

1953

Randolph Land & Livestock Co. et al v. United States of America et al : Brief of Appellants

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

McKay, Burton, McMillan & Richards; Paul E. Reimann; Milton A. Oman; Attorneys for Objectors and Appellants;

Recommended Citation

Brief of Appellant, *Randolph Land & Livestock Co. v. US*, No. 7983 (Utah Supreme Court, 1953).
https://digitalcommons.law.byu.edu/uofu_sc1/1961

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

APR 12

LAW LIBRARY
U. of U.

In the Supreme Court of the State of Utah

IN THE MATTER OF THE GENERAL
DETERMINATION OF RIGHTS TO
THE USE OF WATER OF BEAR
RIVER DRAINAGE AREA IN RICH
COUNTY, STATE OF UTAH.

RANDOLPH LAND & LIVESTOCK
COMPANY, a corporation, DESERET
LIVESTOCK COMPANY, a corporation,
BOUNTIFUL LIVESTOCK COMPANY,
a corporation, HAROLD SELMAN, NICK
CHOURNOS, ORVAL JOHNSON, and
WILLIAM JOHNSON,

Objector and Appellants,

— vs. —

THE UNITED STATES OF AMERICA,
Water Claimant and Respondent,
THE STATE ENGINEER OF THE
STATE OF UTAH, *Respondent.*

FILED
AUG - 1 1953
Clerk, Supreme Court, U.

No. 7983

BRIEF OF APPELLANTS

McKAY, BURTON, McMILLAN
& RICHARDS,
PAUL E. REIMANN, and
MILTON A. OMAN,
*Attorneys for Objectors and
Appellants.*

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	3
STATEMENT OF FACT	4-25
(a) The claims filed by the United States of America...	5
(b) The Proposed Determination of Water Rights.....	6-7
(c) Objections to the Proposed Determination	7-12
(d) Oral motion to strike the government claims....	13-15
(e) Stipulation of facts	15-19
(f) Declared purpose of each application	19-20
(g) Waiver of priority of claims	20
(h) Memorandum decision	21-22
(i) Findings of fact, conclusions of law and interlocutory decree	22-24
POINTS ON WHICH APPELLANTS RELY FOR REVERSAL OF THE INTERLOCUTORY DECREE	25-28
ARGUMENT	28-70
Point No. 1: A proceeding for the complete adjudication of rights to the use of water of a river system under Sections 100-4-12 and 15, U.C.A. 1943, is a proceeding for the determination of the present rights to the use of the waters of the river system, not what those rights might have been some years ago	28-36
Point No. 2: In a general water adjudication case, the objection by a known water user to the State Engineer's proposed allowance of certain water claims by a landowner who has never used the water and who does not presently make any beneficial use of the water, does not constitute a collateral attack upon some prior proceeding before the State Engineer, but a direct attack upon the claim that such claimant presently has a right to the use of the water.....	36-40
Point No. 3: Neither the United States of America nor any other landowner on whose land water arises, can acquire diligence rights to the use of water for livestock upon such land, when the only beneficial use of water was made by livestock owners and operators other than the landowner, and which livestock operators neither operated under permission of or agreement with the landowner or in subordination to the landowner...	40-51
Point No. 4: Where the livestock operators who actually made the beneficial use of the water (or their successors in interest), have acquired diligence rights to the use of the water, the landowner who never used the water and had no interest in such livestock cannot claim diligence rights predicated upon such use made exclusively by other when there was no privity whatsoever....	51-55
Point No. 5: The stipulation of facts in this case shows conclusively that the United States of America never acquired any diligence rights to the use of water, and that the diligence rights claims which the State Engineer proposes to have incorporated into the decree on behalf of the United States of America, are void....	55-59
Point No. 6: Prior to the 1941 amendment, except for purposes of the Bureau of Reclamation, the United States had no authority under the State statutes to file on water, and there is no Federal statute which authorizes the Forest Service or the Bureau of Land Management to make water applications, and consequently such applications were and are void	59-62
Point No. 7: The stipulation of facts shows that even if there had been any authority of the United States of America to file applications to appropriate water in this State, such applications in question were void ab initio in	

	Page
view of the fact that the stipulation of facts shows that there was no intention on the part of the applicant to put the water to beneficial use.....	62-65
Point No. 8: The declared purpose in each of the applications filed by the United States of America is shown to be an attempt to preempt the water, to gain a monopoly and to control other lands of private citizens and to "regulate" the public grazing lands, and such purposes are for the domination of the property rights of others and not for the application of water to beneficial use by the landowner or applicant	65-58
Point No. 9: The stipulation shows that some of the applications lapsed or were withdrawn, and that where certificates of appropriation were issued such proof was false and that no water has ever been put to beneficial use, so that there are no existing rights to the use of water and no beneficial use of water being made upon which any adjudication could be made in favor of the United States of America	68-70

TABLE OF CASES

Adams v. Portage Irrigation, Reservoir & Power Co., 95 Utah 1, 72 P. 2d 648	58
Board of Directors, etc. v. Jorgensen, 136 P. 2d 461	46-47
Hague v. Nephi Irrigation Co., 16 P. 2d 421, 52 P. 765, 41 L.R.A. 311	49
Ickes v. Fox, 300 U. S. 82, 81 L. Ed. 525, 57 S. Ct. 412	47-48
Lake Shore Duck Club v. Lake View Duck Club, 50 Utah at 82, 166 P. at 311	49-50
Robinson v. Schoenfeld, 62 Utah 233, 218 P. 1041	49-50
Smith v. District Court, 69 Utah 493, 256 P. 539	30-31
Sowards v. Meagher, 37 Utah 212, 108 P. 112	51-52
Twin Falls Salmon River Land, etc. v. Caldwell, 272 F. 356 ..	45
United States v. Union Gap Irrigation Co., 209 F. 274	47
United States v. West Side Irrigation Co., 230 F. 284	47
Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co., 104 Utah 448, 137 P. 2d 634	58

FEDERAL STATUTES

16 U. S. C. A., sec. 590 (4)	61
30 U. S. C. A., sec. 51, R. S. 2339, (14 Stat. 253)	43-44
30 U. S. C. A. sec. 52, R. S. 2340, (26 Stat. 1097)	44
43 U. S. C. A. sec. 321, (19 Stat. 377)	44-45
43 U. S. C. A. sec. 372, (32 Stat. 390)	46
43 U. S. C. A. sec. 383, (32 Stat. 390)	46
43 U. S. C. A. sec. 315, 315b	53

STATE LAWS

Constitution of Utah, Article XVI, Section 1	45
C. L. Utah 1917, sec. 3451	60
Sec. 100-3-2, R. S. U. 1933	57, 60
Laws of Utah 1941, chap. 40	60
Sec. 100-3-2, U. C. A. 1943, (73-3-2, U. C. A. 1953)	57, 60
Sec. 100-1-3, U. C. A. 1943, (73-1-3, U. C. A. 1953)	31, 39
Sec. 100-1-4, U. C. A. 1943, (73-1-4, U. C. A. 1953)	31, 54
Sec. 100-3-1, U. C. A. 1943, (73-3-1, U. C. A. 1953)	31
Sec. 100-3-8, U. C. A. 1943, (73-3-8, U. C. A. 1953)	66, 67
Sec. 100-3-17, U. C. A. 1943, (73-3-17, U. C. A. 1953)	39
Sec. 100-4-1, U. C. A. 1943, (73-4-1, U. C. A. 1953)	29, 30
Sec. 100-4-3, U. C. A. 1943, (73-4-1, U. C. A. 1953)	30
Sec. 100-4-5, U. C. A. 1943, (73-4-5, U. C. A. 1953)	32, 35
Sec. 100-4-11, U. C. A. 1943, (73-4-11, U. C. A. 1953) ..	32, 33, 38
Sec. 100-4-12, U. C. A. 1943, (73-4-12, U. C. A. 1953) ..	33, 34
Sec. 100-4-13, U. C. A. 1943, (73-4-13, U. C. A. 1953) ..	34
Sec. 100-4-14, U. C. A. 1943, (73-4-14, U. C. A. 1953) ..	34
Sec. 100-1-15, U. C. A. 1943, (73-4-15, U. C. A. 1953) ..	34, 35

In the Supreme Court of the State of Utah

IN THE MATTER OF THE GENERAL
DETERMINATION OF RIGHTS TO
THE USE OF WATER OF BEAR
RIVER DRAINAGE AREA IN RICH
COUNTY, STATE OF UTAH.

RANDOLPH LAND & LIVESTOCK
COMPANY, a corporation, DESERET
LIVESTOCK COMPANY, a corporation,
BOUNTIFUL LIVESTOCK COMPANY,
a corporation, HAROLD SELMAN, NICK
CHOURNOS, ORVAL JOHNSON, and
WILLIAM JOHNSON,

Objector and Appellants,

— vs. —

THE UNITED STATES OF AMERICA,
Water Claimant and Respondent,
THE STATE ENGINEER OF THE
STATE OF UTAH, *Respondent.*

No. 7983

BRIEF OF APPELLANTS

PRELIMINARY STATEMENT

The Supreme Court of the State of Utah granted an
appeal from an interlocutory decree entered on February

7, 1953, in the District Court of Rich County, State of Utah. By such interlocutory decree appealed from, the district court overruled and dismissed the objections filed by appellants to the stockwatering "diligence rights" claims, and also the stock watering claims based upon applications to appropriate water filed by the Forest Service and by the Bureau of Land Management of the United States of America, listed on pages 327, 328, 361 and 362 of the State Engineer's "Proposed Determination of Water Rights in Bear River, Rich County, Utah, Drainage Area." (Volume III, Record on Appeal).

The only matters in controversy here, relate to the claims of water rights asserted by the United States of America on behalf of the Forest Service and the Bureau of Land Management. The rights of appellants and others are not involved in this appeal. Consequently, notwithstanding the voluminous character of the State Engineer's "Proposed Determination" (Volume III of the Record on Appeal), only pages i, ii, 327, 328, 329, 361 and 362 are material to this appeal. For the convenience of the court, the essential items of pleading, the stipulation of facts and other matters which would constitute an abstract of the record, are incorporated into the Statement of Facts.

STATEMENT OF THE FACTS

On July 13, 1942, the respondent State Engineer filed his original petition for a general adjudication of

the rights to the use of the waters of Bear River drainage area in Rich County, Utah (R. 1-5). On May 14, 1945, an amended petition was filed (R. 6-8). An order was entered for publication of notice to water claimants, September 1, 1948 (R. 9).

