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Green River Canal Company, a Utah Mutual Water Company v. Lee Thayne: Unknown
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Utah Supreme Court
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In the Utah Supreme Court

GREEN RIVER CANAL COMPANY, a
Utah Mutual Water Company,

Plaintiff/Appellee/Cross-Appellant,

v.

LEE THAYN,

Defendant/Appellant/
Cross-Appellee.

Reply Brief of
Appellee/
Cross Appellant

Supreme Court No. 20010357-SC
Seventh District No. 950706174

Priority No. 15

**Appeal from the Seventh Judicial District Court
Emery County, Utah
Judge Bryce K. Bryner Presiding**

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FILED
UTAH SUPREME COURT

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APR 29 2007

PAT BARTHOLOMEW
CLERK OF THE COURT

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Argument

I. THE TRIAL COURT INCORRECTLY CONCLUDED THAT RULE 65A(C)(2) OF THE UTAH RULES OF CIVIL PROCEDURE DOES NOT PERMIT THE RECOVERY OF EXPENSES NECESSARILY INCURRED IN DEFENDING AGAINST A WRONGFULLY ENTERED INJUNCTION.

In response to Green River Canal Company's (GRCC) argument that, since it prevailed at the preliminary injunction hearing, it was entitled to have its expert witness fees and other litigation costs awarded pursuant to Rule 65A of the Utah Rules of Civil Procedure, Thayn seems to argue that this Court in *Mountain States Tel. & Tel. Co. v. Atkin, Wright & Miles, Chartered*, 681 P.2d 1258 (Utah 1984), refused to grant attorney fees under Rule 65A. (See Thayn's Second Brief (Sec. Brief) 38.) Because this Court refused to permit attorney fees, Thayn's argument continues, the legislature amended Rule 65A of the Utah Rules of Civil Procedure to explicitly permit attorney fees. (See *id.*) Accordingly, he implicitly argues that GRCC's argument fails for two reasons: (1) if the legislature had intended Rule 65A to allow for the recovery of expert witness fees it would have explicitly so stated; and (2) GRCC is attempting to circumvent the *Mountain States* holding by arguing that expert witness fees are recoverable as "damages" and not as "costs." (See *id.*)

There are several very significant problems with this argument, not the least of which is that Thayn mistakenly assumes that Rule 65A of the Utah Rules of Civil Procedure was amended by the Utah legislature. Of course, unless the Utah legislature votes by a two-thirds majority to amend the rules adopted by this Court, the amendment of the Rules of Civil Procedure is vested entirely with this Court by Article VIII, Section 4 of the Utah

Constitution. The amendment of this rule was not, however, made by the legislature. (See Utah R. Civ. P. 65A, History & Notes.)

The second serious problem with this argument is that it assumes that *Mountain States* held that a party could not recover attorney fees. However, this Court explicitly stated that under Rule 65A a wrongfully enjoined party “has an action for costs and damages incurred as a result of the wrongfully issued injunction. These *damages* ... may include the *attorney fees* of the party wrongfully enjoined.” 681 P.2d at 1262 (emphasis added). The Court then allowed an action to establish those damages to proceed.

These two critical errors in Thayn’s argument severely undercut the conclusions he implicitly draws. Because (1) *Mountain States* **allowed** an action to establish the amount of attorney fees under Rule 65A to continue and (2) the legislature **did not** amend the rules in reaction to a strict interpretation of the rule by the Court, one cannot infer that the amendment was a reaction to a strict interpretation of the rule in a Supreme Court case.

Not only are the assumptions underlying Thayn’s arguments incorrect, he also misapprehends GRCC’s argument. GRCC’s argument is simply that the trial court was incorrect when it explicitly ruled that Rule 54 and Rule 65A of the Utah Rules of Civil Procedure must be interpreted in exactly the same way. *Mountain States* makes clear that such an interpretation is wrong—Rule 65A is not interpreted consistently with Rule 54, otherwise attorney fees would never have been collectable under Rule 65A. The logic of *Mountain States* and the cases that this Court relied on in *Mountain States* make clear that, just as attorney fees are collectible, any expense necessarily incurred due to a wrongful

injunction is collectible. See 681 P.2d at 1262, n.7 (citing *Coggins v. Wright*, 526 P.2d 741 (Ariz. Ct. App. 1974); *Unity Light & Power Co. v. Burley*, 445 P.2d 720 (Idaho 1968); *Shultz v. Pascoe*, 614 P.2d 1083 (N.M. 1980)).¹

In this case, GRCC's property was put in jeopardy by the wrongful injunction placed on it by Thayn. In order to recover the property, it was necessary for GRCC to incur expert witness fees and other expenses to fight the continued imposition of the wrongful injunction at the preliminary injunction hearing held on March 23, 1999. GRCC contends that even if the expenses incurred to overturn the wrongfully obtained temporary restraining order are not considered costs under the rule, they should be considered as "damages", just as attorney fees were prior to the 1991 amendments to Rule 65A.

Accordingly, the trial court incorrectly concluded that expert witness fees and the other costs of litigation were not "costs" or "damages" recoverable under Rule 65A of the Utah Rules of Civil Procedure.

II. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FAILED TO REQUIRE THE DISGORGEMENT OF THAYN'S PROFITS.

In response to GRCC's argument that the trial court abused its discretion when it failed to require the disgorgement of Thayn's profits from his hydroelectric facility, Thayn

¹ In *Coggins*, for instance, the Arizona Court of Appeals stated:
If one's property is taken, injured, or put in jeopardy by another's neglect of duty imposed by contract, or by his wrongful act, any necessary expense incurred for its recovery, repair, or protection is an element of the injury. It is often the legal duty of the injured party to incur such expense to prevent or limit the damages, and, if it is judicious and made in good faith, it is recoverable, though abortive.
526 P.2d at 743 (quoting *First Nat'l Bank v. Williams*, 63 P. 744 (Kan. 1901)).

responds with essentially three arguments: (1) the trial court's order denying the motion for entry of judgment was not inconsistent with its summary judgment order, (2) GRCC failed to produce any evidence of Thayn's profits, and (3) the law does not allow the disgorgement of profits. GRCC will respond to each of these arguments in turn.

