

1953

# Joseph M. Tracy v. L. L. Peterson et al : Brief of Respondents

Utah Supreme Court

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**In the Supreme Court of the  
State of Utah**

FILED  
APR 10 1966  
Clerk, Supreme Court

**JOSEPH M. TRACY, State Engineer,  
Plaintiff and Appellant,**

**vs.**

**L. M. PETERSON; MRS. R. M.  
OLDROYD; and MILBURN IRRIGA-  
TION COMPANY, a corporation,  
Defendants and Respondents**

**CASE  
NO. 7966**

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**RESPONDENTS' BRIEF**

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Respondents**

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# In the Supreme Court of the State of Utah

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JOSEPH M. TRACY, State Engineer,  
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## RESPONDENTS' BRIEF

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Appellant's "Statement of Facts" is fragmentary and it evidences an apparent misunderstanding concerning the basic facts shown by the record. It is, therefore, deemed necessary for the respondents to make a more complete statement.

### STATEMENT OF FACTS

This action was commenced by Joseph M. Tracy, State Engineer, against the various defendants, the material allegations of the complaint being as follows:

1. Stating the appointment and qualifications of Joseph M. Tracy as State Engineer.

2. Stating the organization and existence of the Milburn Irrigation Company, and the residence of the defendants.

3. That pursuant to statute, the plaintiff appointed a water commissioner of Sanpitch River.

4. That each of the defendants is the owner of rights to the use of, entitled to use, and does use, waters of the Sanpitch River.

5. That the salary of the said water commissioner was determined and fixed at a meeting duly and regularly called by the State Engineer of the water users of said river.

6. That the State Engineer levied assessments during the years 1950 and 1951 against the water users of Sanpitch River for their proportionate share of the moneys necessary to pay the expenses of said water commissioner. That as to the defendants, Ray S. Tanner, Tim Fowels, Winston Mower, George Olsen, Urban Hartley, John W. Irons, R. A. Olsen and Wanless Rasmussen, said assessments were based upon the amount of diversions made by each defendant during the previous year. That as to the defendant, Olsen and Ephraim Company, a water association, said assessment was based on a flat \$10 per year. That all of the other defendants were newly listed water users during the year 1951. Assessments against said water users were determined by an estimate made by the water users association as to the amount of water used by said defendants. (To avoid confusion, it should be noted here that there was no evidence as to any water users association estimate and the estimates of any association are not involved.)

7. That defendants, and each of them, have failed, neglected and refused to pay the water assessment levied against him by the State Engineer in the year and in the amount set out as follows: (Thirty-four defendants are then listed and the amounts assessed against each for the years 1951 and 1950 are stated. Only five users are listed for 1950, but all defendants are listed for 1951. Of the five for 1950, three are the respondents herein (File 1-3).

8. That if the assessments are not paid, the State Engineer will not have, and at the present time does not have, sufficient moneys to pay the salary of the river commissioner.

The defendants and respondents, L. L. Peterson, Mrs. R. M. Oldroyd and Milburn Irrigation Company, filed separate answers, which were substantially as follows:

1. The plaintiff's complaint as to the defendant fails to state a claim upon which relief can be granted.

2. Defendant admits paragraphs 1, 2 and 7 of the complaint; as to paragraphs 3 and 5 thereof, defendant alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations therein contained.

3. As to paragraph 6 of the complaint, defendant admits that he received notice of purported assessments for the years 1950 and 1951 for the distribution of water to him from Sanpitch River, but in this connection denies that during said years, or either of them, he had distributed to him or used any water from Sanpitch River, and defendant further denies that the State Engineer by reason of any estimate of the water users association, or upon any other pretended basis, was authorized to make any assessment



against the defendant, and that any such pretended assessments are void.

4. This defendant further alleges that the said pretended assessments have no reasonable basis or justification either by reason of services rendered or on account of any water distributed to him from Sanpitch River, for the payment of any proportionate share of any monies necessary to pay the water commissioners or commissioners for Sanpitch River.

5. The defendant denies each and every allegation of the complaint not hereinbefore admitted or otherwise denied (File 36-41).

Upon the foregoing issues the case was tried, argued and decided in open court in favor of plaintiff and against the defendants. The court directed the attorney for plaintiff to draw findings of fact, conclusions of law and decree (Tr. 115). Following the announcement of the court's decision as above stated, the attorney for plaintiff applied to the court to be permitted to amend the complaint by interlineation by adding "system" after "Sanpitch River" whenever the latter appeared in the complaint. Thus, paragraph 3 of the complaint was made to read that pursuant to statute plaintiff appointed a water commissioner for "Sanpitch River System"; also in paragraph 4, 5 and 6 a similar change was made by adding "system" whenever "Sanpitch River" was mentioned in the original complaint, thereby changing the issues framed by the pleadings and thus making the evidence adduced upon the trial almost wholly inapplicable to the new issue attempted to be made. However, the court over the objection of defendants to the effect that the proposed amendment would change the cause of action upon which the case was tried, overruled the objection and per-



mitted the amendments to be made on the ground that they would conform to the evidence (Tr. 115-116).