Some two years after the filing of the original petition for a general adjudication, the United States Forest Service and the Grazing Service (later known as the Bureau of Land Management) filed in the office of the State Engineer, various applications to appropriate water for *stockwatering* purposes, all of which were listed as approved claims in the State Engineer's "Proposed Determination of Water Rights in Bear River, Rich County, Utah, Drainage Area," in 1951, pages 327 and 328.

On April 2, 1951, *after* the Proposed Determination had gone to press, the United States of America through the Forest Service, filed with the State Engineer, "water users' claims" numbered 1104 to 1115 inclusive, as "diligence rights" claims for stock watering, based upon the alleged use of water in some instances as early as 1865. As indicated in the Stipulation of facts, not one of those claims was based on any alleged use by any agency of the Federal government, nor by any officer or agent of the United States, but based entirely on the use of water for livestock made by various livestock operators who had grazed their stock on government-owned lands. Those claims were added to the Proposed Determination, as an appendix, pages 361 to 362.

The State Engineer by his "Proposed Determination" recommended allowance of all of the claims therein listed, including all of the claims filed by the United States of America. He further stated (Volume III, page ii) :

"10. This proposal is intended to cover all existing rights and those subsisting applications initiated in the State Engineer's Office and not perfected at this time within the area described. The rights listed herein which are founded upon contemplated appropriations of water by reason of subsisting applications filed in the State Engineer's Office, are subject to their inclusion in a decree conditioned upon compliance with the terms of the applications upon which each respective contemplated appropriation is based, and upon compliance with the provisions of the Laws of the State of Utah relating thereto, and Proof of Appropriation being made to the State Engineer in compliance with said laws. At the end of the five-year period herein-after mentioned, the status of said applications shall be reported by the State Engineer to the court, at which time the final decree should be made to agree with the records of said applications, as shown by the records in the State Engineer's Office. Any applications which are not perfected at the end of the five-year period should be excluded from the decree.

"11. It is recommended that the rights to the use of water within the area covered by this proposal be decreed to the various parties substantially as set forth herein. It is further recommended that the court retain jurisdiction of this case for a period of five years for the purpose of making adjustments, correcting errors and for such other purposes as time may indicate to the

court as proper and just. In all matters whatsoever pertaining to this determination and the decree to be rendered, the services and advice of the State Engineer are at all times available to the court."

After receipt of a copy of the Proposed Determination, appellants in 1951 filed the following "Objections to the Proposed Determination of Water Rights in the Bear River Drainage of Rich County, Utah, by the State Engineer" (R. Vol. II, pages 90-94):

"Petitioners allege and petition the Court as follows:

I

"That they and each of them are owners of ranch and range lands located in the water drainage area herein concerned, which lands and the forage produced annually thereon are used to feed and to graze great numbers of livestock which petitioners own and operate; that petitioners also graze, in addition to the lands they own and individually control, the public domain and Forest Reserve lands of the United States of America which are located in this drainage area with said livestock. That petitioners and their predecessors in interest have conducted the said livestock operations for a period of time prior to the year 1900 and continuously since that date.

II

"That located upon and coursing through and across the above said privately owned, public domain and Forest Reserve lands are waters which the petitioners and their respective predecessors

in interest have used to water said livestock and to irrigate certain of their ranch lands for all of the above said period of time.

III

“That petitioners have each appropriated the waters and the rights to the use of waters as the State Engineer for the State of Utah sets out in his ‘proposed determination of water rights’ which have been filed with the Court in this case, and each of the petitioners now own exclusively the rights to the use of the waters as proposed by the State Engineer in his said proposal, and have a continuing need for the use of these waters.

IV.

“That the United States of America has, since the State Engineer’s original petition which initiated this action for a determination of the water rights concerned was filed herein, through its departments of Agriculture and Interior, filed with the said State Engineer numerous applications and claims for the appropriation and recognized use and rights to the use of certain waters as listed and set out in the said proposed determination submitted to this Court by the State Engineer; that the said applications are identified in the proposal for determination of these water rights by the State Engineer and at the page of said document as follows:

W. U.

<i>Application</i>	<i>Claim</i>		
<i>No.</i>	<i>No.</i>	<i>Page</i>	<i>Source</i>
16887	778	327	Well
20337	993	327	Well

16881	772	327	Reservoir
16877	768	327	Spring
a-2388	1096	327	Well
16879	770	327	Spring
16788	787	327	Reservoir
16878	769	327	Spring
16787	786	327	Reservoir
16886	777	327	Reservoir
16807	793	327	Reservoir
19622	1018	327	Well
16810	796	327	Reservoir
19872	1016	327	Well
16791	790	327	Reservoir
16790	789	327	Reservoir
17240	780	327	Spring
17272	782	327	Spring
17241	781	327	Spring
16786	785	327	Spring
20077	1098	327	Well
16789	788	327	Reservoir
16806	792	327	Spring
16808	794	327	Reservoir
16882	773	327	Reservoir
16884	775	327	Reservoir
21297	1004	328	Well
16809	795	328	Spring
16883	774	328	Spring
16805	791	328	Spring
17239	779	328	Spring
16880	771	328	Spring
16785	784	328	Spring
19954	1099	328	Well
16885	776	328	Spring

“That in addition to the above listed applications for appropriation the United States of America has also filed with the State Engineer numerous claims to the use of water in the area

here involved, which said claims are each made as a diligence right and for livestock watering purposes. The said claims are listed in the appendix of the State Engineer's said proposed determination at the page and with claim numbers and source of water as follows, they having been filed after the said proposed determination has been submitted to the printer.

<i>Claim No.</i>	<i>Page</i>	<i>Source</i>
1104	361	Creek
1105	361	Creek
1106	361	Creek
1107	361	Stream
1108	361	Creek
1109	361	Creek
1110	361	Creek
1111	361	Creek
1112	361	Creek
1113	362	Creek
1114	362	Creek
1115	362	Creek

"That the United States of America has not heretofore made any use of the waters included in its above said claims and applications, nor has it made any other beneficial use thereof as contemplated by the laws of the State of Utah; that no legislation is pending for the purpose of authorizing the United States of America to own or to operate livestock which might make any beneficial use of the said waters, nor is there any reasonable possibility that the United States of America may, in the foreseeable future, put said waters or any part thereof to any other beneficial use.

V

"That the said applications and claims filed by the United States of America conflict with rights to the use of waters held individually by petitioners; and amount to representations by the said applicant that there are waters available surplus to the needs of petitioners or others, whereas no such surplus waters exist in said area; that such representations on the part of the said applicant serve no useful purpose and tend to cast a cloud upon the water rights owned within this area by petitioners; that since the United States of America has made no beneficial use of said waters and is in no position to make such use thereof now nor in the foreseeable future, no appropriation of said water can be recognized nor granted under governing law and regulations; and that the endeavor on the part of the United States to assume and take control of the waters described in its considerable number of applications and claims amounts to an unlawful attempt to deny to citizens an opportunity to acquire this property.

VI

"That the State Engineer proposes in his above mentioned proposed determination of the water rights in the drainage area herein concerned, to grant to the United States of America a period of five years within which to comply with the requirements of law as to the applications heretofore listed, and proposes that a final determination of the water rights in this area be not made until the end of said period.

VII

"That the State Engineer recommends in his

proposed determination herein filed that the decree of this Court now recognize and approve the diligence claims of the United States of America as heretofore listed and set forth in the appendix at pages 361 and 362 of the said proposed determination, and that the decree of this Court award to the United States of America the rights to the use of the waters described in said claim.

“NOW, THEREFORE, petitioners and each of them respectfully pray for judgment as follows:

“1. That an order now be issued awarding no part of the water rights as listed herein to the United States of America, and which order shall adjudge and decree that the United States of America has never made and is unable to make a beneficial use of waters for livestock watering purposes as is contemplated and required by the laws of the State of Utah; that such beneficial use is necessary to complete an appropriation of waters in this State, and rejecting each application and diligence claim filed by the United States of America as listed herein.

“2. Ordering and directing the State Engineer to immediately reject each of the applications filed by the United States of America as herein listed, together with any other application for similar appropriations which might have been filed for or in behalf of the United States; and ordering and directing the State Engineer to issue such notices as may be required to show the denial of each of the diligence claims filed for the use of waters in the drainage area herein concerned.

“3. For such other and further relief as to the Court may seem just and equitable.”

The objections filed by appellants to all of the claims asserted on behalf of the Federal Government, came on for hearing on August 20, 1952, (R. 28-44). At said hearing, appellants orally moved to strike each and every one of the claims of the United States of America listed in said Proposed Determination (R. 28-30). Appellants moved to strike each of the "diligence rights" claims listed on pages 361 to 362 upon each of the following grounds:

1. The so-called diligence rights and each of them are invalid on the face of the record, inasmuch as they purport to antedate the existence of the Forest Service of the United States—many years prior to the creation of the Forest Service — and no diligence right could possibly have been acquired by any agency prior to its existence.

2. The Forest Service at no time owned any livestock in the area.

3. Neither the United States of America nor the Forest Service operated any livestock in the area so as to be able to acquire any diligence water rights.

4. There has never been any authority of law for the United States Forest Service or the Bureau of Land Management to operate in the livestock business, and therefore, no authority to appropriate water under the law.

5. The claims are based not on any use made by the

United States of America, but on use made by individual water users, who did not act in any governmental capacity nor on behalf of the United States of America.

6. The claims are contrary to Federal law, which precluded the Government from claiming water rights, particularly in the capacity in which the claims were filed. The decisions of the United States Supreme Court based upon statutes enacted as early as 1866, recognized the fact that the United States had no water rights nor could claim water rights on the public domain.

Appellants also moved to strike each of the claims of the United States of America listed on pages 327 and 328 of the Proposed Determination, upon the same grounds (R. 30), and in addition thereto protestants alleged:

Application No. 16887, claim No. 778,
Application No. 16878, claim No. 769,
Application No. 16807, claim No. 793,
Application No. 16886, claim No. 777,
Application No. 16810, claim No. 796,
Application No. 19872, claim No. 1016,
Application No. 16790, claim No. 789,
Application No. 17240, claim No. 780,
Application No. 17272, claim No. 782,
Application No. 16808, claim No. 794,
Application No. 16789, claim No. 788,
Application No. 16882, claim No. 773,

have all lapsed and therefore there is nothing to ad-

judicate; and applicants are to be allowed five years in which to perfect appropriations, but beneficial use is impossible as to any of those applications. Application No. 17241, claim No. 781, and application No. 16786, claim No. 785, were withdrawn according to the information received at the State Engineer's office, and such applications could not be allowed in this proceeding. In addition thereto, the balance of the applications and each and all of the applications are predicated upon a claim of a right to appropriate water, not on the basis of any use made by the United States of America, but on the basis of use by permittees of the United States of America, which is contrary to law. The United States of America has invoked a regulation to the effect that no person is entitled to a permit and he is not regarded as a bona fide livestock operator unless he actually owns and operates livestock, and therefore, by its own regulation the United States of America is precluded from asserting a water right under any of these applications; and it is also precluded from asserting any diligence rights. (R. 30-32, Exhibit "A").