A. The Trial Court's Inconsistencies

First, Thayn argues that the order denying the motion to enter judgment on the Third Cause of Action was not inconsistent with the trial court's previous summary judgment order. In support of this argument, Thayn makes several claims. First, he argues that "[nowhere] in the record did GRCC specifically move for judgment on the third cause of action." (Sec. Brief 40.) Second, Thayn claims that the trial court was not really granting summary judgment on the third cause of action but rather was granting summary judgment as to the claim that the affirmative defense of eminent domain "did not preclude the third . . . cause of action." (*Id.*)

The actual language of the motion and the memoranda supporting and opposing the motion belie this argument. As discussed at length in its first brief, GRCC alleged in the Third Cause of Action of its Complaint that "Thayn has realized economic gain from the commercial sale of electrical power generated by water diverted and conveyed by [GRCC's] diversion and distribution facilities, but has not compensated [GRCC] for the additional and unauthorized use of [GRCC's] diversion works and water distribution facilities to generate such economic gain." (*Compl.* ¶ 18.) Accordingly, it sought "an Order granting [GRCC] an equitable portion of the proceeds from the commercial sale of electrical power by Thayn."

On June 26, 1996, GRCC filed a Motion for Summary Judgment seeking the entry of “an Order of Summary Judgment granting [GRCC] the relief sought in the Complaint.” In response to this motion, Thayn explicitly argued that GRCC was not entitled to the relief it was seeking on the Third Cause of Action, i.e., a share of Thayn’s profits. (*See* R. at 151n (“Green River has pled that it is entitled to . . . relief, as follows: 1) A share of Thayn’s profits The first claim, for a share of profits, can be dealt with quickly.”) In responding, it argued that disgorgement of profits was not a proper remedy, citing the same cases that Thayn argues in its Second Brief to this Court. (*See id.* at 151n-151o, 151t.) Despite these arguments, on September 9, 1997, the trial court entered an order that explicitly granted Plaintiff’s motion for summary judgment.

Accordingly, it is simply impossible to argue, as Thayn tries to, that GRCC did not specifically move for judgment on the third cause of action in its motion for summary judgment. It is equally disingenuous to argue that the only issue that was argued and decided was whether the eminent domain statutes were proper affirmative defenses against the third cause of action. Thayn himself recognized that GRCC was asking for summary judgment on the Third Cause of Action and for a share of profits, and he explicitly argued against it.

The motion was unequivocally granted in the Court’s order. Further, the court made clear that the only issue to be tried after the motion for summary judgment was “the issue on estoppel.” Thus, the trial court’s order granted summary judgment but left alive only one issue—whether GRCC was equitably barred from bringing its claims. The trial court’s Order on Trial Procedure, dated April 28, 1999, confirms that this was the understanding of the

court and the parties. (See R. at 865 (discussing order of presentation of case on trial on the issue of estoppel).) Even more importantly, however, is Thayn's position in its post-trial briefs, which clearly state that "[u]nder the Court's pre-trial rulings, the issues of waiver, estoppel and laches on the part of the plaintiff were reserved for trial." (R. at 981; *see also Appellant's Brief* at 16.) Thus, the trial court's summary judgment order, the understanding of the trial court, and the understanding of the parties all confirm that the only issue to be tried with regard to the Third Cause of Action was whether GRCC was estopped from bringing the claim. Accordingly, the order's declaration that the only issue disposed of in the summary judgment motion was the issue of liability is a completely mistaken description of the summary judgment order that is tantamount to a change in a previous order of the trial court.

Because of the change of position, the trial court was bound by this Court's jurisprudence to identify the narrow exception under which its previous order could be corrected. *See Thurston v. Box Elder County*, 892 P.2d 1034, 1038 (Utah 1995). Not only did the trial court fail to do so, but it could not under any circumstance justify the change of position under the narrowly defined exceptions to the law-of-the-case doctrine. There has not been an intervening change of controlling authority; there has been no new evidence presented or identified; and the trial court's decision was not clearly erroneous nor would it work a manifest injustice. All the parties knew that the trial court had granted summary judgment on the third cause of action, except to the extent that Thayn could present evidence that GRCC was estopped from bringing the claim. The trial court therefore abused its

discretion when it failed to enter judgment for GRCC entitling it to the disgorgement of the Thayn's gross profits.

B. The Trial Court Abused Its Discretion When It Failed to Award Gross Profits and/or Failed to Grant an Evidentiary Hearing.

Further, given that the only issue reserved for trial was the issue of estoppel with regard to the Third Cause of Action, it was an abuse of discretion for the trial court to refuse to award gross profits in the amount of \$289,500.17 and/or to hold an evidentiary hearing to determine the amount of gross profits due.

In its motion for an award of gross profits, GRCC submitted a copy of one of Thayn's proposed trial exhibits, in which Thayn admitted that it had produced and sold electricity from the hydroelectric facilities. (*See R. at 1547.*) Although Thayn vigorously objected to the motion for entry of judgment and moved to strike the motion, he never objected to the accuracy of the information provided in the exhibit nor did he object to the figure derived from that exhibit, i.e., a gross profit in the amount of \$289,500.17. (*See R. at 1566-76.*) Further, Thayn did not object to the request for an evidentiary hearing to determine the amount of gross profits from March 1999 to the present date (the time period excluded from the exhibit). Accordingly, even if the trial court were correct to rule that GRCC was obligated to present evidence of gross profits during the trial, GRCC did provide evidence with its motion.

As mentioned above, Thayn never objected to the accuracy of the amounts when the motion was submitted at the trial court. Accordingly, he waived any objection to the correctness of the amounts. *State v. Ross*, 782 P.2d 529, 532 (Utah Ct. App. 1989)

(defendant's failure to make contemporaneous, specific objection to allegedly improper prosecutorial conduct precluded appellate review).² The trial court therefore abused its discretion when it ruled that GRCC had failed to meet its evidentiary burden.

Even assuming that any evidentiary objection was not waived, the trial court abused its discretion when it failed, in the alternative, to hold an evidentiary hearing regarding the amount of the gross profits to be disgorged from Thayn. As is apparent from the discussion above, the trial court granted summary judgment for GRCC and reserved only the issue of estoppel for trial. Pursuant to the summary judgment order, GRCC was entitled to disgorgement of Thayn's property. Thus, the trial court should, at the very least, have ordered an evidentiary hearing to determine the amount of profits to be disgorged.

C. Disgorgement is a Proper Remedy

Finally, Thayn argues that Utah case law supports its position that GRCC should not be permitted to disgorge the profits it retained from the sale of electricity, because, he claims, the only remedy available in such a case is damage for the diminution in the value of the canal company's property. In support of his position he relies on two Utah cases: *Tanner v. Provo Bench Canal & Irrigation Co.*, 40 Utah 105, 121 P. 584 (1911), and *Salt Lake City v. East Jordan Irrigation Co.*, 40 Utah 126, 121 P. 592 (1911). The citation to these cases reveals once again that Thayn has misapprehended the basis of GRCC's claims.

