these will not diminish *plaintiff's* supply of water under its appropriations, *and will not impair any existing rights of plaintiff.*"

"That's all there is; there isn't any more."

Little Cottonwood Water Company vs. Kimball, 76 Utah 243.

Kimball made application for right to appropriate 10 cubic feet of water per second, proposed to be saved by delivering through a pipe line water diverted from the creek and delivered to places of use by means of an open ditch from which the amount of the proposed savings was lost by evaporation and seepage.

The court held the savings to be subject to appropriation, and hence that it had not been shown that there was no unappropriated water in the proposed source. It held also that practical difficulties in the way of effecting the proposed savings had nothing to do with the propriety of granting an application

for right to appropriate it. "The inquiry on this branch of the case ends when, from the facts found, it cannot be said that there is no unappropriated water in the proposed source."

That is what this case decides. Chief Justice Cherry said that the application ought to be approved, anyway, because of the existence of some flood waters. But they were not the subject of Kimball's application.

This case is cited by the Attorney General (pages 5, 6 and 7) to the effect that "the State Engineer has no judicial power, and he must not attempt to decide judicial questions or determine vested rights except in a very general way" and "It is only where there is no probability that the application might be perfected that the State Engineer should deny the application," and, "The Utah Court has, time and again, said that an application to appropriate is not a completed appropriation."

We have no fault to find with any of this except "It is only where there is no probability that the application might be perfected that the State Engineer should deny the application." We suppose this was intended to read, "It is only when there is no probability that the *appropriation* might be perfected" etc. But even so, it is an inaccurate statement. This court may have said something like that. In fact, *unappropriated water having been found*, this court in Yates vs. Newton held that the application ought not to be rejected even though it appeared that the effort "must prove a failure." There also, what was involved was a "Savings Filing." It is only in relation to such a situation that the language objected

to is relevant without addition. It cannot be properly applied in the first instance to the situation presented by Section 8, Chapter 3, Title 100, where the Engineer is authorized to approve only "IF": "(1) There is unappropriated water in the proposed source; (2) The proposed use will not impair existing rights or interfere with the more beneficial use of the water."

As to the other language quoted and said to have been the "holding" of the court in *Little Cottonwood Water Company vs. Kimball*; the fault found is not necessarily that it was unnecessary to the decision, if it was, but that it is taken out of a context with which it may have been in accord and is used as the basis of faulty reasoning. The Engineer has no judicial powers; *therefore* he has no powers. "An application is not an appropriation. It is but a preliminary notice of intention. There is no appropriation of water until a Certificate of Appropriation issues. *Therefore*, so long as there are only applications on a stream, all the waters thereof are unappropriated, and *therefore*, new applications ought not to be rejected."

One should not expect to find decisions on this, for it is something which cannot be "seriously" considered. It was implicit, however, in the decision of *Sowards vs. Meagher*, where one application was "rejected by the State Engineer on the sole ground" that it was "in conflict with prior applications." It was also implicit in the decision in *Tanner vs. Bacon*, State Engineer. In both cases the interference and consequent rejection of the interfering application was with an application under which the authorized appropriation had

not yet been made. Here the waters in question have been found to be the result of appropriations already made of waters from the Weber River, impounded in and used from the Deer Creek Reservoir by means of the Provo Reservoir Canal enlargement. Will anyone contend that those waters have not been appropriated?

This court "knows," or if it doesn't, it cannot but realize that it must be, that holders of approved applications often *appropriate and use water continuously*, often for years, before a Certificate of Appropriation issues. It's common practice. It is true under the Provo River Project, and it is and has been true as to literally thousands of other *appropriators* in similar situation.

The briefs of Respondents, and especially the Reply brief of the Attorney General, have been largely composed by a stringing together of isolated sentences or unauthorized versions of sentences from the opinions of this court and by adding to them conclusions which do not logically follow.

It is possibly impolitic to say it, but we cannot help being reminded of what Mr. Justice Thurman said and did in *Stokey vs. Green*, 53 Utah 311. "We appreciate the importance of every decision of this court relating to the subject of irrigation and water rights, especially when we realize that even fugitive suggestions outside the issues of the case, as well as expressions applicable to the facts, may be erroneously referred to and relied on in subsequent cases."

This, after reviewing and stating the effect of half a dozen or so former Utah water cases, and strongly intimating that *if*

certain facts not before the court were before it, its decision would be so and so. The result has been that *Stookey vs. Green*, which really decides nothing, has been cited as often, perhaps, as any water case, and as authority for almost anything.

Clark vs. North Cottonwood Irrigation & Water Co.
79 Utah 425.

This is another "the court said" case. It is otherwise of no possible relevancy here. "The court said that it is quite generally held that one may not acquire a perfected right to have seepage water kept up, but when seepage water finds its way back to the natural stream from which it originally came, such water may be appropriated again. All the parties to this litigation, the court said, proceeded well they might upon the theory that the seepage water in controversy was subject to appropriation."

Neither of the subjects of the court's statement were in issue, but the court did say something like that, but not quite that. It said "permanent" right, not "perfected" right. If we were not in agreement with what the court said, we might cite what the court said in *Stookey vs. Green* in regard to *Garns vs. Rollins* 41 Utah 260 and *Roberts vs. Gribble* 43 Utah 511. "The principle underlying these cases seems to be that waste and seepage waters from artificial irrigation constitute an artificial, rather than natural, source of supply, and *therefore* are not subject to appropriation." But we don't cite them to that point because we think they decide no more than that the appropriator of seepage from irrigation above

cannot require its continuance.