It was admitted at the hearing that the United States of America is not a livestock operator in the area. It owns no cattle ranches and no livestock (R. 33).

Following said hearing of August 20, 1952, a written Stipulation was entered into between the United States of America, the State Engineer, and the appellants herein, filed September 10, 1952, which Stipulation of facts is as follows (R. 12-15):

“STIPULATION

“The water rights asserted by the United States of America in this case, are limited to rights which can be acquired under the laws of the state of Utah. Any sovereign rights which the United States of America might claim in or with respect to the waters of Bear River as an interstate stream, are not listed in the Proposed Determination of the State Engineer, and are not before the court. The alleged water rights of the United States consist of (1) so-called “diligence rights,” based upon an alleged beneficial use initiated prior to 1903 and evidenced by water users’ claims filed with the State Engineer allegedly pursuant to the provisions of Section 3, Chapter 97, Laws of Utah 1949, and (2) application for appropriation of water filed by the United States allegedly pursuant to the provisions of Chapter 3, Title 100, Utah Code Annotated 1943, as amended.

“IT IS STIPULATED:

“1. On or about April 2, 1951, the United States of America filed with the State Engineer water users’ claims numbered 1104 to 1115, both inclusive, which claims are listed as diligence claims in the Proposed Determination on pages 361 and 362. The diligence claims are based upon the use of water for stock watering purposes by livestock operators and others who in the past have grazed livestock on the public domain. Such use commenced in 1875 and has continued down to the present time.

“2. The United States of America has neither owned nor operated any of the livestock which has watered at the sources of supply or at any of the watering places listed in either the

claims of diligence rights or in the applications for appropriation. Any beneficial use of the waters with which the United States or any governmental agency is here concerned is a use made by livestock exclusively owned and operated by interests other than the United States of America.

"3. No grazing permits were issued on the Cache National Forest by the United States Forest Service prior to 1906, and no permits for grazing of livestock on public lands of the United States outside of the national forest were issued prior to 1935.

"4. In filing the aforesaid diligence rights claims on April 2, 1951, the officials of the United States at whose instance said claims were filed, did so in the belief that the past use of the water at the points listed in the claims, by livestock operators, has inured to the benefit of the United States of America. In filing the applications to appropriate water, the government officials at whose instance such applications were filed, did so with the purpose of acquiring for the United States of America, water rights through the use of water by livestock operators grazing livestock under permits issued by the United States for the use of forage grown on public lands.

"5. The sources of water supply described in the so-called "diligence rights" claims described above, and in the applications for appropriation filed by the United States of America as listed below, arise generally upon public lands of the United States, with the possible exception of Little Crawford Spring, shown in the State Engineer's Proposed Determination as Claim No. 275. Waters from some of said sources run off the public lands, onto privately owned lands of objectors and

others. All streams referred to in the diligence claims listed above, and in the applications for appropriation listed below, run through public lands and also through privately owned lands in Rich County, Utah. The objectors and other livestock operators in the area concerned, own ranches and also range lands, through which these streams run. Some of these privately owned lands border upon and some lie across each of the streams mentioned in the claims filed by the United States of America. Objectors and other livestock operators also own lands in the vicinity of each of the streams and springs hereinabove mentioned, so that the waters involved in controversy can be properly utilized by livestock which graze on these privately owned lands.

“6. The following applications for appropriation of water were filed by the United States with the State Engineer of the State of Utah, were approved by him and according to the records of his office are in good standing.

17239	16788	16809
17240	16787	16883
17272	19622	16805
20337	16791	16880
16881	20077	16785
16877	16806	19954
A-2388	16884	16885
16879	21297	

“7. The following applications for appropriation of water were filed by the United States with the State Engineer, were approved by him, but subsequently such applications lapsed or were withdrawn:

17241*	16886	19872	16789
16887	16807	16790	16808
16878	16810	16786*	16882

"8. The objectors herein claim rights as listed in the State Engineer's Proposed Determination, on the same streams or water courses, but down-stream from points of diversion specified in the claims or applications of the United States of America. Objectors also claim rights in opposition to the claims of the United States as listed in the State Engineer's Proposed Determination, designated as follows:

Objectors'			United States'	
<i>Claim</i>	<i>Page</i>	<i>Source</i>	<i>Claim</i>	<i>Page</i>
682	156	Upper Otter Creek Spring	779	328
508	156	Upper Otter Creek	779	328
275	129	Little Crawford Spg.	780	327
499	173	Hawk Spring	784	328
495	152	Old Canyon Spring	795	328
500	155	Otter Creek Spring	774	326 "

The foregoing Stipulation was approved by the court on September 13, 1952, at the further hearing on the objections of appellants (R. 44). At said hearing the United States of America agreed to withdraw claim to Little Crawford Spring situated on privately owned land (R. 47). The Bountiful Livestock Company was added to the list of objectors (R. 50).

At said hearing counsel for the United States of America stated for the record that "the whole purpose of the United States and the agencies actively making claims to the water in this case" is "entirely for the bene-

fit of permittees and other grantees to graze on the public lands" (R. 51). The following statement taken from each application filed by the United States was read into the record as part of the statement of the purpose of the Government in making the filings (R. 52):

"The purpose of the appropriation is to provide water for livestock using the surrounding federal range and to conserve and regulate the public grazing lands to stabilize the livestock industry dependent on them and in aid thereof to promote proper use of the privately controlled lands and water dependent upon the public grazing lands. The quantity of water sought to be appropriated is limited to that which can be beneficially used by the persons herein described."

Counsel for the objectors then offered in evidence, and the court received in evidence, Exhibit "A", the Federal Range Code for Grazing Districts. Exhibit "B", was admitted in evidence, which is a map pertaining to Forest Reserve lands involved in this case, which shows that privately owned and state owned lands are checkerboarded in many instances with federally owned land (R. 53-54).

With respect to the "diligence rights" claims, it was stipulated in open court that the United States withdrew its claims of priority as to any uses claimed to be in conflict with the claim of appellants, so that the claims asserted by the Federal government would be junior to the claims of objectors (R. 55-57, 63-65). After the case was argued by written memoranda, the Honorable Lewis

Jones, district judge, issued his Memorandum of decision on January 12, 1953, as follows (R. 16-17) :

"Objectors have moved to strike from the proposed final decree certain portions thereof wherein water rights are proposed by the State Engineer of Utah to be decreed to the United States. By oral argument and written brief, these parties challenge the legal right of the United States to own or control water rights in this State in connection with the administration of public lands under the Land Management statutes. Each of these springs or water courses arise on the public lands within Rich County.

"Questions presented include: whether springs which arise on the public domain and never reach private property passed to the control of Utah under the Enabling and subsequent Acts; whether the United States can claim 'diligence' rights by reason of the manner of use of said springs prior to the creation of the Forest Service; whether there has ever been statutory authorization for the United States to take the title to or hold water rights either in its own right or as a trustee for its permittees under the several Forest Service and Land Management statutes; whether (assuming that the appropriation must be made under Utah law) the government has had those tools or animals under its control so that the use made of the waters appropriated, or sought to be appropriated, is the use of the United States and not the use of someone else; and whether (same assumption as supra) the State Engineer's approval of certain applications to appropriate water rights (and the issuance of the usual certificate of appropriation under our statute) can be subjected to collateral attack in this proceeding.

"At the hearing a written stipulation of facts was submitted by the parties. During the oral argument, the United States withdrew its claim No. 780 on Little Crawford Springs and further stipulated that the final decree might recite that in each case of appropriation of water by the United States from the same stream or other source of supply, the priority of objectors' rights may be shown in the final decree as senior to the priority of the Government's rights. This waiver on the part of the United States does not satisfy the objectors. They maintain that they will still be injured because they will be barred in the future from acquiring new rights should the Government be allocated any water rights whatsoever. Objectors further maintain that the Government should not be permitted to pre-empt the water and thereby control the livestock industry in the bureaucratic manner in which it has been functioning in the past.

"But, in view of the waiver of priority on the part of the government, I do not feel that a justiciable controversy is presented for determination. See *Huntsville Irrigation Co. v. District Court*, 72 Utah 431.

"The attorneys for the Government may prepare findings, conclusions, and a proposed interlocutory decree covering the issues raised in this particular proceedings, serve copies on counsel and mail the original to me at Brigham. In this way it will be possible for the objectors to take an intermediate appeal, should they be so advised, prior to the signing of the final decree."

The findings of fact recite that "the United States of America on various dates subsequent to the year 1944

made applications under State law for appropriation of water for stock watering purposes" at points on public lands; that the government also filed diligence claims numbered 1104 to 1115 inclusive, which claims are listed on pages 361 to 362 of the Proposed Determination; that as shown by the Stipulation, objectors claim rights as listed in the Proposed Determination, on the same streams or water courses, but down-stream from points of diversion specified in the claims or applications filed by the United States of America, and objectors also claim rights in opposition to the claims of the United States listed in the Proposed Determination which are enumerated; that it was stipulated that "in each case of appropriation of water by the United States from a source of supply from which the objectors have made an appropriation, the priority of objectors' rights is senior to the priority of the right of the United States;" and that "the claim of the United States to the water of Little Crawford Spring, evidenced by Claim No. 780, page 327 of the Proposed Determination, could be considered withdrawn because the claim was made upon the assumption that the Little Crawford Spring was located on public land, where, as a matter of fact, such spring is located on private land." (R. 18-19).

By conclusion of law it is specified that the United States of America "is entitled to an Interlocutory Decree overruling and denying the objections to the Proposed Determination interposed by Randolph Land and Livestock Company, Desert Livestock Company, Harold

Selman, Nick Chournos, Orval Johnson and William Johnson and declaring that there is no justiciable issue or contest between the objectors, or any of them, and the United States of America." (R. 19). By the interlocutory decree it is provided (R. 20) :

"IT IS ORDERED, ADJUDGED AND DECREED:

"1. That there is no justiciable controversy between the objectors, Randolph Land and Livestock Company, Desert Livestock Company, Harold Selman, Nick Chournos, Orval Johnson and William Johnson, or any of them, on the one hand, and the United States of America, on the other hand, over the claims of the United States of America listed in the Proposed Determination herein.

"2. That the objections to the claims of the United States to the water of Bear River, listed in the State Engineer's Proposed Determination on pages 327, 328, 361 and 362, which said objections were heretofore interposed by the objectors above named, be and they are hereby overruled and denied and the Petition setting forth the objections of said objectors is hereby dismissed."

