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Green River Canal Company v. Lee Thayne : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GREEN RIVER CANAL COMPANY,
Plaintiff/Appellee,

vs.

LEE THAYNE,

Defendant/Appellant.

)
)
) Case No. 20010357-SC
) District Court No. 950706174
) Priority #15
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BRIEF OF THE APPELLANT

Defendant/Appellant.

On Appeal from the Seventh Judicial District Court, County of Emery,
Hon. Bryce K. Bryner presiding.

Attorney for Appellant

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STATEMENT OF JURISDICTION OF THE APPELLATE COURT

Jurisdiction is appropriate with the Supreme Court pursuant to U.C.A. § 78-2-2(3)(j).

Final judgment in this case was entered on March 14, 2001. Notice of Appeal was filed on April 9, 2001.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. DID THE COURT ERR IN INTERPRETING THE 52 AMENDMENT TO THE 52 CONTRACT BY GRANTING SUMMARY JUDGMENT PRECLUDING THAYN FROM USING ITS 600 CFS NON-CONSUMPTIVE STATE APPROVED WATER RIGHT YEAR ROUND AND LIMITING HIM TO 435 CFS DURING THE IRRIGATION SEASON ONLY?**

Interpretation of contracts is a question of law which is reviewed for correctness. *Levanger v Vincent*, 3 p.3d 187 (Ut. 2000). The existence of an ambiguity in a contract is a question of law. *Munford v Lee Servicing Co.*, 999 P.2d 23 (Ut. App. 2000). The matter was preserved for appeal by virtue of memorandums in opposition to the original motion for summary judgment, (R. 151-153 a-v) and in opposition to the motion of GRCC for partial summary judgment (R. 454-472).

- II DID THE COURT ERR IN HOLDING THAT THAYN HAD A DUTY TO DISCOVER THE “UNRECORDED” 52 AMENDMENT AND BINDING HIM TO SAID AMENDMENT DESPITE THE FACT THAT NO NOTICE WAS EVER PROVIDED TO HIM UNTIL AFTER THE HYDRO ELECTRIC PLANT HAD BEEN BUILT?**

The Supreme Court gives no deference to a trial courts ruling on legal issues. *A.R.v C.R.* 982 P.2d 73 (Ut. 1999): An Appellate Court reviews questions of law for correctness. *Marcis & Associates, Inc. v Neways, Inc.*, 986 P.2d 748 (Ut. App. 1999). This issue was

reserved at virtually every stage of the proceedings. Thayn first raised it in his original Affidavit in Support of Summary Judgment and in Opposition to the Motion for Summary Judgment by GRCC (R. 40-45). It was further raised in objection to the Findings of Fact and Conclusions of Law. (R. 1419-1424).

III. DID THE COURT ERR IN CONSTRUING THE CONTRACT IN A MANNER THAT VIOLATES PUBLIC POLICY AND AFFORDING AN EQUITABLE REMEDY THEREFOR?

The Court of Appeals review legal issues for correctness. *Harmon City Inc. v Draper City*, 997 P.2d 371. The Supreme Court reviews statutory interpretations for correctness and gives no deference to the conclusions of the trial court. *Adkins v Uncle Barts, Inc.* 1 P.3d 528 (Utah 2000). The issue was preserved by arguments made at the hearing on Summary Judgment, (R. 1905) and the two Motions for Reconsideration filed by Thayn.

IV. DID THE COURT ERR IN DENYING THAYN FROM HIS STATUTORY RIGHTS UNDER U.C.A. § 73-1-6,7 INsofar AS POWER GENERATION FOR SALE IS CONCERNED?

The Court of Appeals reviews legal decisions for correctness. *Harmon City Inc. v Draper City*, 997 P.2d 321 (Ut. App. 2000). The Supreme Court reviews statutory interpretations for correctness and gives no deference to the conclusions of the trial court. *Adkins v Uncle Bart's, Inc.*, 1 P.3d 528 (Ut. 2000). This issue was preserved for appeal by virtue of the arguments made in the Memorandum in Support for Summary Judgment, Defendant's Motion for Summary Judgment (R. 151-153 a-v), the Motion to File Supplemental Complaint (R. 208-241) which motion was denied by the trial court. (R. 242-244).

V. DID THE TRIAL COURT ERR IN ASSESSING ATTORNEY'S FEES FOR DENIAL OF THE MOTION FOR PRELIMINARY INJUNCTION WHEREIN GRCC WAS BUILDING AN OBSTRUCTION WALL TO IMPEDE THAYN'S WATER IN THE CANAL DURING THE COURSE OF THIS ACTION, WHICH CONDUCT WAS IN BLATANT VIOLATION OF U.C.A. § 73-1-15?

Inasmuch as the Supreme Court reviews statutory interpretation for correctness and gives no deference to the conclusions of the trial court. *Adkins vs Uncle Bart's Inc.*, 1 P.3d 528 (Ut. 2000). The issue was preserved in the lower court with a memorandum in objection to the application for attorney's fees. (R. 761-772).

VI. DID THE TRIAL COURT ERR IN APPLYING THE STANDARDS OF ESTOPPEL, WAIVER AND LATCHES AND IN CONCLUDING THAT GRCC HAD NO DUTY TO PROTEST THAYN'S WATER FILING IF GRCC INTENDED TO RELY ON ITS INTERPRETATION OF THE 52 AMENDMENT?

The Court of Appeals reviews legal issues for correctness. *Harmon City Inc. v Draper City*, 997 P.2d 321 (Ut. App. 2000). The Supreme Court gives no deference to the trial courts ruling on legal issues. *A.R.v C.R.* 982 P.2d 73 (1999).

These issues were reserved in the record by virtue of Defendant's Objection to the Proposed Findings of Fact and Conclusions of Law (R. 1419-1424) and its Post Trial Memorandum Regarding Estoppel, Waiver and Latches (R. 1242-1282).

VII. DID THE COURT ERR GRANTING GRCC'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN PRECLUDING EVIDENCE AT TRIAL REGARDING MAINTENANCE ISSUES, WHILE ALLOWING GRCC TO ATTEST IT WAS NOT GETTING ITS WATER?

The judgment of the trial court admitting or excluding evidence will not be reversed unless it is shown that the discretion therein has been abused. *Terry v Zions Coop*

Mercantile Institute, 605 P.2d 314 (Utah 1979) overruled on other grounds, *McFarland v Skaggs Co., Inc.*, 678 P.2d 298 (Utah 1984). “Abuse of discretion” means a trial court has exceeded the range of discretion allowed for a particular act under review; it should not be misread to imply a conscious and intentional violation of permitted discretion by the trial judge. *Riviera v State Farm Mutual Auto Ins. Co.*, 1 P.3d 539 (Utah 2000). The Supreme Court applies the same standard as the trial court on review of a Motion for Summary Judgment, *Briggs v Holcomb*, 740 P.2d 281 (Ut. App. 1987).

This issue was reserved by objection and arguments made at trial in attempt to get said evidence admitted. (R. 1902, U. I., pp. 74-87.) It was specifically raised in answer to GRCC’s Second Supplemental Complaint wherein GRCC asserted it was not getting its full 80 cfs. (R. 256, 258.)

VIII. DID THE COURT ERR IN MAKING FINDINGS OF FACT AGAINST THE CLEAR AND UNDISPUTABLE WEIGHT OF THE EVIDENCE?

The Supreme Court upholds the lower court’s findings of fact unless the evidence supporting them is so lacking that the court must concede the finding is clearly erroneous. *Desert Miriah, Inc. v B & L Auto, Inc.*, 12 p.3d, 580 (Ut. 2000). This issue was preserved in the record by objections to the findings of fact and post trial memoranda (R. 1419-1424; 981-1019; 1192-1220).

STATEMENT OF THE CASE

Approximately six (6) miles north of the City of Green River, Utah lies certain water diversion facilities at the heart of this dispute. (Ex. 54, A-1). Spanning the width of the Green River is a crescent shaped concrete dam, which serves to raise the height of the water

some eight feet (R.1905, p.6; Ex. 54, A-1). While the bulk of the water spills over the dam and continues on downstream, water is nonetheless diverted at both banks of the river. (R. 1905. p.6). On the east, water is channeled to the Eastside Water Users, (Ex. 54, A-6). On the west bank, water is channeled to the parties herein. Plaintiff/Appellee Green River Canal Company (hereinafter “GRCC”) consists of approximately thirty-one (31) stockholders, seven (7) of which have modest sized farms, and the remainder of which utilize water for domestic irrigation and/or stock watering. (Ex. 54, Appendix 1). Total acreage by survey being served by GRCC is 1,443.50. (R. 1369). GRCC holds a state approval water right for a maximum flow of 60 cfs during the irrigation season, inclusive of a 20 cfs stock watering right year round. (R. 1353, 1365-1369). Further, GRCC is subject to a “duty” or limitation of 5,774.00 acre feet per annum for irrigation and 75.60 for stock watering. (R. 1369).

Defendant/Appellant Lee Thayn (hereinafter “Thayn”) is the successor in interest to a farm and appurtenant water rights purchased from Wilson Produce Company (hereinafter “Wilson”) under a contract for sale in 1979. Thayn’s farm is approximately 1,362 acres. (R. 40-45, Ex. 54, Appendix A-2).

In addition to the dam, the west side diversion facilities consist of a 40 foot wide 2,500 foot long unlined canal (hereinafter referred to as the “raceway”). (R.40-45; Ex. 54 A-2). The dam lies on state property (Green River) and a portion of the raceway crosses Bureau of Land Management property, with the lower portion of the raceway crossing GRCC property and Thayn property. (Ex.54, Figure A-2). Diverted water flows southerly down the raceway through a set of “control gates” which can be utilized to restrict the flow

of water for maintenance or repair on the raceway. (R. 40-45, Ex. 54 A-3 and Figure A-2). Water continues to the foot of the raceway wherein a significantly smaller canal owned by GRCC continues the flow to its shareholders southerly, towards the city of Green River. (*id*). GRCC has a headgate at the point its ditch meets the raceway to either permit or restrict water to flow into its ditch. (*id*).

Perpendicular to, and abutting directly east of the GRCC canal inlet, along the east bank of the raceway, at the foot of the raceway, is a building known as the pump house/power house, which building also abuts the west side of the Green River. (R.1905, p.6, Ex. 54, Figure A-2). Incorporated into the pump house is a set of “radial gates” which can be opened to flush water through the raceway rapidly, returning virtually the entire flow of the raceway back to the river. (R.1905, p.7, Ex. 54, Figure A-2). Periodically Thayn opens the radial gates briefly to flush silt and sand buildup from the raceway. (R. 40-45). When the radial gates are closed, all raceway water not flowing down GRCC’s canal goes under the pump house through a set of turbines or to Thayn’s irrigation pumps. As originally acquired from Wilson, there were two (2) turbines providing mechanical power to two (2) pumps to lift Thayn’s irrigation water some forty-two (42) feet to Thayn’s canal running along a hillside to the east of GRCC’s property. (R. 40-45, Ex. 54, Figure A-2.). The facilities were originally constructed in 1906, by Pearson and Taft (Wilson’s predecessor) (R. Ex.54, A-5, E-25). There was no substantial improvement or modification to the facilities until Thayn renovated, upgraded and put in a small co-generation facility in 1992 at a cost of some \$300,000, spawning the present action. (R. 40-45).

Lee Thayn and his brother Leon Thayn originally contracted to purchase the farm and water rights from Wilson in 1979 (R. 40). At the time of closing (1981) of the property, the following water rights were established of record with the State Engineer's Office: Nov. 17, 1933 Certificate of Appropriation filed by Wilson for 35 second feet (consumptive) for irrigation March 1 to December 1, of each year, approved 10/13/52, certificate No. 4617; (Ex. 54, Appendix 2) Application to Appropriate Water, 600 cfs for power, noting plant has been in operation since 1907, approved 4/1/75 (non-consumptive) (*id*) , Application No. 44455 and Change Application No. A-12054 filed by Wilson at Thayn's request on 5/11/81 to have the 600 cfs power right be year round, approved 9/2/83 (without protest by GRCC)(R. 82-84; See also R. 40-45). GRCC's water right is 60 cfs with a 5,904 acre foot limitation.

After purchase of the property in 1979, Thayn and his brother initially attempted a large scale hydro-electric project in conjunction with National Hydro Corporation of Boston, Mass. (R. 43). That project was known as the National Hydro project and called for expansion of the raceway to accommodate 4,100 cfs non-consumptive. (R. 43-44). Thayn applied for the 1,400 cfs from the State, (Ex. 54, Appendix 2) which was originally protested by GRCC. Eventually a proposed contract was entered into with GRCC and Thayns regarding the National Hydro project, which contract obligated GRCC to provide land for development of a new, enlarged power house, and expansion of the raceway, together with withdrawal of the protest filed by GRCC to the application for 1,400 cfs. Thayns were not obligated to proceed with National Hydro, but if it was eventually built, GRCC would

receive one percent (1%) of the hydro-electric proceeds for 15 years, and two percent (2%) thereafter, less 863,000 Kilowatt hours which was calculated as Thayns power demand to pump his irrigation water. (R. 44; Ex. 54, Appendix 1). Wilsons and Thayns had been using their approved 600 cfs to supply the “power demand” of the pumps.

National Hydro fell through due to environmental protests and other reasons. (R.44). Thayn learned of the April 15, 1952 agreement between GRCC and Wilson at about the time they purchased the property. (R. 40-45; Ex. 54, Appendix 1). This agreement purports to be a covenant running with the land, (Ex. 45). None of the copies of the April 1, 1952 agreement (hereinafter “52 agreement”) submitted at summary judgment or trial show any recording with either the State Engineers’ office or the County Recorder. However, a copy of the 52 agreement in the National Hydro Federal Energy Regulator Commission (FERC) Application shows an instrument No. 79787, that was found in County records Book E. (Ex. 54, Appendix 1). The 52 agreement was a settlement of disputes between GRCC and Wilson, including a then pending lawsuit as to which party owned which facilities, who would pay maintenance costs, and the priorities of water rights. Under the agreement, the dam, portions of the raceway and certain real property were transferred by Wilson to GRCC, the pump house, and all appurtenances were to be deeded to Wilson, parties were to split equally the maintenance costs on the dam and raceway, and priority of water usage was set forth in paragraph 6 as follows:

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 raceway that the first party

shall have enough and sufficient water to supply its stockholders. The quantity of water to supply the stock holders of the first party is to be exclusively determined by the first party.

Further, each party covenanted to cooperate with the other for mutual use and benefit of the facilities. (R. 107-113; 67-73).

After failure of National Hydro, Thayn re-explored a small co-generation project, and ultimately obtained a FERC exemption for a small scale co-generation facility. (R.44), at which time they met Rick Kaster. (R. 1902, V. IV., p.77). Rick Kaster works on hydroelectric plants, pumps and mechanical things. (R. 1902, V. III, p.176). Mr. Kaster made a proposal in 1988 regarding refurbishing of the pump house and perhaps selling power surplus over and above Thayn's pumping needs to finance the rebuilding. (R. 1902 V. III, p. 180-181). Mr. Kaster first focused on rebuilding the pumps, cleaning up the building and prep work. (R. 1902 V. III, p. 187-188). In late 1989 or early 1990 he began looking for turbines and generators (*id*). In the summer of 1990 he found some used equipment that would match this site, and the decision was made to commence the project. (R. 1902, V. III, pp. 90, 191). A verbal agreement was made among Lee Thayn, Leon Thayn and Rick Kaster to share profits as to the surplus power generated by the newer, more efficient turbines and ownership of the turbines and generators. (R. 1902, V. III, pp. 96-98). Both Kaster and Leon Thayn told numerous people of their intent to go forward with a co-generation facility. (R. 1902, B. IV, p 9, V, III, p. 9) including attending meetings with GRCC. (R. 1902, V. III, p. 56-57). It was common knowledge throughout the area that Thayns were doing the co-generation project. (R. 1902, V. III, p. 111; see also testimony

of Clinton Thompson, ditch rider for GRCC, (R. V. I, p.87); Blaine Silliman, GRCC Board member and vice-president in 1989 and President 1991-92, (R. 1902 R. V. I, p.138); Olive Anderson, Green River City councilwoman and GRCC shareholder, (R. 1902, V. I., p.156); Bernard Lassen, GRCC shareholder, (R. 1902 V. I., p. 167); Odell Anderson, Green River resident, (R. 1902, V. I, p. 188-190); Robert Seely, GRCC shareholder, (R. 1902 V. I, p. 200). GRCC minutes reflect the board's knowledge of Thayns co-generation project. (Ex. 98, minutes of 1/9/90, 1/7/92, 3/26/92). In fact, the 1/7/92 minutes of GRCC discloses that Leon Thayn told GRCC the amount Utah Power and Light would pay for the electricity to be generated. (Ex. 98). The facility was rebuilt and went online in May 1992. (R. 1902, V. IV, p.36). After Thayn began generating electricity the board presented Thayns with an "amendment" to the 1952 agreement dated September 30, 1952, which had also been signed by Wilson. (R. 1902, V. IV, pp.84-85; see also Ex. 66). Neither Thayns nor Kaster would have proceeded with the project if there had been any question about the right to use the 600 cfs non-consumptive year round. (R. 1902, V. IV, pp. 13, 82). By the time GRCC presented the September 1952 amendment (hereinafter "52 amendment") Thayns had already expended over \$300,000 in the project. (R. 40-45). Nowhere in the record is there any evidence that the 52 amendment was recorded or filed with the State Engineer's office.

The 52 amendment provides in relevant part that:

That the meaning of paragraph 6 of said original agreement was intended to be that the first party should have a priority of diversion, and should be entitled to take whatever water should be needed by the said first party or its stockholders before the second party should be entitled to divert any water through or over the dam and diversion works; and that the quantity of water

needed should be exclusively determined by the said first party. However, it was and is also mutually understood and agreed that the first party claims for the uses of its stockholders 80 second feet of water as particularly set forth in that certain diligence claim No. 46 on file and of record in the office of the State Engineer of the State of Utah and that after said rights are satisfied through diversion at said dam and diverting works that the water rights of the second party as set forth in its water filing about to be issued by said State Engineer for 35 second feet of water for irrigation uses upon approximately 1,325 acres of land, as well as its filings for power purposes to pump said water not to exceed 400 second feet or such lesser amount as may be approved by the State Engineer of the State of Utah shall then be satisfied through diversions at said dam and diverting works before any other or additional diversions are made, by the first party. [Emphasis added]

This lawsuit then ensued. GRCC filed its original complaint on 6/17/95 (R.I.-2) alleging breach of contract (Count One) for utilizing the diversion works in excess of the 52 amendment, breach of contract (Count Two) for assigning a portion of his rights to a third party, equitable relief (Count Three) loss of profits and for an injunction (Count Four). Thayn answered and counterclaimed denying that GRCC owned all of the diversion facilities, admitting that his predecessor in interest entered into the 52 agreement and the 52 amendment, but denying that GRCC's interpretation of the agreement and the amendment precluded his use of his water right for co-generation activity. As affirmative defenses, Thayn raised the doctrine of *de minimis non curat lex*, arguing that the real nature of the breach of contract and injunction claims was not for damages, but was an attempt to extort profits from Thayn. Thayn further averred that U.C.A. § 73-1-7 provided a right of eminent domain to Thayn, that GRCC had an adequate remedy at law if in fact any damages really occurred, and raised laches, estoppel and waiver. Thayn also counterclaimed for his attorney fees and costs. (R. 23-28).