Appellant in his brief disposes of more than 100 pages of evidence reported in the transcript in five short paragraphs. Since this is an action at law, the findings of the lower court must stand unless the evidence favorable to defendants taken as true with all reasonable intendments does not support the judgment. Respondent has not pointed out wherein the court has thus failed, but so that it may not be assumed from general statements that it has, we take this means of giving a fuller statement of the facts of the record which, we think, by a great preponderance support the conclusions and judgment.

Frank Reese, chief accountant of the State Engineer's office, testified that he computed the assessments claimed against the defendants from a report furnished by the water users of the Sanpitch River, taking the overall gross total of acre feet delivered to the water users, arriving at a calculating factor and computing what the individual assessments would be for the three defendants (Tr. 1-3); against Mr. Peterson, 1951—\$57.55; 1950—\$71.62; total—\$123.17; Mrs. Oldroyd, 1951—\$26.90; 1950—\$37.13; total—\$64.03; Milburn Irrigation Co., 1951—\$66.18; 1950—\$77.15; total—\$143.33 (Tr. 4-5). He knew nothing about how much water was delivered, assumed that the reports of quantities made to him were correct and assumed that the waters were part of the waters of Sanpitch River (Tr. 6). In connection with his testimony it was stipulated that the waters of Lone Pine Creek, Dry Creek and all of the other creeks that come down out of the mountains in Sanpete County were not taken into consideration in determining the assessments (Tr. 7-8).

Blain Draper, witness for the plaintiff, testified that he was employed by the State Engineer as commissioner of the Sanpitch River and that he prepared the river commissioner's report. The defendants, Peterson, Oldroyd and Milburn Irrigation Company, had no measuring devices and the water diverted by them was estimated. He went up and viewed the diversions from time to time as he thought he needed to and estimated them (Tr. 11-13). He couldn't remember when he went up but started about the first of May, and included high water as well as low water and charged them for it (Tr. 14-15), and was not interested in whether they put the water on their land or not (Tr. 16). He claimed that the Sanpitch River commences with the North Fork and that this was the head of Sanpitch River; he said that the South Fork was also the head, too (Tr. 17-19).

The decree in the case of Richlands Irrigation Co. v. West View Irrigation Company, et al, Civil Case No. 843 of the Fifth Judicial District, being the so-called "Cox Decree" of the general adjudication of the waters of the Sevier River System, was received in evidence, with particular reference to the part beginning on page 70, dealing with Sanpitch River (Tr. 29). Chapter V of this decree, beginning on page 70, divided the Sanpitch River System into two types of awards, i. e: Sanpitch River and tributaries. For example, typical headings of the awards, with the pages on which they appear, and omitting the details as to the awards, are:

#### "Chapter V.

"To this includes all of the rights to the use of the waters of Sanpitch River and its tributaries and certain

other miscellaneous rights to the use of water in Sanpete County, Utah.

“That as to the rights to the use of waters of Sanpitch River and its tributaries, and as to the right to the use of the water of certain miscellaneous sources of supply in Sanpete County, Utah,

“ IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

“That the parties to this action as hereinafter set out in this chapter are the owners of the right to the use of the waters of the Sanpitch River and its tributaries and from the other miscellaneous sources of supply in Sanpete County, within the Sevier River System, and they are entitled to have said waters as hereinafter set out, distributed to them for the purposes and in the quantities and for the periods of time as follows:

#### Sanpitch River and Tributaries

North Fork (p. 70)

South Fork (p. 71)

Lone Pine Creek (p. 72)

Springs (p. 72)

Stewart Spring (p. 73)

Sanpitch River (p. 73)

Crooked Creek & Stewart Springs (p. 73)

Dry Creek (p. 74)

Sanpitch River (p. 75).

Indian Spring Hollow (p. 75)

Sanpitch River (p. 76)

Oak Creek (p. 76)

Spring Branch (p. 77)

Spring Area (p. 77)

6 Springs (p. 78)

Spring Area (p. 78)

Cottonwood Creek (p. 78)

Seepage Springs (p. 79)

Old Mill Race (p. 80)	
Spring Creek (p. 80)	
Cottonwood Wash (p. 80)	
Sanpitch River (p. 81)	
Spring Creek Sloughs (p. 81)	
Lower Spring Creek (p. 83)	
Spring Creek Canyon (p. 83)	
Archie's Hallow (p. 84)	
Birch Creek (p. 84)	
Spring Area (p. 86)	
Sanpitch River (p. 88)	
North Creek (p. 88)	
Springs (p. 91)	
Pleasant Creek (p. 92)	
Springs (p. 95)	
.....	
Sanpitch River and Tributaries (p. 104-111)	
Peterson Slough (p. 114)	
.....	
Sanpitch River (p. 118)	
Gamit Canyon (p. 119)	
.....	
Sanpitch River (p. 129)	
Cottonwood and New Canyons—Tributary to Sanpitch River (p. 140)	
Ephraim Willow Creek (p. 141)	
.....	
Manti City Creek (p. 147)"	
(and so forth, on down the river).	

It will thus be seen that the rights on the North and South Forks, under which defendants' water rights in question come, are classified in the same manner as all other tributaries or other sources as distinguished from "Sanpitch River", and when rights are awarded under Sanpitch River they are done so under that term, as distinguished from

tributaries and other sources such as South Fork, North Fork, Manti City Creek, etc.