For purposes of this appeal, it is assumed that counsel for the United States of America intended to include the Bountiful Livestock Company as one of the objectors, inasmuch as it was joined at the hearing on August 20, 1952; and that the denial of the objections applies with equal force to said corporation as well as to the objectors actually named.

On March 17, 1953, this Honorable Court granted the

petition for appeal from the interlocutory decree entered February 7, 1953.

POINTS ON WHICH APPELLANTS RELY FOR REVERSAL OF THE INTERLOCUTORY DECREE

Point No. 1

A PROCEEDING FOR THE COMPLETE ADJUDICATION OF RIGHTS TO THE USE OF WATER OF A RIVER SYSTEM UNDER SECTIONS 100-4-12 AND 15, U. C. A. 1943, IS A PROCEEDING FOR THE DETERMINATION OF THE *PRESENT* RIGHTS TO THE USE OF THE WATERS OF THE RIVER SYSTEM, NOT WHAT THOSE RIGHTS MIGHT HAVE BEEN SOME YEARS AGO.

Point No. 2

IN A GENERAL WATER ADJUDICATION CASE, THE OBJECTION BY A KNOWN WATER USER TO THE STATE ENGINEER'S PROPOSED ALLOWANCE OF CERTAIN WATER CLAIMS BY A LANDOWNER WHO HAS NEVER USED THE WATER AND WHO DOES NOT PRESENTLY MAKE ANY BENEFICIAL USE OF THE WATER, DOES NOT CONSTITUTE A COLLATERAL ATTACK UPON SOME PRIOR PROCEEDING BEFORE THE STATE ENGINEER, BUT A DIRECT ATTACK UPON THE CLAIM THAT SUCH CLAIMANT PRESENTLY HAS A RIGHT TO THE USE OF THE WATER.

Point No. 3

NEITHER THE UNITED STATES OF AMERICA NOR

ANY OTHER LANDOWNER ON WHOSE LAND WATER ARISES, CAN ACQUIRE DILIGENCE RIGHTS TO THE USE OF WATER FOR LIVESTOCK UPON SUCH LAND, WHEN THE ONLY BENEFICIAL USE OF WATER WAS MADE BY LIVESTOCK OWNERS AND OPERATORS OTHER THAN THE LAND OWNER AND WHICH LIVESTOCK OPERATORS NEITHER OPERATED UNDER PERMISSION OF OR AGREEMENT WITH THE LANDOWNER OR IN SUBORDINATION TO THE LANDOWNER.

Point No. 4

WHERE THE LIVESTOCK OPERATORS WHO ACTUALLY MADE THE BENEFICIAL USE OF THE WATER (OR THEIR SUCCESSORS IN INTEREST), HAVE ACQUIRED DILIGENCE RIGHTS TO THE USE OF THE WATER, THE LANDOWNER WHO NEVER USED THE WATER AND HAD NO INTEREST IN SUCH LIVESTOCK CANNOT CLAIM DILIGENCE RIGHTS PREDICATED UPON SUCH USE MADE EXCLUSIVELY BY OTHERS WHEN THERE WAS NO PRIVITY WHATSOEVER.

Point No. 5

THE STIPULATION OF FACTS IN THIS CASE SHOWS CONCLUSIVELY THAT THE UNITED STATES OF AMERICA NEVER ACQUIRED ANY DILIGENCE RIGHTS TO THE USE OF WATER, AND THAT THE DILIGENCE RIGHTS CLAIMS WHICH THE STATE ENGINEER PROPOSES TO HAVE INCORPORATED INTO THE DECREE ON BEHALF OF THE UNITED STATES OF AMERICA, ARE VOID.

Point No. 6

PRIOR TO THE 1941 AMENDMENT, EXCEPT FOR PUR-

POSES OF THE BUREAU OF RECLAMATION, THE UNITED STATES HAD NO AUTHORITY UNDER THE STATE STATUTES TO FILE ON WATER, AND THERE IS NO FEDERAL STATUTE WHICH AUTHORIZES THE FOREST SERVICE OR THE BUREAU OF LAND MANAGEMENT TO MAKE WATER APPLICATIONS, AND CONSEQUENTLY SUCH APPLICATIONS WERE AND ARE VOID.

Point No. 7

THE STIPULATION OF FACTS SHOWS THAT EVEN IF THERE HAD BEEN ANY AUTHORITY OF THE UNITED STATES OF AMERICA TO FILE APPLICATIONS TO APPROPRIATE WATER IN THIS STATE, SUCH APPLICATIONS IN QUESTION WERE VOID AB INITIO IN VIEW OF THE FACT THAT THE STIPULATION OF FACTS SHOWS THAT THERE WAS NO INTENTION ON THE PART OF THE APPLICANT TO PUT THE WATER TO BENEFICIAL USE.

Point No. 8

THE DECLARED PURPOSE IN EACH OF THE APPLICATIONS FILED BY THE UNITED STATES OF AMERICA IS SHOWN TO BE AN ATTEMPT TO PREEMPT THE WATER, TO GAIN A MONOPOLY AND TO CONTROL OTHER LANDS OF PRIVATE CITIZENS AND TO "REGULATE" THE PUBLIC GRAZING LANDS, AND SUCH PURPOSES ARE FOR THE DOMINATION OF THE PROPERTY RIGHTS OF OTHERS AND NOT FOR THE APPLICATION OF WATER TO BENEFICIAL USE BY THE LANDOWNER OR APPLICANT.

Point No. 9

THE STIPULATION SHOWS THAT SOME OF THE

APPLICATIONS LAPSED OR WERE WITHDRAWN, AND THAT WHERE CERTIFICATES OF APPROPRIATION WERE ISSUED SUCH PROOF WAS FALSE AND THAT NO WATER HAS EVER BEEN PUT TO BENEFICIAL USE, SO THAT THERE ARE NO EXISTING RIGHTS TO THE USE OF WATER AND NO BENEFICIAL USE OF WATER BEING MADE UPON WHICH ANY ADJUDICATION CAN BE MADE IN FAVOR OF THE UNITED STATES OF AMERICA.

ARGUMENT

Point No. 1

A PROCEEDING FOR THE COMPLETE ADJUDICATION OF RIGHTS TO THE USE OF WATER OF A RIVER SYSTEM UNDER SECTIONS 100-4-12 AND 15, U. C. A. 1943, IS A PROCEEDING FOR THE DETERMINATION OF THE *PRESENT* RIGHTS TO THE USE OF THE WATERS OF THE RIVER SYSTEM, NOT WHAT THOSE RIGHTS MIGHT HAVE BEEN SOME YEARS AGO.

At the further hearing on the objections filed by appellants, held on September 13, 1952, counsel for the United States sought to obviate the objections of appellants, by acknowledging the claims of appellants to be prior and senior to the claims asserted by the Federal government (R. 55-57, 16-20, 63-65). The appellants as objectors refused to treat such waiver on the part of the government, as a termination of the justiciable controversy. The learned trial judge, however, adopted the contention of respondents that such a "waiver" on the

part of the Federal government "terminated the conflicts," and that there was no longer any "justiciable controversy." (R. 16-17, 57-61).

We contend that the trial court was in error in dismissing the objections to the allowance of both the "diligence rights" claims and the claims based upon alleged applications for appropriation asserted by the United States, and in decreeing that there is no justiciable controversy, for the reason that the statutes of this State contemplate that the court in a general adjudication proceeding shall determine not only the *priority of rights*, but also what are the *present rights* to the use of the water, in quantity, manner and nature of use, and also time of use.

An examination of the statutes inexorably leads to the conclusion that the purpose of a general adjudication action is to ascertain and define: (a) Who are the persons who presently *claim* the rights to use the waters? (b) *Which* claims are *presently* valid in whole or in part? (c) As to the claims which are presently valid, *how much water* is each claimant presently entitled to use, and at what *time* and in what *manner*? (d) What are the *priorities* with respect to the present rights to use the water?

Section 100-4-1, U. C. A. 1943 (73-4-1, U. C. A. 1953) specifies:

"Upon a verified petition to the State Engineer, signed by five or more or a majority of

water users upon any stream or water source, requesting the investigation of the relative rights of the various claimants to the waters of such stream or water source, it shall be the duty of the state engineer, if upon such investigation he finds the facts and conditions are such as to justify a determination of said rights, to file in the district court an action to determine the various rights. In any suit involving water rights the court may order an investigation and survey by the state engineer of all of the water rights on the source or system involved."

The statute is clear in defining the scope of such a proceeding as one to investigate "the relative rights of the various claimants to the waters," and to "determine the various rights." Nowhere in the statute is there any authority to allow the establishment of fictitious claims as valid water rights. While the statute does not employ the phrase "at the present time," we believe such is implicit in the statute, and also evidenced by the language of the context of the several statutes relating to general adjudications. By Section 100-4-3, U. C. A. 1943 (73-4-3, U. C. A. 1953), the State Engineer is required to "prepare and file with the court a statement giving the names and addresses of all the claimants to the use of water from the river system or water source involved in such actions," and "to this end the clerk of the court shall publish" notice of the pendency of such action and requiring the claimants to notify the State Engineer of their names and addresses for the purposes indicated.

In *Smith v. District Court*, 69 Utah 493, 256 P. 539,

this Court held that the statute was intended to prevent piecemeal litigation in the determination of water rights, and to provide means of determining all rights in one action, as the only effectual method of preventing a multiplicity of suits. We believe that the decisions of this Honorable Court at least imply that the purpose of such a suit is to determine what water rights the various claimants actually enjoy at the time of the adjudication, not what the party claims nor even what those rights might have been in the remote past.

Section 100-1-3, U. C. A. 1943 (73-1-3, U. C. A. 1953), declares that "Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state." Water rights, other than diligence rights which were acquired prior to 1903, can be acquired only by appropriation "for some useful and beneficial purpose." Section 100-3-1, U. C. A. 1943, (73-3-1, U. C. A. 1953). By the terms of Section 100-1-4, U. C. A. 1943, (73-1-4, U. C. A. 1953), "When an appropriator or his successor in interest shall abandon or cease to use water for a period of five years the right shall cease, and thereupon such water shall revert to the public, and may be again appropriated as provided in this title . . ."

In the light of these statutes, in a general adjudication of the water rights of a river system, the court could not properly decree that a claimant is presently entitled to use 10.00 c. f. s. of water for irrigation, where for illustration, the undisputed evidence showed: (a) The claimant in 1920 properly filed application to appropri-

ate 10.00 c. f. s. of water for that purpose, and his application was approved, but (b) the water claimant never actually put more than 3.00 c. f. s. of water to beneficial use, and finally (c) in 1935 the claimant ceased altogether to use any water and he never again resumed the use of water nor filed any application with the State Engineer required by Section 100-1-4 for an extension of time in which to resume the use of the water.