On June 28, 1996 Thayn filed a Motion for Summary Judgment together with the Affidavit of Lee Thayn pointing out that while Wilson, Thayn's predecessor, had initially filed a water right claim for 35 cfs consumptive and 600 cfs non-consumptive power, during irrigation season only, in 1975, subsequently Wilson, on behalf of Thayn, filed a second application with the State Engineer's office in 1981. This second application was to change the non-consumptive 600 cfs power use to year round. (R. 50-51). Both applications were approved. (R. 40-45). Thayn argued that inasmuch as there was never an increase or actual change of use by Wilson, and no modifications were made to the diversion facilities, and because GRCC had never objected to Wilson's use or protested Water Right applications filed by him, or alleged any breach of contract as against Wilson, that Thayn's use of 600 cfs for hydroelectric power generation and irrigation power pumping should not be prohibited under the contract. Thayn sought summary judgment under theories of estoppel, laches or waiver. Thayn further argued the contract and amendment set up only a system of priorities and that the terms of the amendment as to the parties' various water rights were intended only as descriptive of the parties' rights, not intending to forever preclude through the eons of time any future water rights or water right usages. Alternatively, Thayn argued he had a statutory right of eminent domain to utilize the raceway, provided he pay any damages said use might cause and contribute pro-rata to maintenance of the dam and raceway under U. C. A. § 73-1-7.

As to the claim for profits by GRCC, Thayn cited numerous cases that the measure of damages for a canal appropriator is not the benefit to the appropriator, but the diminution

in value to the canal company. Accordingly, under the facts of the present case, GRCC would get only minimal damages. (R. 48-85).

GRCC filed its own Motion for Summary Judgment on the same date, 6/28/96 asserting that the 52 agreement and amendment must be interpreted as not merely descriptive of the parties' water rights, but as the quantitative limit of both the rights and uses of the parties, and any successors in interest, forever and ever. Inasmuch as GRCC had no substantive damages, they argued for injunctive relief and specific performance. (R. 910104).

In opposition to Thayn's Motion for Summary Judgment, GRCC argued estoppel was not applicable, that Thayn could not reasonably rely upon GRCC's inaction over some 40 years as a basis for constructing a \$300,000 co-generation facility. Further, GRCC contended that U.C.A. § 73-1-7 requires a "proceeding" and that mere affirmative defense is inapplicable. It then argued that nominal damages are an inadequate remedy at law, and accordingly an injunction should issue. (R. 117-143).

In response, Thayn filed a Motion for leave to file an amended and supplemental counterclaim seeking to raise U.C.A. § 73-1-7 as a counterclaim as well as an action to seek enlargement/clean out of the raceway. (R. 148-150).

Thayn responded to GRCC's Motion for Summary Judgment by pointing out the amendment expressly purports to clarify paragraph six (6) of the 52 agreement. That said amendment set up a system of priorities by which GRCC would not have an unlimited first position priority. Thayn further contended that the amendment language is ambiguous and

that the court should look to the parties' course of conduct in interpreting the intent of the agreement. Since Wilson had attained a water right of 600 cfs, non-consumptive power right, and since no enlargement of the facilities had taken place since 1952 and Wilson's use of the water never changed, the Court should construe the contract in accordance with the parties' own conduct. Thayn pointed out the lack of protest by GRCC to Wilson's 1975 and 1981 water right applications and contrasted that to the 1981 application filed by Wilson with respect to the National Hydro contract (to which GRCC did protest but subsequently withdrew its protest after agreeing to the National Hydro project). That application sought 1,400 cfs. If, in fact, Wilson's 600 non-consumptive power right was a violation of the 52 agreement, why did not GRCC protest? Thayn points out the Vetere Affidavit which claims GRCC did not know of Thayn's purported use for co-generation until 1992 is not a defense to estoppel; that it is the quantity of the non-consumptive water right to which Thayn sought to estopp GRCC. How Mr. Thayn chooses to best use his water right was not a proper inquiry for the Court. (R. 151-153).

Thayn further addressed GRCC's argument that the value of a canal company rests in its ability to exclude others. Thayn argued there is no basis in law for such reasoning, that by virtue of U.C.A. § 73-1-7 the canal company does not possess the right to exclude, only the right to demand contribution of maintenance costs, and remuneration in value to GRCC, if any. (R. 153 K-P).

In reply, GRCC argued laches was inapplicable because it asserted Thayn did not put GRCC on notice of Thayn's plans for the small co-generation facility. GRCC asserted that

mere silence is ineffective to constitute a waiver without an affirmative duty to speak. GRCC argued Thayn had a duty of good faith to abide by the contract, so it had no duty to speak out. Finally GRCC maintained U.C.A. § 73-1-7 is unconstitutional if it allows interference with their private property rights. However, says GRCC, since the parties here have a contract, the contract controls and U.C.A. §73-1-7 is inapplicable. (Citing *Gunnison-Fayette Canal Co. v Roberts*, 12 Utah 2d 153, 364 P.2d 103, 105 (1961)).

Oral argument on the pending Summary Judgment motions were heard on October 15, 1996, after which the Court, Hon. Bryce K. Bryner presiding, took the matter under advisement. (R. 186). Thereafter, GRCC filed the Affidavit of James Tippetts who purported to have done water flow measurements of the raceway. (R. 189-195). Thayne objected and filed a second Affidavit of Lee Thayn. (R. 200-202. The Court then denied Thayn's Motion for Leave to File an Amended Counterclaim, (R. 242-244), holding that U.C.A. § 73-1-7 is precluded in any situation where the parties have an existing contract in place. No mention is made about Thayn's claim to have the raceway cleaned or expanded, but said claim was denied by virtue of the denial of leave to file the Supplemental Counterclaim. (*id*).

GRCC also moved to file a Supplemental Complaint, and then moved to file a second Supplemental Complaint, (R. 263-311), which was stipulated to by defense counsel. (R. 254)

The Second Supplemental Complaint incorporated the prior four causes of action, and added Trespass (fifth cause of action), punitive damages (Count six), a claim for injunction against Thayn going onto GRCC property (Count seven), Declaratory Relief (Count eight),

a claim for injunction that Thayne receive no water until GRCC has a full eighty cfs (with no duty) during the irrigation season and 20 cfs all year (Count nine) and “Wrongful diversion” (Count ten). (R. 263-311).

Thayne answered the Second Supplemental Complaint, denying most of the new allegations, reincorporating its prior defenses and asserting that any failure of GRCC to receive 80 cfs was due to its own failure to properly maintain the diversion works the raceway, the dam and its own canal. (R. 256-259).

The Court then entered its ruling on the Motion to Strike Affidavit and on Reciprocal Motions for Summary Judgment. (R. 314-318).

Despite the fact that neither party requested partial summary judgment, the Court entered what can only be deemed a “conditional” partial summary judgment. The Court held there was disputed material issues of fact regarding latches, estoppel and waiver precluding summary judgment, but then held that the 1952 amendment and agreement were unambiguous, certain, definite and limit Thayn to 435 cfs for irrigation and to pump the irrigation water. There is no opportunity to expand or enlarge Thayn’s right, presumably forever. The Court held that injunction was the proper remedy because there was only nominal damages and that any damages actually suffered would be impossible to prove. Finally the Court reiterated its position that U.C.A. § 73-1-7 was inapplicable where there was an existing contract between the parties. These rulings were to take effect after trial on the estoppel, waiver and latches issues.

At this juncture Reed Martineau, of Snow Christensen and Martineau, substituted in

as counsel for John Waldo. Mr. Martineau moved to extend the discovery schedule and trial date (R. 351), which was ultimately granted. (R. 451). GRCC then filed a Motion for Partial Summary Judgment on its eighth and ninth causes of action seeking a permanent injunction and declaratory relief that GRCC get its full eighty (80) cfs during the irrigation season and 20 cfs all year prior to Thayn receiving any water. (R. 359-405). Thayn opposed arguing that GRCC only had a State water right to 60 cfs during the irrigation season and 20 cfs year round, and that the 20 was inclusive in the sixty (60) during the irrigation season, (R. 461-462), not cumulative. In response to GRCC's claim that Thayn was trespassing on GRCC property for some repair work which caused two (2) trees (believed dead) to be removed, Thayn argued he was only doing work made necessary by GRCC's repeated failure to do demanded maintenance work on the raceway. (R. 454-460). Court granted Partial Summary Judgment and struck from the record the Affidavit of Leon Thayn (which contained GRCC's State approved water right document showing that GRCC only had a 60 cfs right, not an 80 cfs right), and entered an injunction against Thayn that GRCC receive 80 cfs during the irrigation season and 20 cfs all year before Thayn receives any water. (R. 497-98). Thereafter, Thayn applied for a Temporary Restraining Order due to the fact that GRCC was attempting to construct a forty (40') foot wall extending out from its canal into the raceway, adjacent to and in front of Thayn's pump house thereby impeding, if not blocking, the flow of water to Thayn. (R. 524-539). TRO was granted, but subsequently dissolved after evidentiary hearing on March 23, 1999 on the preliminary injunction, GRCC arguing that Thayn could not prevail on the merits as he had no counterclaim pending regarding the

wall¹, and because Thayn's injury would be compensable by money damages. (R.621-626). Thayn appealed by interlocutory appeal said denial of the Preliminary Injunction, which was rejected by this Court, Case No. 990303, Order Denying Injunction Pending Appeal, dated 5/24/99.

Thayn then filed a Motion to Reconsider the Summary Judgment arguing that GRCC only had a 60 cfs State approved water right, not 80 cfs (R. 571-593). Thayn also filed on March 26, 1999 a Motion to Allow a Second Amended Counterclaim raising the lack of maintenance by GRCC issues as a counterclaim, not merely an affirmative defense. (R. 594-603).

The Court denied the Motion for Reconsideration citing that "there were no new material facts or legal theories not considered by the Court at the time of the previous ruling". (R. 873-874). The Court further denied the Motion to File a Second Amended Counterclaim reasoning there was insufficient time for Plaintiff to do additional discovery without changing the trial date. (R. 871-872).²

Thereafter, GRCC filed a Motion in Liming to limit Thayn's use of witnesses and evidence at trial to Discovery responses already provided and not to allow an deviation from responses to admissions already filed. (R.739-760). In particular, GRCC sought to preclude

¹The 40 foot wall was subsequently ordered removed by Federal Authorities and is not at issue in this appeal. On remand, the District Court awarded attorney fees and costs which is appealed herein.

²The maintenance issues had already been raised as a defense. Presumably very little discovery would be necessary.

Thayn under a theory of unclean hands from denying he had somehow promised to share revenue from the hydro plant with GRCC.³ The Court granted the Motion in Limine on the discovery issues (R. 867-870)., and denied the motion to limit Thayn from being able to argue estoppel at trial. (R. 909-911).

The Court directed trial proceed first on Thayn's defenses of estoppel, waiver and laches, thence upon the remaining claims of GRCC for trespass (claiming certain improvements to the pump house encroached upon the real property deeded GRCC under the 52 agreement including the trash racks and the radial gates) and the claim for profits whereby GRCC sought all past gross revenues of Thayn from the hydro electric plant. (R. 865). Trial was held on May 18, 19, 20, 24, 25, 27, 28, June 17, 18 and 22.⁴

Subsequently, GRCC filed a Motion for Contempt contending they were not getting their full 80cfs. A hearing was held on August 6, 1999, at which hearing the Court heard the testimony of Jack Barnett, expert witness for GRCC who attested that he took measurements on the canal and raceway showing 532 cfs in the raceway and 692 cfs in the canal. (R. 1901, P. 21). Accordingly, in his opinion, GRCC was not getting a full 80 cfs in the canal.

In Opposition to the Motion for Contempt, Thayn called David Hansen as his expert who also took measurements in the raceway and the canal showing measurements

³GRCC's position was that it never knew the hydro plant was under construction, yet at the same time had oral promises from Leon to share the revenues.

⁴A detailed discussion of the evidence at trial on the estoppel, laches and waiver issues is contained in the argument section under issue VIII infra as Appellant was required to marshal the evidence there.

between 78 to 82 cfs. (*id.* at 137-138). He further attested that if the canal company would remove three (3) feet of silt from the bottom of its canal, that would increase the flow significantly. (*id.* at 145). In his opinion, there was adequate water in the raceway to meet all of the 800 cfs needs, but that there was a restriction in the canal limiting the canal flows. (*id.*) He opined that the two (2) major factors that needed to be fixed were cleaning the canal and enlarging the inverted siphon inside the canal. (*id.*) At the conclusion of the testimony on GRCC's Motion for Contempt, the Court ruled that, inasmuch as GRCC had no measuring device, it had failed to meet its burden of proof on contempt with regard to how much water was or was not flowing down its canal. (R. 1082-1087).

Thereafter, the parties filed their post trial memorandums and the Court entered its Memorandum Decision Regarding Estoppel, Waiver and Latches on April 13, 2000. (R. 1395-1402). It also entered Memorandum Decisions regarding the issues of trespass (R. 1515-1517) and GRCC filed a Motion for Clarification and Reconsideration on the trespass issue. (R. 1518-1533). After a number of objections and memorandums regarding the rulings and/or proposed Findings of Fact, the Court entered its Findings of Fact, Conclusions of Law Regarding Estoppel, Waiver and Latches and its Judgment on the First, Fourth, Eighth and Ninth Causes of Action and on the Affirmative Defenses of Estoppel and Waiver on March 14, 2001. (R. 1657-1673). This appeal, followed by a Notice of Appeal filed on April 9, 2001. (R. 1714-1715).

ARGUMENT AND AUTHORITIES

I. THE COURT ERRED IN INTERPRETING THE 52 AMENDMENT TO THE 52 CONTRACT BY GRANTING SUMMARY JUDGMENT PRECLUDING THAYN FROM USING ITS 600 CFS NON-CONSUMPTIVE STATE APPROVED WATER RIGHT YEAR ROUND AND LIMITING HIM TO 435 CFS DURING THE IRRIGATION SEASON ONLY.

Interpretation of contracts is a question of law which is reviewed for correctness. *Levanger v Vincent*, 3 p.3d 187 (Ut. 2000). The existence of an ambiguity in a contract is a question of law. *Munford v Lee Servicing Co.*, 999 P.2d 23 (Ut. App. 2000). The matter was preserved for appeal by virtue of memorandums in opposition to the original motion for summary judgment, (R. 151-153 a-v) and in opposition to the motion of GRCC for partial summary judgment (R. 454-472).

The gist of both the original motion for summary judgment filed by GRCC, and its motion for partial summary judgment was to preclude Thayn from utilizing his State approved water right for 600 cfs all year round. GRCC sought, and successfully obtained, orders restricting Thayn to 400 cfs power right and 35 cfs consumptive right during the irrigation season only. The basis for said restriction was the 52 agreement and the 52 amendment. This Court reviews these decisions giving no deference to the rulings of the trial court. *Levanger v Vincent, supra*. While the analysis begins by looking at the contract, it does not end there. For example, in *Peterson v Severe Valley Canal Company*, 151 P.2d 477 (Ut. 1944) the Court was faced with interpreting a contract regarding the assessment of maintenance costs between the *Severe Valley Canal Company* and the *Paiute Reservoir and Irrigation Company*. The Court noted:

From the recitals of the contract and the record and the course of conduct, it is apparent that the parties intended the contract to apply only to Defendant's main water canal, and that they were contemplating certain unusual expenses in the operation and maintenance of such canal during the season. The costs of operating said canal which are prorated by the provisions of paragraph 2, do not include the costs of maintaining and operating the laterals leading therefrom. To say that the italicized clause above set out prohibits any further charges made against the Paiute company stockholders on a count of maintenance of said laterals, would require the Defendant to flow Plaintiff's water through its ditches without charge for the costs of maintaining and operating those ditches. We conclude that the contract does not prohibit the accessing of maintenance charges against Plaintiff for maintaining the laterals, but that it applies to the main canal only. (*id.* 479).

The language of the contract specifically stated "that there shall be no further charges against the Paiute Reservoir and Irrigation Company or its stockholders for turning out water, for irrigation services, etc." The Peterson Court declined to apply a strict interpretation of that clause, and instead applied a common sense approach taking into consideration the parties course of conduct and common sense reasoning. Appellant Thayn seeks nothing less herein.

In the present case, the original 52 agreement contains no merger clause. It does not purport to be the entire contract of the parties, nor does it recite that all understandings and agreements are incorporated therein. Rather, it is a resolution of an existing lawsuit by which certain portions of the real property are transferred by and between the parties in accordance with their respective needs and uses. It contains a paragraph dividing equally the maintenance costs of the commonly utilized facilities and a covenant that each party shall "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 respective 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”. (R. 278). It is a contract that says what they do agree to, it is not a contract precluding any further or other agreements or understandings. The trial court focused on the 52 amendment (of which Thayn had no notice, nor could he reasonably be charged with notice), particularly paragraph 1 which provides in full text as follows:

That the meaning of paragraph 6 of said original agreement was intended to be that the first party should have a priority of diversion, and should be entitled to take whatever water should be needed by said first party [GRCC] or its stockholders before the second party [Wilson] should be entitled to divert any water through or over the dam and diversion works; and that the quantity of water needed should be exclusively determined by the said first party. However it was and is mutually understood and agreed that the first party claims for use of its stockholders 80 second feet of water as particularly set forth in that diligence claim No. 46 on file and of record in the office of the State Engineer of the State of Utah and that after said rights are satisfied through diversion at said dam and diverting works that the water rights of the second party as set forth in its water filing about to be issued by said State Engineer for 35 cfs of water for irrigation uses upon approximately 1,325 acres of land, as well as its filing for power purposes to pump said water in not to exceed 400 second feet or such lesser amount as may be approved by the State Engineer of the State of Utah shall then be satisfied through diversions at the dam and diverting works before any other or additional diversions are made, by the first party.

It is apparent from a review of this contract that Wilsons water right filing had not yet been determined and that same was still to be determined. Moreover, the quantity of water allotted to the first party is limited to that water “needed”. Although the contract provides that the first party has the exclusive right to determine what it needs, that provision must be

read in light of the duty of good faith and fair dealing imposed in all contracts. *Malibu Investment Company v Sparks*, 996 p.2d 1043 (Ut. 2000) (as a general rule, every contract is subject to an implied duty of good faith and fair dealing, under which both parties to a contract promise not to intentionally or purposefully do anything which will destroy or injure the other parties right to receive the fruits of a contract). Thayn maintained below in its motion for reconsideration, and on this appeal, that although GRCC claimed 80 cfs in its application to the State Engineer's office, GRCC was only allotted 60 cfs, inclusive of its 20 cfs year round stock watering right. Thus, under the covenant of good faith, GRCC cannot determine that it "needs" a greater water right than it is actually allotted by law. In fact, not only is such a claim a violation of the duty of good faith, it goes to such an extreme point as to be actually criminal conduct. U.C.A. § 73-3-3(9) provides:

Any person who changes or attempts to change a point of diversion place or purpose of use, either permanently or temporarily, without first applying to the State Engineer in the manner provided in this section: (a) obtains no right; and (b) is guilty of a misdemeanor, each day of the unlawful change constituting a separate offense separately punishable.

Further, U.C.A. § 76-10-202 mandates in relevant part:

Every person who, in violation of any right of any other person, willfully turns or uses the water, or any part thereof, of any canal, ditch, pipeline or reservoir, except at a time when the use of the water has been duly distributed to the person, or willfully uses any greater quantity of the water than has duly distributed him, ...is guilty of a class B misdemeanor. [Emphasis added]

In the present case GRCC has been allotted by the State only 60 cfs during the irrigation season as its maximum flow rate, and subject to an acre foot limitation. But what GRCC has attempted (heretofore successfully) to do in this proceeding is to change both the

maximum flow volume and the duty restrictions, to unlimited 80 cfs, prior to junior water right holders such as Thayn. Of course, the State Engineer was not joined as a party to this proceeding, not by mere omission Thayn asserts, but by deliberate intention. While Thayn's counsel could be criticized for not having raised the 60 cfs issue at the original Motion for Summary Judgment, which was denied subject to certain defenses, Thayn certainly did raise the issue in the Motion for Reconsideration. Once the trial court was aware that the right of GRCC was less than the right it asserted under the contract, the trial court was obligated not to participate in a criminal conspiracy to thwart the water right statutes.