² Thayn now argues that he could have shown that there were no profits had there been a hearing. However, the record clearly shows that Thayn never argued that in response to the motion for the entry of judgment on the Third Cause of Action. Thus, he waived the argument and should not be allowed to now present it here.

Both of these cases involved a water right owner's use of the statutory right of eminent domain to condemn a private canal owner's canal to permit the transportation of water. In each of these cases, a litigant sought to enforce the right to use existing facilities owned by a private party to transport the litigant's water to its place of use. In each of those cases the private party owning the facilities sought to recover under the eminent domain statute not only the damage to the existing canal but also to recover for the benefit conferred to the litigant diverting the water using the private party's facilities.

In each of these cases, the litigants were relying on the condemnation power of the eminent domain statute, which explicitly limits the compensation to be paid to “the damage, if any, caused by said enlargement” of the property at issue. *See Tanner*, 121 P. at 585; *East Jordan*, 121 P. at 593. Accordingly, this Court ruled that for eminent domain purposes the proper measure of damages is the diminution in value to the property—not the benefit to the litigant condemning the property. *See Tanner*, 121 P. at 589-90 (“Counsel, however, urge that to permit respondent to use their canals as contemplated will be of great advantage, and may result in considerable profit to him. This may be so, and yet the question remains, In what way does what he is permitted to do damage appellants? They are limited in their recovery by the amount of damages suffered by them.”); *East Jordan*, 121 P. at 595 (“We will now proceed to a consideration of the principal question arising upon appellant's appeal, namely: What is the measure of damages that should prevail in proceedings of this kind? In other words, what rule should be adopted in ascertaining and determining the ‘just

compensation’ required by the Constitution to be made to the owner of the canal which is sought to be enlarged?”)

This case, of course, is distinct. In this case, Thayn did not attempt to use the power of eminent domain to obtain rights to use the canal. His predecessors-in-interest entered into a contract with GRCC. Under a long line of Utah cases discussed in GRCC’s initial brief, (*see* Brief of Appellee/Cross-Appellant (GRCC Brief) 26), private agreements between parties are controlling and statutory rights of eminent domain apply only in the absence of such agreements. *See, e.g., West Union Canal Co. v. Thornley*, 228 P. 199 (Utah 1924); *Peterson v. Sevier Valley Canal Co.*, 151 P.2d 477 (Utah 1944); *Gunnison-Fayette Canal Co. v. Roberts*, 364 P.2d 103 (Utah 1961). For instance, in *Peterson*, this Court unequivocally held that “if the parties can agree on the joint use of the ditch condemnation is not necessary. In that event if the parties agree on the amount to be paid for the use, or on the basis for determination of the amount **such contract controls.**” 151 P.2d at 479 (emphasis added). Accordingly, because Thayn had already obtained rights to the use of the canal through agreement, the agreements controlled the relationship between the parties. However, in contravention of the contractual rights detailed in the agreement, Thayn used the facility for uses not authorized by the agreements without authority to do so.

The law is clear about how it treats a person who wrongfully converts the use and benefits of another’s property. In such circumstances, the converter is not entitled to profit from his or her wrongdoing, and the person who owns the property at issue is entitled to the disgorgement of all gross profits which the converter received by his wrongful acts.

In *Cablevision v. Tannhauser Condominium Ass'n*, 649 P.2d 1093 (Col. 1982) (en banc), for instance, Cablevision had “constructed several antennas on a mountain peak near Breckenridge[, Colorado], by which it receive[d] six television stations as well as FM radio.” *Id.* at 1095. Cablevision then used these facilities to provide cable service to its customers in Breckenridge. *Id.* Thereafter, a condominium association contracted with Cablevision to provide cable service to all of the condominium units in its complex. *Id.* Cablevision installed an amplifier inside the condominium complex and transmitted the signals to devices previously installed in the walls of the thirty-three individual units by Cablevision. *Id.* The condominium association paid for this service for a period of approximately two years. *Id.*

After two years, the association discontinued service to thirty units and kept only service to three. *Id.* The association, however, connected its own amplifier to the Cablevision line servicing the three units and provided, via its own amplifier, service to the other thirty units. *Id.* The condominium complex was subsequently expanded and an additional twenty-five units were serviced by the association’s addition of another cable line placed in the complex. *Id.* After approximately two and one-half years, Cablevision discovered the condominium association’s unauthorized use and terminated service. *Id.* It then brought suit to recover the monthly amount due for each of the fifty-five units’ use of the service during the period the association only paid for service to the three units. *Id.*

Stating that “Cablevision does have a legally protected interest in the reception, processing and distribution system it has installed and in the service that this system enables Cablevision to provide,” *id.* at 1098, the court ruled:

By retransmission of the signals purchased in connection with three [condominium] units to non-subscribers, the defendants have undercut Cablevision's ability to sell its signal to these other potential customers. These business realities highlight the inequity of permitting the defendants to retain the benefits of Cablevision's services without payment of its value.

Id. at 1097-98. The Court relied heavily on the Restatement of Restitution (1937) in its analysis, and concluded that "[u]nder these facts, restitution is appropriate to avoid unjust enrichment to the defendants." *Id.* at 1098.³

Other courts have engaged in similar types of analysis for various other factual situations. For instance, in a case involving a corporation's minority shareholders' action seeking the disgorgement of all "ill-gotten gains made through [diverting] loan business," the court ruled that restitution was appropriate to recover the total amounts diverted by the corporation's board of directors to a competitor with substantial ties to the board. *Warren v. Century Bankcorporation, Inc.*, 741 P.2d 846, 852 (Okla. 1987) (emphasis added). In addition, courts routinely award real property owners all gross revenues or profits made by

³ Interestingly, the condominium association made the same argument that Thayn made below. Arguing that because "Cablevision acquire[d] its signals free of charge, . . . it ha[d] no legally protected interest in those images and transmissions." *Id.* at 1098. In other words because Cablevision did not own the television signals, Cablevision was not entitled to damages when the condominium association used the signals and did not pay Cablevision for them. Stating that although it did "not acquire an exclusive right in the broadcast signals it receives," the Court ruled that "Cablevision does have a legally protected interest in the reception, processing and distribution system it has installed and in the service that this system enables Cablevision to provide." *Id.* at 1098.