Section 100-4-5, U. C. A. 1943, (73-4-5, U. C. A. 1953), requires each water claimant who is served with notice in a general adjudication proceeding, to file his claim, showing not only where the water was first diverted and put to beneficial use, and the flow, but also "*the place and manner of present use,*" and "such other facts as will clearly define the extent and nature of the appropriation claimed."

Section 100-4-11, U. C. A. 1943, (73-4-11, U. C. A. 1953), defines the duty of the State Engineer in making his report to the court:

"Within thirty days after the expiration of the sixty days allowed for filing statements of claims, the state engineer shall begin to tabulate the facts contained in the statements filed and to investigate, whenever he shall deem necessary, the facts set forth in said statements by reference to the surveys already made or by further surveys, and shall as expeditiously as possible make a report to the court with his recommendations of *how all rights involved shall be determined.*"

"After full consideration of the statement of claims, and of the surveys, records, and files, and

after a personal examination of the river system or water source involved, if such examination is deemed necessary, the state engineer shall formulate a report and *a proposed determination of all rights to the use of the water of such river system* or water source, and a copy of the same shall be mailed by regular mail to each claimant, *with notice that any claimant dissatisfied therewith may* within ninety days from such date of mailing file with the clerk of the district court *a written objection thereto* duly verified on oath. The state engineer shall distribute the water from the natural streams or other natural sources in accordance with the proposed determination or modification thereof by court order until a final decree is rendered by the court; provided, if the right to the use of said waters has been theretofore decreed or adjudicated said waters shall be distributed in accordance with such decree until the same is reversed, modified, vacated or otherwise legally set aside.' (Italics added.)

Section 100-4-12, U. C. A. 1943, (73-4-12, U. C. A. 1953), provides for judgment in the absence of any contest:

"If no contest on the part of any claimant shall have been filed, the court shall render a judgment in accordance with such proposed determination, *which shall determine and establish the rights of the several claimants to the use of the water* of said river system or water source; and among other things it shall set forth the name and post-office address of the *person entitled to the use of the water*; the quantity of water in acre feet or the flow of water in second feet; the time during which the water *is to be used* each

year; the name of the stream or other source from which the water is diverted; the point on the stream or other source where the water is diverted; the priority date of the right; and such other matters as will *fully and completely define the rights of said claimants to the use of the water.*" (Italics added.)

The following provisions of the statute, 100-4-13 to 15 are applicable in the event of a contest:

"If any contest or objection on the part of any claimant shall have been filed, as in this chapter provided, the court shall give not less than fifteen days' notice to all claimants, stating when and where the matter will be heard." Section 100-4-13, U. C. A. 1943, (73-4-13, U. C. A. 1953).

"The statements filed by the claimants shall stand in the place of pleadings, and issues may be made thereon. Whenever requested so to do the state engineer shall furnish the court with any information which he may possess, or copies of any of the records of his office which relate to the water of said river system or water source. The court may appoint referees, masters, engineers, soil specialists, or other persons as necessity or emergency may require to assist in taking testimony or investigating facts, and in all proceedings for the determination of the rights of claimants to the water of a river system or water source the filed statements of claimants shall be competent evidence of the facts stated therein unless the same are put in issue." Section 100-4-14, U. C. A. 1943, (73-4-14, U. C. A. 1953).

"Upon the completion of the hearing, after objections filed, the court shall enter judgment

which shall determine and establish the rights of the several claimants to the use of the water of the river system or water source as provided in section 100-4-12."

The statutes above quoted and cited clearly make justiciable controversies of disputes arising from the challenge of the validity of water claims listed in a proposed determination submitted by the State Engineer, inasmuch as the court is required to determine the "rights of the several claimants to the use of the water of the river system." The party whose claims are assailed by objections which deny that he is presently the owner of any water rights whatsoever, cannot successfully avoid an adjudication of the issue as to the validity of his claim by merely saying: "I hereby waive all claims of priority with respect to the claims of the objectors, and I consent to entry of a decree whereby my rights will be junior in priority to all claims of the objectors. Therefore, there is nothing further to adjudicate, and there is no longer any justiciable controversy, the statutes to the contrary notwithstanding."

By reason of the fact that the duty of the court does not end with a mere determination that the claims of the objectors have priority over the claims filed by the Federal government, the trial court was in error in dismissing the objections filed by appellants, and in failing to make a finding that all of the claims filed by the government are void. By dismissal of the objections, the court inferentially denied the motion of appellants to strike from the Proposed Determination all of the

claims made by the United States of America, listed on pages 327 and 328, and 361 to 362, and the court indirectly approved all of those claims as recommended by the State Engineer.

The interlocutory decree was erroneous, in view of the undisputed facts, and it was also erroneous as a matter of law. Said decree should be vacated and a new decree should be entered denying all of the water claims asserted by and on behalf of the United States of America and adjudging all of said claims to be null and void.

Point No. 2

IN A GENERAL WATER ADJUDICATION CASE, THE OBJECTION BY A KNOWN WATER USER TO THE STATE ENGINEER'S PROPOSED ALLOWANCE OF CERTAIN WATER CLAIMS BY A LANDOWNER WHO HAS NEVER USED THE WATER AND WHO DOES NOT PRESENTLY MAKE ANY BENEFICIAL USE OF THE WATER, DOES NOT CONSTITUTE A COLLATERAL ATTACK UPON SOME PRIOR PROCEEDING BEFORE THE STATE ENGINEER, BUT A DIRECT ATTACK UPON THE CLAIM THAT SUCH CLAIMANT PRESENTLY HAS A RIGHT TO THE USE OF THE WATER.

At the hearing held on September 13, 1952, the respondents made the contention during argument on the objections of appellants that those objections constitute a collateral attack upon the proceedings before the State Engineer. It was conceded that with respect

to the so-called "diligence rights" claims filed by the United States Forest Service on April 2, 1951, the appellants were given no opportunity to protest nor to have any hearing before the State Engineer (R. 65-66). With respect to the applications filed by the United States beginning in 1944, all of which applications were filed after this proceeding was initiated, the appellants filed no protest with the State Engineer (R. 66).

In the Memorandum filed by the trial court, it is apparent that the trial judge viewed the objections filed by appellants as a collateral attack on the proceedings before the State Engineer (R. 16). Neither the finding of fact, conclusions of law, nor the decree, mention "collateral attack" (R. 18-19), although the holding that there is no "justiciable controversy" might well embrace such a conclusion.

We wish to point out that objections filed to a proposed determination of rights to the use of water, as submitted to the court by the State Engineer, do not constitute a collateral attack upon some prior proceedings before the State Engineer. The objections are made to the claims filed in the general adjudication proceeding. Inasmuch as a water claimant in a general adjudication proceeding must file his water claim in such proceeding, and such claim must show *the place and manner of present use* (100-4-5), the filing of objections to a particular water claim is an assertion in the general adjudication proceeding that the claimant whose water

claim is assailed by such objections does not presently have such water right as claimed.

The provisions of Section 100-4-11, U. C. A. 1943, (73-4-11, U. C. A. 1953), specifically authorize any water claimant who is dissatisfied with the proposed determination submitted by the State Engineer, to file a "written objection" thereto. The statute does not prescribe the particular grounds of objection. However, we submit that there are numerous valid grounds for objections, which would include any of the following: (a) The party whose claims of water rights are assailed by objection, never actually made any appropriation of water. (b) The party whose claims are assailed has conveyed his rights or he has otherwise been divested of the right to use any water. (c) The party has not put to beneficial use all of the water claimed. (d) The right to the use of the water has been lost in whole or in part by more than five years of nonuser. (d) The water claimant admits in the adjudication proceeding that his claim, although approved by the State Engineer, is erroneous or wholly unfounded.

An attack made upon the claims of one who asserts rights to the use of water in a general adjudication case, by objections filed in accordance with Section 100-4-11, is a direct attack which is specifically authorized by statute. It was never the intention of the Legislature to facilitate establishment of either extravagant or fictitious water claims. General adjudications are designed to establish actual rights as they have accrued

and presently exist, and to reject erroneous and fictitious claims, and to scale down claims which are exaggerated. Otherwise, the rule that "Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state" (Section 100-1-3), would be nullified by indirection.

At the hearing held on September 13, 1952, argument was made to the effect that objections by appellants could not be entertained because the State Engineer had already issued certificates in some instances where the Federal government had filed applications (R. 59-61). The statute relating to the issuance of a certificate by the State Engineer does not state that it shall be conclusive evidence and invulnerable to attack in a general adjudication proceeding. Section 100-3-17, U. C. A. 1943, (73-3-17, U. C. A. 1953), declares *inter alia*:

"... The certificate so issued and filed shall be prima facie evidence of the owner's right to the use of the water in the quantity, for the purpose, at the place, and during the time specified therein, subject to prior rights."

The certificate is only *prima facie* evidence, which means that such evidence can be refuted. In a general adjudication proceeding, what happens to such prima facie evidence in the light of an admission that the alleged appropriator actually appropriated the water and applied it to beneficial use for some years, but that for more than five years prior to the general adjudication proceeding he abandoned the use of the water?

The prima facie evidence is overcome. Likewise, where the water claims are assailed by proper objections to the effect that the claimant has never applied any water to beneficial use, and the claimant in writing admits that he has actually never appropriated any water to beneficial use and that the proof submitted to the State Engineer was utterly false, the prima facie evidence of the certificate is totally destroyed, and the admission of the claimant that he has never used the water beneficially, requires an adjudication that his claim is invalid.

The objections filed by appellants to allowance of any of the claims asserted on behalf of the United States, were valid objections under the statutes, constituting a direct attack upon the claims of the United States of America as to the right to the present use of the water. In the light of the Stipulation of facts, the trial court should have sustained each of the objections and granted each motion to strike the claims asserted by the United States as set forth in the proposed decree.

Point No. 3

NEITHER THE UNITED STATES OF AMERICA NOR ANY OTHER LANDOWNER ON WHOSE LAND WATER ARISES, CAN ACQUIRE DILIGENCE RIGHTS TO THE USE OF WATER FOR LIVESTOCK UPON SUCH LAND, WHEN THE ONLY BENEFICIAL USE OF WATER WAS MADE BY LIVESTOCK OWNERS AND OPERATORS OTHER THAN THE LAND OWNER AND WHICH LIVESTOCK OPERATORS NEITHER OPERATED UNDER PERMISSION OF OR

AGREEMENT WITH THE LANDOWNER OR IN SUBORDINATION TO THE LANDOWNER.