Again we might well distinguish, for here there is no "seepage water" that "finds its way back to the *natural stream from which it originally came*." The seepage water in question here was appropriated and brought from a foreign water shed for the benefit of a great reclamation project to which it is essential. There is thus presented a state of facts very different from that in Respondent's "the court said." More appropriate we suggest is what the Supreme court of the United States and the Federal Court *said and decided* in *Ide vs. United States*, 263 U. S. 497, and in *United States vs. Haga*, 276 Fed. 41:

"In point of law the general principle upon which the plaintiff relies is scarcely open to controversy; one who by the expenditure of money and labor diverts appropriable water from a stream, and thus makes it available for fruitful purposes, is entitled to its exclusive control so long as he is able to willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface run-off and deep percolation, necessarily incident to practical irrigation. Considerations of both public policy and natural justice strongly support such a rule. Nor is it essential to his control that the appropriator maintain continuous actual possession of such water. So long as he does not abandon it or forfeit it by failure to use, he may assert his rights. It is not necessary that he confine it upon his own land or convey it in an artificial conduit. It is requisite, of course, that he be able to identify it; but, subject to that limitation, he may conduct it through natural channels and may even commingle it or suffer it to commingle with other waters. In short, the rights of an appropriator in these respects are not affected by the fact that the water has once been used."

We might go even further and cite *Clark vs. North Cottonwood Irrigation & Water Company* ourselves, claiming that the following indicates (as it well may) that even seepage water finding "its way back to the natural stream from which it originally came" may not be appropriated unless it be shown that the original appropriator has abandoned. We quote from page 437 of 79 Utah:

"There is no pleading, finding, or proof that defendant abandoned its claim to the right to use the water (seepage and return flow, it was) which finds its way into North Cottonwood Creek . . ."

"What we do decide is that the evidence in this case fails to show that defendant has lost its right to regulate, control, and distribute to its stockholders the water which finds its way into the North Cottonwood Creek above the old intake of the Richards-Spackman-Van Fleet ditch."

Tanner vs. Humphries, State Engineer, 87 Utah 164.

This case has to do with the duty of the State Engineer and, on appeal from his decision, that if the trial court, on application for change of place of diversion. So far as at all helpful here, the court held that ". . . the burden rests upon plaintiff (the applicant) to establish the necessary facts to make out a *Prima Facie* case" and that on motion for nonsuit "testimony to the effect that the diversion would not affect the character of the water in the flume and that it would not impair any rights of the Power Company was sufficient . . ."

This case is not cited by Respondents. We are in perfect accord with what the court said as necessarily following from

and incident to the decision as quoted, that "It would be impracticable to require the plaintiff (applicant) to ferret out all the ways in which the others might perchance be injured and offer proof in negation thereof as a part of its affirmative case." In the case of *Lehi Irrigation Company vs. Jones*, however, the applicant's negation of injury to one water user affirmed it as to another. *In no case we have seen has there been a similar state of facts.*

Eardley vs. Terry, 94 Utah 367.

Application was made to appropriate "1/2 cubic foot per second of the alleged unappropriated waters of a creek . . ." The water sought to be appropriated was that saved from loss by trenching a wash. The trenching had been accomplished before the filing of the application, and the only testimony offered was that "the natural flow of the stream was increased 1/2 second foot" and therefore that there was unappropriated water in the proposed source.

It was "apparent from the pleadings, the evidence and the decree entered by the trial court that the proceedings before the court were considered as involving the litigation of the respective rights of the parties to the water of Beaver Dam wash and a final determination of such rights and their nature and extent. The Respondent was not only granted a reinstatement of his application to appropriate water and the right to continue thereunder by the decree, but he was likewise given a present grant of all the water developed as conserved by him."

For this reason it was necessary to remand the case for correction of the decree as to the present grant, to state why, and thus to define the duties of the State Engineer and, on appeal from him, the nature and scope of those of the trial court.

"It should be remembered that the proceeding in the district court was by way of appeal from the decision of the state engineer rejecting respondent's application to appropriate water. Under the statute, section 100-3-8, R. S. Utah 1933, when an application is filed *the state engineer is required to determine* whether there this unappropriated water in the proposed source of supply and whether the water sought to be appropriated can be put to a beneficial use and can be diverted from the source of supply without doing material injury to the prior rights of others. While the statute, R. S. 1933, 100-3-7, also provides for the filing of protests to any application to appropriate water, this does not enlarge the scope of the proceedings before the state engineer beyond the determination of the question above stated. *The state engineer is required to determine* whether the application should be rejected or approved by a consideration of the elements above stated. He does not, and has no authority in such proceeding to, fix and determine the rights of the parties to the proceeding. He simply determines whether there is unappropriated water which can be beneficially used without injury to or conflict with prior rights. If the application is approved, the applicant must thereafter construct his works, make beneficial use, and, by actual use of the water, fix the nature and limits of the rights which can be claimed and

granted under the application. The approval or rejection of the application is simply a preliminary matter and is not intended to, and does not, fix the rights of the parties before the state engineer in such proceeding. When an appeal is taken from the decision of the state engineer in such a case, *the trial court is required to determine the same questions de novo*. It determines whether the application should be approved or rejected and does not fix the rights of the parties beyond the determination of that matter. The issues remain the same upon an appeal to this court. All that the district court or this court, on appeal from the district court, is called upon to do is to determine whether the application should be rejected or approved. If it appears that there is unappropriated water which the applicant seeks to appropriate and which he can beneficially use without injury to or conflict with the prior rights of others, then the application should be approved by the court; otherwise, it should be rejected. If the application is approved, then the applicant must proceed to perfect his appropriation as provided by law and make proof thereof under Section 100-3-16 R. S. 1933. Until it is so perfected, he cannot be decreed or given present rights as under a completed appropriation. It may be that, although the application is approved, the applicant may not be able to perfect his appropriation."