What is at issue here is not mere private property rights. The legislature has declared that the use of water is a public use, stating "the use of water for beneficial purposes, as provided in this title, is hereby declared to be a public use". U.C.A. 73-1-5. This is further supported by a right of Eminent Domain granted to all persons of this state as follows:

Any person shall have a right of way across and upon public, private and corporate lands, or other rights of way, for the construction, maintenance, repair and use of all necessary reservoirs, dams, water gates, canals, ditches, flumes, tunnels, pipelines and areas for setting up pumps and pumping machinery or other means of securing, storing, replacing and conveying water for domestic, culinary, industrial and irrigation purposes or for any necessary public use, or for drainage, upon payment of just compensation therefor, but such right of way shall in all cases be exercised in a manner not unnecessarily to impair the practical use of any other right of way, highway or public or private road, or to injure any public or private property. [Emphasis supplied].

Appellant Thayn maintains that the Court improperly interpreted the contract with a strict interpretation, which is both nonsensical to the public use of water and not within the intent of the parties as expressed therein. Moreover, the final ruling of the Court forces

Thayn into a position of conspiring with GRCC to take more water than it is legally entitled to or could reasonably utilize, before Thayn can receive even one drop of irrigation water. No evidence of actual intent of the parties was presented at the trial Court inasmuch as the actual signatories to the contract are long since deceased. However, Thayn attempted in his affidavits and memorandums to get the court to consider the parties course of conduct, to wit: the fact that Wilson, through dilapidated and inefficient equipment, had in fact obtained a 600 non-consumptive water right use and had utilized said water for the irrigation season to pump his 35 cfs consumptive use up to his 42 foot canal.

What Thayn did by modernization and technology was to take the same water right use and make it efficient enough to pump the irrigation water with left over use for the generation of hydroelectric power and recoupment of his costs of renovating the pump house and the facilities. Such renovations included the renovation of the radial gates. This was a benefit to both parties as it gave them more control over the raceway and an ability to easily clean the raceway by means of sluicing. Thayn did, through his predecessor Wilson, apply to the State Engineer to utilize the non-consumptive use year round, but nothing in the record indicates there is any impediment to the water right of GRCC in the non-irrigation season inasmuch as their water right is only 20 cfs (again subject to duty) for stock watering during that time. The contract is, in fact, silent as to any additional water rights of Wilson or his successors. Thayn urged, and the trial court rejected consideration of the parties course of conduct in interpreting the contract. As stated in *Willard Pease Oil and Gas Company v Pioneer Oil and Gas Company*, 899 p.2d 766 (Ut. 1995) if a contract is ambiguous and the

case was decided on summary judgment, that decision will be upheld only if undisputed extrinsic evidence regarding intent of the parties shows that the successful position is correct as a matter of law. Whether an ambiguity exists in a contract is a question of law and the Supreme Court accords no deference to the trial court's conclusion. (*id.*)

The question of ambiguity in this case exists because the contract can be read as one of two ways. The contract provision cited above could be read as a restrictive provision by which parties vested water rights were conveyed by and between themselves similarly to the actual conveyance of the real property by and between themselves. In essence, did Wilson convey away his water rights to the Plaintiffs? However, if reference is made back to the original 52 agreement, the language utilized there was that the parties would execute deeds and would convey specific legally described real properties to each other as set forth in very detailed paragraphs. By contrast, the amendment contains no such conveyance language. Rather, it contains language speaking to the interpretation of the original paragraph 6. It utilizes such words as "claim" and notes that Wilson's water right has not even been issued. Accordingly, he had no vested right at that time in which to convey. By contrast, Thayn asserts that the language utilized in the 52 amendment was merely descriptive of the water rights being claimed by the parties at that time, and should not be read strictly as a limitation clause. Moreover, the word "needed" cannot be reconciled with the interpretation placed upon the amendment by the trial court. It is not the water right wanted, the water right desired, the water right wished for, but the water right needed. Needed should be interpreted to be consistent with the State authorized water.

The Supreme Court interprets contract terms in light of the reasonable expectation of the parties, looking to the agreement as a whole and to the circumstances, and nature and purpose of the contract. *Pierce v Pierce*, 994 P.2d 193 (Ut. 2000). It is utterly inconceivable that the parties' intention and purpose of this contract was to violate the law or to otherwise appropriate water in violation of the statutes of the State of Utah. Certainly there is nothing in the contract itself from which such an intent could be gleaned.

When interpreting a contract, a Court must attempt to construe the contract so as to harmonize and give effect to all of its provisions. *Dixon v Pro Image Inc.*, 987 P.2d 48 (Ut. 1999). Under the interpretation placed on the contract by Judge Bryner below, the word "needed" becomes surplusage. There is no test applied to the word. The 80 cfs would define what the parties were talking about and the word "needed" would be irrelevant. Further, the language, "to be exclusively determined by said first party", is also meaningless surplusage. If the parties intended that GRCC would have the first 80 cfs and that Wilson Produce Company would then have the next 435 cfs, they would have simply said that. There would be no need to discuss priority of diversions and utilize such words as "needed" and "allotting to GRCC" some right to make a determination as to what was needed. GRCC would simply get the first 80. The interpretation placed upon the contract by the trial court below renders portions of the contract meaningless.

The original signatories, unlike the trial court below, recognized the State Engineer would be the final arbiter as to their water rights. If a contract is written and it is not ambiguous, the parties' intention is determined from the plain meaning of the contract. *Dixon*

v Pro Image, Inc., 987 P.2d 48 (Ut. 1999). Here the original signatories were describing their water right claims, either filed or about to be filed, not their actual granted rights. What if, as actually happened, the State Engineer were to allot GRCC less than 80 cfs flow? Did Wilson really intend that upon such occurrence he would get no water, simply give up farming and lose his life's investment? As interpreted by the trial court below, unless GRCC (Illegally) gets 80 cfs, Thayn gets nothing. And what of the duty, *i.e.* the acre foot limitations on each parties seasonal use? The contract therein is silent.

A contract is ambiguous if it is unclear, omits terms, has multiple meanings, or is not plain to a person of ordinary intelligence and understanding. *Utah Farm Bureau Insurance Company v Crook*, 980 P.2d 685 (Ut. 1999). Finally, this Court has held that with regard to covenant, restrictive covenants are not favored and are strictly construed in favor of free and unrestricted use of property. *St. Benedicts Dev. Company v St. Benedicts Hosp.*, 811 P.2d 194 (Ut. 1991). Generally, express restrictive covenants are upheld only where they are necessary for protection of the business for the benefit of which the covenant was made, and no greater restraint is imposed than is reasonably necessary to secure such protection. (*id.*) The St. Benedicts court went on to state that in order for a restrictive covenant to be implied, the support for it must be plain and unmistakable or it must be necessary as a matter of law. (*Id.* 198). That same court also discussed the covenant of good faith and fair dealing in the context of a covenant that runs with the land.

In the instant action we are dealing with a covenant that runs with the land, (see 52 agreement). While Thayn maintains that the language is, in fact, ambiguous, and its intent

best ascertained by looking to the course of conduct of the parties, certainly the language does not rise to the level of “plain and unmistakable”. The interpretation placed upon this contract by the trial court is not only unnecessary as a matter of law, **it is contrary to law.** For the foregoing reasons, the judgment of the trial court should be reversed with respect to the interpretation of the contract rendering the trial on the issues of estoppel, waiver and latches moot. This Court should interpret the contract in accordance with common sense meanings and the flexibility necessary to allow the evolution of more efficient water right uses through the future. The contract should not be interpreted to discourage efficient uses of water, but to encourage more efficient uses of water. This is precisely what Thayn did in this case. His conduct should not only be condoned, it should be applauded. The conduct of GRCC, in attempting to improperly extort the profits from another persons sweat and labor in direct violation of the Utah water statutes is not only disingenuous, but intolerable.

II. THE COURT ERRED IN HOLDING THAT THAYN HAD A DUTY TO DISCOVER THE “UNRECORDED” 52 AMENDMENT AND BINDING HIM TO SAID AMENDMENT DESPITE THE FACT THAT NO NOTICE WAS EVER PROVIDED TO HIM UNTIL AFTER THE HYDRO ELECTRIC PLANT HAD BEEN BUILT.

At the conclusion of the trial, the Court specifically ruled in its memorandum decision “the Plaintiff’s silence complained of by the Defendant did not constitute a relinquishment of the quantity and nature of the use limitations because the Plaintiff was under no legal duty to inform the Defendant of the existence of the 1952 agreement and amendment. The Court is persuaded that the Defendant bears the burden of discovering the encumbrances and limitations on the property and water rights he purchases and that burden

cannot be shifted to the Plaintiff'. (R. 1395-1402, 96-97). In point of fact, Thayn never signed the contract. Thayn admitted he was the successor in interest to Wilson but his signature does not appear thereon. Contrary to the law applied by the court below, U.C.A. § 73-3-18, with respect to water rights, provides in relevant part that:

... prior to the issuance of a certificate of appropriation, rights claimed under applications for the appropriation of water may be transferred by instruments in writing. Such instruments, when acknowledged or proved and certified in the manner provided by law for the acknowledgment or proving of conveyances of real estate, may be filed in the office of the State Engineer, and shall from the time of filing in said office impart notice to all person to the contents thereof. Every assignment of an application which shall not be recorded as herein provided shall be void as against any subsequent assignees in good faith and for valuable consideration of the same application or any portion thereof where his own assignment shall be first duly recorded.

If the Court rejects the interpretation under issue one (1) of this appeal, it necessarily follows that the Court is interpreting that Wilson somehow assigned a portion of his water rights to the benefit of GRCC. The burden would be upon the Plaintiff, GRCC, to show that it imparted notice of that assignment to Thayn. This is contrary to the legal ruling of the Court. As far as the Summary Judgment goes, it is elementary that at summary judgment a moving party must show both that there are not issues of material fact and that it is entitled to judgment as a matter of law. U.R.C.P. Rule 56(c).

In the instant case there were, in fact, material issues of fact precluding summary judgment, to-wit: the potential defenses of estoppel, waiver and laches. The Court, however, fashioned a "conditional" summary judgment which ignored the disputed facts and purported to grant summary judgment on the condition that Thayn did not succeed in

one of his defenses. It is unlike the situation where one defense is ruled wholly inapplicable, or one count on the complaint is ruled to be established as a matter of law. Here, virtually all of the counts were subject to the potential defenses and Summary Judgment should not have been granted.

More particularly, the Court erred as a matter of law in shifting the burden from the Plaintiff to show that he was entitled to judgment as a matter of law, to the Defendant to show that the Plaintiff was not entitled to judgment as a matter of law. Since there is no evidence in the record that the 52 amendment was ever recorded, how would Thayn ever learn of the existence of such an amendment? There is no evidence it was filed with the State Engineer's office. There is no evidence that it was filed in the County records (though there is slight evidence that the 52 agreement itself may have been recorded). In *McGarry v Thompson*, 114 Ut. 442, 201 P. 288 (1948) the Court held that an innocent purchaser for value without notice of previous assignment, who first records his assignment, takes preference over prior unrecorded assignments. As is noted in the facts section *supra*, the assignment from Wilson Produce Company to Thayn were of record. The Court itself found that Thayn did not have notice of the 52 amendment until August of 1992 (which is after the hydro electric facility went online) (R. 1657-1668, 1659 Finding of Fact #15).

If, in fact, GRCC owed no duty to disclose the amendment to Thayn, same being unrecorded and unregistered with the State Engineer's office, how would Thayn ever learn of same? Similarly, the real estate recording statutes provide: U.C.A. § 57-3-103 provides:

“Each document not recorded as provided in this title is void as against any

subsequent purchaser of the same real property, or any portion of it, if:
(1) the subsequent purchaser purchased the property in good faith and for valuable consideration; and the subsequent purchaser's document is first duly recorded."

Again, the duty is on he who wishes to assert an interest in land (or water rights) to record or be subject to having his document declared void. In the instant case, GRCC has not proved any recording with regard to the 52 amendment.

It is anticipated that GRCC could argue that it recorded the 52 agreement, and the 52 amendment is at least evidentiary value as to what the parties intended under paragraph 6 of the original agreement. Even accepting that argument, if GRCC is allowed to introduce extrinsic evidence as to the meaning of the agreement, *i.e.* the 52 amendment, should not Thayn also be equally entitled to submit extrinsic evidence as to the meaning of the 52 agreement, to-wit: the parties course of conduct? Thayn contends that the Court misapplied the burdens of proof and imposed upon him an impossible duty to search the world over for an undisclosed, unrecorded, and secreted agreement held only in the hidden files of GRCC until after he had expended some \$300,000 to renovate and remodel the pump house. Equity demands much more of GRCC than this. The Court should reverse the judgment of the trial court and find that the 52 amendment is unenforceable as against Thayn. Alternatively, the Court should remand the matter to the trial court for redetermination of the interpretation of the contract considering all extrinsic evidence, including the 52 amendment, as well as the parties course of conduct in dealing with each other.

III. THE COURT ERRED IN CONSTRUING THE CONTRACT IN A MANNER THAT VIOLATES PUBLIC POLICY AND AFFORDING AN EQUITABLE REMEDY THEREFOR.

U.C.A. § 73-1-1 provides:

All waters in this state, whether above or under the ground, are hereby declared to be the property of the public, subject to all existing rights of the use thereof.

Water is therefore public property, not private property. Persons can acquire private rights to use same if it is a beneficial use. "The use of water for beneficial purposes, as provided in this title, is hereby declared to be of public use." (U.C.A. 73-1-5).

Because of its unique nature in arid lands, water is simply too valuable to allow waste. Accordingly, the state has granted a right of way to persons across public and private lands for the construction of ditches, canals, water gates and for setting up pumps and other means of storing and conveying water for domestic, culinary, industrial and irrigation purposes, U.C.A. 73-1-6.

One already owning a ditch or canal is subject to having another person enlarge the ditch or canal to carry the other person's water by compensating the ditch owner for any damage thereof. U.C.A. § 73-1-7. If persons jointly share use of a ditch or canal, in the absence of an agreement as to cost sharing, the maintenance costs of the ditch or canal is pro-rata. U.C.A. § 73-1-9; see also *Gunnison-Fayette canal Co. v Roberts*, 12 Utah 2d 153, 364 P.2d 103 (1961). The right to use waters can only be acquired as provided in the Utah Water and Irrigation Rights Title. U.C.A. § 73-3-1. Application for the right to use water must be filed with the State, U.C.A. § 73-3-2, subject to action thereupon by the State Engineer,

U.C.A. § 73-3-5, 8, and subject to judicial review of his actions. U.C.A. § 73-3-14. Water users must file proof of their appropriation for a beneficial use, or in areas where a general adjudication has occurred or is pending (such as here) may elect to file a statement of claim for determination by the State as to the nature and amount of beneficial use. U.C.A. § 73-3-16).

Thereafter, the successful user receives a certificate of appropriation, in quantity of flow and/or acre-feet (depending on the use) which is prima facie evidence of the water rights. U.C.A. All users are required to construct and install measuring devices to measure the use of their water. U.C.A. § 73-5-4.⁵

There is no right of adverse possession to water, U.C.A. § 73-3-1 and priorities of use are determined by the date of first use, except that in times of scarcity when the better use has priority. (U.C.A. § 73-3-21.

Failure to utilize water for a five year period causes loss of the right. U.C.A. § 73-1-4. It was argued below by GRCC (successfully) that the 52 Agreement and Amendment must be enforced and an injunction must issue because GRCC had a “constitutional right to exclude others” from the use of their facilities. (R. 1899, p. 89); *See also* oral arguments at Summary Judgment 1905). No authority was ever cited for this premise!

Thayn maintains, based upon the foregoing, that the interpretation placed upon the contract in this case, coupled with denial of his statutory right of eminent domain, violates public policy and that the remedy of injunction should not have been imposed.

⁵ GRCC has no measuring devices on its canal or the raceway. (R. 1899).

First, the lower Court has granted to GRCC a right of use in its canal 80 cfs (without duty) and with priority over Thayn's established beneficial uses, over and above that to which the no State authorized. This violates both the "need" provision of the contract and the overwhelming policy against water waste in this State.

Secondly, without any showing whatsoever of beneficial use by GRCC, Thayn's clear and unequivocal beneficial use of generating electricity is curtailed, and lost. This is egregiously apparent in the off season (non-irrigation season) during which GRCC has only a 20 cfs stock maximum flow watering right and there is no dispute in the record that Thayn could utilize water to generate electricity at such times without even a question of impairment to GRCC.

Nevertheless, the order of the trial court below prohibits same. Why does the Court below allow the water to flow out of State and be appropriated for use by junior water right holders in another State? What possible benefit is that to the citizens of this state?

The reason, of course, is that GRCC desires to extort from Thayn not the measure of any damages to it, as there are no such provable damages, but the profits of Thayn's hard work, ingenuity, industriousness and capital investment.

Third, the trial court below, although it expressly stated it was not adjudicating water rights, in fact did! The judgment of the Court states "The Canal Company has the right to use the first 80 cfs diverted through the canal diversion facilities during the irrigation season and the first 20 cfs during the non-irrigation season." (R. 1670, ¶ 3).

The Court went on to enforce the mystical "right to exclude" claimed by GRCC to

exclude Thayn from any hydro- electric power sale whatsoever without the express consent of GRCC. (*Id* at para. 5.)

This was done without joining the State Engineer as a defendant as provided for in U.C.A. § 73-3-14. In essence GRCC has obtained a water right through the back door for 80 cfs that it never could lawfully obtain from the State Engineer.

Fourth, that to the extent GRCC has obtained a priority of 80 cfs over and above Thayn, and over and above GRCC's State approved water right the Judgment violates the public policy against waste, and is beyond the jurisdiction of the trial court to grant without joining the State Engineer as a party.⁶

Finally, Thayn attacks the preliminary injunction as a remedy. An injunction cannot be used to violate criminal statutes. Literally, unless Thayn cooperates in GRCC's taking water illegally, Thayn doesn't even get his irrigation water. Until GRCC gets 20 cfs of water over and above its State approved water right, in violation of law, (a misdemeanor for every day of the offense), Thayn gets not one drop of water. Moreover, without any duty limitation by the court, GRCC is granted unfettered and unlimited acre foot priority over Thayn.

Additionally, GRCC argued below that Thayn promised to share in the profits, "as agreed previously" if the hydro-electric plant was constructed. (R.E. 98, minutes of 1/7/92). The only agreement which the parties could have been talking about was the National Hydro

⁶ This argument was not raised below because the Court assured the parties it was not adjudicating water rights, then did.

contract under which GRCC would be entitled to one percent of the gross revenues over and above the first 863,500 KWH (i.e. the irrigation pumping needs of Thayn). Accordingly, GRCC had an adequate remedy at law, *i.e.* suit on that oral promise. GRCC chose not to pursue that, but rather pursued some undefined claim for gross revenues. A party cannot simply ignore its contract remedy for damages as a basis to say it has no adequate remedy at law.