Our position is that the United States of America is in no better position than any other landowner in attempting to acquire the right to use unappropriated waters of this State. A landowner, like anyone else, must comply with the laws of this State pertaining to acquisition of water rights. Ownership of the land does not give the landowner a right to the use of any unappropriated water arising on his land. Neither does ownership of the land vest in him the right to use water which has been lawfully appropriated by some other person. Ownership of land does not constitute the owner an appropriator of water. Jurisdiction over the appropriation of fugitive waters within the State is vested in the State, not in the Federal government.

Nine years after this general adjudication proceeding was initiated, the United States Forest Service on April 2, 1951, filed the "diligence rights" claims for stockwatering, which are controversy here. Disregarding the fact that Congress never authorized the filing of water claims by or for and on behalf of the Forest Service or any other Federal agency except the Bureau of Reclamation, the United States was in no better position legally than any other landowner who never owned any livestock and who had never operated any livestock nor put any water to beneficial use by livestock watering. When those claims were challenged by objections in this proceeding, it was admitted by written

stipulation that the livestock which actually used the water was owned and operated by interests other than the Federal government. By stipulation it was explained that

“4. In filing the aforesaid diligence rights claims on April 2, 1951, the officials of the United States at whose instance said claims were filed, did so in the belief that the past use of water at the points listed in the claims, by livestock operators, has inured to the benefit of the United States of America.”

For the first time, the novel but patiently absurd claim was advanced in 1951 that a landowner on whose land the water arose, *vicariously* acquired water rights for stockwatering purposes. Such claim was predicated not on any acts of appropriation by the landowner, but entirely on the belief of some government officials that the application of water to beneficial use by livestock operators on government-owned lands, *enured to the benefit of the United States*. That amounts to saying that any landowner, who has never appropriated any water to a beneficial use, can claim the benefit of appropriations made by livestock operators with whom there is no privity, simply because such beneficial use was made on his land.

The claims of the government strike at the fundamental basis of the entire doctrine that water rights can only be acquired by appropriation for beneficial use. If those claims were to be established as law, there would arise a novel system of *dual water rights*—one set of

water rights in the persons who actually put the water to beneficial use as lawful appropriators, and duplicate set of water rights vested in the landowner acquired without any beneficial use by the landowner, but solely by virtue of a beneficial use made upon his land by others. Ownership of public land does not carry with

ownership of the migrating waters which arise on those lands. Congress did not reserve to the United States of America in connection with any public lands, title to the fugitive waters arising on those lands or flowing through them. Because of the absolute dependency of citizens on the use of water originating on the public domain in the west, the rule of appropriation of water for beneficial use arose as a matter of necessity. Water arising on public lands became necessary for cities, mining, stockwatering and agriculture. Congress did not see fit to pre-empt the water arising on public lands. The doctrine of riparian rights recognized at common law, had to yield to the march of progress in the West. As early as 1866, Congress recognized the doctrine of appropriation of water for beneficial use. And it must not be overlooked, that such doctrine arose with respect to waters arising on the public domain, inasmuch as there was then very little privately owned land.

By the act of July 26, 1866, (14 Stat., 253), it was recognized that citizens could acquire the use of waters arising on public lands by application of water to beneficial use, and Congress expressly authorized the establishment of rights-of-ways over public lands for the construction of ditches and canals. As embodied in Sec.

2339 of the Revised Statutes, 30 U. S. C. A., sec. 51, the statute reads:

“Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right-of-way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; * * *.”

By the act of March 3, 1891, (26 Stat., 1097), R. S. 2340, 30 U. S. C.A. sec. 52, it was provided:

“All patents granted, or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by section 51 of this title.”

The act of March 3, 1877, (19 Stat., 377), known as the “Desert Land Act,” 43 U. S. C. A. 321, provided for acquisition of title to 320 acres of desert land, by persons who sought to conduct water upon the said land in accordance with the rules and laws relating to *appropriation*:

“* * * That the right to the use of water by the person so conducting the same, on or to any tract of desert land of three hundred and twenty acres *shall depend upon bona fide prior appropriation*; and such *right shall not exceed the amount of water actually appropriated, and necessarily*

used for the purpose of irrigation and reclamation; and all surplus water over and above such *actual appropriation and use*, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. * * *” (Italics added).

In *Twin Falls Salmon River Land, etc., Co. v. Caldwell*, (C. C. A., Idaho 1921), 272 F. 356, affirmed 266 U.S. 85, 45 S. Ct. 22, 69 L. Ed 178, the court pointed out that the State has jurisdiction over the appropriation of water for beneficial use:

“The relation of the federal government to the state government in the reclamation of desert lands arises out of the fact that the federal government owns the lands, and Congress is invested by the Constitution with the power of disposing of the same, while the state has been given jurisdiction to provide for the appropriation and beneficial use of the waters of the state which necessarily includes a use for the reclamation of such lands.”

Article XVI, Section 1, Constitution of Utah, which was approved by Congress, provides:

“All existing rights to the use of any of the waters in this State for any useful or beneficial purpose, are hereby recognized and confirmed.”

Thus, by approval of the State Constitution which was adopted in 1895, Congress approved the doctrine of bene-

ficial use of water, as part of the fundamental law of this State. That rule has never been changed.

By the terms of the Reclamation act of June 17, 1902, (32 Stat. 390), Congress recognized the doctrine of appropriation, and also the paramount authority of the states to control the acquisition of water rights. As set forth in 43 U. S. C. A. sec. 372:

“The right to the use of water acquired under the provisions of the reclamation law shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.”

In 43 U. S. C. A. sec. 383, of the same act, it is provided:

“Nothing in this chapter shall be construed as affecting or intending to affect or to in any interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.”

Congress expressly recognized the rule that all rights to the use of nonnavigable waters, had to be acquired under state law. See *Board of Directors, etc. v. Jorgensen, et al.*, 136 P. 2d 461. In a concurring opinion in that

case, at pages 468 to 469, the aforesaid statute is quoted, with the following observation:

“* * * The Reclamation Act gives to the United States by and through its Secretary of the Interior the same, but no superior, right to appropriate the public unappropriated waters of the State of Idaho as the laws of this state give to the individual. 43 U. S. C. A., §§ 372 and 383; *United States v. West Side Irr. Co.*, D. C., 230 F. 284.”

As stated in *United States v. Union Gap Irrigation Co.*, 209 F. 274: “The government, like an individual, can appropriate only so much water as it applies to beneficial uses.”

In construing the aforesaid provision of the Reclamation Act, in *Ickes v. Fox*, 300 U. S. 82, 81 L. Ed. 525, 57 S. Ct. 412, the United States Supreme Court held that the specified activities of the Federal government under the act in the case then before the court, did not vest in the government any title to the water:

“* * * Although the government diverted, stored and distributed the water, the contention of petitioner that thereby ownership of the water or water-rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water-rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works. Compare *Murphy v. Kerr* (D. C.) 296 F. 536, 544, 545. The government was and remained

simply a carrier and distributor of the water (ibid), with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works. As security therefor, it was provided that the government should have a lien upon the lands *and the water-rights* appurtenant thereto—a provision which in itself imports that the water-rights belong to another than the lienor, that is to say, to the land owner.

“The Federal government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of 1877, (chap. 107, 19 Stat. at L. 377, 43 U. S. C. A. § 321), if not before, Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. Acquisition of the government title to a parcel of land was not to carry with it a water-right; but all non-navigable waters were reserved for the use of the public under the laws of the various arid-land states. *California Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142, 162, 79 L. ed. 1356, 1363, 55 S. Ct. 725. * * *

There is no law of this State under which a land-owner can claim the benefit of an appropriation of water by others over whom he has no control and with whom there is no privity. Appropriation of unappropriated waters in this State can be made only by compliance with State law. Even the government apparently recognized this rule when it purported to file its so-called “diligence rights” claims.

An appropriation of water to beneficial use involves three essentials, not one of which was ever satisfied by the United States Forest Service in regard to the so-called "diligence claims": (a) There must be an intent to apply the water to some beneficial use. (b) There must be a diversion of the water from the stream or source. (c) The water diverted must be applied to beneficial use by the appropriator. *Sowards v. Meagher*, 37 Utah 212, 108 P. 1112. As pointed out in *Hague v. Nephi Irrigation Co.*, "appropriation" does not merely mean a diversion of water, but involves an intention on the part of the appropriator to put the water to a beneficial use and also the actual application of the water to a beneficial use; so that if a party diverts more than he can beneficially use, he does not actually appropriate the excess.

In *Robinson v. Shoenfelt*, 62 Utah 233, 218 P. 1041, the plaintiff claimed a diligence right for stockwatering at a spring upon the public domain in Kane County, Utah, and he sought to enjoin interference by defendant. While the proof showed that he had watered cattle at the spring, he had not watered his cattle to the exclusion of other cattle operators on the public domain, and the court held that he did not acquire a diligence right by the intermittent use which was indeterminable in quantity. The court also made it clear that the use made must be for the exclusive benefit of the appropriator:

"In *Lake Shore Duck Club v. Lake View Duck Club et al.*, 50 Utah at page 82, 166 Pac. at page 311, L. R. A. 1918 B, 620, this court said:

“‘But for the purpose of effecting a valid appropriation of water under the statutes of this state we are decidedly of the opinion that the beneficial use contemplated in making the appropriation must be one that riator and subject to his complete dominion and control.’ See, also, sections 759 et seq., 2 Kinney on Irrigation.”

Under this standard, the United States as a landowner could not possibly claim the benefit of any appropriations of water for stockwatering purposes made by the various cattle and sheep operators who actually used the water on the government-owned lands. Such use could only inure to the benefit of the actual appropriators, who were the livestock operators; for such use was not subject to or under the dominion and control of the government, but on the contrary, such use was independent of any supervision or control whatsoever of the Federal government. In fact, the government did not know who were the livestock operators, and it does not now know who they were, and could not possibly identify any of them.

Neither the Federal government nor any other landowner, can lawfully claim diligence rights for stockwatering, when the only beneficial use of water for stockwatering prior to 1903, was initiated and continued exclusively by livestock operators whose operations were independent of the landowner. The government had no interest in the livestock which made a consumptive use of the water, and the government exercised no control

over the livestock operators who appropriated the water to beneficial use. The *belief* of some government officials that such beneficial use which was made independent of government regulation or control, "enured to the benefit of the United States," fortunately did not change the existing law. The government claims of diligence rights are based entirely on the fictitious premise that a landowner could acquire such a right without actually making an appropriation of water to beneficial use. Such a claim, if established, would create in the landowner a duplicate water right, in direct opposition to the fundamental rule that beneficial use shall be the basis, the measure, and the limit of the right to use water.