"It seems clear to us that the Legislature intended that when the application is filed, the state engineer is called upon to determine preliminary whether there is probable cause to believe that an application can be perfected, *having due regard to whether there is unappropriated water available*

for appropriation, whether it can be put to a beneficial use, and whether it can be diverted and so used without injuring or conflicting with the prior rights of others. If he determines there is such probability, the application is approved and the applicant then proceeds to demonstrate by an actual use of the rights sought to be acquired that he is entitled to such rights."

"The District Court should simply determine whether the application was rightly rejected. In determining that question, the court stands in the same position as the state engineer did. *It must determine* from the evidence whether there is probable cause to believe that there is unappropriated water available or water which can be made available for use; that the applicant can beneficially use such unappropriated water; and that such water can be diverted from the source of supply and used without injury to or conflict with prior rights."

This case is cited by Respondent Jones and by the Attorney General on at least four separate occasions.

First to this: (original Respondents, page 5) "The courts below and here can only determine whether the State Engineer rightly approved the application, as against the protest of an Appellant, and will sustain him where he does not act 'arbitrarily or capriciously.' " To this also cited Tanner vs. Bacon, 103 Utah 494. Neither of these cases gives countenance to what is thus claimed for them; *nor does any other Utah case.* The trial in the District Court is de novo. The statute directs that it shall be and Eardly vs. Terry says that

it must be. "It is the duty of the court to try the case *de novo*." There is no question of *sustaining* the Engineer. The "arbitrarily or capriciously" used by counsel is picked out of this, from *Tanner vs. Bacon*, "This decision (of the District Court) not being arbitrary or capricious but based upon experience, and well recognized principles must be sustained."

Next (Reply of Attorney General, page 5) " . . . the issues are limited to those which confronted the State Engineer in the approval or rejection of an application." If by this is meant that rejection or approval of this application is before the Engineer and, on appeal, before the District Court, it is correct, *Eardley vs. Terry* says so. But if what is meant is that if the Engineer did not notice or give regard to all the facts, the court may not, it is quite obviously wrong.

Again (page 6) " . . . In *Eardley vs. Terry* the court said no final rights are acquired until proof of appropriation." Well, what of it?

It may be that *Eardley vs. Terry* is cited elsewhere, but there is no use in pursuing further the claims made for it. They are all directed toward one single purpose—to *persuade this court not to decide this case*, because, after all, as we paraphrase, "approval of an application is of no consequence; neither the State Engineer nor the trial court have the power to decide anything; and an application is not an appropriation. There is no necessity to decide anything here, because everything can be decided elsewhere."

But why *Eardley vs. Terry* has been cited to any purpose of Respondents is something we are unable to understand, for

this is a case in which the court has defined the duties of the State Engineer and the trial court to be precisely those we have consistently and persistently attributed to him. We are inclined to repeat here what we have already quoted from the opinion, but, looking over what has already been given, we see that it is clearly sufficient. Nevertheless, there are certain expressions so definitely and decisively in accord with our own ideas that we give them again. (Last paragraph, page 373 “ . . . *the State Engineer is required to determine . . .*” etc. (Top of page 374) “*The State Engineer is required to determine . . .*” etc. (Middle of page 274) “ . . . *the trial court is required to determine the same questions de novo.*” (page 377) “*It must determine . . .*” That, we suggest, settles that; and so far as anything can be, Eardley vs. Terry also settles *what* is to be determined. The court is explicit, and so is the statute. That the determination may be upset in another and independent proceeding has nothing, *and of course it has nothing*, whatever to do with the matter. “*The State Engineer is required to determine.*”

Rocky Ford Irrigation Company vs. Kents Lake, etc. Company, 104 Utah 202

“In a trial de novo in the district court, the court found on the conflicting evidence that there was unappropriated water during certain high water seasons, and that the applicant could put the water to a beneficial use. Therefore, unless it appears that the approval of the application will injure the vested rights of prior appropriators, the application to appropriate should be approved. See 100-3-8, Utah Code

Annotated 1943; Little Cottonwood Water Company vs. Kimball.”

The applicant’s proposed storage reservoir was upstream from the place of diversion of one protésant and from a power plant, but “ . . . we should not deny this application merely because it puts Kents Lake in a position, as the upstream junior *appropriator*, where it might, when sufficient water was not available for all concerned, interfere with the plaintiff’s rights.” Clearly not, it seems to us; that is a common situation. To hold otherwise would prohibit a large part of the water uses of the state.

This case is cited as follows: “It is only where there is no probability that the application might be perfected that the State Engineer should deny the application. Such was the holding of the court in Rocky Ford Irrigation Co. vs. Kents Lake Res. Co.”

We seem to remember that this was noticed some place above. Certainly that was not the “holding of the court” in that case, *and* anyone who can read ought to be aware of it. Neither is it the “holding” of any other case that has come before the Supreme Court of Utah. The trouble with the last quoted statement is the same as with so very many others in Respondent’s original and Reply briefs. What is said is obviously not “the holding” of the Court in any case; but we read and re-read case after case to see if there was some “fugitive expression” identical or similar or of the same meaning. The Court may have said it in some case in relation to something else; for example, it may have spoken of the probability

of an applicant's being able to do the things necessary to perfect the appropriation which approval authorizes him to commence. Then we think of *Eardley vs. Terry* which is certainly perfectly clear as to the prerequisites of approval, and we seem to recall use of the word "probability" in it; so we read that for the Nth time and find it, but there we find it as part of a sentence in which there are some sixty words of context not given by counsel.

We are moved to waste that much space and time, as well as money, because we have, at last, come to the end of the Attorney General's brief—just before his "Summary", where he says, "This court has always told the State Engineer that the mere fact that a man is given a "fighting" right high on a stream is no justification for refusing his application. See *Rocky Ford Irr. Co. vs. Kents Lake*, supra." Well, what of it? Naturally, the mere fact that an applicant is upstream is no ground for "refusing his application." But where has there been any mention of a "fighting" right?