Attention is called to the stipulation referred to above in this connection, wherein it is stipulated that no other creeks, all of which are tributary to Sanpitch River, were included in the water users' meeting, or assessments. We also invite attention to page 184 of the Cox Decree reading as follows, which again shows the difference between the treatment of tributaries or other sources as distinguished from Sanpitch River proper:

"In the interpretation of the provisions of this decree under Chapter Five, the following rules must prevail unless it is specifically provided herein to the contrary:

"1. That priorities, as to the use of waters, shall apply to each particular tributary with respect to which the priority of use is given, and the same shall not be applied to the priorities upon Sanpitch River unless a different meaning is apparent from the specific language of any award."

The Cox Decree, plaintiff's Exhibit 2, was admitted in evidence, (Tr. 23-24), especially referring to page 70, chapter V, of said decree.

Referring to the North Fork, a tributary of Sanpitch River, as shown on pages 71 to 72, the following awards are made: to the water users on the North Fork of Sanpitch River, water rights are awarded to the amount of 15.80 cubic feet per second (pp. 70-71) and on the South Fork there is awarded water rights to the water users on the said tributary 10.45 cubic feet per second (pp. 72-108).

That according to the commissioner's report for 1950, the water users of the said North Fork at no time diverted or used as much water as decreed to them, except one esti-

mated amount, as shown by said decree according to the report of the water commissioner for the year 1950, defendant's Exhibit "E", and the water users of the South Fork even according to the estimates of said water commissioner at no time diverted from said South Fork any water in excess of the amount decreed, except at three estimates made by said commissioner between the 21st and 26th of May, incl., 1950.

That notwithstanding these facts according to the said commissioner's report, plaintiff's Exhibit "E", he made over fifty trips up to these two forks and the diversions on them during the summer of 1950, a distance from Fairview of 8 to 10 miles. No report of the water commissioner was introduced in evidence in support of the 1951 assessments.

**L. L. Peterson** for the defendants testified that the Sanpitch River commences just south of the divide between Thistle Valley and Sanpete Valley. There is a channel there with a spring in it, which carries in the neighborhood of one-half second foot of water which runs all the year round. There is a well-defined channel for about one-fifth of a mile north from where North Sanpitch Creek comes directly from the east and flows west until it connects with this stream and then both of them run south. The river runs north and south and North Sanpitch Creek runs into it from the east. There was an old dam that has broken out and water has run through it for years (Tr. 27-29). South Sanpitch Creek (South Fork) is about two miles south from North Sanpitch Creek. The Oldroyd home is two or three hundred feet north from where this creek crosses the road. Then going farther south two or three miles is Lone Pine (Tr. 30). Sanpitch River is in the lowest part of the valley (Tr. 31). North Sanpitch Creek goes down fast, and from



the first part of June the water is approximately gone, about dry, and that is about right as concerns South Creek (Tr. 33). The witness had never heard until coming into court that the North Fork was considered as the Sanpitch River. Prior to Mr. Draper coming up the last two or three years, no one has come up to measure the water to his knowledge (Tr. 33-44). In the summer all the water of North Fork is used, and if water comes in below, it is run-off or seepage (Tr. 39).

**Melroy Graham**, a witness for the defendants, testified that he lives at Milburn. The Peterson ranch joins the Oldroyd ranch on the north. He has charge of the Oldroyd ranch (Tr. 48). He gets part of his water from the North Sanpitch Creek and part of it from South Sanpitch Creek and has stock in Milburn Irrigation Company, getting water out of South Sanpitch Creek. The North Fork has a flush of early water in the spring and then it gradually gets less and less along in July and August, it is practically dried up, and the South Fork goes down to a small stream in the summer (Tr. 49-50). He has seen Mr. Draper six times in that vicinity in the last two years (Tr. 51). He takes the Oldroyd water out of the North Sanpitch Creek and also out of the South Sanpitch Creek. From the North to the South Sanpitch Creek it 1.8 miles. Lone Pine Creek is 1.4 miles from South Sanpitch. Crooked Creek is one mile south of Lone Pine Creek. Dry Creek is 1.6 miles from Crooked Creek. Oak Creek is 1.9 miles from Dry Creek, and there are other creeks going on down south (Tr. 53). Oak Creek is the largest and the next largest is South Sanpitch Creek. North Sanpitch Creek flows about one second foot in July and August in an ordinary year and it goes down until some years it won't reach us. The stream west



of our place on the west side of the valley is called Sanpitch River and we do not take any water out of it (Tr. 54). Before 1949, I don't remember anyone coming up here for the purpose of measuring water. North and South Sanpitch Creeks head up in the mountains from a seep or very small spring, gradually getting larger as it comes west (Tr. 55). No one else takes water out of North Sanpitch Creek except us, Tanner and Mr. Peterson (Tr. 56). He had never heard of the North Fork called the Sanpitch River until the last two years, nor the South Fork (Tr. 59). South Sanpitch Creek is dry every year, as is North Sanpitch Creek (Tr. 63).

**Henry V. Wheeler**, who had property in Milburn in the vicinity of Oldroyd and Peterson, and who had been acquainted there all of his life, testified that he was president of Milburn Irrigation Company, getting water out of South Sanpitch Creek (Tr. 69) .