In the trial court, Thayn had made the same argument, i.e., that because GRCC did not own the water, it could not complain when Thayn used more water than he was entitled to. However, it was not the water about which GRCC was complaining, it was the illegal use of its facilities, i.e., the dam, raceway, sluice gates, and other diversion structures, for financial gain.

trespassers who produce oil or gas from lands on which they have trespassed. *See, e.g., Cassinos v. Union Oil Co.*, 18 Cal. Rptr. 2d 574 (Cal. Ct. App. 1993); *Loeb v. Conley*, 169 S.W. 575 (Ky. 1914); *Pittsburg & West Virginia Gas Co. v. Pentress Gas Co.*, 100 S.E. 296 (W. Va. 1919).

The underlying premise of requiring the disgorgement of all of the gross profits of those who have wrongfully converted property to their own use, whether that disgorgement arises out of a claim of unjust enrichment, conversion, or trespass, is that “the law allows a plaintiff to maximize recovery and thus prevent a converter from profiting from wrongful acts.” *Alta Industries Ltd. v. Hurst*, 846 P.2d 1282, 1291 (Utah 1993). As has been thoroughly explained:

The unifying theme of various restitutionary tools is the prevention of unjust enrichment. Equity courts have fashioned the fiction of a constructive trust in order to force restitution from one who was unjustly enriched. The Restatement of Restitution also uses the constructive trust device to explain the essence of this relief. It starts with the general principle that restitution will be available whenever one has received a benefit to which another is justly entitled. The inequity of retaining a benefit can spring from a variety of sources, such as fraud or other unconscionable conduct in which the recipient has received a benefit for which he has not responded with a quid pro quo. The remedy in restitution rests on the ancient principles of disgorgement. Beneath the cloak of restitution lies the dagger that compels the conscious wrongdoer to “disgorge” his gain. Disgorgement is designed to deprive the wrongdoer of all gains flowing from the wrong rather than to compensate the victim of that fraud. In modern legal usage the term has frequently been extended to include a dimension of deterrence. Disgorgement is said to occur when a “defendant is made to ‘cough up’ what he got, neither more nor less.” From centuries back equity has compelled a disloyal fiduciary to “disgorge” his profits. He is held chargeable as a constructive trustee of the ill-gotten gains in his possession. A constructive trustee who consciously misappropriates the property of another is often refused allowance even of his actual expenses. Where a wrongdoer is shown to have been a conscious,

deliberate misappropriator of another's commercial values, gross profits are recoverable through a restitutionary remedy.

Warren, 741 P.2d at 852 (footnotes omitted).

Under these restitutionary doctrines, when a conscious wrongdoer profits unjustly from activities conducted with someone else's property, the person owning the property is entitled to have all profits disgorged, without any reduction for amounts expended by the conscious wrongdoer. *See id.*; *Howard v. Kingmont Oil Co.*, 729 S.W.2d 183, 187 (Ky. Ct. App. 1987) ("Where encroachment is willful, i.e., deliberate and knowing, a trespasser will be liable for the full value of the oil extracted. Where encroachment is innocent . . . damages may be reduced by the proportionate costs of producing the oil."); *Edwards v. Lachman*, 534 P.2d 670, 674-75 (Okla. 1975) (explaining that conscious wrongdoer must disgorge all profits, "without deducting therefrom a reasonable cost of developing and producing the same"); *accord Pittsburg & West Virginia Gas Co.*, 100 S.E. at 296-98; *Johnson v. Kansas Natural Gas Co.*, 135 P. 589, 590-91 (Ka. 1913); *Maxvill-Glasco Drilling Co. v. Royal Oil & Gas Corp.*, 800 S.W.2d 384, 386 (Tex. Ct. App. 1990).

The Restatement of Restitution § 151, which has been cited approvingly by this Court,⁴ defines the rule as follows: "[a] person who tortiously has acquired, retained or disposed of another's property with knowledge that such conduct is wrongful is entitled to no profits therefrom. Therefore, he is subject to liability at the election of the rightful owner for the value of anything received in exchange therefor. He is also liable for profits made by

⁴ *See Alta Industries Ltd.*, 846 P.2d at 1291 n.23.

its use." Restatement of Restitution § 151 cmt. f(1937). The Restatement illustrates this rule with the following two examples.

Knowing that he has no right so to do A enters B's timber tract and thereon cuts trees which have a value of \$1000 when cut. He has them sawed into boards which are carried to the city at which place they are worth \$2000. B is entitled to recover \$2000 from A by way of restitution.

Id. cmt. d ill. 5. Also,

A, mistakenly believing that he has a contract with B for the delivery of goods, delivers goods of the value of \$1000. B receives them, knowing that A was mistaken and consigns them to C with directions to sell them for B's account. C sells the goods for \$1200. A is entitled to restitution from B in the amount of \$1200.

The present case clearly falls within the restitutionary rules. This is not a case where a person sought to condemn a canal, but rather, despite controlling contractual language that clearly delineated each party's rights to the diversion structures, one party breached the contract and sought to profit from that breach. Although Thayn's contractual right to use the dam, raceway, and diverting works was limited to diverting water for irrigation and creating only enough energy to pump that irrigation water to his canal, Thayn began using, in 1992, the energy created by the dam and raceway to create hydroelectric power for sale. He did not, however, have the contractual right to use the dam, raceway, or the energy GRCC harnessed to do so.

Accordingly, Thayn has been consciously profiting from the use of GRCC's property since 1992, although he had no contractual right to do so. This action constitutes either conversion, i.e., "exercis[ing] dominion or control over goods inconsistent with the owner's rights," *Alta Industries Ltd.*, 846 P.2d at 1290 n.18, or trespass, i.e., "physical invasion of

... land," *Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1243 (Utah 1998). By Thayn's wrongful conversion, it is clear that he has been unjustly enriched. *See American Towers Owners Ass'n, Inc. v. CCI Mechanical, Inc.*, 930 P.2d 1182, 1193 (Utah 1996) ("There must be (1) a benefit conferred on one person by another; (2) an appreciation or knowledge by the conferee of the benefit; and (3) the acceptance or retention by the conferee of the benefit under such circumstances as to make it inequitable for the conferee to retain the benefit without payment of its value.") (citations omitted). Because he has consciously used property to which he has no contractual right and which rightfully belongs to GRCC, it would be inequitable for Thayn to benefit from that conduct.