Now we come to the Attorney General's "Summary," upon which we shall comment sentence by sentence with our comments in italics.

"The Supreme Court has told the State Engineer that he has no judicial powers; that he must not, in ruling on an application, attempt to adjudicate or determine vested rights."

True he has no judicial powers, but "... the State Engineer is required to determine whether there is unappropriated water in the proposed source of supply and whether the water sought to be appropriated can be put to a beneficial use and

can be diveretd from the source of supply without doing injury to the prior rights of others." Eardley vs. Terry 94 Utah 367 at 373.

"When an appeal is taken from the decision of the State Engineer in such a case, the trial court is required to determine the source questions de novo. It determines whether the application should be approved or rejected and does not fix the rights of the parties beyond the determination of that matter. The issues remain the same upon an appeal to this court. All that the district court or this court, an appeal from the district court, is called upon to do is to determine whether the application should be rejected or approved. If it appears that there is unappropriated water which the applicant seeks to appropriate and which he can beneficially use without injury to or conflict with the prior rights of others, then the application should be approved by the Court; otherwise it should be rejected." Eardly vs. Terry, 94 Utah 367 at 374.

"On the question of vested rights the State Engineer is to make only a very general inquiry."

"The State Engineer is required to determine."

"If, after such an inquiry, he has any reasonable basis for believing that a right might be perfected, he is to resolve such doubts in favor of approval."

"All right, if "he has any reasonable basis," but there is none in this case where the amount in question is only a small part of the total. There are no doubts to be resolved. There is no "probability" or possibility of any left over. And there

is no probability that the Provo River Water Users Association will abandon its rights. They are being exercised at this moment. They have been continuously exercised for approximately the last three years. Finding of Fact No. 7.

"The Supreme Court has also said that an application to appropriate water is not an appropriation and that waters covered only by application are still not appropriated."

Certainly an application is not an appropriation, and certainly the Supreme Court has said so. Certainly, however, approval of an application authorizes the making of an appropriation. (If an application is approved, "the applicant then proceeds to demonstrate by an actual use of the rights sought to be acquired that he is entitled to such rights." Earley vs. Terry 94 Utah 367 at 376. Section 8 Ch 3 Title 100 Utah Code Annotated 1943.) Equally certain it is that the Supreme Court has NOT said "that waters covered only by an application are still not appropriated." To say that an application is not an appropriation or that approval of an application confers no "final rights, or that the facts or conclusions upon which approval is based may be questioned in another proceeding, are all sayings of very different character from that attributed to the court by counsel. To say "that waters covered only by an application are still not appropriated" is to say something that everyone knows is not true. For illustration we need to go no farther afield than the facts of this case. During the years 1944, 1945, 1946, and 1947, the Provo River Water Users Association, acting under the authority of the approved Weber River applications of the United States,

diverted flood waters of the Weber River into the Weber-Provo Division canal which is a part of the completed works of the Deer Creek Division of the Provo River Project. Those flood waters were transported through a nine mile canal to the Provo River and by means of it into the Deer Creek Reservoir. From there they were turned into the Provo Reservoir Canal and were utilized to produce crops on some 40,000 acres of land.

All of those waters—several hundred thousand acre feet—are “waters covered only by an application.” NOT APPROPRIATED!!!

But counsel may mean (distinguished from what he said) that the flood waters so appropriated were not appropriated UNTIL taken into the canal, etc. But the United States had the right to divert them. It has exercised its right for four successive years—ever since its diverting works and storage reservoir have been completed. It has expended upwards of twenty million dollars with no other purpose. One might add that, in the sense of what we are supposing counsel to have meant, no waters, whether covered by Certificate, Decree, Approved Application or General Adjudication, are actually APPROPRIATED until diverted.

To say that the Supreme Court has said what is attributed to it is, to say the least, uncomplementary. To use the ridiculous statement as the basis for an argument that in spite of the facts stated above there is still unappropriated water in the proposed source, if “covered only by applications” is something beyond our liberty to characterize.

"The court has also said that waters running to waste are for the time being public waters open to appropriation, and that waters which have escaped from the control of the original appropriator and returned to the natural source of supply again become public waters."

It might just as well be said that waters diverted from the Weber River into the Provo were running to waste while on their way to Deer Creek Reservoir, or that all the water in the Provo on its way to Utah Lake is "running to waste." Furthermore, these are NOT waters which have returned or ever will return to "the natural source of supply." THEY ARE WATERS BROUGHT FROM A FOREIGN WATERSHED AND IMPOUNDED IN A STORAGE RESERVOIR. IT MAY WELL BE SAID THAT THEY ARE CREATED WATERS WHICH, UNLESS SHOWN TO HAVE BEEN ABANDONED, BELONG TO THE CREATOR.

"All three of the above are present in the instant case and combined they certainly suggest a reasonable doubt as to whether or not all of the waters are appropriated. Therefore, the application should have been approved."

What do the "three above" amount to, alone or combined! Three times zero is zero.

"The other issues as to ownership raised by the Amicus Curiae simply ask this court to do what it has already told the State Engineer he must not do, to-wit: make an adjudication of vested rights."

No such thing is asked. All that is asked is that there be done in this case what the statute and the decisions of this

court (everyone of them) direct shall be done." The State Engineer is required to determine." The District Court "must determine from the evidence whether there is probable cause to believe that there is unappropriated water which can be made available for use; that the applicant can beneficially use such appropriated water; and that such water can be diverted from the source of supply and used without injury to or conflict with prior rights." Eardley vs. Terry.

There is something interesting, something curious and astonishing, in this last sentence of Counsel's "Summary," elaborated elsewhere in the three briefs of Respondents.