Exhibit "C" was admitted, being a deed by which the company received its water right in 1915 from the "waters of South Sanpitch Creek, flowing from what is known as South Fork of Sanpitch" (Tr. 71-72). The witness' property was irrigated from the South Sanpitch Creek (Tr. 72). He had never known that the North Fork was considered the Sanpitch River (Tr. 74-75). His company does not take any water directly out of Sanpitch River. He had never seen the water commissioner around measuring water for his company, although he had seen him up by Milburn (Tr. 75). Sanpitch River is west, in the trough of the valley, running south, and he had not known of any other place or stream known as Sanpitch River except that. There is no diversion for primary right below the Milburn Irrigation Company; when the stream goes down to where it can be

placed in the company canal, the company handles all the water (Tr. 76). There are diversions below for high water rights, but the company has never had any trouble about high water rights (Tr. 77).

Defendants' Exhibit "A" was received to illustrate the testimony (Tr. 82). This map shows them as "North Sanpitch Canyon" and "South Sanpitch Canyon". The witness had not seen any map listing them as the North Fork of the Sanpitch River and the South Fork of the Sanpitch River, but had a map that shows the same position of the creeks and lists them as the North Sanpitch Creek and the South Sanpitch Creek (Tr. 83-84).

**Charles E. Jennings**, having property under the Milburn Irrigation Company, testified that he was water master for the Milburn Irrigation Company. He had never seen Mr. Draper around there (Tr. 87-88). Draper, he was informed, came to his house once and asked for him (Tr. 99). He disputed the amounts of water reported by Mr. Draper on the basis of the witness' own observation. Defendants' Exhibit "E" was received, showing that Draper's figures were based upon estimates and not measurements (Tr. 105).

In rebuttal, the plaintiff recalled Frank Reese, who testified that he attended the meetings of water users on Sanpitch River during 1950, 1951 and 1952. He said that one of the gentlemen who was present, represented himself as chairman or a representative to the water users and made the statement that more than fifty-one percent of the water users were present. A committee called on the State Engineer to have Blain Draper appointed Commissioner in 1950 and he refused, and they then considered Mr Cole, who acted and in 1951 and 1952, the State Engineer appointed

Mr. Draper as river commissioner for Sanpitch River (Tr. 107-108). The minutes of the 1950 meeting were received as Exhibit No. 3 (Tr. 109).

Plaintiff's Exhibit 3 was admitted and shows that a budget committee met with State Engineer and submitted a budget; some of the items were questionable under a former ruling of the Supreme Court. See *Utah Power & Light Co. v. Richmond Irrigation Co.*, 115 Utah 352, 204 P.2d 818, esp. 825-26).

On cross-examination Mr. Reese testified that there were ten or fifteen users present at the meeting, and the only evidence that the witness had was their representation that they stated they represented fifty-one percent of the "Sanpitch River Distribution System" (Tr. 109). He did not know that they represented fifty-one percent of the water users of the Sanpitch River, including the tributaries. ". . . as a matter of fact, there was a question in my mind as to whether the assessments then were wrong, because of the connection of the Sevier River system. It was very confusing to me at that time."

Minutes of the 1950 meeting were admitted as Exhibit 4. It was stipulated that copies of these minutes could be placed in the records (Tr. 111).

When the evidence was closed, plaintiff moved to make the amendment referring to the Sanpitch River System rather than the Sanpitch River in his complaint, as stated above, which amendment was made by interlineation, but there was no further evidence offered, and the record is silent as to any notice given to users on the system as a whole, or any meetings or proceedings involving users on any part of the system except Sanpitch River and the South and North Forks or Creeks.

The attorney for plaintiff prepared findings, conclusions and judgment, which were signed by the court on June 16th, 1952, and entered June 18th, 1952 (File 48-52). Within the time provided by law, motion for a new trial was filed by defendants and notice duly given (File 42, 46). The motion was set down for hearing for September 30th, 1952, and notice duly given to the attorneys for the respective parties. At the hearing on the motion for new trial, which plaintiff's counsel did not attend, the court, pursuant to Utah Rules of Civil Procedure 59(a), determined that the findings, conclusions and judgment were erroneous and ordered the attorneys for the defendant to prepare new findings, conclusions and judgment, and in accordance with the direction of the court, this was done, and copies were served upon the attorney for plaintiff, together with a cost bill, on or about the 13th day of October, 1952 (File 53-63).

On October 14th, 1952, the court signed the proposed findings, conclusions and judgment, and on the 21st of October, 1952, copies of the findings, conclusions and judgment as signed and entered were served upon the attorney for the plaintiff (File 68). On the 21st day of October, 1952, the attorneys for plaintiff filed and served upon the attorneys for the defendants the following objections:

"Comes now the plaintiff above named and objects to the Findings of Fact and Conclusions of Law, submitted by the defendants herein, and particularly to Findings No. 4, No. 5, No. 6, No. 8, No. 10, No. 11, No. 13 and No. 14, on the grounds that they are contrary to the evidence, and in violation of the statutes.

"Dated this 20th day of October, 1952".

(Filed October 21st, 1952).