Accordingly, the judgment of the trial court should be reversed as void against public policy. Alternatively, the matter should be reversed and rewarded to ascertain the damages against Thayn under the “oral promise to share revenues as previously agreed” and the injunctive relief denied.

IV. THE COURT ERRED IN DENYING THAYN FROM HIS STATUTORY RIGHTS UNDER U.C.A. § 73-1-6 AND 7 IN SO FAR AS BOTH VOLUME AND POWER GENERATION FOR SALE IS CONCERNED.

The Court below held Thayn was not entitled to utilize eminent domain inasmuch as the agreements were enforceable. U.C.A. § 73-1-7 entitled “Enlargement for Joint Use of Ditch” provides as follows:

When any person desires to convey water for irrigation or any other beneficial purpose and there is a canal or ditch already constructed that can be used or enlarged to convey the required quantity of water, such person shall have the right to use or enlarge such canal or ditch already constructed, by compensating the owner of the canal or ditch to be used or enlarged for the damage caused by such use or enlargement, and by paying an equitable proportion of the maintenance of the canal or ditch jointly used or enlarged; provided that such enlargement shall be made between the first day of October and the first day of March, or at any other time may be agreed upon with the owner of such canal or ditch. The additional water turned in shall bear its proportion of loss by evaporation and seepage. [Emphasis added]

Further, U.C.A. § 73-1-6 provides a right-a-way across public, private and corporate lands for the construction, maintenance and repair of any such facilities including for industrial and irrigation purposes. The trial court in this case not only prohibited Thayn from its eminent domain rights as provided by statute, but also entered an order against him prohibiting him from having his right of way access to maintain or repair the raceway even in the absence of GRCC's unwillingness to do so. (R. 497-498). Again, the argument of GRCC was its nebulous "right to exclude". Further, GRCC maintained that because there was an agreement with Wilson that Thayn had no statutory right of eminent domain.

Thayn contends this is error in two (2) points. First, the case law cited by GRCC is case law under U.C.A. § 73-1-9 which addresses the issue of how maintenance costs should be apportioned. Case law under that statute holds that where there is an express agreement between the parties U.C.A. § 73-1-9 is inapplicable. See, *e.g. Gunnison-Fayette Canal Co. v Roberts, supra* (and cases cited therein in footnote 1 p. 105). Based upon that line of reasoning, the Court held there was no right of eminent domain applicable to Thayn. (R. 242-244). In *Peterson v Severe Valley Canal Company*, 107 Ut. 45, 151 P.2d 477 (1944) the Court held as follows:

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 the basis for determination of the amount, the contract controls. If, however, the parties cannot agree on the price to be paid for the use, the ditch owner can close the ditch against the other parties water until he gets his price, but the party who desires to use may exercise the right of eminent domain to acquire such use.

Whatever this court interprets the agreement to have been in 1952 between GRCC

and Wilson, and even if this Court interprets that contract is binding on Thayn as successor in interest, nevertheless, a new use has come upon the scene. A use of hydroelectric power by means of modern technology and efficiency in the pumping of the irrigation water. That use extends not just for the irrigation season, but for the entire year. As to the new use, the parties have not agreed. This lawsuit is abundant evidence of that. The injunction and restraining order that the Plaintiff sought shows the parties don't agree. The water right for 600 cfs non-consumptive all year round which was approved by the State Engineer is not the water right specified under the 52 or amendment. The new use carries with it a right of eminent domain. The Court was in error to deny a right of eminent domain for the new use. In its equitable powers, the Court may well have found that the old formula for costs and maintenance, *i.e.* 50% to each party, was no longer equitable. The Court may well have imposed a pro rata share of the costs and maintenance upon Thayn, by reason of the alleged use to which Thayn sought to employ.

To hold, as did the trial court in this case, that a contract for one use forever and ever precludes any future uses, enlarged uses, or changed uses is to narrow the scope of §7 3-1-7 beyond the intent of the plain meaning of the statute. In fact, the statute specifically anticipates "additional water". As to the "additional water" here, there is no agreement and Thayn should have its statutory right of eminent domain. A review of the cases cited by GRCC below shows that the Court therein was attempting to resolve issues wherein the contribution as to ditch maintenance had already been agreed upon, but one or more parties to the contract sought to impose the pro rata formula as opposed to the agreement. Such is

not the case here.

Thayn has a beneficial use for the generation of hydro electricity which was never anticipated under the 52 amendment. It is true that Thayn's predecessor was using power to pump water but same was mechanical power, not hydro electric power. By use of modern and efficient means, Thayn's power needs to pump water have been reduced and excess water energy can be utilized for hydro electric purposes. As to this use, there was no agreement and U.C.A. § 73-1-7 controls.

In interpreting the statute, the Supreme Court should ask itself did the legislature intend for parties who have an existing contract, to be forever precluded from the benefits of modernization and new technology? For example, assume parties have a joint ditch sharing agreement in place. For 60 years water has meandered through an earthen ditch with seepage and evaporation losses to both parties. One party now seeks to enlarge the ditch to accommodate a pipeline to prevent seepage and loss of water for his irrigation water and allow same to be pumped at higher pressure, more regulated volume, and greater efficiency. Under the interpretation placed upon the statute by Judge Bryner below, that party can never do so because there is in place an existing agreement as to how they will share the ditch. Just because parties in the early 1900s entered into agreements and contracts of accommodation with each other to utilize water according to the technology of their day, should modern day successors in interest be forever barred from renovating and industrializing? Should they be trapped in the obsolete technology of third world countries forever? Was that the legislative intent?

Thayn propounds it was not. Rather the statute should be interpreted in terms of common sense reasoning and flexibility to encourage, not prohibit, modernization. This is especially true with respect to something as scarce as water. The more efficiently it is used, the more water there is for everyone. Remember, this is public water, not private water. The State is the steward over that water and any private party's rights to utilize same is conditional. As a matter of good public policy, the Supreme Court should hold that eminent domain lies whenever a new or expanded use of the water, or even a more efficient technological use of the water, is proposed by one party to the contract and the other party to the contract will not agree. Anything less forever imprisons parties whose predecessors in interest may have amicably resolved their joint ditch or canal sharing in the past, and relegates them to only obsolete technology forever and ever⁷. The Supreme Court should reverse the ruling of the trial court and remand the matter for proceedings under the eminent domain statutes. Upon such remand the Court should instruct the trial court as to how to apportion the maintenance costs and for a determination of damages, if any, by the hydro electric use of Thayn.

V. THE TRIAL COURT ERRED IN ASSESSING ATTORNEY'S FEES FOR DENIAL OF THE MOTION FOR PRELIMINARY INJUNCTION WHEREIN GRCC WAS BUILDING AN OBSTRUCTION WALL TO IMPEDE THAYN'S WATER IN THE CANAL DURING THE COURSE OF THIS ACTION, WHICH CONDUCT WAS IN BLATANT VIOLATION OF U.C.A. § 73-1-15.

⁷ Ironically, while GRCC herein argued there can be no enlargement of future uses by Thayn, the 52 agreement itself specifically anticipated increased future use under the cost sharing provisions.

U.C.A. § 73-1-15 provides in relevant part:

Whenever any person, partnership, company or corporation has a right of way of any established type or title for any canal or other water course it shall be unlawful for any person, persons or governmental agencies to place or maintain in place any obstruction, or change of the water flow by fence or otherwise, along or across or in such canal or watercourse.... That the vested rights in established canals and watercourses shall be protected against all encroachments...Any person, partnership, company or corporation violating the provisions of this section is guilty of a misdemeanor and is subject to damages and costs.

When GRCC began building the 40 foot wall extending out from its canal into the raceway and blocking the water flow to Thayn's pump house, Thayn applied for and received a temporary restraining order on March 15, 1999, (R. 540-542). Thereafter a hearing was held on the Motion for Preliminary Injunction, which injunction was denied due to the failure to have an underlying claim in the Thayn's pleadings and because the Court ruled there was no irreparable injury, money damages could be awarded. (R. 621-627). Thereafter the Court awarded attorney's fees of \$7,518.50 and no costs for GRCC's resistance of the preliminary injunction, and \$1,614.00 and \$734.00 in costs on appeal for resisting the application of Thayn for preliminary injunction on appeal on November 27, 2000. (R. 1624-1625).

The conduct of GRCC in attempting to obstruct water flow to Thayn was clearly culpable and in violation of law under the above set forth statute. Nevertheless, no preliminary injunction was issued. U.R.C.P. Rule 65A(c)(2) provides:

The amount of security shall not or establish or limit the amount of costs, including reasonable attorney's fees incurred in connection with the restraining order or preliminary injunction, or damages that may be awarded

to a party who is found to have been wrongfully restrained or enjoined.

In the present case, the attorney's fees were all expended in resisting an application for preliminary injunction, and not for wrongful injunction. (See Affidavit of David Hartvigsen In Support of Application for Attorney's Fees, (R. 733). Although a temporary restraining order was issued, no motion to dissolve the temporary restraining order was made as is provided for under U.R.C.P. 65A(b)(4) and it lapsed of its own accord. Rather the efforts of GRCC were fully devoted to resisting issuance of a preliminary injunction, which efforts were successful. In *Mountain States Tel. & Tel. Co., v Atkin, Wright & Miles, Chtd.*, 681 P.2d 1258 (Ut. 1984) the Utah Supreme Court has held that "if it's found that the injunction was wrongfully issued, the enjoined party has an action for costs and damages as a result of the wrongfully issued injunction". (*id* 1262). Moreover, in *Tholen v Sandy City*, 849 P.2d 592 (Ut. App. 1993), *Tholen Court* held that wrongfully enjoined parties "are only entitled to fees...incurred in defending against wrongfully obtained injunctive relief, and not to fees incurred in litigation in the underlying lawsuit associated with the injunction". (*id* 597). In the present case, no injunction was issued and the attorney's fees, both at the trial court level and at the Supreme Court level, were incurred in attempting to obtain an injunction and not in wrongfully enjoining a party. While attorney's fees directly related to the dissolution of a wrongful injunction are recoverable, *Artistic Hairdressers Inc. v Levy*, 486 P.2d 482, 484 (Nev. 1971)(cited with approval in *Saunders v Sharp*, 793 P.2d 927 Utah App. 1990), there is no Utah appellate case of record showing that one successfully resisting the issuance of an injunction is entitled to his attorney's fees. While the policy and purpose

of Rule 65A may well be to “up the ante” for those obtaining a restraining order or an injunction, neither the Rule nor the case law provide for attorney fees in those situations where an injunction is not obtained. It is elementary that Utah follows the American rule with regard to attorney’s fees, and attorney’s fees are not awarded unless provided for in the contract or by statute. While Rule 65A(c)(2) does refer to attorney’s fees “in connection with” a restraining order or preliminary injunction, said fees may only be awarded, “to a party who is found to have been wrongfully restrained or enjoined”. All of the attorney’s fees and costs incurred and awarded to GRCC were attorney’s fees expended in resisting a preliminary injunction. They were not so enjoined. Accordingly, the award of attorney’s fees and costs should be reversed. The order of the Court below awarding attorney fees to GRCC adds insult to injury where, as here, the conduct sought to be enjoined is itself a criminal action.

VI. THE TRIAL COURT ERRED IN APPLYING THE STANDARDS OF ESTOPPEL, WAIVER AND LATCHES AND IN CONCLUDING THAT GRCC HAD NO DUTY TO PROTEST THAYN’S WATER FILING IF GRCC INTENDED TO RELY ON ITS INTERPRETATION OF THE 52 AMENDMENT.

a: Burden of Proof

Thayn maintains that the Court erred below in applying a clear and convincing evidence standard under estoppel. This is a question of first impression to the Supreme Court. GRCC argued below that a majority of courts have applied a clear and convincing evidence standard to estoppel. A review of the cases cited by GRCC does not show that a majority of the jurisdictions have so ruled. While there are a number of courts that do in fact

apply the clear and convincing evidence standard to estoppel, Utah has never so ruled. When faced with the issue on waiver, the Court in *Soter's Inc. v Desert Fed. Sav. & Loan Ass'n*, 857 P.2d 935 declined to impose a clear and convincing evidence standard on the issue of waiver. Thayn maintains as a matter of law there is no just reason for imposing a higher burden of proof on estoppel than any other equitable defense, or equitable action. What policy is served by affording an equitable right, such as an injunction by a preponderance of the evidence, and then imposing on an equitable defense, such as estoppel, a higher burden of proof? It is true that fraud has historically required clear and convincing evidence due to the nature of the action requiring a misrepresentation. Estoppel, on the other hand, is only a defense and is imparted in those actions where, in justified reliance on a party's word, conduct or inaction, a person changes his position to his detriment. Estoppel is there to prevent a wrongdoer from obtaining an unjust benefit by virtue of his own conduct. It is not similar to fraud where one seek to recover damages or undo a transaction already complete. This Court should hold the burden of proof is preponderance of the evidence standard and not the clear and convincing evidence standard.

(b) The trial court's conclusions are non-sequitur to its findings. In its findings of fact and conclusions of law the Court held that the standard of proof in an estoppel case is clear and convincing evidence (R. 1665 ¶ 23). The Court further held that "because Mr. Thayn did not inform an intent to proceed with the commercial hydro electric project until July of 1990, the conduct of the parties prior to that date is irrelevant to the issue of estoppel". (*id.* ¶ 24). Such conclusion is non-sequitur from the findings. It is precisely because the canal

company did not protest the water filing of Wilson, under which the State Engineer determined Wilson was utilizing 600 cfs and not the previously applied for 400 cfs and the subsequent water filing in 1981 by Wilson to change the 600 cfs approved water right to a year round water right that induced Thayn to even consider the possibility of hydro electric generation. Unquestionably, by the time of the National Hydro project, the issue of Thayn and Wilson's prior claimed use of the water had been brought to the forefront of the canal company. The water rights already established were part and parcel of the contract regarding the proposed National Hydro project *i.e.* the pumping needs of Thayn to which the National Hydro contract purported to exclude any royalty payment for. The canal companies utter silence and non-protest of the water rights would induce any reasonable person to believe that there was no issue with regard to the 600 cfs. Mr. Thayn would not proceed to invest \$300,000 into a hydro electric plant if there were an issue as to his use of the 600 cfs. For the Court to rule that any conduct prior to Thayn's forming an intent to invest the money into the hydro electric plant was irrelevant is simply absurd and illogical. Parties do not make a decision in a vacuum. It was the perfected water rights upon which Thayn believed there was no issue and no question that he sought to make use of.

Moreover, the Court ruled that Mr. Thayn's pre-1992 actual water use did not impart any notice to the canal company that Thayn intended to divert more than 435 cfs through the raceway in contravention of the 1952 agreements. (R. 1666 ¶ 30). In actual fact, it is the canal company's egregious violation of 73-5-4 by not installing any measuring devices which, even if you take the facts in the light most favorable to the Plaintiff, results in its lack

of knowledge of the amount of water being used. However, as of the publication of notice to water users in 1982 (R. 53), the canal company is charged with notice by virtue of the posting of the water right application. Said notice specifies that the 600 second feet of water would be diverted as set forth in the application through the raceway. Ten (10) years follow and still no objection to Thayn regarding utilizing 600 cfs in the raceway. These conclusions are error as a matter of law. They simply do not follow from the facts as found by the Court.

In paragraph 28 of its conclusions, the Court finds that the minutes of the canal company do not evidence any awareness by the canal company that Thayn intended to use the 600 cfs for commercial power generation. First, how he used the cfs was really none of the canal companies business. It is the quantity, not the particular use, to which the canal company may have any objection. Whether he intends to use his water for irrigation pumping or commercial power generation is irrelevant, or should be, to the canal company. Of course, if the canal companies real motivations are to attempt to extort profits from a joint ditch user, they might well be concerned as to how valuable the use of the water is. If the canal company is simply concerned about receiving its own water, their only concern should be the amount of water flowing through the diversion facilities. It doesn't take a rocket scientist to know what the true motivations of the canal company are in this case.

For example, the testimony of David Hansen, Thayn's expert witness at the contempt hearing (R. 1901, pp. 145-146), was that there was plenty of water to satisfy all of the parties needs and that the raceway could accommodate the entire 800 cfs without problem. Hansen further noted that there was between 5 and 10 cfs flow being lost through the upper sluice

gates which the canal company had not fixed (R. 1901, pp. 148-150). His testimony was that there was three (3) feet of silt in the bottom of GRCC's canal and an inverted siphon which were restricting its own flow. This is failure of the canal company to maintain its own ditch utilized as an excuse to attempt to extort profits from Thayn.

The Court further found that Mr. Thayn first learned of the 52 amendment in 1992, (after the hydro electric plant was online) when being questioned by the canal company about his commercial hydro electric plant. (R. 1660 ¶ 15).

The Court also concluded that the 1981 newspaper article in the *Sun Advocate* about the hydro electric project was too vague and general in nature to give any notice of any intent to build the present hydroelectric project.

These conclusions simply do not follow from the facts. There is no question that the canal company members, including board members were well aware of, (or are charged with notice by virtue of the water right filing) that Thayn was utilizing 600 cfs. Allowing, even in the best light, 15 years of utter silence, by the canal company and then imposing a duty upon Thayn to discover an unrecorded 52 amendment to the contract which apparently the canal company had in its records and, for no reason whatsoever, never disclosed or discussed with Thayn as a basis to now preclude him is unquestionably a *prima facie* case of estoppel. See and compare *Ceco Corp. v Concrete Specialties Inc.* 772 P.2d 967, 969-970 (Ut. 1989) also *Utah State Building Comm'n v Great American Indemnity Company*, 105 Ut. 11, 140 P.2d 762, 771-72 (1943) (inaction or silence may amount to an estoppel where a party remains silent when there is a legal or moral duty to speak or where there is "something

wilful or culpable in the silence which allows another to place himself in an unfavorable position by the reason thereof”.

At a minimum, the elements of waiver and laches were established, even if you accept the factual findings of the trial court as valid. *Beckstead v Deseret Roofing Co. Inc.*, 831 P.2d 130 (Ut. App. 1992) “waiver is the voluntary and intentional relinquishment of a known right and the failure to adhere to the precise terms of a contract, combined with the absence of notice of a party’s intention to insist on strict compliance, is enough evidence to support a finding of waiver”. *Airoulofski v State* 1992 P.2d 889 (Ala. 1996) “implied waiver occurs when the neglect to insist on a right is such that it would convey a message to a reasonable person that the neglectful party would not in the future pursue the legal right in question”. *Doit Inc. v Touche Ross & Co.*, 926 P.2d 835 (Ut. 1996) “laches is present when a Plaintiff seeking equity unreasonably delays in bringing an action and this delay prejudices the Defendant”. Laches is an equitable doctrine based on the maxim that equity aids the vigilante, not those who slumber on their rights. *Nilson-Newey & Co. v Utah Resources Int’l*, 905 P.2d 312.

VII. THE COURT ERRED GRANTING GRCC’S MOTION FOR PARTIAL SUMMARY JUDGMENT AND IN PRECLUDING EVIDENCE AT TRIAL REGARDING MAINTENANCE ISSUES, WHILE ALLOWING GRCC TO ATTEST IT WAS NOT GETTING ITS WATER.

The Court at trial ruled that because the issue of lack of maintenance was not raised as an affirmative defense prior to the original Summary Judgment ruling, it could not now be raised at trial. (R. 81-85.) Defense Counsel argued both that it was an additional element

of the estoppel theory and direct rebuttal to their claim that Thayn was preventing GRCC from getting its full 80 cfs. (R. 84.) The Court nevertheless denied admission of the evidence as irrelevant to the issue of estoppel. (R. 86.)

