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Randolph Land & Livestock Co. et al v. United States of America et al : Motion to Dismiss and Supporting Brief

Utah Supreme Court

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No. 7983

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 DRAIN-
AGE AREA IN RICH COUNTY, STATE OF UTAH

RANDOLPH LAND & LIVESTOCK COMPANY, A CORPORA-
TION; DESERET LIVESTOCK COMPANY, A CORPORATION;
BOUNTIFUL LIVESTOCK COMPANY, A CORPORATION;
HAROLD SELMAN, NICK CHOURNOS, ORVAL JOHNSON,
AND WILLIAM JOHNSON, OBJECTORS AND APPELLANTS

v.

THE UNITED STATES OF AMERICA, WATER CLAIMANT
AND RESPONDENT

THE STATE ENGINEER OF THE STATE OF UTAH,
RESPONDENT

MOTION TO DISMISS AND SUPPORTING BRIEF

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v.

THE UNITED STATES OF AMERICA, WATER CLAIMANT
AND RESPONDENT

THE STATE ENGINEER OF THE STATE OF UTAH,
RESPONDENT

MOTION TO DISMISS

Comes now the United States of America, acting by and through J. Lee Rankin, Assistant Attorney General, and A. Pratt Kesler, United States Attorney for the District of Utah, under and pursuant to the authority of the Attorney General of the United States, and appears specially for the purpose of objecting to the jurisdiction of this Honorable Court as to the United States of America, and for no other purpose, and moves this Court to dismiss this cause as against the United States of America for want of jurisdiction over it upon the following grounds and for the following reasons:

(1)

1. The United States of America has neither consented to be sued nor waived its immunity from suit under the facts and circumstances which prevail in the above-entitled cause.

2. The United States of America was not a party to the case in the District Court of the First Judicial District of the State of Utah, In and For the County of Rich, In the Matter of the General Determination of the Rights to the Use of Water of the Bear River and its Tributaries, Both Surface and Underground, and to the Use of All Waters of the Drainage of Said Streams in Rich County, State of Utah, Civil No. 299, nor to the judgment of that Court and may not now be made a defendant in the cause to which this motion relates.

3. There was no authority in the then United States Attorney nor in the Attorney for the Bureau of Reclamation, who purported to represent the United States of America in the subject cause in the District Court, to appear for, or to stipulate on behalf of the United States of America in regard to its rights to the use of water.

4. There is no justiciable controversy before this Court.

Wherefore the United States of America prays that this cause be dismissed against the United States of America for the reasons expressed above and predicated upon the authorities in support of this motion set forth in the accompanying brief.

J. LEE RANKIN,
Assistant Attorney General.

A. PRATT KESLER,
United States Attorney.

NOVEMBER , 1953.

OPINION BELOW

There was entered on February 7, 1953, by Honorable Lewis Jones, Judge of the First Judicial District Court, Rich County, State of Utah, an interlocutory decree dismissing appellants' objections. From that decree this appeal is taken.

STATEMENT OF FACTS

The Attorney General of the State of Utah filed on May 14, 1945, in the District Court of the First Judicial District in and for Rich County, State of Utah, an amended petition* in this action in which he prayed for "a decree * * * adjudicating the relative rights of all water users on the Bear River and tributaries, both surface and underground, and the drainage within the watersheds of said streams, in Rich County, State of Utah, in accordance with the provisions of Chapter 4, Title 100, Revised Statutes of Utah, 1933, as amended."

The Attorney General of the United States was not served with process in the action. No effort was made to join the United States of America as a party to the cause. Several years subsequent to the initiation of the action, representatives of the Bureau of Land Management of the Department of the Interior and of the Forest Service of the Department of Agriculture made filings with the State Engineer of the State of Utah purporting to appropriate water on lands, title of which resides in the United States of America. There were in the aggregate thirty-five (35) filings made with the State Engineer.¹ Thirty-

*The original petition was filed by the State Engineer on July 13, 1942; the amendment to that petition was filed by the Attorney General of the State of Utah.

¹ R. 14.

two (32) of the filings were made by the Bureau of Land Management, three (3), by the Forest Service.

On or about April 2, 1951, the Forest Service filed twelve (12) additional claims with the State Engineer of the State of Utah. Those are referred to throughout as "diligence claims." A priority date of 1875 was asserted for certain of those rights by the Forest Service. The claimed priority date was predicated upon the use of the water by livestock, which from the date last mentioned to the present time have been grazed upon the public domain.