Accordingly, GRCC is entitled to restitution from Thayn and such an award is both appropriate and permitted.

III. THE TRIAL COURT CLEARLY ERRED IN FINDING THAT THE RADIAL SLUICE GATES WERE APPURTENANT TO THE PUMPHOUSE.

Finally, Thayn argues that the trial court did not err when it found that the radial sluice gates were appurtenances that existed at the time of the 1952 agreement. He contends that three inferences can be drawn from the existing evidence that supports the trial court's findings: (1) the existing concrete structure is evidence of the existence of the gates in 1952; (2) because radial sluice gates are necessary for the operation of the raceway, the radial sluice gates must have existed; and (3) the Agreements use of the word "diverting works" evidences the existence of the radial sluice gates. GRCC will respond to each of these arguments in turn.

A. There Is No Evidence that Any Monolithic Structure Existed in 1952

In responding to GRCC's appeal, Thayn returns to the argument he made below, i.e., that "the south wall of the radial sluice way is the footing for the north wall of the pump house." (Sec. Brief 45.) He then proceeds to make the argument that the pump house would collapse without that wall. (*See id.*) This, of course, is mere sophistry.

It is true that the north wall of the pump house defines the south end of the radial sluice gate spillway. However, despite what Thayn states on page 45 in his brief, there was no testimony about the age of any of the concrete in the spillway. This is evidenced by the fact that Thayn cannot cite to one portion of the record in which any witness testifies regarding the age of the concrete. In fact, the only evidence about the age of any structure is exhibit 85 in which Rick Kaster clearly identifies the north wall, but not the radial sluice gate spillway, as being part of the old part of the building which was constructed some time prior to 1940. (*See* R. at 1895, 66-68; R. at 1902, v.4, 54; Ex. 85; R. at 1902, v. 9, 215. A copy of Exhibit 85 is attached to this brief as Exhibit A).⁵ No inference can be drawn from the fact that the north wall also happens now to be next to the sluice gate spillway. As evidenced by Exhibit 85, the spillway is not dependent on the north wall, nor is the north wall dependent on the spillway.

⁵ Thayn states in footnote 41 of his Second Brief that Exhibit 85 says the newest portion of the pumphouse was constructed in approximately 1915. Although a notation of that date is made on the Exhibit, Mr. Kaster never testified to that date, and, in fact, testified in the preliminary injunction hearing that he surmised that the construction actually occurred sometime in the 1940s. (*See* R. at 1895, 66-68.) Although GRCC referenced this testimony in its brief, it cited to the wrong record page number.

Accordingly, the only “evidence” that can be cited for the existence of the sluice gates is wholly improper inference regarding the age of cement based upon pictures and observation of the existing facilities. The Court could not have concluded from observations of conditions existing in 1999 that the cement structure was in place in 1952.

B. Court Cannot Infer that Radial Sluice Gates Existed from Necessity of Sluicing

Thayn next argues that the court could have inferred the existence of the radial sluice gates in 1952 simply by the fact that sluice gates are necessary for the functioning of the raceway. (*See* Sec. Brief 46.) The problem with this argument is that it assumes that the particular radial sluice gates in question were necessary for sluicing in 1952 when there is absolutely no record support for this argument. Although it is true that sluicing is necessary for the proper operation of raceway, there is no evidence that the particular radial sluice gates in question were required for proper sluicing of the raceway. In fact, evidence was presented that one of the slide gates in the pumphouse could be used and had been used for sluicing the raceway. (*See* R. at 1902, v. 4, 52-53, Ex. 83.) Accordingly, it is neither fair nor reasonable to infer based upon the existence of the radial sluice gates in 1979 that those sluice gates existed in 1952 and were appurtenant to the pumphouse at that time.⁶ Other sluice gates

⁶ In fact, the 1952 Agreement, a copy of which is appended to this brief as Exhibit B, references the fact that “pits” existed from which Thayn’s predecessors pumped their water. (*See* Ex. 45, at 1.) The evidence presented at trial never explained the absence of those “pits” or what happened to them. Obviously, it would be error for any fact finder to make an inference about the state of the property in 1952 based upon conditions in 1979.

existed and could have been used and no evidence was submitted showing the existence of the radial sluice gates in 1952.

C. *The 1952 Agreement*

Finally, Thayn argues that paragraph 4 of the 1952 Agreement serves as evidence that the radial sluice gates existed. By selective quotation of the paragraph⁷ and unnatural use of language,⁸ Thayn appears to argue that paragraph 4 defines a “diverting work” to only be those portions of the dam, raceway, and diverting system that are “integral to or essential to the use . . . of the other party.” (*See* Sec. Brief 46.) Relying on this definition, he then argues that, because the “pump house, trash rack and wing walls are solely used by [Thayn] and only for [Thayn’s] benefit,” the parties must have believed that the Thayn would control the radial sluice gates since the only portion of the system that fit this definition of “diverting work” that Thayn could have possibly had control over were the radial sluice gates. (*See id.*) This argument also misses the mark.

First, in the recitals to the 1952 Agreement clearly refers to all of the structures used for the diversion of water from the Green River, including the dam, raceway, canal, and all other structures on Lot 4 as “diverting works.” (*See* Ex. 45, at 1. A copy of the 1952

⁷ Thayn’s indented quotation of the paragraph fails to identify that significant portions of the paragraph have been removed and not quoted.

⁸ This Court recently reiterated that in interpreting language it would not arbitrarily ignore elementary rules of grammar and punctuation. *State v. Huntington-Cleveland Irrigation Co.*, 2002 UT 40, ¶ 16. In order to arrive at the interpretation that Thayn suggests, the Court would be required to violate this basic principle of interpretation of language.

Agreement is attached as Exhibit B.) Lot 4 included all of the land at issue in this case from the dam to the pumphouse. In the recital found on page 2 of the agreement, it provides:

[I]t is the desire of the parties hereto to forever settle and put at rest their differences and adopt a permanent plan for the operation of said diverting works and to also divide the area comprising said Lot 4 between them in accordance with their just needs and to their mutual advantage.

(*Id.*) Accordingly, the 1952 agreement identified parcels of property that were to go to Thayn's predecessors and provided that GRCC was to convey to them those parcels. (*See id.* ¶ 2.) GRCC was to possess the remainder of the property. (*See id.* ¶ 3.)