However, GRCC was allowed to put on evidence it was not getting its full 80 cfs, (Vetere testimony, R. 1902 v. I, p.220). GRCC's Second Supplemental Complaint alleges it should have declaratory relief because commencing in 1996 GRCC became aware it was not receiving its full 80 cfs of water and Thayn refused to turn off his turbines. (R. 271, para. 42-43.) This was denied by Thayn in Answer and specifically raised GRCC's failure to maintain the raceway and diversion facilities. (R. 258, ¶ 15.) It was further raised by Lee Thayn in his Affidavit in Opposition to GRCC's Motion for Partial Summary Judgment on its eighth and ninth courses of action. Thayn attested that:

They have wholly failed to properly maintain the dam and diversion works as required by the 1952 agreement so that the rate of flow to sustain the needs of both the Plaintiff and the Defendant could be satisfied. Specifically, they have refused despite my repeated requests, to close the gates on the West end of the dam to permit an increase of flow into the raceway. In fact, they have locked them open. . . . More importantly, they have refused, in spite of my urgent requests to clean out the raceway, so more water could reach the power house and the head of Plaintiff's canal. In fact, they have refused my repeated requests that I be permitted to clean out the raceway at my own considerable expense. (R. 465.)

Thayn's position on this issue is simple. Either the trial court erred in granting the Motion for Partial Summary Judgment over the issue of whether GRCC was properly maintaining the facilities, or it erred in not admitting the maintenance issues at trial.

If the Court considered the question of maintenance to be part and parcel of the

estoppel, waiver and latches issues, then the partial summary judgment was proper. In ruling on a Motion for Summary Judgment, the Court may consider only facts that are not in dispute, *Sorenson v Beers*, 585 P.2d 458 (Ut. App. 1978.) Accordingly, Thayn was entitled to proceed with the maintenance issues at trial and it was an abuse of discretion to exclude such testimony.

If the Court in fact believed the maintenance issues had no relevancy to the estoppel, waiver and latches theory, the ruling at trial may be upheld, but the summary judgment was improper.

GRCC cannot have its cake and eat it, too. Thayn was entitled, somewhere, to have his day in Court on the maintenance issues.

The Court should reverse and remand for new trial either on the error of granting partial summary judgment or for excluding evidence of failure to maintain the facilities from the trial.

VIII. THE COURT ERRED IN MAKING FINDINGS OF FACT AGAINST THE CLEAR AND UNDISPUTABLE WEIGHT OF THE EVIDENCE.

The trial court found that the canal company did not intend to relinquish either the quantity of nature of use limitations of the 1952 agreements and that it did not make a distinct relinquishment of the quantity or nature of use limitations. (R. 1661 ¶¶ 21-22). The trial court further found the canal company did not know, nor should have known, that Mr. Thayn was unaware of the 52 agreements prior to August of 1992. (R. 1621 ¶ 23). The trial court further found that Mr. Thayn did not suffer any injury as a lack of diligence on the canal company. (R. *id.* at ¶ 25). The trial court

further found that, although some of the canal company's board members knew that Mr. Thayn was renovating his facilities and the generators were being delivered to the pump house, they were not aware he was going to generate power for sale until spring of 1992 when Thayn began generating commercial power and using more water. (R. 1662, ¶ 27).

Finally, the trial court found that neither Mr. Thayn nor anyone else informed the canal company prior to April of 1992 that Mr. Thayn was going to generate commercial power as a part of the pump house facilities renovation and upgrade project. (*id.* at ¶ 28). Thayn maintains that these conclusions are not supported by the evidence as a matter of law and are clearly erroneous.

In marshaling the evidence, the evidence at trial discloses the following:

At trial Thayn first called Clinton Thompson, GRCC's ditch rider from 1987 to 1989, who testified he observed the construction occurring at the pump house and knew Thayn was putting in electrical generating facilities. (R. 1902, V.I. p. 31). He further testified he had a conversation with Jack Erwin about the raceway that it needed to be cleaned out and growth of shrubs cut back (R. 1902, V. I., p. 34-35). He further noted the dam needed repair. (R. 1902, V. I., p. 35).

Dean King, GRCC board member for 18 years until 1988, attested he wasn't sure if he knew about Wilson's, 1974 application for a 600 cfs water right. (R. 1902, V.I., p.45) but did know Wilson was diverting water year round since 1981. (R. 1902 V.I., p. 45). King attested that he, Tim Vetere, Jack Erwin, Blaine Silliman and Bill Cache were the members of GRCC who negotiated on the National Hydro contract. (R. 1902, V.I., p. 47). The National Hydro contract was to pay GRCC 1% of the gross revenues for 15 years and 2% thereafter, except the first 863,500 KWH representing Thayn's pumping needs. (*id.* at 49).

King was aware GRCC did not protest Wilson's application for 600 cfs in 1974. Further that he didn't have a problem with Wilson's application to increase from 400 to 600 cfs because it was Wilson, Not Thayns. (R. *id.* at 52). He did it for Wilson because he was one of the "good ole boys". (*id.*). GRCC didn't have a problem with Wilson having 600 cfs or they would have objected. (*id.* 55).

King acknowledged he knew from the size of the pump house renovation that it would be used to generate electricity. (R. 1902 V.I., p. 96). King specifically acknowledged Thayn's requesting GRCC clean its canal and the raceway and that GRCC never did it. (R. 1902, V.I., p. 12). King further acknowledged Thayn addressing the 600 cfs non-consumptive going through the pump house back to the river. (*id.* 12).

Thayn presented Kenneth Stillman, Mayor of Green River City and GRCC board member beginning in 1989. He was also vice-president of GRCC from 1991-1993. (R. 1902, V.I., p. 127). He had originally protested Wilson's 1981 600 cfs change filing on behalf of the city, but later withdrew that protest. (*id.* at 130). GRCC did not protest that filing. (*id.*) Further, GRCC had no measuring devices on its property. (*id.* at 131).⁸

Stillman was aware Thayn intended to generate power for sale on a commercial basis (*id.* at 132), that Wilson's old pumping equipment was in disrepair and wasting water, (*id.* at 134), and that the sluice gates were in "tough shape". (*id.* at 136). The raceway had branches and stuff hanging into it. (*id.*). Stillman specifically recalled a 3/14/89 GRCC board meeting discussion of Thayn's proposed hydroelectric plant being discusses. (*id.* at

⁸Measuring devices are required by U.C.A. § 73-5-4.

139). Stillman said that Leon Thayn represented that if power was generated, GRCC would receive a royalty. (*id.* at 141).

Olive Anderson, Green River City Councilwoman and GRCC shareholder attested she knew of Thayn's intent to sell power to U. P. & L, that the city wanted to buy direct, and that it was talked about around town. (R. 1902, V.I., 155-158).

Bernard Lassen, GRCC shareholder, knew of Thayn's plans to sell power, he had no water problems, and attested that anyone who drove up the road by the pump house could see the transformers sitting outside the pump house prior to their installation in 1990. (R. 1902, V.I., p. 162-171).

Odell Anderson, local resident, attested it was common knowledge Thayn was going to pump water and generate electricity before, during and after the project was being built. (R. 1902, V.I., pp. 182-193). This was confirmed by Robert Seely, GRCC shareholder. (*id.* 200-203).

Tim Vetere, current board member, was called. Vetere was elected to GRCC's board in 1991 and claimed that since 1992 there had been numerous problems getting water, that the amount of the water would fluctuate. (R. *id.* at 220). Vetere acknowledged that he had gone to the pump house in 1989 and talked with Leon Thayn who told him they were putting generators in to generate power. (*id.* at 223). Vetere was vice-president of GRCC at that time and was aware Thayn was going to sell power. (*id.* at 224). His understanding was that there was an agreement with the canal company regarding the generation of power for sale. (*id.* at 228).

Leon Thayn was called and testified that he was originally a partner with Lee when they bought the Wilson farm. (R. 1902, V.2, p. 11). He and Lee obtained copies of the water filings and verified the water rights prior to purchase. (*id.* at 12-13). The records were very clear and documented as 600 cfs non-consumptive use for power and 35 cfs consumptive use for irrigation. (*id.* p. 15). They relied on the water right in order to purchase the property. (*id.* at 16). The condition of the equipment was very poor. (*id.* at 16-19). The pumping equipment was in such disrepair that they had to run both turbines of water continuously during the irrigation season in order to pump water. (*id.* at 33). He and Lee determined it would have to be rebuilt (*id.* at 39-40).

Leon was contacted by National Hydro who recommended it as a site for power generation and was working with the canal company at the time. (*id.* at 49). He became aware of the 52 agreement when he saw the application presented to the Federal Energy Regulatory Commission by National Hydro. (*id.* at 50). He first learned of the 52 amendment in a meeting with GRCC in 1992. (*id.*). They signed an agreement with U. P. & L. in late 1990 or early 1991 and began delivering power on April 2, 1992. (*id.* at 51). They took out a loan to finance the project with a credit limit of \$250,000, Thayn ranch and Rick Kaster both signed on the loan, with the equipment itself as security for the loan. (*id.*) Thayn also pledged some of the farm equipment as additional security. (*id.*)

It was no secret they intended to generate electricity, in fact, there was an article in the Sun Advocate about a local farmer wanting to develop a power project. (*id.* at 52). There was no copy of the 52 amendment included in the National Hydro FERC application. (*id.* at

55). National Hydro proposed a 5,000 cfs water consumptive right including the 600 of Thayns. (*id.*) Leon was present when the National Hydro contract was executed, and a copy was given to the canal company. (*id.* at 57). GRCC never objected to the fact that Thayns were reserving 600 cfs out of the royalty proceeds for their pumping; there was never an objection to it prior to 1992. (*id.* at 58).

Thayns relied upon the 600 cfs power right in order to go forward with the generation project. (*id.* at 60). The whole purpose was to produce enough power to pay to pay for the improvements and expenses necessary to do the repairs. (*id.*) National Hydro decided not to go forward because Fish and Wildlife would not approve the project. (*id.* at 61). Thayns decided to go forward with some of the project, and a study was done to see if the smaller scale project could be accommodated by Fish and Wildlife. (*id.* at 64-66). Thayns would have to flush the raceway channel out at least twice a month by closing the gates to their turbines and opening the radial gates, taking about 8 hours to flush the sand and silt out of the channel. (*id.* at 68). Leon even offered to clean the raceway out at his own expense but was not allowed to. (*id.* at 78). He attended a June 24, 1992 board meeting and told the board they had a 600 cfs for non-consumptive use. No objection was raised by the board at that time. (*id.* at 80).

On August 4, 1992, they had another meeting wherein GRCC said it only recognized 435 not 600; Thayn learned of the 52 amendment at that time. (*id.* at 82-83). The list of expenses and costs to do the co-generation project totaled some \$355,000. (*id.* at 101). Leon denied ever telling Vetere or Mr. King that the power would only be for pumping. (R. 1902,

V.III., pp. 5-6). There were visitors to the site including tours from SCS and CED in 1990. They had met with GRCC on January 15, 1982 and March 13, 1982 as well as September 29, 1982 after taking over operation on the Wilson farm. (*id.* at 56). Those meetings were for the purpose of the National Hydro project which proposed some 4,100 cfs in addition to Thayn's 600 cfs. (*id.* at 63). The original raceway was designed to carry 1,000 cubic feet per second. (*id.* at 64). He didn't know if the canal company was ever given written notice, but that they did receive verbal notice that the National Hydro project did not go through and that Thayns intended to do the current project. (*id.* at 65-66). In 1989 they received approval from FERC to allow them to do the co-generation project. (*id.* at 76). At that time they still were concerned about funding the project. (*id.* at 83).

The new project started around the summer of 1990 when they bought the first equipment and decided to do the project one stage at a time so as to not interrupt the irrigation water for farming to Thayn's ranch. (*id.* at 90-98). They hired Rick Kaster to work on the improvements of the building in 1989. (*id.* at 125). Leon is a 25% owner in the power plant itself, along with Mr. Kaster and Lee. (*id.* at 132). In 1990 they found some used equipment which would meet the needs of their plant and obtained financing to proceed. (*id.* at 143).

Rick Kaster testified that he did the actual reconstruction and power plant building work. (*id.* at 176-180). He understood Thayns had a 600 non-consumptive use which was a factor in his interest in doing the project. (*id.* at 182). He signed on the loan at Zions with Lee and Leon. (R. 1902, V. IV, p. 6). There were a lot of visitors from 1990-1992 and no

one was ever denied the opportunity to go through the plant if they wanted to. (*id.* at 9). Rick owns 50% of the surplus energy over and above that required for Lee's pumping of irrigation. (*id.* at 30). He would not have gone forward with the project if there had been any doubt about the 600 cfs that they had. (*id.* at 82). He had met with the canal company and had never turned down a request to meet with them. (*id.*).

Lee and Leon dissolved their partnership in the farm in 1993 due to Leon's retirement. (*id.* at 98). All three (3) were still partners in the co-generation project. (*id.*). Rick had told Blaine Stillman, Bruce Nelson and Gary Eckhert that they were going to generate power for sale. (*id.* at 122).

Leon Thayn was again re-examined regarding the meeting of 3/14/89 with GRCC wherein he said GRCC would be sharing power as previously agreed. The only agreement he was aware of was the National Hydro contract. (R. 1902, V. V., pp. 33-34).

GRCC then called John Vetere who attested he was the president of the canal company in 1981 and he had never been told about the change application of Wilson to year round use. (*id.* at 95). He attested the water shortage problems began in 1962. (*id.* at 100). Every year since 1992 there had been a shortage of water. (*id.* at 101). He learned of the power project in about 1991 or 1992. (*id.* at 108). Robert Quist, shareholder of GRCC, was called and attested he learned that Thayns were generating power for sale in 1992 and had no knowledge of the present project before then. (*id.* at 135). He acknowledged that Thayns appeared at board meetings when they were asked to and answered questions when they were asked. (*id.* at 137).

Edward Hansen was called, who was on the board of directors of GRCC from 1990 to 1995. (*id.* at 149). He testified that he was expecting Thayns to pay a royalty on the power generation. (*id.* at 154).

Glen Baxter was called and testified that he first learned of the electrical power for sale being done by Thayns in 1992. (*id.* at 178).

Judy Scott, secretary/treasurer of GRCC since 1985, attested that she wasn't aware Thayns were building a hydro electric plant from 1985 to 1991. Jack Erwin, GRCC board member from 1980 to 1983, 1988 to 1990, and 1993 to current attested that GRCC took no action against Thayns to stop refurbishing of the pump house. (R. 1902, V., VI, p.48). He attested Leon Thayn said he wasn't going to sell power in 1990. (*id.* at 50). He further attested that they had problems since 1992. (*id.* at 54).

Tim Vetere was recalled and attested that in 1992 the board made a decision that they would talk to the Thayns about sharing the revenues the way that they had promised back in 1985 (National Hydro). (*id.* at 89). He was not aware of any other promises made by Thayns to GRCC except the National Hydro project. (*id.* at 94-97).

At trial Thayn also introduced Exhibit 49 which was the environmental assessment impact statement prepared by Ron Hagan, GRCC shareholder and was almost elected board member in the January 18, 1990 annual stockholder's meeting. (R. Ex. 99, 1/09/90 minutes). This environmental study was sent to Leon Thayn after doing an impact study of the proposed co-generation project and provided specifically, with respect to the canal company, "The Green River Canal Company & local farmers and area residents are in favor of this

project. Not aware of anyone opposed to this project”. (R. Ex. 49, p. 3){emphasis added}.

Thayn also admitted Exhibit 48 which was the 1982 protest to the application to increase Thayn’s water right by an additional 4,100 for the National Hydro project. GRCC specifically protested that. That protest was in response to an application that specified that Thayn had already received a 600 year round use right from the State Engineer.

How can the Court rule that GRCC had no knowledge that Thayn was asserting a 600 non-consumptive use right when it, in fact, protested an application which, by its very terms, declared such right of record? Thayn also submitted the minutes of GRCC which showed that on January 8,m 1985 the minutes of GRCC reflect that Leon Thayn explained about his new deal, he said he would mount a new agreement with the canal company that would eliminate the National Hydro. (Ex. 99, 1/8/85 minutes). The March 14, 1989 minutes of GRCC reflect that “Jack Erwin asked if they were going to put power in there. Leon said the building was being put in with that capacity. If something developed, the canal company would share in power as previously agreed”. (R. Ex. 99, 3/14/89 minutes). And finally, the minutes of January 7, 1992 state:

Gene Dunham asked about the raceway and status with Thayns on power plant. Some discussion by stockholders who were there when commitments were made as to canal co.s’ status. Need to review previous agreement and update if needed. Judy referred to minutes for the 3/14/89 meeting when Leon Thayn was present. Gene Dunham and Clell Duncan said they had discussed this with Leon at a Soil Conservation meeting recently and he indicated the first couple of years would be very costly but the 3 to 5 year period should have some revenue. Indicated that 1 ½ cents is what UP&L will pay.” (Ex. 98 1/7/92 minutes)

To find that GRCC was in the dark about the plans of the Thayns to build a power

plant based upon its own minutes, the testimony of its own board of directors, and the evidence as set forth above is preposterous and disingenuous. It's clear that GRCC knowingly allowed Wilson to increase his water right to 600 cfs year round because he was "a good ole boy".

GRCC had, in opposition to this evidence, the testimony of Tim Vetere and the testimony of the secretary/treasurer, all of whom took their respective offices in approximately 1991 or thereafter, who say they did not know of the intention of Thayn to go forward with hydro electric power until after the plant was online in 1992. However, that testimony cannot be reconciled with those who were in the position of power at GRCC at the time, in question, *i.e.* after the National Hydro project up until the construction began.

Accordingly, this Court should find that the Findings of Fact set forth above are not sustainable by the evidence and, in fact, are contrary to it. *See e.g. Keith MacKay and State Stone, Inc v Roy E. Hardy and Rex L. Jackson*, 973 P.2d 941 (Ut. 1998) (proper remedy for a mistake in the Findings of Fact is to appeal and challenge the findings under the clearly erroneous standard.

For the foregoing reasons the matter should be reversed and the Court should direct the lower court to enter findings in accordance with the overwhelming weight of the evidence and afford Defendant Thayn its defense under all three (3) theories, *i.e.* estoppel, waiver, and laches.

CONCLUSION

For the foregoing reasons the judgment of the lower court should be reversed under

issue numbers I, II, III, IV, V, and VI. In the alternative, judgment should be reversed and remanded for further proceedings under VII, and VIII. Thayn should be awarded his costs and attorney's fees on appeal.

DATED this 2 day of November, 2001.