At the same time notice was given that the "plaintiff will call up its objections to the proposed findings of fact, and conclusions of law, on Monday, November 17th, 1952, at 10 a. m., or as soon thereafter as plaintiff can be heard." Later, the hearing on said objections was continued until December 1st, 1952, at which time, after hearing arguments, the objections were by the court overruled and the last findings of fact, conclusions of law and judgment were ordered to remain as the decision of the court.

On the 31st day of December, 1952, the attorney for the plaintiff filed in the office of the clerk of the District Court purported notice of appeal in the following form:

(Title of Court and Cause)

"Comes now the plaintiff and appeals from the decision of the judge of the above entitled court entered on the 1st day of December, 1952, and from the findings of fact, conclusions of law and decree entered in the above entitled matter

"Dated this 30th day of December, 1952.

/s/ J. Lambert Gibson  
Attorney for Plaintiff"

(File 69). Filed December 31st, 1952.

No designation of the record on appeal or statement of points was filed until after the file had been forwarded to the Supreme Court and until after the defendants moved to dismiss the appeal on the grounds that it was not taken in time. This was several months after the time provided by the Utah Rules of Civil Procedure.



## ARGUMENT

**I. The appeal should be dismissed.**

Motion has been duly made. While upon oral presentation, this motion was denied, it is our understanding that this does not preclude us from presenting the matter for final adjudication in this brief. The matter is jurisdictional and a review of the record in the light of prior decisions of this Court will indicate, we believe, that if the appeal here can be sustained, the Rules of Civil Procedure concerning the manner and time of taking appeals jurisdictional by the express provisions of those rules and prior statute, will have been disregarded. They should not be disregarded in one case if they are to be applied in others.

URCP 73 (a) provides in the most positive language that the time within which an appeal may be taken shall be one month from the entry of the judgment appealed from unless a shorter time is provided by law, except upon a showing of excusable neglect based on a failure of a party to learn of the entry of the judgment, the District Court in any action may extend the time for appeal not exceeding one month from the expiration of the original time herein prescribed. The judgment in this case was entered on October 14th, 1952. The purported notice of appeal was filed December 30th, 1952. There was no showing of excusable neglect before the District Court based on a failure of a party to learn of the entry of the judgment, or for any other reason. As a matter of fact, the record shows that not only were the proposed findings, conclusions and judgment served upon plaintiff's attorney, but within one week from their signing by the judge, additional copies showing the

signature on the final papers were served. No application was made at any time to the District Court.

The same rule provides that the running of the time for appeal is terminated by a timely motion made pursuant to any of the following rules hereinafter enumerated, and the full time for appeal fixed in this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: Granting or denying a motion for judgment under Rule 50(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; or granting or denying a motion under Rule 59 to alter or amend the judgment; or denying a motion for a new trial under Rule 59. No such motion was ever filed, claimed or acted upon. The only paper filed was the objection to findings and conclusions which moved the court to do nothing, was directed only to proposed findings and conclusions and which were in no way changed in form or substance after plaintiff was served with copies of the signed findings, conclusions and judgment. After he was so served, there remained twenty-three days for an appeal to be taken. There even remained three days for the filing of a motion for a new trial or the other motions specified in the rule. Nothing further was filed. This Court recently dismissed an appeal because it was not filed strictly within the one month. *Brennan v. Lynch*, 254 P.2d 454, \_\_\_\_\_ Utah \_\_\_\_\_. In that case, the appellant was only one day late. In the case at bar, he was more than a month late. This Court has properly pointed out that notice of the judgment or ruling is not required to set the time running. In re: *Bundy's Estate*, 241 P.2d 462. In the case at bar, notice was actually given.



To say that the objection to proposed findings is a motion for new trial or similar motion, in spite of subsequent actual notice of the entry of judgment, and the fact that by no stretch of the imagination could such objection be thought to be one of the motions so specifically designated in the rule, seems to say that a mere intent will substitute for one of such motions or timely notice of appeal. It is to say more, for there is nothing in the objection which resembles a motion or which indicates an intent to file any such motion or to do anything else but note objections to proposed findings and conclusions, which intent was made completely moot and ineffective to the knowledge of plaintiff by receipt of copy of the findings, conclusions and judgment as signed by the trial court.

A reference to Rule 7, URCP, will show that by very definition the objection could not be considered a motion:

“An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.”

This matter is jurisdictional, and jurisdiction must appear as we understand it. It should not be sufficient to say that a motion might have been intended or would have been filed under other circumstances or might have been acted upon without any filing or even any making or presentation to the court, which the record utterly fails to disclose.

The form of the notice of appeal itself, which is also jurisdictional, should be fatal to the appeal. The court to which the appeal is taken is not stated in the notice. Rule

73(b) specifically provides that “The notice of appeal shall . . . designate that the appeal is taken to the Supreme Court.” Plaintiff’s notice of appeal does not do this in form, substance or at all. The filing of the notice of appeal required by the rule is mandatory. If it is now to be said that this rule does not mean what it says by mandatory language concerning the contents of a notice, the filing of which is jurisdictional, then any paper, whether it complied with the rule in any respect, could be deemed a notice of appeal.