It has apparently never occurred to apply the "State Engineer has no judicial powers" to the ordinary case. It seems not to have occurred to either counsel that the inevitable result of their reasoning is that neither the State Engineer or the District Court can ~~neither~~ approve or disapprove an application for right to appropriate. They can't approve, for that necessarily involves a determination that all of the waters of the proposed source have not been appropriated and that there are no conflicting rights. They can't disapprove, for that involves a determination that there is no unappropriated water in the proposed source and that there are other rights which exhaust it.

• It would never occur to either respondent to argue that the State Engineer could not approve the Jones applications because that result necessarily involved a determination that the waters in question were not within the rights of Lehi Irrigation Company. Neither would it occur to either to argue

that the case would have to be reversed if the District Court had rejected the Jones applications because it had determined that the waters in question were and always had been contributory to Dry Creek and that Lehi Irrigation Company had (no matter how) long since acquired the right to use them!

*Curiously and astonishingly, however, the rights of the United States and the Provo River Water Users Association may not be "determined" because "this Court . . . has already told the State Engineer he must not . . . make an adjudication of vested rights."*⁴

We have very carefully examined all of the decisions and all of the expressions of this court directly or indirectly relating to the matter before it here, with the result that we have no doubt of the source of Respondent's confusion. THE CASE IS UNIQUE. No new or unusual principles of law are involved; it is the facts that are peculiar. In almost every other case of its kind that has been brought to this court the rights of the actually *contending* parties have either been, or they have seemed to be, or it has not appeared that they were not, the only rights relevant to the issue. Sowards and Meagher, Rocky Ford Irrigation Company and Telluride Power Company and Kents Lake Irrigation Company, Eardley and the Terrys, etc., etc., so that in some instances the matter has been spoken of and treated as though it has been a "private dispute"; and so *in practical effect* it has been. But in no case has this court failed to enunciate the principles involved in any substance or effect differently than in Eardley vs. Terry.

Never before, so far as we have been able to discover, has any of the actually contending parties brought before the

court rights and interests of a person or persons not contending. *But that was done here;* and, in response to direction of the statute, and in response to the uniform pronouncements of this court, they must be considered.

It may be recalled that some place above we have used the word “unworthy” in reference to the “third party” argument. What we had in mind is the fact that everyone knows, and especially everyone associated with the State Engineer knows, that not only is the State Engineer required by law to “determine” rights and interests of persons not before him—protest or no protest—but also that it has been the uniform practice of the present State Engineer and of every one of his predecessors to do so.

We do not suggest that the “determination” required to be made by the State Engineer or, an appeal from his decision, by the trial court, calls for anything in practical effect in the nature of the general adjudication suit, or that an applicant is bound at peril to approval to “ferret out” all possibilities of conflict. What we do suggest, and urge as perfectly clear and obvious, is that the Engineer is bound to notice the records of his own office, and that, while neither he nor the District Court can be blamed or over-ruled for failure to consider rights not known or brought to attention, *both are bound to consider and determine the effect of rights that are.*

But both Respondents say this court ought not to do so. “We assert that this court should not do so.” (Page 4 Reply of Attorney General). Pages 13 and 14 are devoted to a

relation of alleged facts as to claims made by Utah Lake Users, and their intentions in relation to the very well known intentions of the United States. "Those parties have argued in the past that the Bureau of Reclamation and the Provo River Water Users Association cannot retain title to seepage waters after they escape into Utah Lake and they have indicated that they will oppose any attempt to perfect such a scheme for recapturing and reusing this water."

That's interesting indeed, but what has it to do with this case? The writer has known for several years that certain "parties have argued in the past . . ." etc.; they are the parties who opposed approval of application 12144 passed on by this court in *Tanner vs. Bacon State Engineer*, 103 Utah 494 referred to in our original brief at considerable length.

For one reason or another it is argued that, *Amicus Curiae* having come into this case, it must be "by-passed." It must not be critically examined because, as it is said, there is nothing of any importance involved anyway. Then also it must not be decided because many will be affected by it.

We have been under the impression that the only issue that *can* be presented is whether the Respondent Jones has or has not made a case for the approval of his applications. The facts which determine that it ought to be rejected were brought to attention by him. That was all right as long as their effect was to defeat the claims personal to Lehi Irrigation Company—was all right as to counsel for Jones and Counsel for the State Engineer so long as the case seemed to be going by default.

In deciding the matter submitted to the State Engineer and to the district Court, and now before this court, it was

necessary, of course, as it is, to determine the legal effect of the facts. In a simple action for trespass it may be necessary to decide as to the legal effects of long occupancy of real property. In *Falkenberg vs. Neff*, an action for damages, it was necessary to decide and the court did decide that one party had certain rights under a pending application to appropriate, etc., so that the decision is one as to water rights as well as to damages. In *Sowards vs. Meagher* in order to decide that one application was properly approved and another properly rejected it was necessary to decide whether waters on and intended for use on an Indian Reservation were subject to appropriation. It is often so, but in no case is the necessity of deciding affected by the fact that the decision will be of wide or of narrow significance.

This court said in *Eardley vs. Terry*, and we think that under the circumstances it was necessary to say . . . "It seems clear to us that the Legislature intended that when the application is filed, the State Engineer is called upon to determine preliminarily whether there is probable cause to believe that an application can be perfected, *having due regard to whether there is unappropriated water available for appropriation, whether it can be put to a beneficial use, and whether it can be diverted and so used without injuring or conflicting with the prior rights of others.* If he determines there is such probability, the application is approved and the applicant then proceeds to *demonstrate by an actual use* of the rights sought to be acquired that he is entitled to such rights."

Now it seems perfectly clear to us that the facts as to the waters in the proposed source are such that so far from

it being probable that "the application can be perfected" it is highly improbable, almost certain, that it cannot be. That approval *might* be the occasion of litigation is not in itself sufficient to compel rejection, but here it can result in nothing *but* litigation, and that *is* sufficient.