STEVEN A. WUTHRICH

CERTIFICATE OF MAILING

I certify that on the 2 day of November, 2001 I mailed a true and correct copy of the foregoing Appellant Brief to the following:

J. Craig Smith
Nielsen & Senior
60 East South Temple, Suite 1100
Salt Lake City, Utah 84111

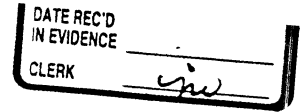
Attorney for Plaintiff/Appellee



APPENDIX OF THE APPELLANT

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Tab A



A G R E E M E N T

This agreement made and entered into this 30 day of September, 1952, by and between the GREEN RIVER CANAL COMPANY, a Utah Corporation, 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 parties hereto made and entered into an agreement under date of April 5, 1952, the purpose and intent of which agreement was to fix and determine the respective parties' rights and obligations with respect to a certain dam and diverting works jointly used by the said parties, and situated on the Green River, in Emery County, Utah; and

WHEREAS, there has arisen some question as to the intent and meaning of the paragraph numbered 6 of said agreement; and

WHEREAS, it is the mutual desire of the parties hereto to dispel any doubt as to what was intended by said paragraph 6, and to settle the meaning thereof, beyond question;

NOW, THEREFORE, in consideration of the premises and of the mutual covenants and agreements set forth in said original agreement and by way of supplement to said original agreement, it is hereby mutually understood and agreed as follows:

1. That the meaning of paragraph 6 of said original agreement was intended to be that the first party should have a priority of diversion, and should be entitled to take whatever water should be needed by the said first party or its stockholders before the second party should be entitled to divert any water through or over the dam and diversion works; and that the quantity of water needed should be exclusively determined by the said first

party. However, it was and is also mutually understood and agreed that the first party claims for the uses of its stockholders 80 second feet of water as particularly set forth in that certain diligence claim No. 46 on file and of record in the office of the State Engineer of the State of Utah and that after said rights are satisfied through diversion at said dam and diverting works that the water rights of the second party as set forth in its water filing about to be issued by said State Engineer for 35 second feet of water for irrigation uses upon approximately 1325 acres of land, as well as its filings for power purposes to pump said water in not to exceed 400 second feet or such lesser amount as may be approved by the State Engineer of the State of Utah shall then be satisfied through diversions at said dam and diverting works before any other or additional diversions are made, by the first party.

2. That this agreement, when executed by the respective parties hereto, shall be attached to and become a part of the original agreement more specifically described above.

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

FIRST PARTY:

GREEN RIVER CANAL COMPANY,
a corporation

By *Debert F. Johnson*
Its President

ATTEST:

O.K. Anderson
Its Secretary

SECOND PARTIES:

WILSON PRODUCE COMPANY, a co-partnership

S. M. Wilson
S. M. WILSON

M. J. Wilson
M. J. WILSON

Francis M. Wilson
FRANCIS M. WILSON

Stewart B. Wilson
STEWART B. WILSON

Lorin H. Wilson
LORIN H. WILSON
Co-Partners

STATE OF UTAH)
: ss
COUNTY OF EMERY)

On this 30 day of September, 1952, personally appeared before me 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:

Aug 4 1954

J. N. Jensen
Notary Public

Residence:

Price, Utah

STATE OF UTAH)
: ss
COUNTY OF EMERY)

On this 30 day of September, 1952, personally appeared before me 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:

Green River, Utah

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

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°52' east 285 feet; thence north 0°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° 00' east 69 feet; thence north 6° 00' east 220 feet; thence north 87° 00' west 55 feet; thence south 13° 00' east 90 feet; thence south 7° 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 D. E. L. L. L. L. L.
It's President

SECOND PARTY:

WILSON PRODUCE COMPANY, a
co-partnership

S. 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 14, 1954

O. K. Anderson
Notary Public

Residing at Green River, 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:

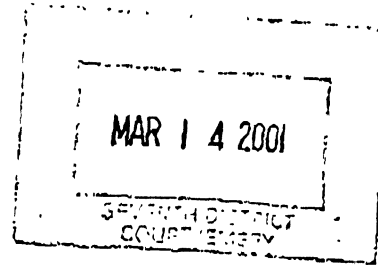
July 11-1955

O. K. Anderson
Notary Public

Residence: Green River, Utah

Tab C

J. Craig Smith (4143)
David B. Hartvigsen (5390)
NIELSEN & SENIOR, P.C.
60 East South Temple, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 532-1900
Facsimile: (801) 532-1913



Attorneys for Plaintiff Green River Canal Company

IN THE SEVENTH JUDICIAL DISTRICT COURT

IN AND FOR EMERY COUNTY, STATE OF UTAH

GREEN RIVER CANAL COMPANY,	:	JUDGMENT ON THE FIRST, FOURTH,
a Utah Mutual Water Company,	:	EIGHTH AND NINTH CAUSES OF
	:	ACTION, AND ON THE AFFIRMATIVE
Plaintiff,	:	DEFENSES OF ESTOPPEL, WAIVER,
	:	AND LACHES
v.	:	
	:	
LEE THAYN,	:	Civil No. 95-070-6174
	:	
Defendant,	:	Judge Bryce K. Bryner

The above-captioned matter came before this Court in a 10-day non-jury trial beginning on May 18, 1999 and ending on June 22, 1999. Plaintiff Green River Canal Company ("Canal Company") was represented by J. Craig Smith, David B. Hartvigsen, and Daniel J. McDonald of Nielsen & Senior and Defendant Lee Thayn ("Mr. Thayn") was represented by Reed L. Martineau and Rex E. Madsen of Snow, Christensen & Martineau. The Court, having reviewed and considered the all of the relevant evidence and law with respect to the Canal Company's First, Fourth, Eighth, and Ninth Causes of Action as set forth in its Second Supplemental Complaint, as well as the claims of estoppel, waiver, and laches raised by Mr. Thayn as defenses to those claims, having considered

the arguments and memoranda of the parties and the prior rulings of the Court, having entered its findings of fact and conclusions of law on these claims, and otherwise being fully advised in the premises;

HEREBY ORDERS, ADJUDGES and DECREES as follows:

1. The Court's Order on Plaintiff's and Defendant's Motions for Summary Judgment and on Defendant's Motion to Strike dated September 9, 1997 and filed on September 10, 1997 is incorporated herein by this reference.

2. The Canal Company owns the water diversion facilities on the Green River north of the City of Green River, e.g., the dam, raceway, and control gates at the head of the raceway on the property owned by the Canal Company.

3. The Canal Company has the right to use the first 80 cfs diverted through the Canal Company's diversion facilities during the irrigation season (March 15 to November 1) and the first 20 cfs during the non-irrigation season (November 2 to March 14).

4. Mr. Thayn has the right to use the next 35 cfs for irrigation purposes during the irrigation season and up to 400 cfs during the irrigation season to pump the irrigation water up to Mr. Thayn's canal.

5. Mr. Thayn is permanently enjoined from using the Canal Company's diversion facilities to divert water for any other purposes other than for irrigation and for generating power to pump said irrigation water up to Mr. Thayn's canal, unless and until he obtains that Canal Company's express written consent and agreement to the use of its diversion facilities for such purposes.

6. Mr. Thayn is permanently enjoined from using the Canal Company's diversion facilities to divert any more than 35 cfs of for irrigation purposes and up to 400 cfs of water for generating power to pump said irrigation water up to Mr. Thayn's canal, unless and until he obtains that Canal Company's express written consent and agreement to the use of its diversion facilities for such additional quantities.

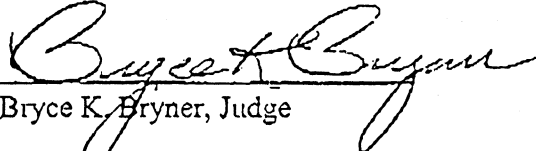
7. Mr. Thayn is further enjoined permanently from diverting any water for any purposes until the Canal Company has received its full entitlement to 80 cfs of water during the irrigation season and 20 cfs of water during the non-irrigation season.

8. Mr. Thayn is ordered to pay \$7,518.50 in attorney fees incurred by the Canal Company in defending against Mr. Thayn's efforts to obtain a temporary restraining order and a preliminary injunction, plus \$1,614.00 in attorney fees and \$734.00 in costs incurred by the Canal Company in defending against Mr. Thayn's efforts to appeal the Court's ruling on said temporary restraining order and preliminary injunction, for a total of \$9,866.50.

9. Mr. Thayn is ordered to pay all taxable costs associated with the Canal Company's Causes of Action, other than the Fifth, Sixth, and Seventh Causes of Action which dealt with the trespass portion of the case.

DATED this 14th day of March, 2001.

BY THE COURT:


Bryce K. Bryner, Judge

Approved as to Form:

Reed L. Martineau
Rex E. Madsen
Counsel for Mr. Thayn

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of _____, 2001, a true and correct copy of the foregoing JUDGMENT ON THE FIRST, FOURTH, EIGHTH AND NINTH CAUSES OF ACTION, AND ON THE AFFIRMATIVE DEFENSES OF ESTOPPEL, WAIVER, AND LACHES was mailed, first-class, postage prepaid to the following:

Reed L. Martineau, Esq.
Rex E. Madsen, Esq.
Snow, Christensen & Martineau
10 Exchange Place, #1100
P. O. Box 45000
Salt Lake City, Utah 84111


CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 950706174 by the method and on the date specified.

METHOD NAME

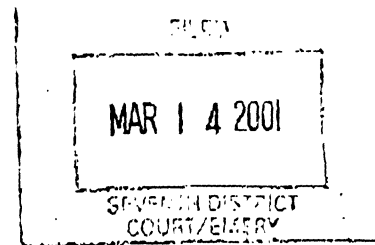
Mail	REED L. MARTINEAU ATTORNEY 10 EXCHANGE PLACE, 11TH FLOOR P.O. BOX 45000 SALT LAKE CITY, UT 84145
Mail	J CRAIG SMITH ATTORNEY 60 E. SOUTH TEMPLE; BOX 11808 SUITE 1100, EAGLE GATE PLAZA SALT LAKE CITY UT 841111004

Dated this 14th day of March, 2001.


Deputy Court Clerk

Tab D

J. Craig Smith (4143)
David B. Hartvigsen (5390)
NIELSEN & SENIOR, P.C.
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Salt Lake City, Utah 84111
Telephone: (801) 532-1900
Facsimile: (801) 532-1913



Attorneys for Plaintiff Green River Canal Company

IN THE SEVENTH JUDICIAL DISTRICT COURT

IN AND FOR EMERY COUNTY, STATE OF UTAH

GREEN RIVER CANAL COMPANY,
a Utah Mutual Water Company,

Plaintiff,

v.

LEE THAYN,

Defendant,

:
:
: **FINDINGS OF FACT AND**
: **CONCLUSIONS OF LAW REGARDING**
: **ESTOPPEL, WAIVER, AND LACHES**
:

:
:
: Civil No. 95-070-6174
:

:
:
: Judge Bryce K. Bryner
:

The above-captioned matter was tried before the Seventh District Court, the Honorable Bryce K. Bryner presiding, in a 10-day non-jury trial beginning on May 18, 1999 and ending on June 22, 1999. Plaintiff Green River Canal Company ("Canal Company") was represented by J. Craig Smith, David B. Hartvigsen, and Daniel J. McDonald of Nielsen & Senior and Defendant Lee Thayne ("Mr. Thayne") was represented by Reed L. Martineau and Rex E. Madsen of Snow, Christensen & Martineau. Having reviewed and considered the relevant evidence and law with respect to the claims of estoppel, waiver, and laches raised by Mr. Thayne as defenses to the enforcement of the terms of 1952 Agreement and Amendment and having considered the arguments and memoranda of the parties, the Court enters its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

(General)

1. The Canal Company owns certain water diversion facilities on the Green River north of the City of Green River, e.g., a dam, raceway, and control gates at the head of the raceway utilized by the Canal Company and Mr. Thayn.

2. The Canal Company has a diligence water right with an 1880 priority for 80 cfs during the irrigation season and 20 cfs during the non-irrigation season to be diverted through said diversion facilities.

3. In 1933, Mr. Thayn's predecessor, Wilson Produce, filed an application for 35 cfs of water for irrigation purposes, also to be diverted through said diversion facilities.

4. The Canal Company and Wilson Produce, entered into an agreement and an amendment thereto in 1952 ("1952 Agreements") which set forth the rights and obligations of the two parties with respect to Wilson Produce's use of the Canal Company's diversion facilities.

5. In 1974, Wilson Produce filed an application with the State Engineer to allow for the diversion of 600 cfs for "power to pump" purposes during the irrigation season.

6. In 1981, Mr. Thayn, as successor to Wilson Produce, filed a change application with the State Engineer seeking to change the period of use of that 600 cfs to year-round. The application did not seek to change the nature of use of the water.

7. The Canal Company did not protest either application and both were approved by the State Engineer of Utah.

8. In a 1983 agreement between the parties as part of the proposed "National Hydro Project" that later failed, Mr. Thayn acknowledged that the total capacity of the raceway at that time was 600 cfs.

9. The Canal Company has the right to the first 80 cfs in the raceway and Mr. Thayn has the right to 35 cfs for irrigation, thus leaving a maximum of only 485 cfs in the raceway for other purposes, such as pumping, as opposed to 600 cfs.

10. In about 1987 or 1988, Mr. Thayn began renovating and updating his pump house, which is at the end of the Canal Company's raceway.

11. In July of 1990, Mr. Thayn first formed an intent to proceed with hydro-electric power generation for commercial sale.

12. Mr. Thayn began generating hydro-electric power for commercial sale in April of 1992.

13. Immediately after Mr. Thayn began generating hydro-electric power for commercial sale, Mr. Thayn's diversion rates increased and the Canal Company began experiencing problems in obtaining a constant flow of 80 cfs.

14. Mr. Thayn first asserted his claim to a right to use the Canal Company's diversion facilities to divert 600 cfs for commercial power generation at a board meeting of the Canal Company on June 24, 1992, at which time an objection to that claim was immediately voiced by the Canal Company.

15. Mr. Thayn first learned of the 1952 Amendment in August of 1992 when he was being questioned in a Canal Company Board Meeting about his commercial hydro-electric project and the water diversion problems.

16. Between 1992 and 1995 when this action was filed, the Canal Company initiated ongoing discussions regarding these problems with Mr. Thayn.

17. Mr. Thayn's water diversion rates were measured at 638 cfs in February of 1993 as shown in Mr. Thayn's 1997 Proof of Diversion filed with the State Engineer on the 600 cfs water right.

18. Recent measurements have shown that Mr. Thayn was diverting as much as 750 cfs on May 5, 1999.

19. Prior to the 1993 flow measurement, neither party knew how much water Mr. Thayn was diverting.

20. Mr. Thayn never notified the Canal Company of his intent to generate electrical power for commercial sale.

(Waiver)

21. The Canal Company did not intend to relinquish either the quantity or nature of use limitations in the 1952 Agreements.

22. The Canal Company did not make a distinct relinquishment of the quantity or nature of use limitations.

23. The Canal Company did not know, nor should have known, that Mr. Thayn was unaware of the 1952 Agreements prior to August of 1992.

(Laches)

24. There was no lack of diligence on the part of the Canal Company.

25. Mr. Thayn did not suffer an injury as the result of any lack of diligence on the part of the Canal Company.

(Estoppel)

26. Leon Thayn told certain board members of the Canal Company that the pump house facilities were in need of refurbishing and upgrading.

27. Although some of the Canal Company's board members knew that Mr. Thayn was renovating his facilities and that generators were being delivered to the pump house, they were not aware that he was going to generate power for sale until the spring of 1992 when Mr. Thayn began generating commercial power and using more water.

28. Neither Mr. Thayn nor anyone else informed the Canal Company prior to April of 1992 that Mr. Thayn was going to generate commercial power as part of the pump house facilities renovation and upgrade project.

29. Mr. Thayn never gave notice of any intent to divert more than 435 cfs through the raceway in contravention of the 1952 Agreements.

30. Mr. Thayn had no measurements showing that he or any of his predecessors had ever diverted more than a total of 435 cfs prior to April of 1992 when he began generating power for commercial sale.

31. The Canal Company never acted inconsistently with respect to its contract rights under the 1952 Agreements, specifically including the quantity and nature of use limitations contained therein.

32. Any injuries to Mr. Thayn were of his own making, were not caused by any action or inaction on the part of the Canal Company, and were prior to the time when the Canal Company learned of Mr. Thayn's intentions and claim to a right to divert 600 cfs through the Canal Company's facilities.

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CONCLUSIONS OF LAW

(General)

1. Mr. Thayn is the successor to Wilson Produce with respect to the 1952 Agreements.
2. Leon Thayn and Rick Kaster are Mr. Thayn's agents and representatives with respect to his dealings with the Canal Company.
3. The 1952 Agreements govern the relationship between the Canal Company and Mr. Thayn concerning the use of the Canal Company's diversion facilities.
4. The 1952 Agreements allow Mr. Thayn to use the Canal Company's diversion facilities. Among other things, it establishes that the Canal Company has the right to the first 80 cfs of water diverted through the facilities and limits the quantity of water Mr. Thayn may divert through the facilities thereafter to a maximum of 435 cfs. It also limits the nature of use for which such water may be diverted, i.e., up to 35 cfs may be used for irrigation purposes and up to 400 cfs may be used to pump the irrigation water up to Mr. Thayn's own canal.
5. Mr. Thayn is contractually prohibited from diverting water through the Canal Company's diversion facilities for any other purposes, or in any amounts beyond those specified in the preceding paragraph.
6. Mr. Thayn has breached the 1952 Agreements by diverting more water than allowed thereunder.
7. Mr. Thayn has breached the 1952 Agreements by diverting and using water for purposes other than those allowed thereunder.

(Waiver)

8. The applicable burden of proof that Mr. Thayn must meet in order to establish his waiver defense is a *preponderance of the evidence*.

9. The Canal Company did not expressly waive its rights to enforce either the quantity or nature of use limitations contained in the 1952 Agreements.

10. The Canal Company was under no legal duty to inform Mr. Thayn of the existence of the 1952 Agreements.

11. Mr. Thayn bears the burden of discovering any encumbrances or limitations upon the property and water rights he purchased from Wilson Produce.

12. The 1974 water right application and the 1981 change application did not impose any affirmative duty upon the Canal Company to act.

13. The approval of said applications by the State Engineer did not grant Mr. Thayn any right to exceed the limitations in the 1952 Agreements.

14. Despite the approval of said applications, Mr. Thayn still needed to obtain permission from the Canal Company before he could change or expand the quantity or nature of use limitations in the 1952 Agreements.

15. The approval of said applications did not affect the rights of the Canal Company concerning the control and use of its own property, i.e., the diversion facilities and raceway. Therefore, the Canal Company had no legal duty to act or protest said applications or approvals.

16. Mr. Thayn has failed to meet his burden of proof by a preponderance of the evidence as to any of the following mandatory elements for his waiver defense: (1) a relinquishment of these contractual rights and limitations; (2) that was clearly intended; and (3) distinctly made.

17. The Canal Company did not waive any of its rights under the 1952 Agreements and is therefore entitled to enforce the terms thereof as previously determined in the Court's Orders dated September 9, 1997 and March 13, 1999.

(Laches)

18. The applicable burden of proof that Mr. Thayn must meet in order to establish his laches defense is a *preponderance of the evidence*.

19. Because the Canal Company had no duty to act as set forth above, there can be no lack of diligence by the Canal Company in taking any required actions.

20. Because there was no lack of diligence by the Canal Company, there can be no injury to Mr. Thayn attributable to a lack of diligence.

21. Mr. Thayn has failed to meet his burden of proof by a preponderance of the evidence as to either of the mandatory elements for his laches defense, i.e, a lack of diligence by the Canal Company or an injury to Mr. Thayn that was caused by such a lack of diligence.

22. The defense of laches is not applicable in this matter and therefore the Canal Company is entitled to enforce the terms of the 1952 Agreements as previously determined in the Court's Orders dated September 9, 1997 and March 13, 1999.

(Estoppel)

23. The applicable burden of proof that Mr. Thayn must meet in order to establish his estoppel defense is *clear and convincing evidence*.

24. Because Mr. Thayn did not form an intent to proceed with the commercial hydro-electric project until July of 1990, the conduct of the parties prior to that date is irrelevant to the issue of estoppel.

25. The Canal Company's board members were justifiably not alarmed or put on notice of any intent to violate the 1952 Agreements by such renovation work.

26. The 1983 agreement between the parties with respect to the "National Hydro Project" did not constitute consent by the Canal Company to use of the raceway to divert 600 cfs because Mr.