Paragraph 4 then makes clear that the diverting works located upon each of the party's respective parcels were to be owned by the party owning the parcel upon which the diverting works were located. (*See id.* ¶ 4.) Specifically, paragraph 4 of the 1952 Agreement provides in relevant part:

The ownership, maintenance, upkeep, repair, supervision, control and operation of the said raceway and diverting works situated upon the real property [of the Canal Company] as well as the ownership, maintenance[, upkeep, repair, supervision, control and operation of said dam shall be and remain with the [Canal Company] at all times. The ownership, maintenance, upkeep, repair, supervision, control and operation of said diverting works situated upon the lands [of Thayn] shall be and remain with [Thayn]. Each party agrees to keep the portion of said diverting works under its supervision in a state of reasonably good repair and condition so that insofar as the diverting works situated on the lands [of each party] respectively of this agreement are integral to or essential to the use, operation, and enjoyment of the other party that the same will be maintained and kept in reasonably good repair and condition at all times. . . .

Paragraph 4 continues by stating that the parties will share the expenses for the maintenance or repair "of said dam, diverting works, raceway or lands adjacent thereto which are jointly used by the parties."

The language and meaning of Paragraph 4 is clear: each party knew and expected that all of the diverting works were integral or essential to the other party's enjoyment of their property interests and water rights. Accordingly, they agreed to keep the portions of the diverting system that they owned in good repair and condition.

Thayn's argument is not consistent with the clear meaning of the contractual language. The parties did not define "diverting works" to only mean those parts of the diversion system that could be used by both parties. Rather, the parties used the term "diverting works" to include all of the parts of the diversion system, including those parts of the system that were used solely by either party and for their sole benefit.

Additionally, this argument assumes the very fact in question. In other words, before the trial court could find that the radial sluice gates were a "diverting work", it would have to know that radial sluice gates existed. Once again, there is no evidence of that the radial sluice gates that existed in 1979 existed in 1952 at the time of the entry of the 1952 Agreement.

D. The Trial Court Clearly Erred

Thayn conceded in post-trial briefing that he "could not testify concerning the condition of the radial gates 50 years ago." (R. at 1478). The fact is that no one testified that the radial sluice gates existed at the time of the 1952 Agreement. Thayn's concessions and this evidence are absolutely fatal since GRCC could not have deeded what it did not have in 1952. Because there is no evidence that the radial sluice gates existed in 1952, and Thayn has conceded that the radial sluice gates are not located on parcel B, Thayn failed to meet his

burden to establish that the sluice gates were appurtenant to the property at issue in 1952, and, thus, passed to his predecessors-in-interest. Accordingly, the trial court clearly erred when it found that the radial sluice gates were appurtenant to the pump house in 1952.

Conclusion

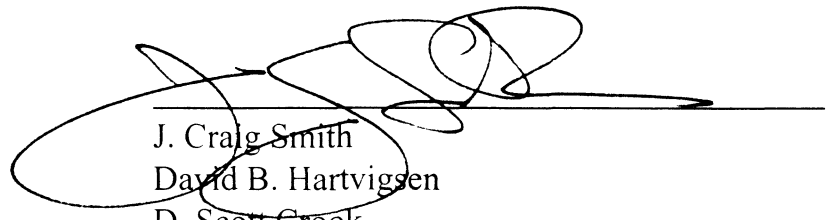
GRCC was wrongfully enjoined and is entitled to all of its expert witness fees and litigation related expenses. Additionally, the trial court abused its discretion when it failed to enter judgment on GRCC's Third Cause of Action, disgorging profits from Thayn during the time that he earned profits from his illegal use of GRCC facilities. Finally, the trial court clearly erred when it ruled that the radial sluice gates were appurtenant to the pump house.

Accordingly, GRCC requests that this Court affirm the trial court's order on GRCC's claims and reverse the trial court's order which refused to award expert witness fees and other litigation related expenses incurred as a result of the preliminary injunction proceeding. Further, GRCC requests that the Court reverse the trial court's order refusing to enter judgment on the Third Cause of Action and remand to the trial court to disgorge profits in the amount of \$289,500.17 and to hold an evidentiary hearing to determine the amount of

gross profits earned from March 1999 to the present. Finally, GRCC requests that the Court reverse the trial court's finding that the radial sluice gates are appurtenant to the pump house.

DATED this 26th day of April, 2002.

NIELSEN & SENIOR



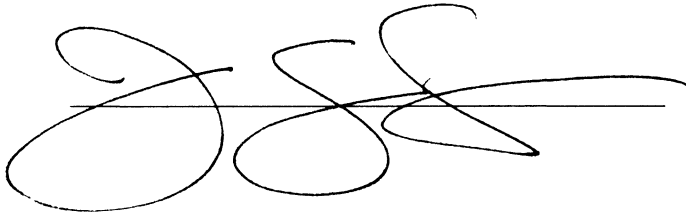
J. Craig Smith
David B. Hartvigsen
D. Scott Crook
Scott M. Ellsworth
*Attorneys for Appellee/Cross-Appellant,
Green River Canal Company*

Certificate of Service

On the 29th day of April, 2002, two true and correct copies of the foregoing *Reply Brief of Appellee/Cross-Appellant* were mailed, United States mails, postage prepaid, to the following:

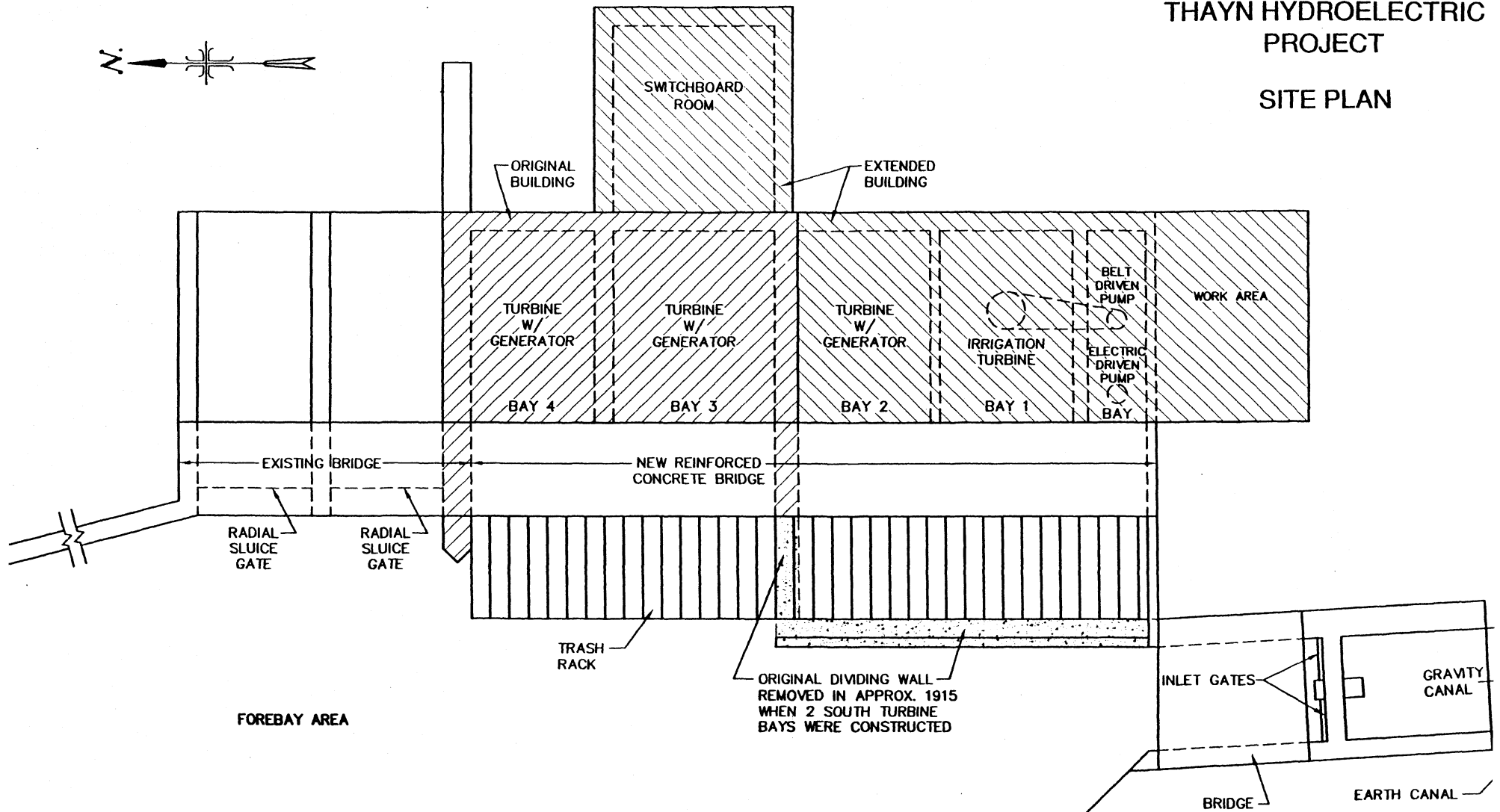
Steven A. Wuthrich
1011 Washington, Suite 102
Montpelier, Idaho 83254

Attorney for Appellant/Cross-Appellee Lee Thayn

A handwritten signature in black ink, appearing to be 'SW', written over a horizontal line.

Tab A

THAYN HYDROELECTRIC PROJECT SITE PLAN



PLAINTIFF'S EXHIBIT
EXHIBIT NO. 85
CASE NO. 6174
DATE REC'D IN EVIDENCE
CLERK

Tab B

A G R E E M E N T

This agreement made and entered into this 5th day of April, 1952, by and between GREEN RIVER CANAL COMPANY, a Utah corporation with its principal place of business at Green River, Utah, First Party, and S. M. WILSON, STEWART B. WILSON, LORIN H. WILSON, M. J. WILSON and F. M. WILSON, doing business as co-partners under the name and style of WILSON PRODUCE COMPANY, Second Party,

WITNESSETH:

WHEREAS, the first party is a mutual irrigation company and for many years has been and now is diverting waters from the Green River in Emery County, Utah, by means of a dam across said Green River and by use of a certain race way, canal and other diverting works in connection therewith; and

WHEREAS, the second party is the owner of most of the lands lying under what is commonly known as the 42-foot canal which lands are likewise irrigated by waters diverted from the said Green River by means of said dam and diverting works, and the waters are thereupon pumped from pits at the end of said race way into the said 42-foot canal and thence transported through said 42-foot canal to the said lands of the second party; and

WHEREAS, the parties hereto on January 2, 1930 made and entered into a certain agreement pertaining to the said dam, diverting works, race way, pits and other properties situated upon Lot 4, Section 17, Township 20 South, Range 16 East of the Salt Lake Meridian; and

WHEREAS, disputes have arisen from time to time between the parties hereto with respect to said agreement and the respective rights and obligations of the parties hereto thereunder and an action was filed by the first party against the Green River Irrigation Company and others in the District Court Within and for Emery County, State of Utah, in which action the second party

appeared as an intervenor and in which action a judgment and decree was executed on August 19, 1939 by District Judge Lewis Jones and said judgment provided, among other things, that the second party by reason of the said contract of January 2, 1930 was estopped to assert or claim that the first party was not the owner of said Lot 4 and the improvements thereon so long as said contract should remain in force and effect; and

WHEREAS, it is the desire of the parties hereto to forever settle and put at rest their differences and adopt a permanent plan for the operation of said diverting works and to also divide the area comprising said Lot 4 between them in accordance with their just needs and to their mutual advantage; and

WHEREAS, on or about July 15, 1942 the Green River Irrigation Company filed an action in the District Court Within and for Emery County, State of Utah, against the first party herein seeking to quiet title to said Lot 4 and in said action the first party herein filed a counter-claim seeking to quiet its title to said Lot 4 and said action has not as yet been disposed of;

NOW, THEREFORE, in consideration of the premises and of the covenants herein set forth and in the event and only in the event the first party is successful in the said pending litigation between it and the Green River Irrigation Company to the end that title to said Lot 4 is finally quieted in the first party, then it is understood and agreed as follows:

1. Said agreement of January 2, 1930 between the parties hereto shall be terminated.

2. The first party shall convey to the second party by quitclaim deed the following portions of said Lot 4 in Emery County, State of Utah:

Parcel A.

Beginning at the southwest corner of Lot 4, Section 17, Township 20 South, Range 16 East, Salt Lake Base and Meridian; and running thence east 195 feet; thence north $1^{\circ}52'$ east 285 feet; thence north $0^{\circ}24'$ west 97 feet; thence west 200 feet; thence south 383 feet more or less to the point of beginning, together with all improvements thereon and appurtenances thereunto belonging. Subject to the County Road right of way, and subject to the right in the first party to use in common with the second party the private road which leads from the said County Road to the pumping plant situated on the parcel of land described in Parcel B of paragraph 2. of this agreement and subject also to a right of way in the first party which is particularly described as follows:

Beginning at a point 195 feet east of the southwest corner of said Lot 4 and running thence north 50 feet; thence west to the said County Road right of way; thence southerly along said County Road right of way to a point due west of the place of beginning; thence east to the point of beginning.