Regardless of Application No. 12144, the facts found establish that the waters in question result from an appropriation made from a foreign watershed, and thus have been saved from wastage into Great Salt Lake; that they have been stored in a reservoir constructed to receive and conserve them; that *they have been reduced to actual possession* by the United States as an essential part of the water supply of a great reclamation project. In practical effect, they have been created. Are these facts of any legal consequence? Are these waters, having once been used, now subject to appropriation by a stranger without a showing or attempt to show that they have been abandoned by those responsible for their existence? Respondents urge that by some hocus pocus this question be left unanswered.

If those facts are of no legal effect noticeable on application to appropriate the waters so realized, how can this court avoid saying so? And if they are—if under those facts those waters are not subject to appropriation without showing of abandonment by their creator, how can this court avoid saying *that*?

Except for the fact and effect of Application No. 12144, there is in this case nothing but that question worthy of any time or space whatever; and we regret the long and obstacle-strewn road necessary to reach it. This is the question in aid of

which we referred the court to *Ide vs. United States* and *United States vs. Haga*, in our original brief, pages 16-18 as to the former, and pages 22-23 as to the latter.

In *Ide vs. United States*, the controversy was between parties who, upon application to the State Engineer, had received permission to perfect an appropriation of the seepage waters, on one side, and the United States whose construction and operation of the Shoshone Project had produced them, on the other. That is to say, the same controversy that would inevitably ensue between Jones and the United States if the Jones applications were approved. The court said—and this is its decision—“. . . the artificial flow was not available, because the plaintiff (United States) was entitled and intending to use it. The asserted appropriations, therefore, derive no support from the permits.” And so, as here, their granting produced, and could produce, nothing except litigation.

The court held, on a claim of abandonment by the United States, that there had been none, adding, “As making against this conclusion, the defendants say that the plaintiff, in 1910, applied to the state engineer for a permit authorizing it to divert water from the ravine for the irrigation of particular lands, and that the application was returned without approval. But we find no evidence of abandonment in this. If the application shows anything material in this connection, it is that the plaintiff was then intending to divert and use the seepage. The reason given by the state engineer for returning the application without approval was that the irrigation of the particular lands was “already covered” by the plaintiff’s existing permit.

Certainly nothing was lost by the application or by the engineer's action thereon."

A similar, though not quite identical, argument is made in the Reply of Respondent Jones. We quote from page 23. "And of course, the Government must have considered its filing No. 12144 to be on unappropriated water, and on water, according to the previous argument as to the statutes (A. 10), which the Engineer must have found were unappropriated waters before approving this application. Then, if these waters were unappropriated and subject to this lower filing by the Government itself, how can Amicus Curiae, speaking here for the Government, contend as against us that the same waters were already appropriated by the Weber River filing. The Government's actions do not conform with the assertions of its spokesman."

We might answer this in the language of the Supreme Court: "If the application shows anything material in this connection, it is that the United States was then intending to divert and use the seepage. Certainly nothing was lost by the application or the engineers' action thereon."

The general principles underlying the decisions—Ide vs. United States and United States vs. Haga—are so cogent and compelling and so appropriate, that we repeat them in part from the opinions. "In point of law the general principle upon which the plaintiff relies is scarcely open to controversy; one who by the expenditure of money and labor diverts appropriable water from a stream, and thus makes it available for fruitful purposes, is entitled to its exclusive control so long as he is

able and willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface run-off and deep percolation, necessarily incident to practical irrigation. Considerations of both public policy and natural justice strongly support such a rule."

It may be noticed that neither Respondent makes any attempt whatever to question either the result or the reasoning of these cases. The Attorney General fails to so much as touch them, and Respondent Jones' Reply does not mention them except to say the actions were of a different character.

In his original brief, Respondent Jones did not refer to *United States vs. Haga* at all, but sought to distinguish *Ide vs. United States* on the facts. Our comments upon the attempt as to the facts begins with the last paragraph of page 18 of our original brief, and continues to page 21. Of course the actions were of different character. The cases are cited, as we have stated again and again, to the end of determining that the waters the right to appropriate which is sought by Jones are not the subject of appropriation by him, and so that there is no unappropriated water in the proposed source, and that the proposed use would impair existing rights, and so that it is *improbable* to the utmost degree that the right sought could ever be perfected.

Suppose that what was said by the Federal Court and by the Supreme Court of the United States "In point of law the general principle upon which the plaintiff relies is scarcely open to controversy; one who by the expenditure of money and labor diverts appropriable water from a stream, and thus makes it

available for fruitful purposes; is entitled to its exclusive control so long as he is able and willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface run-off and deep percolation, necessarily incident to practical irrigation. Considerations of both public policy and natural justice strongly support such a rule." had been said by the Supreme Court of Utah; would Jones' Counsel say: "Yes, but that was said in an action of different form!" We hope not.

If Respondents had argued that what we have quoted was pure dictum or that the principles enunciated by the Supreme Court were unsound, and that this court ought not to agree, the argument, however unreasonable, would at least be understandable.

Now the argument made (Jones Reply, page 23) is the one we have already touched upon, viz.: "And of course, the Government must have considered its filing No. 12144 to be an unappropriated water, and on water, according to the previous argument as to the statutes (A. 10), which the Engineer must have found were unappropriated waters before approving this application. Then, if these waters were unappropriated and subject to this lower filing by the Government itself, how can Amicus Curiae, speaking for the Government, contend as against us that the same waters were already appropriated by the Weber River filing. The Government's actions do not conform with the assertions of its spokesman."

The answer of the Supreme Court of the United States in similar situation, we have given under this same quotation a

page or so above; but that answer, however sufficient, is scarcely as pointedly decisive as the one about to appear below.