The State Engineer approved all of the filings originally made by the Bureau of Land Management and the Forest Service.² However, twelve (12) of those original filings approved by the State Engineer, it is reported, subsequently lapsed or were withdrawn.³

In accordance with the laws of the State of Utah and pursuant to the statutory procedure in actions of this character there was issued by the State Engineer of that State a "Proposed Determination of Water Rights in Bear River, Rich County, Utah Drainage Area." Listed by the State Engineer in the proposed determination were the claims of the Bureau of Land Management and the Forest Service. In that document it was recommended by the State Engineer that there be an allowance of all of those claims. Objections were filed by the appellants to the proposed determination. Those objections are set forth in the brief filed by the appellants in this appeal. Praying for judgment, the appellants petitioned the court as follows:

² R. 14.

³ R. 14.

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.

Predicated upon the proceedings of August 20, 1952, before Honorable Judge Lewis Jones,⁴ a stipulation was filed on September 10, 1952, Exhibit I of this brief. That stipulation was signed by the then United States Attorney⁵ and purports to bind the United States of America. At the hearing of September 13, 1952,⁶ the objection was made by appellants to the priority date of 1875 asserted in connection with the diligence claims as above mentioned. An attorney for the Bureau of Reclamation, purporting

⁴ R. 28.

⁵ R. 12.

⁶ R. 44.

to act for the United States of America, agreed that the priority date of 1875 should be changed to 1899, one year subsequent to the most recent priority date of the appellants.⁷ The Attorney General of the United States of America has not authorized any Assistant Attorney General, any United States Attorney or the attorney for the Bureau of Reclamation to act on behalf of the United States of America under the circumstances which prevail in this case.

Predicated upon the trial of the issues,⁸ upon the stipulation,⁹ upon the agreement by the Attorney for the Bureau of Reclamation,¹⁰ the court issued a memorandum opinion,¹¹ dated the 12th day of January, 1953. Among other things, the court there declared 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.¹²

Judge Jones likewise declared in his memorandum:

* * * 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.¹³

There were entered by Honorable Judge Jones on February 7, 1953, the findings of fact and conclusions

⁷ R. 64.

⁸ R. 28-89.

⁹ R. 12-15.

¹⁰ R. 64.

¹¹ R. 16-17.

¹² R. 16.

¹³ R. 17.

of law.¹⁴ Set forth in those findings of fact and conclusions of law is the following statement: "4. It was stipulated at the trial that in each case of appropriation of water by the United States from a source of supply from which the objectors [appellants] have made an appropriation, the priority of the objectors' rights is senior to the priority of the right of the United States; * * *." Premised upon the stipulation at the trial and upon the other findings of fact, Judge Lewis Jones declared:

* * * there is no justiciable issue or contest between the objectors, or any of them, and the United States of America.

In the light of those findings of fact and conclusions of law, Judge Jones entered an interlocutory decree in which it was ordered, adjudged and decreed that: "1. * * * there is no justiciable controversy between the objectors * * * 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. * * * the objections to the claims of the United States to the water of Bear River * * * be and they are hereby overruled and denied and the Petition setting forth the objections of said objectors is hereby dismissed." ¹⁵

Wholly aside from the declaration of the lower court that there was no controversy between the United States of America and the appellants, this appeal was taken predicated principally upon the grounds that the United States of America did not and could not acquire rights to the use of water under the circumstances of the case.

¹⁴ R. 18-19.

¹⁵ R. 20.

STATEMENT OF POINTS

1. The United States Attorney had no authority to enter into the stipulation purporting to bind the appellants and the United States of America in connection with the rights claimed by the latter in the action in the district court.

2. Rights to the use of water and the priorities asserted in connection with them are substantive rights in the nature of real property and neither the United States Attorney nor any Attorney of the Bureau of Reclamation were empowered to relinquish those rights.

3. This is an action against the United States of America, which has not, under the circumstances, waived its immunity from suit.

4. Sovereign immunity from suit may be waived only by specific Congressional enactment; no officer of the United States, in the absence of express authority, may waive that exemption or subject the property of the United States of America to jurisdiction; that immunity from suit exists whatever the character of the proceedings, including the action to adjudicate rights to the use of water.

5. Assuming that the lower court had jurisdiction of the claims of the United States, which is denied, there is no basis for this appeal, as there is no controversy among the parties.

ARGUMENT

I

There was no authority in any official of the Department of Justice or any other department to stipulate in regard to the rights to the use of water of the United States as revealed by the record and Exhibit I of this brief

By the stipulation¹⁶ of September 10, 1952, the then United States Attorney sought to bind the United States of America in a manner which, if valid, would have resulted in the relinquishment by the United States of America of valuable rights to the use of water. Similarly, the Attorney for the Bureau of Reclamation purported to relinquish priorities in connection with certain other rights originally set forth in the stipulation of September 10, 1952.¹⁷ As declared above, a careful review of the records of the Attorney General of the United States fails to disclose that either the then United States Attorney or the Attorney for the Bureau of Reclamation was empowered to bind the United States in the manner proposed or that the acts of either were ratified. Thus the stipulations of those attorneys are not and could not be binding upon the Attorney General. Unfortunately for all concerned, the interests of the United States in this matter are of such magnitude that the Attorney General on behalf of the National Government may not now ratify those stipulations and accordingly they are rejected.