No motion was filed to extend the time; the appeal was not taken in time; the notice of appeal did not contain the substance of what is required by the mandatory language of the rule; the designation of the record was not filed in time; no statement of points was filed as provided by the rule. It would seem that if in any case an appeal should be dismissed, this would be it. We submit that it should be. There is nothing in the rules, or in our history or practice before, that would exempt the State from the requirements applicable to citizens on these points.

**II. Assignments or points sought to be raised by appellant are not based on the record, involve a misinterpretation of it, and establish no basis for reversing the judgment of the lower court.**

Assignment No. 1. This assignment is divided into two parts: the first portion of the assignment follows verbatim:

“That the trial court erred in finding that the respondents were not water users diverting water from the Sanpitch River System.”

There is no specification as to which particular finding of the court in which the court so found. We will therefore examine the court's findings to determine if the court so found. If the court so found, error will be admitted. If the court did not make such finding, such assignment should be disregarded.

The court made fourteen findings (File 55 to 58), and we submit that in none of such findings did the court make any finding in substance or effect as set out in assignment of error No. 1; but on the contrary, in its finding No. 12, the court did find that the respondents are water users diverting water from the Sanpitch River System, which said finding reads as follows:

"12. The court further finds that the North Fork and the South Fork of the Sanpitch River are tributaries of said river, and are a part of the Sanpitch River System, as alleged in the Amended Complaint of the plaintiffs herein as are numerous other tributaries of the Sanpitch River as disclosed by the evidence in this case, but the evidence further shows that the water users from said North and South Forks are the only water users using water from the tributaries of Sanpitch River that have been assessed for the salary and expenses of the water commissioner of Sanpitch River System for the years 1950 and 1951,"

As to the latter part of Assignment No. 1, that said assessment was unauthorized and void, this necessarily follows from the finding made.

Assignment No. 2. This assignment is in two parts; the first part reads verbatim as follows:

"The trial court erred in finding that the water commissioner never attempted to measure or distribute any of

the water of the Sanpitch River, including the North and south Forks thereof.”

Appellant’s brief does not specify where such alleged finding may be found, or in which of the court’s findings such assigned error may be found. We submit, however, that no such finding as error No. 2, either in substance or effect, can be found in the court’s findings. The only finding where even the language of the said assignment may in part be found is finding No. 10, which is here set out verbatim:

“10. That the State Engineer during the years 1950 and 1951, made assessments against the water users of the Sanpitch River, and included the water users from the North Fork and the South Fork of Sanpitch River, so called in the Cox Decree, for the alleged proportionate share of the money necessary to pay the salary and expenses of the water commissioner of Sanpitch River, and including the water users of the two tributaries of Sanpitch River called North and South Forks, but said State Engineer did not include or attempt to include the water users of the other tributaries of Sanpitch River, and said water commissioner at different times visited, and at times claimed to estimate the water being diverted from these forks by the defendants herein, but he never attempted to measure or distribute any of said waters.”

There is nothing in such finding that could even remotely be held to find that the commissioner did not measure any of the water of Sanpitch River.

In the last portions of assignments of error Nos. 1 and 2, where the court is alleged to find and conclude that the assessment made by the State Engineer was unauthorized

and void, it should be noted that this holding applied only to the respondents herein, the great bulk of the assessments being on Sanpitch River proper and therefore regular.

The only finding of the court wherein it is found that the assessments made by the State Engineer were found to be unauthorized and void is finding No. 14, and that finding specifically mentions the assessments against the respondents, which is here set out verbatim:

“14. The court further finds that any assessment levied or attempted to be levied by the plaintiff against the defendants herein, L. L. Peterson, Mrs. R. M. Oldroyd and/or the Milburn Irrigation Company, for the years 1950 and 1951 as water users of the Sanpitch River System and as claimed by plaintiff's amended complaint was, and is, unauthorized and therefore void.”

### **III. The court did not err in its Findings of Fact; and its Conclusions of Law and Judgment are fully supported by the Findings of Fact.**

In the first point in appellant's brief, it is argued “That the trial court erred in finding that the respondents are not water users diverting from the Sanpitch River System . . . .” Under his point II, it is stated “That the trial court erred in finding that the water commissioner never attempted to measure or distribute any of the water of the Sanpitch River, including the North and South Forks thereof . . . .” We find it impossible to present our argument under headings corresponding to such assignments for, as we have already pointed out in Division II of this brief, no such findings were made. No findings other than these supposed findings are attacked.

We do submit, however, that the court's determinative actual findings are supported by the great preponderance of the evidence and on most phases by the undisputed evidence. The court found in finding No. 10 that the State Engineer during the years 1950 and 1951 made assessments against the water users of the Sanpitch River, and included the water users from the North Fork and the South Fork of Sanpitch River, so called in the Cox Decree, for the alleged proportionate share of the money necessary to pay the salary and expenses of the water commissioner of Sanpitch River, and including the water users of the two tributaries of Sanpitch River called the North and South Forks, but said State Engineer did not include or attempt to include the water users of other tributaries of Sanpitch River, and said water commissioner at different times visited, and at times claimed to estimate the water being diverted from these forks by the defendants therein, but he never attempted to measure or distribute any of said water. There is no dispute in the record in support of this finding.