Parcel B.

Beginning at a point 245 feet east and 170 feet north of the southwest corner of Lot 4, Section 17, Township 20 South, Range 16 East of the Salt Lake Base and Meridian; and running thence south $80^{\circ}00'$ east 69 feet; thence north $6^{\circ}00'$ east 220 feet; thence north $87^{\circ}00'$ west 55 feet; thence south $13^{\circ}00'$ east 90 feet; thence south $7^{\circ}30'$ west 110 feet more or less to the point of beginning, together with all improvements thereon and appurtenances thereunto belonging.

3. The second party shall make, execute and deliver to the first party a quitclaim deed to the following described real property in Emery County, State of Utah:

All of said Lot 4, less the lands described in paragraph No. 2 immediately next preceeding.

4. The ownership, maintenance, upkeep, repair, supervision, control and operation of the said race way and diverting works situated upon the real property described in paragraph 3. of this agreement as well as the ownership, maintenances, upkeep, repair, supervision, control and operation of said dam shall be and remain with the first party at all times. The ownership, maintenance,

upkeep, repair, supervision, control and operation of said diverting works situated upon the lands hereinabove described in paragraph 2. shall be and remain with the second party. Each party agrees to keep the portion of said diverting works under its supervision in a state of reasonably good repair and condition so that insofar as the diverting works situated on the lands described in paragraphs 2. and 3. respectively of this agreement are integral to or essential to the use, operation and enjoyment of the other party that the same will be maintained and kept in reasonably good repair and condition at all times. In this connection it is understood and agreed that the water belonging to the second party must be diverted by means of said dam and by means of the said race way and diverting works situated on the lands described in paragraph 3. hereof and the second party agrees to annually pay on or before the 1st day of February of each year commencing with the year 1953, one-half of the cost of the maintenance, control, supervision, repair, upkeep and operation of said dam, diverting works, race way and all other property described in paragraph 3. which are jointly used by the parties hereto. The first party shall furnish to the second party on or before the 1st day of January of the year 1953 and on or before January 1 of each succeeding year an itemized statement of the said expenses for the preceeding twelve-month period. It is specifically provided, however, that if the first party receives from any other person, firm or corporation, any consideration in money, work or otherwise for the maintenance, upkeep, repair, supervision or control of said dam, diverting works, race way or lands adjacent thereto which are jointly used by the parties then and in that event the consideration so received shall first be deducted from the whole of said expenses and after said deductions the remainder of said expenses shall be divided equally between the parties hereto. The second party shall pay its own

and repair of the race way, pits and diversion works situated upon the property hereinabove described in paragraph 3. In the event the second party fails to pay its portion of said costs and expenses as herein provided the second party shall not have the right to receive or divert any water through said diverting works until said costs shall have been paid together with interest on any delinquent sum at the rate of eight percent (8%) per annum. This remedy is specified for the benefit of the first party and is optional, cumulative and not exclusive. In other words, the first party may at its option also bring suit to enforce the payment of such amount or may pursue any other remedy which may be available at law or equity.

5. Each party hereto shall have the right at all reasonable times to enter upon and pass over the property of the other hereinabove described in connection with the reasonable use to be made by each party of the land to be quitclaimed to it as hereinabove particularly set forth and in particular but not by way of limitation the first party shall have a right of way to cross over the area which is now covered with planks in front of the pumping plant situated on the lands described in parcel 3 of paragraph 3 above and the road way leading thereto from the County Road.

6. It is understood and agreed that before the party of the second part can or may use any water from said dam, diverting works or race way that the first party shall have enough and sufficient water to supply its stockholders. The quantity of water to supply the stockholders of the first party is to be exclusively determined by the first party.

7. This agreement shall constitute a covenant running with the said lands in said Lot 4 insofar as the respective parties, their successors and assigns are concerned, and it shall be binding upon and shall inure to the benefit of the successors and assigns

of the respective parties. In this connection it is understood and agreed that the second party contemplates the formation of an irrigation company to handle and distribute waters under the said 42-foot canal and that when and if any such company is formed by the second party then the second party shall have the right to convey the lands described in paragraph 2. of this agreement to such new company and to assign this contract thereto. Neither the second party, nor its successor or assigns or their successive successors or assigns shall have the right to make any such transfer and/or assignment to more than one corporation or partnership at any particular time because to so do would unduly burden the first party in its administration of said dam, race way and diverting works and in the collection of the monies to be paid by the second party, its successors and assigns.

IN WITNESS WHEREOF, the parties hereto have set their hands to this instrument in duplicate the day and year first above written.

FIRST PARTY:

ATTEST:

GREEN RIVER CANAL COMPANY, a
corporation

OK Anderson
It's Secretary

By Debbies Ziauwelt
It's President

SECOND PARTY:

WILSON PRODUCE COMPANY, a
co-partnership

W. H. Wilson

M. J. Wilson

Francis M. Wilson

Stewart B. Wilson

William H. Wilson

STATE OF UTAH)
 : ss
COUNTY OF EMERY)

Personally appeared before me this 30 day of April, 1952, DELBERT TIDWELL and O. K. ANDERSON who duly acknowledged to me that they are the President and Secretary, respectively, of the Green River Canal Company, a corporation, one of the signers of the foregoing instrument; that they signed the foregoing instrument on behalf of said corporation pursuant to a resolution of the Board of Directors thereof and also pursuant to a resolution of the stockholders thereof adopted at a special meeting duly called and held for such purpose and the said officers duly acknowledged to me that said corporation executed said agreement.

My commission expires:

August 4, 1954

O. K. Anderson
Notary Public

Residing at Provo, Utah

STATE OF UTAH)
 : ss
COUNTY OF EMERY)

Personally appeared before me this 23 day of April, 1952 S. M. WILSON, STEWART B. WILSON, LORIN H. WILSON, M. J. WILSON and F. M. WILSON, co-partners doing business under the name and style of WILSON PRODUCE COMPANY, a co-partnership, the signers of the foregoing instrument who duly acknowledged to me that they executed the same.

My commission expires:

July 11, 1955

O. K. Anderson
Notary Public

Residence: Provo, Utah