The powers of the United States Attorney to stipulate in connection with litigation of the character

¹⁶ Exhibit I.

¹⁷ R. 64.

here involved are clear and unequivocal. His authorization at that time was as follows:

In no case shall a field attorney* enter into an agreed statement of facts or a stipulation to abide the result in another case or any stipulation concluding the substantive rights of the United States without specific authority from the Assistant Attorney General in charge of the Lands Division.¹⁸

Absent specific authorization from the Attorney General of the United States to the United States Attorney, the latter would be powerless to proceed in the manner attempted. Relative to the broad powers of the Attorney General, reference is made to the investiture of authority in that official by the Congress of the United States. It is provided that: “* * * The Attorney General shall have supervision over all litigation to which the United States or any agency thereof is a party and shall direct all United States attorneys * * * in the discharge of their respective duties.” That and correlative enactments¹⁹ vest in the Attorney General plenary power over litigation in which the United States is engaged. In numerous

*Field Attorney includes United States Attorney.

¹⁸ Department of Justice, Lands Division, Field Instructions, page 19, Subdivision E. The present authorization is: “In no case shall the United States Attorney or field Attorney enter into an agreed statement of facts or a stipulation to abide the result in another case or any stipulation concluding the substantive rights of the United States without specific authority from the Assistant Attorney General in charge of the Lands Division.” United States Attorneys’ Manual, Title 5, Lands Division, page 2, Stipulations.

¹⁹ 28 U. S. C. 507 (b) ; 5 U. S. C. 300 et seq.

instances the courts have considered the powers of the Attorney General.²⁰

In an authoritative decision respecting the powers of an official of the United States of America to employ counsel to represent the United States independent of representation by the Attorney General, this statement was made: “* * * quite aside from the respectable authority that confirms our view, we should have had no doubt that no suit can be brought except the Attorney General, his subordinate, or a district attorney under his ‘superintendence and direction,’ appears for the United States.”²¹

There can be little doubt of the power of the Attorney General under the circumstances to require prior specific approval of all stipulations of the character of those by which the then United States Attorney and the Attorney for the Bureau of Reclamation attempted to bind the United States. Necessarily, with the full responsibility residing with the Attorney General, his subordinates could not be permitted to stipulate in connection with substantive rights of the United States of America—absent his approval or the approval of an Assistant Attorney General.

Cognizant of the immense value of water in the arid West, particularly in connection with the vast grazing areas here affected, the Attorney General cannot permit the loss of priorities in connection with those rights to the use of water through unauthorized agreements of the character here involved. Historically, and for soundest reasons, the Attorney Gen-

²⁰ *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 279 (1887), *Booth v. Fletcher*, 101 F. 2d 676 (U. S. Ct. App. D. C. 1939), cert. denied, 307 U. S. 628. See also 81 A. L. R. 124.

²¹ *Sutherland v. International Insurance Co. of New York*, 43 F. 2d 969, 970 (C. A. 2, 1930).

eral has exercised with great care the power to relinquish claims of the United States of America to property or to funds. Reference in that regard is made to an opinion written in reply to a question presented by the Secretary of the Treasury as to whether that official had the power to compromise a claim of the United States which was in litigation. Asserting that there resided in the Attorney General the sole power to dispose of claims in litigation, the opinion referred to contains this declaration: "Except as modified by the statutes already cited [which have no bearing here] the power to determine whether compromises should be made of pending litigation, would seem to rest with this Department, as the suits are necessarily under my control and subject to my direction."²² Contained in the opinion last cited is this pertinent declaration taken from an earlier pronouncement:²³ "He [the Attorney General] exercises superintendence and direction over United States attorneys and general supervision over proceedings instituted for the benefit of the United States, and to him is necessarily intrusted, in the exercise of his sound professional discretion and because of the nature of the subject, the determination of many questions of expediency and propriety affecting the continuance or dismissal of legal proceedings. * * * He may absolutely dismiss or discontinue suits in which the Government is interested; *a fortiori* he may terminate the same upon terms, at any stage, by way of compromise or settlement." Continuing, the Attorney General declared, in denying the power of the Secretary of the Treasury to compromise a suit: "Without expressly deciding whether I am authorized

²² 23 Opin. Atty. Gen. 507, 508.

²³ 22 Opin. Atty. Gen. 491, 494.

to compromise an adverse claim against the Government under this general power to conduct its litigation, I am clearly of opinion from an examination of the papers that the present suit should not be compromised, but that the United States attorney should be instructed to press the case to a final decision.”²⁴

Manifest from the authorities cited is this:

All litigation of the character here involved is under the direction and superintendence of the Attorney General. Power to stipulate in connection with claims in the manner attempted resides with the Attorney General. Only pursuant to specific authority from the Attorney General was the United States Attorney empowered to enter into the stipulation in question. He did not have that specific authorization, nor has the stipulation ever been approved by the Attorney General. It necessarily follows that the Attorney for the Bureau of Reclamation was without power to compromise the rights of the United States of America in the manner attempted.