"And of course," it is said, "the Government must have considered its filing No. 12144 to be an *unappropriated* water . . ." EXACTLY THE OPPOSITE IS TRUE; the making of application 12144 was an affirmance by the United States that the right to the use of the seepage waters "a result of the construction and operation of the Deer Creek Reservoir" belonged to it—that those waters were NOT unappropriated.

" . . . and on water, according to previous argument as to the statutes (A. 10) which the Engineer must have found were unappropriated waters before approving this application." EXACTLY THE OPPOSITE IS TRUE. Before, and as a prerequisite to his approval of Application No. 12144, the State Engineer must have found the right to the use of the seepage and return flow to accrue from "the construction and operation of Deer Creek Reservoir" vested in the Applicant, the United States of America.

" . . . Then, if these waters were unappropriated and subject to this lower filing by the Government itself, how can Amicus Curixæ, speaking here for the Government, contend as against us that the same waters were already appropriated by the Weber River filing . . ."

But, as we have said, "these waters" the subject of the Government's Application No. 12144, were *not* unappropriated, and the very fact of the filing of Application No. 12144 asserted that they were not. That application asserted them to have been, or that when they accrued from the con-

struction and operation of the Deer Creek reservoir, they would be already appropriated. That is to say, as early as April 3, 1936, the United States gave public notice of its intention to recapture and re-store and reuse the seepage to accrue from the construction and operation of Deer Creek Reservoir, among which are the waters—now identified as such—the subject of the Jones Application; and, in doing so, it then did the very opposite of that which Respondent mistakenly infers.

Just as soldiers, faced with the anxieties of combat, frequently develop all sorts of disabling infirmities, so the zeal of counsel for Respondent has developed a psychological “blind spot.”

Application No. 12144 is not an Application to APPROPRIATE at all. It is an application to store and EXCHANGE waters already appropriated—as the application itself expressly states—“*Waters belonging to the United States which will flow into and augment the water supply of Utah Lake as a result of the construction and operation of Deer Creek Reservoir.*”

The application was made pursuant to the provisions of Section 20, Chapter 3, Title 100, entitled, “Right to Convey Appropriated Waters Into Natural Streams and to Impound.” It reads in part: “. . . upon application in writing and approval of the State Engineer, any appropriated water may . . .” etc., etc.

Counsel has not noticed the language used in referring to this Application in our original brief, (page 31). “By this application the United States *confirmed* its right to recapture; and it declared its intention to recapture, waters accruing to

Utah Lake by the 'seepage and return flow' of waters stored in and used from the Deer Creek Reservoir and to exchange them for direct flow rights in the Provo River." "The rights of the United States *confirmed* by this Application are vital to the water supply of the Provo River Project."

The Application expressly alleged that the waters proposed to be exchanged were already appropriated—more than that even—that they belonged to the United States,—an expression fully permissible under the circumstances.

Approval of the Application necessarily involved a determination by the State Engineer that the right to the use of the waters the subject of the Application belonged to the United States; and such a determination was also implicit in the decision of the State Engineer, the decision of the District Court and in the decision of this court in *Tanner vs. Bacon State Engineer*, 103 Utah, 394, for prerequisite to the right of exchange is the right to use the waters exchanged.

The result is that the principles, the foundation of the decisions of *Ide vs. United States* and *United States vs. Haga*, sufficient in themselves to affirm the rights of the United States totally irreconcilable with approval of the Jones Applications, have long since been affirmed by the State Engineer and by this court. And why not? *Who will deny that the result was directed by "considerations of both public policy and natural justice."*

Is it probable that there is unappropriated water in the proposed source, or that the proposed use will not impair existing rights? Is it probable that the Jones Applications

can be perfected? Is it not true that their approval could have no other result than litigation, the necessity for which may be obviated by the rejection impelled by the facts?

In his Reply, Respondent Jones is driven to the desperate expedient of urging that the District Court did not find that *all* of the waters involved were the result of the use of Deer Creek storage, but only "*substantially all*," and to assert that some accrued as early as 1913, referring to the transcript.

We have not examined the testimony, for the all sufficient reason that it is not open to us, any more than it is open to Appellant or Respondent to question the findings of fact of the trial court. The facts of this case are those found.

The findings in each of the three consolidated cases are identical except as to the rate of flow, which in one case is "7 cubic feet per second—for irrigation"; in another, "6 cubic feet per second—for irrigation"; and in the other, "5 cubic feet per second—for irrigation."

"*Such water* (in each case) "is from increased flow in a spring and spring area due to increased seepage from an enlarged canal and extensive increased irrigation at higher levels *from waters stored at Deer Creek Reservoir* on the Provo River, and which waters so used and so seeping and arising in defendant's land are substantially all waters diverted from Weber River Irrigation System to the Provo River and to Deer Creek Reservoir." (Finding No. 6.)

"*The waters thus and here involved*" (in each case) have arisen during approximately *the last three years . . .*" (Finding No. 7).

There is no finding of the existence of any increased flow except "from waters stored at Deer Creek Reservoir," or any arising except during "approximately the last three years." It is hardly possible, we think, for this court to say that the applicant may now proceed in accord with the statute "to take all steps required to apply the water to the use named and to perfect the proposed appropriation"—"*except as to substantially all of the said waters.*" "Substantially all" in its context of finding No. 6 must mean "all of any consequence."

In our original brief we gave it as our opinion that the Provo River Project of the United States Bureau of Reclamation is judicially known, and commencing on page 25 and continuing to include page 28, we gave our reasons. Nothing said up to this point is dependent upon the validity of the opinion there expressed and supported, for our conclusions from it stated beginning at page 28 of our first brief, add very little to the more than fifty references to Deer Creek, its enlarged canal, its reservoir, its Weber diversions, and its general plan supplied by Court and Counsel at the trial, in the findings and by the original briefs of both Appellant and Respondent. In regard to this last, we are unable to resist mention of the naive statement of Counsel that his rather detailed account of the real facts of Deer Creek was only for the purpose of showing that the facts of *Ide vs. United States* were different.