Thayn had acknowledged in that same agreement that the total capacity of the raceway in 1983 was 600 cfs, which left only 485 cfs of capacity available in the raceway for other purposes. It also predated the formation of Mr. Thayn's intent to proceed with the present project.

27. The 1981 newspaper article in the Sun Advocate did not give notice of any intent to build the present hydro-electric project because it was vague and general in nature and preceded the actual generation of power as well as the formation of the intent to do the present project by approximately 10 years.

28. The minutes of the Canal Company's board meetings do no evidence any awareness by the Canal Company that Mr. Thayn was claiming a right to use Canal Company facilities to divert 600 cfs for commercial power generation until June 24, 1992, at which time an objection to that claim was immediately voiced.

29. Mr. Thayn's filing for and receiving a water right for 600 cfs did not impart any notice to the Canal Company that Mr. Thayn intended to divert more than 435 cfs through the raceway in contravention of the 1952 Agreements.

30. Mr. Thayn's pre-1992 actual water use did not impart any notice to the Canal Company that Mr. Thayn intended to divert more than 435 cfs through the raceway in contravention of the 1952 Agreements.

31. Mr. Thayn's actions in renovating his facilities and adding electrical power generation equipment without informing the Canal Company of his intentions or claim to a right to divert 600 cfs through the Canal Company's facilities were made in spite of, rather than in reliance upon, the Canal Company's conduct with respect to its rights under the 1952 Agreements.

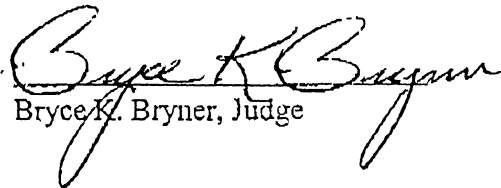
32. Mr. Thayn has failed to meet his burden of proof by clear and convincing evidence as to any of the mandatory elements for his estoppel defense, i.e.: (1) that the Canal Company's

conduct was inconsistent with its present claims; (2) that Mr. Thayn acted reasonably in reliance on the Canal Company's earlier conduct; and (3) that Mr. Thayn would be injured if the Canal Company were allowed to now change positions.

33. The Canal Company is not estopped from asserting or enforcing any of its rights under the 1952 Agreements and is therefore entitled to enforce the terms thereof as previously determined in the Court's Orders dated September 9, 1997 and March 13, 1999.

DATED this 14th day of March, 2001.

BY THE COURT:


Bryce K. Bryner, Judge

Approved as to Form:

Reed L. Martineau
Rex E. Madsen
Counsel for Mr. Thayn

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of _____, 2001, a true and correct copy of the foregoing FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING ESTOPPEL, WAIVER, AND LACHES was mailed, first-class, postage prepaid to the following:

Rcd L. Martineau, Esq.
Rex E. Madsen, Esq.
Snow, Christensen & Martineau
10 Exchange Place, #1100
P. O. Box 45000
Salt Lake City, Utah 84111

CERTIFICATE OF NOTIFICATION

I certify that a copy of the attached document was sent to the following people for case 950706174 by the method and on the date specified.


METHOD NAME

Mail REED L. MARTINEAU
 ATTORNEY
 10 EXCHANGE PLACE, 11TH
 FLOOR

 P.O. BOX 45000
 SALT LAKE CITY, UT 84145

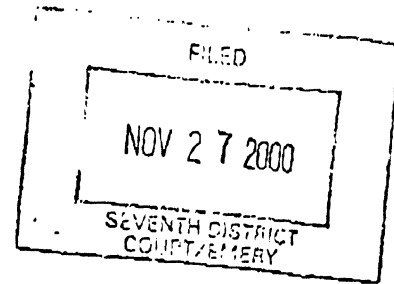
Mail J CRAIG SMITH
 ATTORNEY
 60 E. SOUTH TEMPLE; BOX
 11808
 SUITE 1100, EAGLE GATE PLAZA
 SALT LAKE CITY UT 841111004

Dated this 14th day of March, 2001.


Deputy Court Clerk

Tab E

J. Craig Smith (4143)
David B. Hartvigsen (5390)
NIELSEN & SENIOR, P.C.
60 East South Temple, Suite 1100
Salt Lake City, Utah 84111
Telephone: (801) 532-1900



Attorneys for Plaintiff Green River Canal Company

IN THE SEVENTH JUDICIAL DISTRICT COURT

IN AND FOR EMERY COUNTY, STATE OF UTAH

GREEN RIVER CANAL COMPANY,
a Utah Mutual Water Company,

Plaintiff,

v.

LEE THAYN,

Defendant.

**ORDER & JUDGMENT ON
MOTION FOR ATTORNEY FEES**

Civil No. 95-070-6174

Judge Bryce K. Bryner

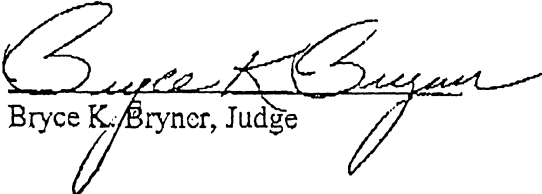
Plaintiff Green River Canal Company, following the dissolution of a temporary restraining order issued by this Court on March 15, 1999, filed an *Application for Attorney Fees for Wrongfully Obtained Injunctive Relief*. Defendant Lee Thayn appealed the Court's refusal to issue a preliminary injunction upon the termination of said order. Following the withdrawal of that appeal, the Utah Supreme Court directed this Court to determine and award fees on appeal if it decided to award fees on at the trial court level. The Canal Company thereafter filed a *Supplemental Affidavit for Attorney Fees* for the fees incurred on the appeal. The matter was briefed by the parties and on November 1, 2000, the Court entered a ruling awarding certain fees and costs. The Court, having considered the arguments and memoranda of the parties and being otherwise fully advised in the premises;

HEREBY ORDERS, ADJUDGES, and DECREES as follows:

1. The Plaintiff is awarded judgment against the Defendant in the amount of \$7,518.50 for attorneys fees (after deducting 5.0 hours of duplicated time by co-counsel during the site visit) and no costs at the trial court level, plus \$1,614.00 for attorneys fees and \$734.00 for costs on appeal, for a total amount of \$9,866.50 incurred by Plaintiff in defending against Defendant's wrongful efforts to obtain injunctive relief.

DATED this 17th day of November, 2000.

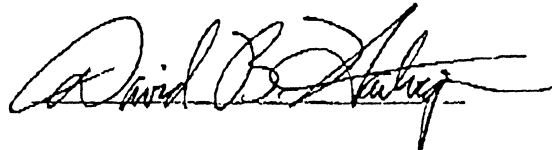
BY THE COURT:


Bryce K. Bryner, Judge

CERTIFICATE OF SERVICE

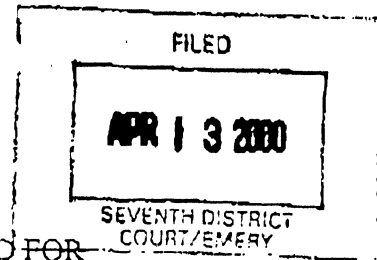
I hereby certify that on this 10th day of November, 2000, a true and correct copy of the foregoing *Order & Judgment on Motion for Attorney Fees* was hand-delivered to the following:

Reed L. Martineau, Esq.
Rex E. Madsen, Esq.
Snow, Christensen & Martineau
10 Exchange Place, #1100
Salt Lake City, Utah 84111



Tab F

GreenRiver



IN THE SEVENTH DISTRICT COURT IN AND FOR
EMERY COUNTY, STATE OF UTAH

GREEN RIVER CANAL COMPANY,)	MEMORANDUM DECISION RE
)	ESTOPPEL, WAIVER, AND LACHES
Plaintiff,)	
VS.)	
LEE THAYN,)	Civil No. 950706174
)	
Defendant.)	Judge Bryce K. Bryner

Under the court's prior rulings, the issues of estoppel, waiver, and laches were reserved for trial. The court heard the sworn testimony of the witnesses, received exhibits into evidence, and allowed counsel to file post-trial memorandum. The court has read the memorandum, considered the evidence and the law, and now issues this memorandum decision.

I. Standard of Proof

The court finds that the standard of proof as to the issue of estoppel is *clear and convincing* and that the standard of proof as to the issue of laches and waiver is *preponderance of the evidence*.

II. Positions of the Parties

The Plaintiff seeks to enforce the 1952 Agreement and Amendment that limits the Defendant's use of water through the raceway to 35 cfs for consumptive use and to 400 cfs for non-consumptive use. The Defendant defends by claiming that it filed Applications with the State Engineer in 1974 and 1981 to increase the non-consumptive use in the raceway to 600 cfs; that the Defendant and his predecessor in interest (Wilson Produce) have used 600 cfs continuously for non-consumptive use; that the Plaintiff did not object to the applications for 600

cfs; that the Plaintiffs knew that the Defendant was planning on generating power for sale and failed to timely protest the expansion of the plant; and that the Plaintiff is therefore estopped from enforcing the 1952 Agreement and Amendment that limits the Defendant's use of the facilities to 400 cfs for non-consumptive uses. The Defendant also claims that the Plaintiff waived its right to limit the quantity and nature of use of the 435 cfs limitation, and that the Plaintiff is prevented by laches from enforcing the 1952 Agreements.

III. Waiver

On p. 3 of its Supplemental Post-Trial Memorandum, the Plaintiff concedes the first two elements of waiver; (1) an existing right, i.e., the 435 cfs limitation on the quantity of water that the Defendant may divert through the Plaintiff's facilities and the nature of the use, and (2) a knowledge of the existence of the right, and in this particular instance, a knowledge of the existence of the "quantity" and "nature of use" limitations contained in the 1952 Agreement and the 1952 Amendment. The Plaintiff contests the remaining three elements and the court will address them individually.

As to the third, fourth, and fifth elements of waiver, i.e. *a relinquishment* of these limitations that was *clearly intended* and *distinctly made*, " the court finds as follows:

1. The Plaintiff did not make an express waiver of its right to limit the quantity and nature of the 435 cfs limitation. Any waiver, if made, would have to be implied.

2. With regard to whether an implied waiver was made, after reviewing the totality of the circumstances, the court cannot find by a preponderance of the evidence that the Plaintiff clearly intended or distinctly made a relinquishment of the quantity and nature of use limitations imposed by the 1952 Agreement and Amendment:

- A. The Plaintiff's silence complained of by the Defendant did not constitute a relinquishment of the quantity and nature of use limitations because the Plaintiff was under no legal duty to inform the Defendant of the existence of the 1952 Agreement and Amendment.

The court is persuaded that the Defendant bears the burden of discovering the encumbrances and limitations on the property and water rights he purchases, and that burden cannot be shifted to the Plaintiff. The court also finds that the Plaintiff in this instance cannot be presumed to know that the Defendant did not know of the existence of the Agreement, if in fact the Defendant did not know of the Agreement until August of 1992 as he claims. Moreover, no evidence was presented from which the court can find that the Plaintiff knew or should have known that the Defendant was not aware of the existence of the 1952 Agreement and Amendment prior to August of 1992.

B. The court also finds that the Plaintiff was under no affirmative duty to act because of its knowledge of the 1974 water right application for 600 cfs for power to pump water and the 1981 change application to convert that water to year around use. Even though the applications were approved by the State Engineer, the Defendant still had to obtain permission from the Plaintiffs to expand the limitations contained in the 1952 Agreement and Amendment. It is clear that the approval of the application did not in and of itself impose a right to exceed the 435 cfs limitation. Accordingly, the Plaintiff was under no obligation to protest the application because the Defendant would still have to obtain the Plaintiff's permission to exceed the quantity of water allowed to be diverted through the raceway.

IV Laches

To prevail on the issue of laches as a defense to the enforcement of the 1952 Agreement and Amendment, the Defendant must establish by a preponderance of the evidence (1) a lack of diligence on the part of the Plaintiff, and (2) an injury to the Defendant owing to such lack of Plaintiff's diligence.

From the evidence presented the court cannot find a lack of diligence on the Plaintiff's part when it failed to protest or object to the granting of the 1974 and 1981 applications filed by Wilson and Defendant. As discussed above in Section III, the State Engineer's approval of the application for 600 cfs did not grant the Defendant any rights with regard to the use of the

Plaintiff's property or facilities. Because the granting of those applications did not affect the right of the Plaintiffs to control the use of its own property, i.e., the raceway, there was no reason for the Plaintiff to file or voice a protest or objection to the granting of the applications, and consequently there was no legal duty of Plaintiff to protest. If there was no duty to protest, then there can be no lack of diligence in failing to protest or object to either of the applications.

As to the second element of laches, i.e., whether there was an injury to Defendant owing to the Plaintiff's lack of diligence, the court finds that because there was no lack of diligence on the part of Plaintiff there can be no injury that is attributable to the lack of diligence on the part of Plaintiff.

From the foregoing, the court finds that the Defendant has failed to meet his burden in justifying the application of the defense of laches to prevent the Plaintiff from enforcing its rights under the 1952 Agreement and Amendment.

V. Estoppel

The Defendant claims that the Plaintiff had knowledge of the Defendant's activities, his plans to generate power for sale, and his use of the water, and that the Plaintiff is therefore estopped from enforcing the 1952 Agreement and Amendment. To prevail on the issue of estoppel, the Defendant must prove by *clear and convincing evidence* that (1) the Plaintiff's conduct was inconsistent with its present claims; (2) that the Defendant acted reasonably in reliance on the Plaintiff's earlier conduct; and (3) that the Defendant would be injured if the Plaintiff were allowed to now change positions. *CECO Corp. v. Concrete Specialists, Inc.*, 772 P.2d 967, 969-970 (Utah 1989).

A. Was the Plaintiff's Conduct Inconsistent with its Present Claims? The court finds from the testimony of the Defendant, Rick Kaster, and Leon Thayn that the Defendant did not form the intent to proceed with the hydro-electric project until July of 1990. Therefore, the Plaintiff cannot be charged with silence or inaction prior to the time the Defendant's intent was formed,

and there was no duty on the part of Plaintiff to take action prior to July of 1990 to counter an intent that was not yet formed. Thus, it cannot be said that the Plaintiff had knowledge of the Defendant's intent to do the hydro-electric project prior to July of 1990 because the Defendant had not formed the intent until that time.

The court must now consider whether any events occurred after July of 1990 that could have evidenced an intent on the part of the Defendant to proceed with the project, and of which the Plaintiff had knowledge and was silent or took no action. The Defendant asserts that the Board members knew that the generators were being placed in the pumphouse for the purpose of generating hydro-electric power for sale. The great weight of the evidence is, however, that although the Board members knew that the power house had been renovated, they were not aware until the Spring of 1992 that the Defendant was going to generate power for sale; Jack Erwin, Jay Vetcrc, Tim Vetere, and Dean King each testified that they had been told by Leon Thayn, as the agent for Defendant, in 1990 that the Defendant was not going to generate power for sale. The court also finds that when the generators were delivered to the pumphouse the Board members who saw them were not aware that they were to be used to generate power for sale. Evidence was also produced from which the court finds that Leon Thayn had told the Board members that the pumphouse was facilities were in need of refurbishing and upgrading. The Board members were therefore justifiably not alarmed or put on notice of intent to violate the 1952 Agreements when the renovation work began.

The court also rejects the assertion that the National Hydro Project or the 1983 agreement between the parties regarding the National Hydro Project evidences the Plaintiff's consent to the use of the raceway to divert 600 cfs. Paragraph B of the Agreement states that the total capacity of the raceway is 600 cfs. Because the Plaintiff has the right to the first 80 cfs and the Defendant has the right to 35 cfs for irrigation, that would leave the Defendant only 485 cfs for pumping as opposed to the 600 cfs for pumping. This inconsistency leads the court to find that the Agreement did not represent the Plaintiff's consent to 600 cfs being used by the Defendant.

The court also finds that the 1981 newspaper article in the *Sun Advocate* did not give notice of any intent to build the present hydro-electric plant because it was vague and general in nature and preceded the generation of power for sale by approximately 10 years.

The court also finds that the minutes of the Canal Company's Board Meetings do not support the Defendant's position that the Board was aware that the Defendant claimed 600 cfs for power generation for sale: the 1985 minutes refer only to the need for a new agreement to eliminate National Hydro; the March 14, 1989 minutes refer only to a project in the future and do not mention a specific cfs; and although the minutes of June 24, 1992 reveal that the Defendant and his Brother stated to the Board that they had 600 cfs for non-consumptive use, Board member Ted Ekkor objected by stating that the Defendant would have to release water back or the Canal Co. would have to take action. This represented an objection. After reviewing the minutes submitted as evidence the court cannot find that the Plaintiffs knew, prior to June 24, 1992, that the Defendant claimed the right to 600 cfs for non-consumptive use.

The court also finds that neither the 1974 Water Right Application for 600 cfs nor the actual water use in the 1970s imparted any notice of the Defendant's intent to use water in excess of the amount provided for in the 1952 Agreements. The court has previously ruled that an application to appropriate water does not award the applicant the right to exceed a contract amount. Further, the court cannot find that the Defendant was diverting more than 435 cfs prior to April of 1992 when he began generating power.

B. Did the Defendant Act Reasonably in Reliance on the Plaintiff's Conduct?

The court finds that the Defendant has failed to meet the second requirement for equitable estoppel, i.e., that he acted reasonably in reliance on the plaintiff's conduct. The Plaintiff's conduct consisted of maintaining the position that the 1952 Agreements set forth the Defendant's quantity and nature of use of the water flowing thorough the raceway, and the court cannot find that the Plaintiff deviated from that position. The improvements made to the pumphouse, including the ability to generate power for sale, were made by Defendants even though the

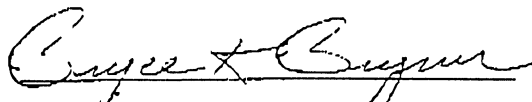
Defendant was aware of the Plaintiff's position.

C. Would the Defendant be Injured if the Plaintiff were Allowed to Change Positions?

The court finds that the Defendant has not proved the third element of equitable estoppel because the injuries of the Defendant were not caused by the action or inaction of the Plaintiff. Rather, his injuries were of his own making. The Defendant elected to proceed with the improvements and complete them without advising the Plaintiff until June of 1992 that he claimed the right to divert 600 cfs and use the additional water to generate power for sale. This was clearly beyond the time in which the Plaintiff could have or should have taken any action to object to the excess use.

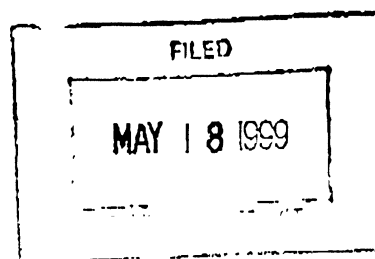
From the foregoing analysis, the court finds that the Defendant has not proved the affirmative defenses of waiver, laches, and estoppel. The Plaintiff's counsel is directed to prepare findings of fact, conclusions of law, and a judgment consistent with this decision.

DATED this 10th day of April, 2000.