Point No. 4

WHERE THE LIVESTOCK OPERATORS WHO ACTUALLY MADE THE BENEFICIAL USE OF THE WATER (OR THEIR SUCCESSORS IN INTEREST), HAVE ACQUIRED DILIGENCE RIGHTS TO THE USE OF THE WATER, THE LANDOWNER WHO NEVER USED THE WATER AND HAD NO INTEREST IN SUCH LIVESTOCK CANNOT CLAIM DILIGENCE RIGHTS PREDICATED UPON SUCH USE MADE EXCLUSIVELY BY OTHERS WHEN THERE WAS NO PRIVILEGE WHATSOEVER.

The cases which we have previously cited, as well as the statutes, indicate that private citizens could lawfully appropriate water to beneficial use on the public domain. See *Sowards v. Meagher*, 37 U. 212, 108 P. 1112. Appellants and other water claimants acquired diligence rights

based upon actual application of water to beneficial use, dating back to 1875. Those uses were not in subordination to any claims of the United States of America, for the government made no such claims prior to 1951. The government had no interest in the livestock which actually watered at the watering places in question on the government-owned lands. In fact, the government had nothing whatever to do with the appropriations of water for stockwatering purposes by the livestock operators.

No claim is made that the Federal government ever succeeded to the rights of the livestock operators who actually appropriated the water to a beneficial use. The government has never been in the livestock business, at least in the area in question, so that it could not have been the successor in interest. It has neither acquired livestock nor had the management of any of the livestock which utilized the water. None of the rights of the livestock operators have been acquired by the United States through purchase, levy or by eminent domain proceedings. If the government had acquired the ownership of those rights, the appropriators or their successors in interest would have necessarily been divested of those rights. No claim of succession is made. The substance of the government claim is that the appropriation of water by the livestock operators to a beneficial use in watering their livestock, "enured to the benefit of the United States." If the livestock operators themselves acquired no water rights by beneficial use, by reason of failure on their part to comply with the law, such a failure could

not have enured to the benefit of the landowner anyway when such landowner did none of the acts essential to an appropriation of water. However, if the livestock operators acquired diligence rights, which does not seem to be disputed, those rights were vested in them, not in the landowner.

Congress has recognized the fact that livestock operators did acquire water rights on the public domain, not only by the early legislation previously cited, but by more recent legislation. By the Taylor Grazing Act, 43 U. S. C. A., 315 et seq., it is provided (sec. 315b):

“* * * Preference shall be given in the issuance of grazing permits to those within or near a district, who are landowners engaged in the livestock business, bona fide occupants or settlers, *or owners of water rights*, as may be necessary to permit the proper use of lands, *water or water rights* owned, occupied, or leased by them, * * *.” (Italics added).

In the Federal Range Code, Exhibit “A”, 161.1 (b), the same rule is stated. In fact, by such code, in order to obtain a permit, the party must be a citizen (or have declared his intention to become one) and must be engaged in the livestock business. Under its own regulation, the United States could not qualify to graze any livestock, since it has never been engaged in the livestock business.

By the Federal Range Code, the United States has recognized the fact that livestock operators have acquired rights to the use of water whether that water has its ori-

gin on the public domain or elsewhere.

No claim is made in the case that there was any agreement between the stockmen and the government with respect to the application of water to beneficial use. There was no privity between the government and the appropriators of water for stockwatering purposes. The beneficial use made was that of the livestock operators, not a use by the government. The use by the livestock operators was exclusive, since the United States owned no livestock and had no control of livestock.

Inasmuch as duplicate water rights or dual water rights cannot exist in the State of Utah, the fact that the livestock operators acquired diligence rights and never conveyed the same to the government, precluded the Federal government from acquiring those identical water rights. The government does not claim that it acquired any rights from the original appropriators by purchase, levy, or eminent domain.

Even if it were assumed that the livestock operators who acquired diligence stockwatering rights by appropriation to beneficial use some of the waters arising on government-own lands, subsequently lost those diligence rights by more than five years of nonuser, such forfeiture on the part of the original appropriators could not aid the claims of the government. Where a party loses his right by nonuser, that water reverts to the public and becomes subject to re-appropriation (100-1-4, U. C. A. 1943, 73-1-4, U. C. A. 1953). Thus, in no event could the

government benefit from any act or failure on the part of the appropriators.

Point No. 5

THE STIPULATION OF FACTS IN THIS CASE SHOWS CONCLUSIVELY THAT THE UNITED STATES OF AMERICA NEVER ACQUIRED ANY DILIGENCE RIGHTS TO THE USE OF WATER, AND THAT THE DILIGENCE RIGHTS CLAIMS WHICH THE STATE ENGINEER PROPOSES TO HAVE INCORPORATED INTO THE DECREE ON BEHALF OF THE UNITED STATES OF AMERICA, ARE VOID.

The Stipulation of facts clearly above shows that the Federal government neither appropriated any water to beneficial use for stockwatering, nor had any control or ownership over the livestock which actually used the water:

"IT IS STIPULATED:

"1. On or about April 2, 1951, the United States of America filed with the State Engineer water users' claims numbered 1104 to 1115, both inclusive, which claims are listed as diligence claims in the Proposed Determination on pages 361 and 362. The diligence claims are based upon the use of water for stock watering purposes by livestock operators and others who in the past have grazed livestock on the public domain. Such use commenced in 1875 and has continued down to the present time.

"2. The United States of America has neither owned nor operated any of the livestock

which has watered at the sources of supply or at any of the watering places listed in either the claims of diligence rights or in the applications for appropriation. Any beneficial use of the waters with which the United States or any governmental agency is here concerned is a use made by livestock exclusively owned and operated by interests other than the United States of America.

“3. No grazing permits were issued on the Cache National Forest prior to 1906, and no permits for grazing of livestock on public lands of the United States outside of the national forest were issued prior to 1935.

“4. In filing the aforesaid diligence rights claims on April 2, 1951, the officials of the United States at whose instance said claims were filed, did so in the belief that the past use of the water at the points listed in the claims, by livestock operators, has inured to the benefit of the United States of America. In filing the applications to appropriate water, the government officials at whose instance such applications were filed, did so with the purpose of acquiring for the United States of America, water rights through the use of water by livestock operators grazing livestock under permits issued by the United States for the use of forage grown on public lands.”

The Stipulation shows conclusively that prior to 1903 when any diligence rights claims would have arisen, the United States of America did not even issue a permit for the use of the forests, and that as to the balance of the public domain, no grazing permits were issued prior to 1935. The Stipulation precludes any possibility that diligence rights for stockwatering purposes were

ever acquired by the Federal Government. The Stipulation in effect admits the grounds stated in the motion of appellants made on August 20, 1952, to strike the diligence rights claims recapitulated here as follows (R. 28-29):

1. The so-called "diligence rights" and each of them are invalid on the fact of the record, inasmuch as they were filed on behalf of the Forest Service and they purport to antedate the existence of the Forest Service. Even if the Forest Service had been authorized by both State and Federal statutes to acquire diligence rights for stockwatering (which appellants deny) it could not acquire ownership of the waters which arise on those lands. Congress did not attempt to reserve to the United States a right before it came into existence.

2. Neither the Forest Service nor any other agency of the United States ever operated any livestock in the area so as to be able to acquire any diligence rights.

3. The claims were not based on any use made by the United States of America, nor by any agent or agency, but based on use by individual water users with whom there was no privity, none of said users ever having acted for or on behalf of the United States.

4. There was no authority of law for acquiring any diligence rights by the Forest Service, even if there had been a Federal statute permitting such acquisition, for prior to 1941 our State statutes, 100-3-2, U. C. A. 1943, did not permit the appropriation of water by the United

States except by and through the Bureau of Reclamation, and by that time it had become impossible to acquire any diligence rights for approximately 48 years.

The trial court should have granted the appellant's motion to strike each of the so-called diligence claims, for the reason the United States conclusively demonstrated by its stipulation that it did not do any of the acts essential to the appropriation of water to a beneficial use for stockwatering, prior to 1903 or at any other time. The government owned no livestock and it did not operate any livestock by which a beneficial use of the water could have been made. No beneficial use was ever made by or under the control or supervision of the United States. No agency of the government exercised any dominion over the stockwatering, and therefore there could not have been any appropriation of water for beneficial use.

An appropriation of water still consists of putting the same to a beneficial use. See *Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P. 2d 634. As indicated in *Adams v. Portage Irrigation Co.*, 95 Utah 1, 72 P. 2d 648, the use of water for stockwatering purposes is an appropriation of water by the livestock operators. The only parties who put the water to beneficial use on the government-owned lands, were the livestock operators. There was no privity between the livestock owners and the Federal government. There was no foundation for the claim that diligence rights were claimed by virtue of the belief of some government officials that the acts of the livestock operators

who actually put the water to beneficial use, "enured to the benefit of the United States."

Inasmuch as the government admitted facts which showed that its claims of diligence rights were wholly unfounded, and that the Federal government never made any appropriation of water for stockwatering purposes, the appellants were entitled to a finding that there was no appropriation of water for beneficial use and a conclusion of law to the effect that the diligence claims were null and void *ab initio*. The appellants are entitled to a decree adjudging those diligence claims to be null and void, the same as any other unfounded claims, for the reason that the proof here was conclusive, by virtue of the admission of facts in the stipulation on which reasonable minds could not differ.

Point No. 6

PRIOR TO THE 1941 AMENDMENT, EXCEPT FOR PURPOSES OF THE BUREAU OF RECLAMATION, THE UNITED STATES HAD NO AUTHORITY UNDER THE STATE STATUTES TO FILE ON WATER, AND THERE IS NO FEDERAL STATUTE WHICH AUTHORIZES THE FOREST SERVICE OR THE BUREAU OF LAND MANAGEMENT TO MAKE WATER APPLICATIONS, AND CONSEQUENTLY SUCH APPLICATIONS WERE AND ARE VOID.

Prior to 1919, the State statute allowed "Any person, corporation, or association, to hereafter acquire the right to the use of any public water in the State of Utah."

C. L. U. 1917, sec. 3451. In 1919, the statute was amended to read:

“Any person who is a citizen of the United States, or who has filed his declaration of intention to become such as required by the naturalization laws, or any association of such citizens or declarants, or any corporation, in order hereafter to acquire the right to the use of any unappropriated public water in this state shall, before commencing the construction, enlargement or extension of any ditch, canal or other distributing works, or performing similar work tending to acquire such right or appropriation, make an application in writing to the State Engineer.” Section 100-3-2, R. S. U. 1933).

By chapter 40, Laws of Utah 1941, Section 100-3-2 was amended by inserting after the word “corporation,” the following:

“or the state of Utah by the chairman of the commission of publicity and industrial development, the fish and game commissioner, the executive secretary of the state land board or the chairman of the state road commission for the use and benefit of the public, or the United States of America.”