Nevertheless, and important or not, we are still of the opinion formerly expressed. The Special Assistant Attorney General has little if anything to say of the matter, agreeing rather, as it seems to us, but urging that in no event ought

any consideration to be given to the facts relative to the Project however disclosed. Counsel for Respondent Jones, however, disagrees entirely and cites a half dozen or so authorities said to be opposed. We have not looked into them, being content with the general statement of one of them as given by him. "In other words, judicial knowledge is measured by general knowledge of the same facts." We have seen this expressed elsewhere as "The court knows what everyone else knows."

Without pretending to any expertness in this field, we hope we may still give our view on what ought to be. It seems to us that the judicial knowledge of the Supreme Court of Utah, while comprehending a great deal that is known to the courts of other jurisdictions, also includes a great deal that is peculiar to Utah, and it seems to us that, in addition to much else, it ought to include that which for considerably more than a quarter of a century has been the subject of official solicitude of the State of Utah—of the Provo River Project of which there could be said in the year 1943 what was said of it by Mr. Justice Wade in *Tanner vs. Bacon*, State Engineer, commencing at page 501 of 103 Utah, and by Mr. Justice Wolf at page 511; the latter saying something especially appropriate to the merits of this case:

"Suffice it to say in this case that the Deer Creek Project reached a point in conception and realization where it could definitely be said to be against public interest to affirm any application which would interfere with its fruition."

A Project of such vital significance to the State of Utah that,

as the court held, interference with its water right under Application No. 12144, basicly deriving from its Weber River rights, was detrimental to the public welfare, even as against a filing made eleven years before. Most of its water rights were initiated by the State itself, and were passed to it by special act of its legislature.

In our original brief, at page 27, we said, "in point of expenditure of money, of effort, of engineering works, and of benefits, the Provo River Project is the greatest public enterprise so far undertaken in the State of Utah" and we might properly have added, "and by the State of Utah." We also stated the fact (page 26) that various reports—official documents of the State and of the United States—concerning it were given to the public on three separate occasions.

All in all, it seems to us that its public character alone compels Judicial knowledge of it. As to the nature and extent of this we invite attention to our original brief pages 25 to 27.

In addition, there is the fact that for many years the project has been the subject of a publicity in the public press, broader in scope, more detailed, and more persistent than any other enterprise, public or private has ever received in the State of Utah. It commenced many years ago with the commencement of public and official interest, and has continued, scarcely unabated in intensity to this day. The effect can hardly be better exemplified than it is in the mere fact of Finding No. 6 of this cause.

Is it possible that this court, as such, does not know of the existence of the *private enterprise* known as the Utah

Copper Mine, that it is the largest open cut copper mine in North America, that it produces a large tonnage of low grade ore, and even that its ores are refined by what is known as the flotation process? "Everyone else" in the State of Utah knows these things; but of the Provo River Project everyone is reminded almost every day, and a large proportion of the State's population is affected by it, and the welfare—almost the continued existence—of its capital city is dependent upon it.

Permit us to state once more the principles of law which, as we see it, are controlling in this case, and a barest outline of the facts the effect of which they will "determine."

Applications to appropriate certain alleged unappropriated public waters of the State of Utah were filed with the State Engineer. The State Engineer was thereupon "required to determine whether there" was "unappropriated water in the proposed source of supply and whether the water sought to be appropriated" could "be put to beneficial use and" could "be diverted from the source of supply without doing material injury to the prior rights of others" Section 8, Chapter 3, Title 100, Utah Code Annotated 1943; *Eardley vs. Terry*.

The Application, having been disposed of by the State Engineer, was brought before the District Court under Section 14 of Chapter 3. Thereupon the District Court was "required to determine the same questions de novo."

If it "appeared to the" District Court "that there" was "unappropriated water which the applicant" sought "to appropriate and which he" could "beneficially use without injury to or conflict with the prior rights of others, then the

application should" have been "approved by the court;" "otherwise it should" have been "rejected."

The facts found by the District Court, "establish that the waters in question result from an appropriation made from a foreign watershed, and thus have been saved from wastage into Great Salt Lake; that they have been stored in a reservoir constructed to receive and conserve them; *that they have been reduced to actual possession* by the United States as an essential part of the water supply of a great reclamation project. In practical effect, they have been created. Are these facts of any legal consequence? Are these waters, having been once used, now subject to appropriation by a stranger without a showing or attempt to show that they have been abandoned by those responsible for their existence?"

There is no other issue in this case except that; and, its "determination" it seems to us, is logically impelled by the reasoning of *Ide vs. United States* and *United States vs. Haga*:

" 'In point of law the general principle upon which the plaintiff relies is scarcely open to controversy; one who by the expenditure of money and labor diverts appropriable water from a stream, and thus makes it available for fruitful purposes, is entitled to its exclusive control so long as he is able and willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface run-off and deep percolation, necessarily incident to practical irrigation. Considerations of both public policy and natural justice strongly support such a rule. Nor is it essential to his control that the appropriator maintain continuous actual possession of such water. So long as he does not abandon it or forfeit it by failure to use,

he may assert his rights. It is not necessary that he confine it upon his own land or convey it in an artificial conduit. It is requisite, of course, that he be able to identify it; but, subject to that limitation, he may conduct it through natural channels and may even commingle it or suffer it to commingle with other waters. In short, the rights of an appropriator in these respects are not affected by the fact that the water has once been used.' "

Respectfully submitted,

FISHER HARRIS

Amicus Curiae