Bryce K. Bryner, Judge

Tab G

J. Craig Smith, USB No. 4143
David B. Hartvigsen, USB No. 5390
Daniel J. McDonald, USB No. 7935
NIELSEN & SENIOR, P.C.
1100 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 532-1900
Facsimile: (801) 532-1913



Attorneys for Plaintiff Green River Canal Company

IN THE SEVENTH JUDICIAL DISTRICT COURT

IN AND FOR EMERY COUNTY, STATE OF UTAH

GREEN RIVER CANAL COMPANY, a Utah :
Mutual Water Company, :

Plaintiff, :

v. :

LEE THAYN, :

Defendant, :

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT ON ITS EIGHTH AND
NINTH CAUSES OF ACTION
ENJOINING DEFENDANT FROM
INTERFERING WITH PLAINTIFF'S
PRIOR RIGHT TO USE OF WATER
AND STRIKING THE AFFIDAVIT
OF LEON THAYN**

Civil No. 6174

Judge Bryce K. Bryner

The Court having reviewed and considered the Memoranda, Exhibits and Affidavits filed for and in opposition to Plaintiff Green River Canal Company's ("Green River") Motion for Summary Judgment on its Eighth and Ninth Causes of Action, and Motion to Strike the Affidavit of Leon Thayn, and having considered the arguments of J. Craig Smith of Nielsen & Senior, who appeared and argued the motions on behalf of Green River Canal Company, and the arguments of Reed

Martineau of Snow, Christensen and Martineau, who appeared and argued against the motions on behalf of Defendant Lee Thayn ("Thayn") at the hearing conducted on February 26, 1999, the Court does hereby ORDER, ADJUDGE AND DECREE as follows:

OK 1. Green River's Motion for Summary Judgment is granted on its Eighth and Ninth Causes of Action.

2. Green River holds first priority to divert and place into its canal the first eighty (80) cubic feet per second of water diverted by the low dam and diverted through the raceway and diversion facilities of Green River during the irrigation season, March 1st through November 15th of each year.

3. Green River holds first priority to divert and place into its canal the first twenty (20) cubic feet per second of water diverted by the low dam and diverted through the raceway and diversion facilities of Green River during the non-irrigation season, November 16th through February 28 of each year.

OK 4. The right of Thayn to divert and take water is subsequent and junior to Green River's right to the eighty (80) cubic feet per second during the irrigation season and twenty (20) cubic feet per second during the balance of the year as set forth herein.

5. In the event that Green River is not receiving its entire water right as set forth herein, Thayn shall not divert or take any water.

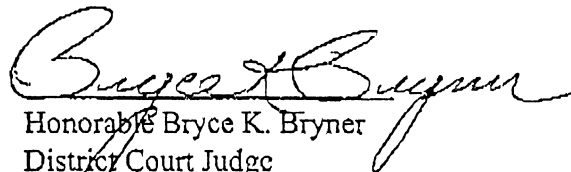
6. Thayn is permanently enjoined from encroaching upon or interfering with Green River's right to divert eighty (80) cubic feet per second of water into its canal during the irrigation season, and twenty (20) cubic feet per second during the balance of the year.

OK 7. The priority of the diversion of water and the quantity of Green River's right are enforceable by the powers of this Court to enforce injunctions issued by this Court.

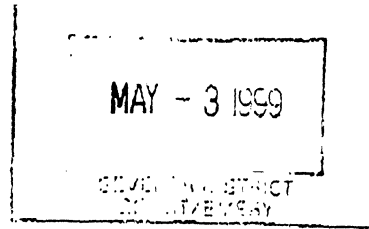
8. The Affidavit of Leon Thayn submitted in opposition to Summary Judgment is stricken as hearsay, and as attempting to controvert facts previously admitted by Thayn.

DATED this ^{7th} 13 day of March, 1999.

BY THE COURT


Honorable Bryce K. Bryner
District Court Judge

Tab H



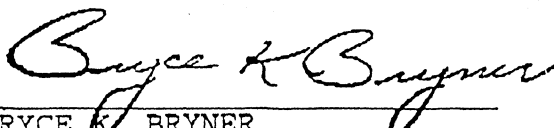
IN THE SEVENTH JUDICIAL DISTRICT COURT
EMERY COUNTY, STATE OF UTAH

GREEN RIVER CANAL COMPANY, a Utah Mutual Water Company,	:	RULING ON MOTION TO RECONSIDER
	:	RULING ON MOTION FOR SUMMARY
Plaintiff,	:	JUDGMENT
vs.	:	
LEE THAYN,	:	
Defendant.	:	Civil No. 6174

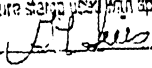
On March 26, 1999, the Defendant filed a motion requesting the court to reconsider its ruling on Plaintiff's Motion for Summary Judgment dated July 11, 1997. The court has considered the memorandum of counsel and the oral arguments presented on April 26, 1999, and now issues this ruling.

The court is persuaded by the cases cited by Defendant that this court has the authority to reconsider its previous ruling on the motion for partial summary judgment. However, the court is not persuaded that the motion to reconsider raises any legal theories or any new material facts that were not considered by the court at the time of the previous ruling on the motion for summary judgment. The motion to reconsider is therefore denied.

DATED this 30th day of April, 1999.


BRYCE K. BRYNER
District Court Judge

Signature stamp and approval of above-named Judge by:

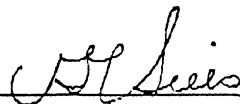


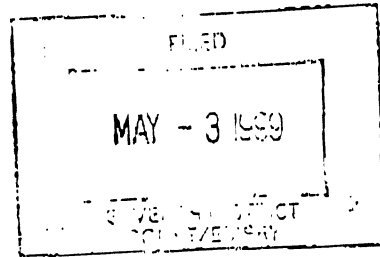
CERTIFICATE OF MAILING

I hereby certify that on the 30th day of April, 1999, a true and correct copy of the foregoing RULING ON MOTION TO RECONSIDER RULING ON MOTION FOR SUMMARY JUDGMENT was mailed, postage prepaid, to the following:

J. Craig Smith
David B. Hartvigsen
Daniel J. McDonald
Attorneys at Law
1100 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Reed L. Martineau
Rex. E Madsen
Attorneys at Law
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145





IN THE SEVENTH JUDICIAL DISTRICT COURT
EMERY COUNTY, STATE OF UTAH

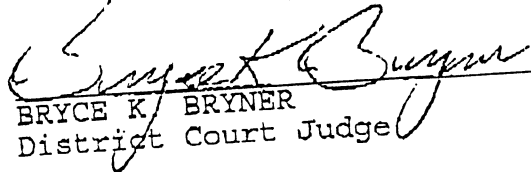
GREEN RIVER CANAL COMPANY, a Utah Mutual Water Company,	:	RULING ON MOTION TO FILE SECOND AMENDED COUNTERCLAIM
Plaintiff,	:	
vs.	:	
LEE THAYN,	:	
Defendant.	:	Civil No. 6174

Trial in this matter is scheduled to begin on May 18, 1999, and the Defendant's motion was filed on March 26, 1999. The Plaintiff filed a memorandum in opposition and the Defendant filed a reply. Oral argument was conducted on April 26, 1999. The court has considered the memorandum and the arguments of counsel and now issues this ruling.

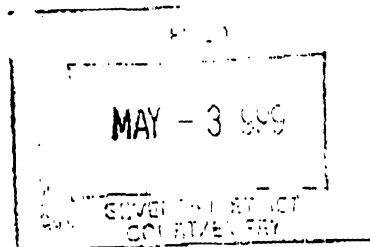
The motion to file a Second Amended Counterclaim is denied for the reason that it is untimely, i.e., filed one week after the close of discovery and less than two months before trial. The court finds that the Plaintiff would be prejudiced by (1) not being able to engage in reasonable discovery, and (2) by not having time to prepare and assert a defense to the counterclaims. This could only be cured by granting a continuance of the trial. The court declines, however, to continue the trial for the reason that

several continuances have been had by the Defendant, and the Plaintiff is entitled to have his complaint heard.

DATED this 28th day of April, 1999.


BRYCE K. BRYNER
District Court Judge

Tab I



IN THE SEVENTH JUDICIAL DISTRICT COURT
EMERY COUNTY, STATE OF UTAH

GREEN RIVER CANAL COMPANY,	:	PARTIAL RULING ON GREEN
a Utah Mutual Water Company,	:	RIVER'S MOTION IN LIMINE
	:	
Plaintiff,	:	
	:	
vs.	:	
	:	
	:	
LEE THAYN,	:	
	:	
Defendant.	:	Civil No. 6174

Plaintiff file a Motion in Limine to which the Defendant filed a Memorandum in Opposition. Plaintiff filed a Reply and oral argument was conducted on April 26, 1999. The court took the matter under advisement and now issues this partial ruling on two of the three issues raised by Plaintiff in its motion. The court will issue a supplemental ruling on the issue of whether the Defendant should be barred from introducing evidence to show estoppel.

I. FAILURE TO SUPPLEMENT DISCOVERY REQUESTS

At oral argument on March 16, 1999, the court ruled from the bench that the Defendant is barred from introducing at trial evidence, documents or witnesses that were not disclosed in his answers to Plaintiff's discovery requests. Upon further review, the court amends the order from the bench as follows:

1. The Defendant is barred from introducing at trial any evidence, exhibit prepared by, or testimony from, any expert witness that was not disclosed in Defendant's answers to Plaintiff's discovery requests. Pursuant to Rule 26(e)(1)(B) Utah Rule of Civil Procedure, the Defendant was under a duty to supplement his answers as to experts without a request for supplementation from Plaintiff.

2. The Defendant is barred from introducing any witness, evidence, or document from any person having knowledge of discoverable matters whose identity and location were not disclosed in Defendant's answers to Plaintiff's discovery requests. See Rule 26(e)(1)(A), Utah Rule of Civil Procedure.

3. The Defendant is barred from presenting any evidence, witness, or document that has the effect of amending any prior discovery response if the Defendant knew the response was incorrect when made, or knows that the response, though correct when made, is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

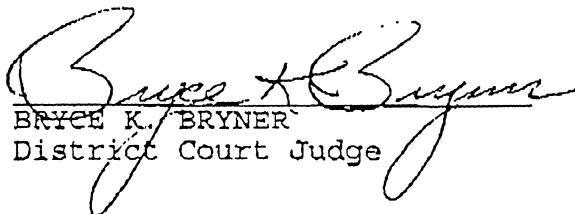
The Defendant was under a continuing obligation to make the above supplementation without being requested to do so by Plaintiff. The Defendant is not under an obligation, however, to supplement any of his other previous discovery responses that were complete when made and for which new or additional information has

been obtained by Defendant unless the Plaintiff has filed a request for supplementation.

II. SHOULD DEFENDANT BE BARRED FROM INTRODUCING EVIDENCE TO
CONTRADICT THE ADMISSIONS ON FILE?

The Plaintiff served Defendant with Requests for Admissions dated September 24, 1998, and in an Amended Scheduling Order dated February 22, 1999, the court extended Defendant's time to respond to the discovery to March 12, 1999. Plaintiff's Motion in Limine is granted insofar as Defendant is barred from introducing any evidence to contradict the Admissions that were on file as of March 12, 1999.

DATED this 29th day of April, 1999.

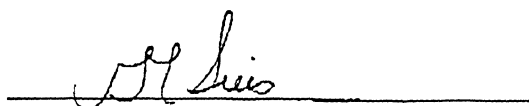

BRYCE K. BRYNER
District Court Judge

CERTIFICATE OF MAILING

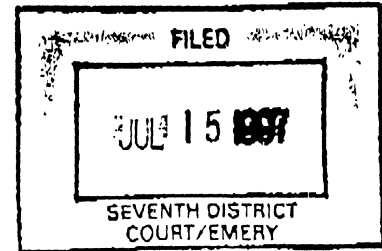
I hereby certify that on the 29th day of April, 1999, a true and correct copy of the foregoing PARTIAL RULING ON GREEN RIVER'S MOTION IN LIMINE was mailed, postage prepaid, to the following:

J. Craig Smith
David B. Hartvigsen
Daniel J. McDonald
Attorneys at Law
1100 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111

Reed L. Martineau
Attorney at Law
10 Exchange Place, Eleventh Floor
P.O. Box 45000
Salt Lake City, Utah 84145



Tab J



IN THE SEVENTH JUDICIAL DISTRICT COURT
EMERY COUNTY, STATE OF UTAH

GREEN RIVER CANAL COMPANY,	:	RULING ON MOTION TO STRIKE
a Utah mutual water company,	:	AFFIDAVIT AND RULING ON
	:	RECIPROCAL MOTIONS FOR
Plaintiff,	:	SUMMARY JUDGMENT
	:	
vs.	:	
	:	
	:	
LEE THAYN,	:	
	:	
Defendant.	:	Civil No. 6174
	:	

Plaintiff and Defendant filed reciprocal Motions for Summary Judgment. Subsequent to the hearing on oral argument the Plaintiff submitted an Affidavit of James R. Tibbetts. The Defendant filed a Motion to Strike Affidavit of James R. Tibbetts, a decision on which is material to the arguments on the reciprocal Motions for Summary Judgment. A Notice to Submit for Decision was submitted on May 12, 1997, and the Court now issues this Ruling.

I. MOTION TO STRIKE AFFIDAVIT

The filing of the Affidavit of James R. Tibbetts was untimely but that defect was cured when the Defendant subsequently submitted the "Second Affidavit of Lee Thayn". The Court also

finds that the Affidavit is relevant as it addresses the issue of whether the Defendant increased his diversion of water in 1992. The Motion to Strike is therefore denied.

II. ESTOPPEL

The Defendant asserts that Plaintiff is estopped from complaining about Defendant's diversion of water because Plaintiff did not protest Defendant's change applications and stood idly by while the Defendant invested \$300,000.00 in power generation facilities. The Court finds that there are genuine issues of material fact as to estoppel, laches, and waiver, which preclude summary judgment in favor of Defendant on this issue, e.g., whether Plaintiff knew Defendant was intending to generate power for re-sale and if so, when this knowledge was obtained; the circumstances surrounding the Hydro Power application, etc.

If, after trial on the issue of estoppel, the Court finds that the Plaintiff is not estopped from bringing this action, the following rulings will apply:

III. BREACH OF AGREEMENT

The Defendant admits that he diverted water in excess of 435 cfs. Based thereon, the Court finds that the Defendant

breached the 1952 amendment to the agreement. The agreement and the amendment are unambiguous, certain, definite, and enforceable and limit the Defendant's diversion of water to 435 cfs for irrigation and for power generation to pump the water for irrigation. The Court rejects the notion that the agreement and amendment only establish priorities. It is clear to the Court that the parties intended the amendment to "forever settle and put at rest their differences and to adopt a permanent plan for the operation of the diverting works." The contract and the amendment do not contemplate or provide for an enlargement of the right beyond 435 cfs.

IV. SPECIFIC PERFORMANCE AND INJUNCTION

The Court also finds that by reason of the breach, GRCC should be entitled to an order of specific performance and an injunction limiting the Defendant to diverting 435 cfs for the specific purposes enumerated in the contract and agreement. To rule otherwise would sanction a continuing violation of the 1952 contract and amendment and would likely result in the parties returning to Court numerous times in the future to consider damages that may accrue.

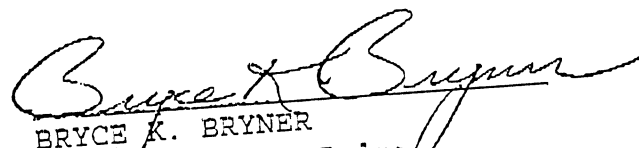
The Court also finds that there is not an adequate remedy at law available to the Plaintiff and that it would be extremely difficult if not impossible to prove damages with any degree of precision because of the peculiar position of the Plaintiff. If the Plaintiff cannot prove the amount of his damages, only nominal damages would be awarded which constitutes an inadequate remedy.

V. APPLICABILITY OF SECTION 73-1-7 UTAH CODE ANNOTATED

Utah case law has held that Section 73-1-7, Utah Code Annotated, is controlling only in the absence of an enforceable agreement regulating the use of the water and facilities as between the parties. The Court finds that the above section is inapplicable to the instant fact situation for the reason that the 1952 amendment constitutes an existing and enforceable agreement between the parties which regulates and defines their respective rights. The Defendant cannot therefore claim that his diversion in excess of 435 cfs was authorized by statute.

Plaintiff's counsel is directed to prepare an appropriate summary judgment consistent with this ruling.

DATED this 11th day of July, 1997.


BRYCE K. BRYNER
District Court Judge

CERTIFICATE OF MAILING

I hereby certify that on the 14th day of July, 1997, a true and correct copy of the foregoing RULING ON MOTION TO STRIKE AFFIDAVIT AND RULING ON RECIPROCAL MOTIONS FOR SUMMARY JUDGMENT was mailed, postage prepaid, to the following:

John F. Waldo
 John W. Anderson
 Attorneys at Law
 1850 Beneficial Life Tower
 Salt Lake City, Utah 84111

J. Craig Smith
 David B. Hartvigsen
 Attorneys at Law
 1100 Eagle Gate Tower
 60 East South Temple
 Salt Lake City, Utah 84111

By: [Signature]

Tab K

ORDERED, ADJUDGED AND DECREED:

RECIPROCAL MOTIONS FOR SUMMARY JUDGMENT

1. Defendant's motion for summary judgment is denied. Defendant is not entitled as a matter of law to Summary Judgment on the Plaintiff's causes of action, and genuine issues of material fact exist as to the affirmative defenses of estoppel, laches, and waiver asserted by Defendant, which preclude entry of summary judgment in favor of the Defendant.

2. Plaintiff's motion for summary judgment is granted. If after trial on the issue on estoppel, the Court finds that the Plaintiff was not estopped from bringing this action, the following rulings will apply to Plaintiff's First, Third and Fourth Causes of Action:

(a) The 1952 Agreement attached as Exhibit "A" to the Complaint and an Amendment that same year attached as Exhibit "B" to the Complaint are unambiguous, certain, definite, and enforceable and binding upon the parties and limit the Defendant's diversion of water to 35 cfs for irrigation and up to 400 cfs for power generation to pump the water for irrigation.

(b) The Defendant has breached the 1952 Agreement as he has admitted to diverting water in excess of 435 cfs.

(c) There is no adequate remedy at law available to Plaintiff. Therefore, by reason of the breach, Green River is entitled to an Order of specific performance and a Permanent Injunction limiting the Defendant to a total of 435 cfs (35 cfs for irrigation purposes and up to 400 cfs to pump irrigation water), and limiting the use of water to the specific purposes enumerated in the Agreement and Amendment.

3. The Court finds that § 73-1-7, UTAH CODE ANNOTATED, is inapplicable to the present case. UTAH CODE ANNOTATED § 73-1-7 is controlling only in the absence of an enforceable agreement regulating the use of the water and facilities as between the parties. The 1952 Agreement as amended constitutes an

existing and enforceable agreement between the parties which regularly defines their respective rights, and the Defendant cannot, therefore, claim that his diversion in excess of 435 cfs was authorized by statute.

4. The Court rejects the notion of Defendant that the Agreement and Amendment only establish priorities as to the use of water.

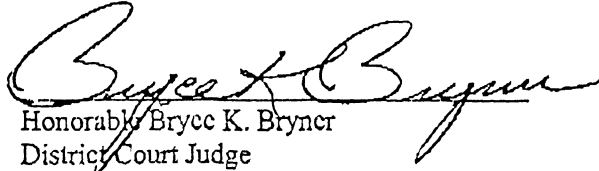
5. The Agreement and the Amendment do not contemplate or provide for an enlargement of the Defendant's right to divert water beyond a total 435 cfs, 35 cfs for irrigation purposes and up to 400 cfs to pump irrigation water.

MOTION TO STRIKE AFFIDAVIT


1. The Motion to Strike the Affidavit of James R. Tibbetts is denied.


DATED this 9th day of Sept. ~~August~~, 1997.

BY THE COURT:


Honorable Bryce K. Bryner
District Court Judge

Approved as to form:


John F. Waldo, Esq.
John W. Anderson, Esq.
of PRUITT, GUSHEE & BACHTELL
Attorneys for Defendant


J. Craig Smith, Esq.
of NIELSEN & SENIOR
Attorneys for Plaintiff