Except for the Bureau of Reclamation, there was no authority granted by law for any agency of the United States to acquire any water rights prior to the 1941 amendment. The Forest Service was impotent to claim any diligence rights, inasmuch as those diligence rights all allegedly ante-dated the setting up of the Forest Service in the Cache National Forest in 1906. An agency

could not acquire diligence rights before it had any existence.

Even if the Forest Service had been permitted by an act of Congress to acquire stockwatering rights, it would have been compelled to do exactly what any citizen or prospective citizen would have been required to do. Prior to July 1, 1941, the United States of America did not come within the orbit of eligible persons or entities, except in the case of the Bureau of Reclamation which was authorized under other statutes. Under no circumstance could the government have acquired any diligence rights for stockwatering, not only for the reason that no appropriation was made, but likewise because there was no authority granted under our state laws for such acquisition until 38 years after the possibility of acquiring diligence rights had ended. Even in the cases where diligence rights could have been predicated upon use of underground waters from springs and wells prior to 1937 where the water did not flow in any well-defined channel, the Forest Service would have been precluded from any legal authority; and claims of such a character are not involved here.

Nor do the Federal statutes authorize what has been attempted here. As late as August 28, 1937, in the act for Water Conservation, Congress did not authorize Federal agencies to acquire water rights except for purposes specifically authorized, 16 U. S. C. A., 590 (4):

“(4) To obtain options upon and to acquire lands, or rights or interests therein, or rights to

the use of water, by purchase, lease, gift, exchange, condemnation, or otherwise, only when necessary for the purposes of sections 590r-590x of this title."

The overarching objective of the Reclamation Laws is to aid private citizens to acquire water rights appurtenant to land which they otherwise would be financially unable to acquire. None of the Federal legislation manifests any intention to transfer to the Federal government or any agency thereof, control over the non-navigable waters of this State or of any other State.

The attempt to assert diligence stockwatering rights, was obviously void. We contend that with respect to the applications for appropriations, all filed at least two years after this proceeding was instituted, there was no Federal law to authorize the same, even if authorized by the State law in 1941.

Point No. 7

THE STIPULATION OF FACTS SHOWS THAT EVEN IF THERE HAD BEEN ANY AUTHORITY OF THE UNITED STATES OF AMERICA TO FILE APPLICATIONS TO APPROPRIATE WATER IN THIS STATE, SUCH APPLICATIONS IN QUESTION WERE VOID AB INITIO IN VIEW OF THE FACT THAT THE STIPULATION OF FACTS SHOWS THAT THERE WAS NO INTENTION ON THE PART OF THE APPLICANT TO PUT THE WATER TO BENEFICIAL USE.

Everything which has been said previously with

respect to the claims of diligence rights, applies with equal force here, with regard to the alleged attempts to initiate water rights for stockwatering from and after 1944. The stipulation of facts recites:

"4. * * * In filing the applications to appropriate water, the government officials at whose instance such applications were filed, did so with the purpose of acquiring for the United States of America, water rights through the use of water by livestock operators grazing livestock under permits issued by the United States for the use of forage grown on public lands."

In the case of diligence claims, the government claimed the benefit of the acts of the appropriators who watered their livestock on government-owned lands, without having permits. In the case of the applications for appropriation, the government takes the position that if a person comes upon land under a grazing permit from the owner, the application of water to beneficial use by the permittee inures to the benefit of the landowner. A mere permit to graze, which does not have the effect of exercising control over the application of water to beneficial use, cannot make the beneficial use of water by the permittees the beneficial use of the landowner. The acts of appropriation are still the acts of the livestock operator. As far as the permits are concerned, the livestock operators could water their stock on the adjoining privately owned lands. The permits do not vest in the United States any control over the watering of the livestock.

The permittees are *not* in the same category of lessees of land which is irrigated by the lessees under an agreement that the lessees shall apply the water upon the land on behalf of the owner to prove up on the owner's application to appropriate the water for irrigation.

Furthermore, the stipulation clearly shows a lack of intention on the part of the United States to apply the water to beneficial use for stockwatering. The watering of livestock is not a function of the government under the terms of the permits. The livestock operators water their livestock where, when and how they deem appropriate. The watering is under the supervision and control of the livestock operators.

As hereinabove pointed out, in some cases the State Engineer issued certificates of appropriation. Those certificates were only *prima facie* evidence of appropriation of water by the applicant; and the stipulation shows that such *prima facie* evidence is entirely false, and that no appropriation was ever made by the United States of America. The stipulation shows that the United States did not intend to perform any of the acts essential to an appropriation of water to beneficial use for stockwatering, but to claim the benefit of indefinite and in many cases unknown acts of the permittees.

We contend that the Honorable Lewis Jones, district judge, should have granted the motion to strike each of the claims based upon appropriation, since there obvi-

ously was no appropriation and no intention whatsoever to make any appropriation of water in accordance with the laws of this State.

Point No. 8

THE DECLARED PURPOSE IN EACH OF THE APPLICATIONS FILED BY THE UNITED STATES OF AMERICA IS SHOWN TO BE AN ATTEMPT TO PREEMPT THE WATER, TO GAIN A MONOPOLY AND TO CONTROL OTHER LANDS OF PRIVATE CITIZENS AND TO "REGULATE" THE PUBLIC GRAZING LANDS, AND SUCH PURPOSES ARE FOR THE DOMINATION OF THE PROPERTY RIGHTS OF OTHERS AND NOT FOR THE APPLICATION OF WATER TO BENEFICIAL USE BY THE LANDOWNER OR APPLICANT.

At the hearing on September 13, 1952, counsel for the government stated for the record "that the whole purpose of the United States and the agencies actively making claims to water" in this case is "entirely for the benefit of permittees and other grantees to graze on the public lands." (R. 51). Such statement is incorrect, for as indicated by counsel, the permittees might change, and the government does not want any permittee "to obtain permanent rights in the water." The whole purpose of the applications was to obtain control of the water and to preempt the water from further filing by the livestock operators. As indicated at the hearing, each application filed by the government contains the following declaration (R. 52):

“The purpose of the appropriation is to provide water for livestock using the surrounding federal range and to conserve and regulate the public grazing lands to stabilize the livestock industry dependent on them and in aid thereof to promote proper use of the privately controlled lands and water dependent upon the public grazing lands.

“The quantity of water sought to be appropriated is limited to that which can be beneficially used by the persons herein described.”

Thus, the only persons who would beneficially use the water would be the permittees, and the government does not propose that any water rights shall be acquired by them, although the permittees will make the appropriation of water for beneficial use. Furthermore, the declaration shows a design to pre-empt the water from further filing by livestock operators, and to vest the control of the water in the government, although the government itself makes no use of the water. One of the avowed purposes is “to conserve and regulate the public grazing lands to *stabilize the livestock industry dependent on them and in aid thereof to promote proper use of the privately controlled lands and water dependent upon the public grazing lands.*”

No better statement could be made of an intention to control and monopolize the water by a nonappropriator of water in order to regulate the activities of the appropriators and their business. Section 100-3-8, U. C. A. 1943, Section 73-3-8, U. C. A. 1953, authorizes approval

of an application by the State Engineer only if "the application was filed in good faith and not for purposes of speculation or monopoly," and other essential facts exist.

Here, the government proposes to dominate and to control privately owned property through applications for appropriation, without any intention to actually utilize the water. A new theory of water rights was manifested in the claim of diligence rights whereby the landowner would acquire duplicate water rights based on the appropriations of water for beneficial use made on such land by livestock operators not in privity with the landowner. Now we have still another theory that the landowner can pre-empt the water which arises on his land, without any intention himself to appropriate the water to beneficial use, but by permitting others to come upon his land and apply the water to beneficial use. Furthermore, there is implicit in such declaration an attempt to gain control over privately owned lands and water rights, which spells out clearly a monopolistic purpose interdicted by our water law. The whole purpose is in derogation of the rule that beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this State.

We contend that the applications are void on their face, as an attempt to circumvent the law. It is well known, that when an agency of government is invested with power, it seldom exercises less power than it acquires. To permit the approval of such void applica-

tions, and to give them judicial status in the general adjudication decree, is to sanction the declared purposes which are contrary to law, and which would operate to circumvent and destroy our entire law of beneficial use.

We further contend that the trial court should have adjudged those applications, and each of them, to be void.

Point No. 9

THE STIPULATION SHOWS THAT SOME OF THE APPLICATIONS LAPSED OR WERE WITHDRAWN, AND THAT WHERE CERTIFICATES OF APPROPRIATION WERE ISSUED SUCH PROOF WAS FALSE AND THAT NO WATER HAS EVER BEEN PUT TO BENEFICIAL USE, SO THAT THERE ARE NO EXISTING RIGHTS TO THE USE OF WATER AND NO BENEFICIAL USE OF WATER BEING MADE UPON WHICH ANY ADJUDICATION CAN BE MADE IN FAVOR OF THE UNITED STATES OF AMERICA.

It is true that in the findings of fact, paragraph 1, there are set out the numbers of applications which were not withdrawn and which had not formally lapsed; but by the terms of the interlocutory decree, the court did not limit approval to those particular applications, but dismissed all of the objections. The court did not even sustain the objections as to the applications which the government admitted by paragraph 7 of the Stipulation were withdrawn or had lapsed.

It is clear that as to those applications on which certificates were issued, the stipulation shows that there

has never been any appropriation of water to beneficial use by the government, and those claims should be adjudged void. As to the diligence rights claims, they likewise were void. As to the balance of the applications which were not withdrawn, the applications manifest a purpose contrary to the laws of this State. The stipulation shows on its face that the government is not an appropriator of water, it has never been and it does not propose to make any appropriation whatsoever. The stipulation has the force of conclusive evidence.

Consequently, there are no existing water rights nor any valid pending applications which could be adjudicated in favor of the United States of America.

We contend that the record requires a finding that all of the claims of the United States were and are invalid. The findings of fact do not cover the admitted facts at all, and the interlocutory decree erroneously dismisses the objections of appellants, when the decree should grant the motion of appellants to strike each and every one of the claims of the United States from the Proposed Determination.

Appellants respectfully request this Honorable Court to reverse the interlocutory decree and order entry of a decree to the effect that all of the claims of the United States of America, were and are void, and also order the elimination of each of said claims from

the Proposed Determination of the State Engineer in making the final decree.

Respectfully submitted,

McKAY, BURTON, McMILLAN
& RICHARDS,

PAUL E. REIMANN, and
MILTON A. OMAN,

*Attorneys for Objectors and
Appellants.*