It seems apparent from the evidence introduced on behalf of the plaintiff and in that connection assuming that the water commissioner of Sanpitch River went up to the various diversions on the North and South Forks and looked at them, then estimated the amount of water therein and entered these amounts in his book as testified to by him, without distributing or attempting to distribute any of such water between the water users and without any necessity in the least, could clearly be of no benefit to such water users, or to anyone else, except as a means, perhaps of easing the assessment burden upon the water users of the Sanpitch River below, and even if it should be further assumed that these tributaries were actually a part of the Sanpitch River



proper, even then there would be no service rendered to the water users on such tributaries, or even to the water users of the Sanpitch River, excepting as they might be benefited to the extent of the tribute imposed upon the defendants herein, which assumptions, however, are clearly contrary to the basic classification in the Cox Decree and contrary to the common acceptance over many years by all interested parties without at least including the other tributaries in the same positions.

By his amendment at the close of the evidence he apparently abandoned his contention that the North and South Forks, or Creeks, were a part of Sanpitch River proper, and relied upon their being part of the Sanpitch River System. This the court found, but since there was no evidence either offered or received that the assessment had been levied for the Sanpitch River System at meetings called thereof, nor even that Mr. Draper or his predecessor was commissioner for the Sanpitch River System, and it affirmatively appearing that no proper assessment against the users under the Sanpitch River System as a whole had ever been made or attempted, it was properly concluded that the assessments against the defendants were unauthorized and void.

The cases cited by plaintiff in principle support this conclusion, as they recognize that arbitrary assessments are contrary to law.

The first case cited by plaintiff is *Bacon, State Engineer v. Gunnison Fayette Canal Company*, 284 Pac. 1004, 75 Utah 278 decided January 30th 1930. The controversy in this case arose from the method employed by the State Engineer in apportioning the costs of distribution among the water users of the Sevier River System (not including Sanpitch River). Previous to the year in question, such



costs had been assessed against the users of water pro-rata, according to the quantity of water distributed to the users respectively, and as the assessments were to be paid in advance, the State Engineer's schedule of distribution for one year was the basis of the apportionment for the next.

Such method had caused objections, so in 1926 the State Engineer introduced a new basis for apportionment whereby the amount to be assessed and collected from the users was made according to the amount of land upon which the users were entitled to use the water for irrigation. The new method proposed was shown by the evidence to be unequal as to benefits received and services rendered in the case of the defendant, as it owned largely secondary rights, which were ample for a short period during the high water and then decreased so that later crops could not be served and as a consequence, only crops that could be grown by early irrigation could be produced.

This case set a pattern which has been largely followed in later similar cases. Theretofore by statute, it was provided that the costs of maintenance of ditches and canals owned jointly by different parties were required to be paid in accordance with the rights of such parties in the ditches or canals, and where the State Engineer was called upon by water users to distribute water to which they are entitled as provided by statute, such users were required to pay their respective portions of the costs.

The court in deciding the case above mentioned, determined that some similar method could well be satisfactorily employed by prescribing that the salary and expenses of the water commissioner should be borne pro-rata by the users of water from such river system. As the court concluded, the method employed by the State Engineer did not

meet that requirement. The judgment of the lower court was reversed and costs were awarded against the respondent, State Engineer.

The next case cited by appellant is Bacon, State Engineer, v. Plain City Irrigation Co. (another river system case) 52 P.2d 427, 87 Utah 564, decided November 27th, 1935. This case reaffirmed the principle of the decision of the Gunnison Fayette Canal Company case and on account of the engineer failing to comply with that standard in the attempted apportionment. Judgment was reversed, with costs against the State Engineer.

The other case cited by the appellant in his brief is Utah Power and Light Co. v. Richmond Irrigation Company, et al, decided April 8th, 1949, 204 P.2d 818, 115 Utah 352. This case also approves the formula or method laid down in the two previous cases, to the effect that a standard should be employed in apportioning the salary and expenses of the State Engineer and making distribution of water between water users in any water system or water source. It is indicated that under the statute providing for apportionment of the costs of the water commissioners for distribution of water from any river system or water source, required that expenses shall be borne pro-rata by water users based on their individual rights, although mathematical accuracy is impossible, apportionment ought to be according to some standard which approximates an apportionment made according to services rendered and benefits received. (In this case, the two cases hereinabove cited were analyzed and approved with respect to the formula above mentioned), and in the course of the opinion, the Court said:

“A different question arises in connection with the assessment levied against Wellsville North Field Irriga-

tion Company. Sec. 100-5-1, U.C.A., 1943, hereinbefore quoted, provides that the commissioner shall be appointed when in the judgment of the state engineer or the judge of the district court it is necessary for the purpose of distributing the waters from any river, stream, or water source. This statute suggests two elements: first, that distribution of the water between users is necessary; and second, that the persons or companies chargeable with costs and expenses of the commissioner obtain their water from the same water system or common water source. To these two elements should be added the requirement suggested in our previous opinions, namely, that the assessment levied should bear some reasonable relationship to the services performed or the benefits conferred. The record shows an absence of all of these elements in the case of Wellsville North Field Irrigation Company.

“There appears to be no necessity for a commissioner to distribute the waters obtained from the springs located on the property of the Wellsville North Field Irrigation Company. The water used by this irrigation company rises from two springs and all of the flow of one spring and one-half the flow of the other is distributed through a system of canals exclusively under its maintenance and control. The flow from the springs does not equal the company’s decreed right and all of the water belonging to the company is used by its members or stockholders. While some of the water reaches the Little Bear River after it passes from the land irrigated by the company, there is no reasonable possibility of a commissioner performing services in connection with the distribution of the escaping waters. Neither is there any reasonable necessity for a commissioner to divide the waters of one spring as this is done by a permanent cement dividing headgate. (Emphasis ours.)

“Moreover, we are not convinced that the Wellsville North Field Irrigation Company should be considered as a user of water from the Little Bear River system or from a source common with the other users. We do not believe the Legislature intended to make the words ‘water source’ so inclusive that every person using surface water, percolating water, spring water or artesian water should all be charged with the costs and expenses of a commissioner because some part of their flow could be traced to a common source. We believe that the words were used in their generally accepted meaning and that ‘source’ was intended to be restricted to one origin such as a stream, a rise from the ground, a fountain, a spring, an artesian basis or some similar body; and that it was not the intention of the Legislature to combine a river system with springs and artesian basins for purposes of distribution and administration. We conceive many situations where such a combination would bring about impracticable and impossible results.

“To require this company to bear a portion of the expense of maintaining a river commissioner who does not render service to it and who in no way assists in distributing its water to any user would not be in keeping with the purposes or the statute or the previous decisions of this court.”

Justice Wolfe, concurring, said the following:

“I concur in the part of the opinion dealing with the Wellsville North Field Irrigation Company on the other ground names, to-wit: that no services are performed for this company by the commissioner, and the included reason that there can be no relationship between services performed for, or benefits received by, the user and the costs of distribution because no services are rendered nor benefits conferred.”

That while these three cases are essentially river system cases and are distinguishable from this case now before the Court, they support the position that whatever the water commissioner of Sanpitch River, Blain Draper, did as testified to by him as to visiting the said two tributaries of Sanpitch River in 1950 and 1951, did not meet any standard as to service and benefits, that could authorize any assessments levied upon the respondents herein by the State Engineer. Such visits as respect service to such water use was a ridiculous pretense and brazen attempt to impose an unauthorized assessment upon the respondents.

Aside from that, these tributaries are not a part of Sanpitch River, and have never through the years been considered as such, and the attempt to interpret the Cox Decree to mean that Sanpitch River proper, as distinguished from the tributaries, heads up in the top of the Wasatch Range at the head water of two canyons approximately two miles apart and about seven miles long, is wholly unreasonable, and the court most properly found against any such theory.

Finally, it would be the very essence of inequality and capriciousness to say that these two tributaries out of a large number of others in the same situation could be singled out to help bear the cost of maintaining a water commissioner upon the Sanpitch River.

#### **IV. The court did not err in assessing costs against the State Engineer.**

It is urged by plaintiff under its point III that the court erred in assessing costs against the State Engineer.

We can find no statute exempting the State Engineer from costs in such actions as this. Utah Code Annotated,

1953, 73-3-14, provides that "The State Engineer must be joined as a defendant in all suits to review his decision, but no judgment for costs or expenses of the litigation shall be rendered against him . . . ." This provision can have no application to the present case, which is not one in which the State Engineer is a nominal party, but is one where he is seeking in his own right as State Engineer a money judgment against a defendant.

The plaintiff cites the last part of Rule 54(d) to the effect that costs against the State of Utah, its officers and agencies, shall be imposed only to the extent permitted by law. Costs against the State Engineer in an appeal to the District Court under 73-3-13 is not permitted by law. We submit that they are authorized in such cases as the one now before this Court. We think the first part of Rule 54(d) applies, that "Except when express provision therefor is made either in a statute of this state or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ." As a matter of fact, in two of the cases cited by plaintiff in his brief in connection with other points, costs were awarded against the State Engineer.

## CONCLUSION

Plaintiff's appeal should be dismissed for plaintiff's failure to file notice of appeal within time, and for other reasons specified in this brief. This is not such a case that would justify bending and breaking well established rules governing jurisdictional requirements on appeal, if indeed any case is such a one. The points upon which appellants rely do not furnish any sound basis for claiming that the judgment of the trial court should not be permitted to stand.



Not only is there competent evidence in the record to support the findings, conclusions and judgment, but the evidence greatly preponderates in favor of the defendants' position. It affirmatively appears that the North and South Forks or Creeks from which defendants obtain their water are classified by the Cox Decree and by common acceptance for many years as tributaries, as distinguished from, Sanpitch River; that the River Commissioner was appointed and authorized to act only with respect to Sanpitch River proper; that to single out two tributaries out of a large number of others of the same nature to apply assessments against was unauthorized and arbitrary, and that the purported services of the commissioner on the North and South Forks were not such as to justify the assessments; that the commissioner was never appointed or intended to be appointed for the Sanpitch River System, including the tributaries, and even if he were, to make assessments against two tributaries out of perhaps fifty in like position, cannot be sustained. The trial court was correct in declaring such assessments against the defendants void.

The importance of defendants' case, extending beyond the relatively small amount of money at present involved, has justified, we have been led to believe, the somewhat extended treatment we have endeavored to give it in this brief, and we trust will merit the favorable consideration of the Supreme Court.

Respectfully submitted,

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