As the then United States Attorney was without authority to stipulate in connection with the claims of the United States, he was without power to bind the United States in the manner proposed. Moreover, “* * * the rule requires of all persons dealing with public officers, the duty of inquiry as to their power and authority to bind the government; * * *.”²⁵ The Supreme Court of the United States has consistently adhered to that principle.²⁶

²⁴ 23 Opin. Atty. Gen. 508, 509.

²⁵ *Hume v. United States*, 132 U. S. 406, 414 (1889).

²⁶ *Logan County v. United States*, 169 U. S. 255 (1897).

It is the principle adhered to by this Court. On the subject this Court made the statement: "The Federal courts have held without exception * * * that it [the United States] is not bound or estopped by the acts of such officers or agents not within the scope of their authority."²⁷

The highest Court has long recognized that unauthorized acts involving litigation in which interests of the United States are involved are not binding upon it.²⁸ This general statement and the authorities upon which it is premised is especially pertinent under the circumstances: "An officer can * * * bind his government only by acts which come within the just exercise of his official powers and within the scope of his authority, * * *. An unauthorized act or declaration of an officer does not estop the government from insisting on its invalidity.

"Unless duly authorized by law, a board or officer may not waive the state's immunity from suit; nor may an officer of the United States, without statutory authority, waive conditions or limitations imposed by statute in respect of suits against the United States. * * *."²⁹

Further comment respecting the lack of authority in the United States Attorney or the Attorney for the Bureau of Reclamation to enter into the stipulations in question is unnecessary. That the stipulations involved substantive rights is a matter to be considered in the phase of the brief immediately succeeding.

²⁷ *Petty et al. v. Borg*, 106 Utah 531, 150 P. 2d 776, 779 (1944); see also cited cases.

²⁸ *Stanley v. Schwalby*, 162 U. S. 255 (1895); *Utah Power & Light Co. v. United States*, 243 U. S. 389 (1916).

²⁹ 43 Am. Jur., Public Officers, Sec. 254, p. 71.

II

The rights to the use of water claimed by the United States of America are interests in real property—they are substantive rights

It is, of course, an elementary proposition, long recognized by this Court, that a water right is usufructuary and does not partake of the ownership of the corpus of the water itself.³⁰ “This usufructuary right, or ‘water-right,’ * * * is real property. It is as fundamental under the law of riparian rights as under the law of appropriation.”³¹ From the same source as the last quoted statement this precept is taken: “The right to the flow and use of water, being a right in a natural resource, is real estate. * * * The right to have water flow from a river into a ditch is real property. A wrongful diversion of water is an injury to real property. The right to take water from a river and conduct it to a tract of land is realty. * * * An action to quiet title as for real property is proper. And an action to settle rights is one to quiet title to realty.” Moreover, a right to the use of water has “all the dignity of and is an estate of fee simple, or a freehold.”³² Premised on a review of pertinent decisions this conclusion has been expressed: “As has been held in numerous cases, a water right is real property.”³³

³⁰ *Fuller v. Swan River Placer Mining Co.*, 12 Colo. 12, 17, 19 Pac. 836 (1888); *Wright v. Best*, 19 Cal. 2d 368, 121 P. 2d 702 (1942); *Sowards v. Meagher*, 37 Utah 212, 108 Pac. 1112 (1910). See also *Lindsey v. McClure*, 136 F. 2d 65, 70 (C. A. 10, 1943).

³¹ Wiel, *Water Rights in the Western States*, 3d ed., vol. 1, sec. 18, pp. 20, 21.

³² Wiel, *Water Rights in the Western States*, 3d ed., vol. 1, sec. 283, pp. 298–300; Sec. 285, p. 301.

³³ 19 *Rocky Mountain Law Review* 63.

From the statements and authorities cited, it is evident that a right to the use of water is an estate in real property. However, the value which may be placed on such a right is dependent very largely upon the priority to which it is entitled insofar as that right relates to others from the same source. The preceding statement is simply a recognition of the fundamental concept of water law that, "First in time is first in right." That maxim is the essence of the doctrine of prior appropriation. With reference to the subject, this statement has been made: "this court has repeatedly held that priorities of rights to the use of water are property rights. Such is the settled doctrine in this state. * * * Property rights in water consist not alone in the amount of the appropriation, but also in the *priority* of the appropriation. It often happens that the chief value of an appropriation consists in its *priority* over other appropriations from the same natural stream. Hence, to deprive a person of his priority is to deprive him of a most valuable property right * * *." ³⁴

From the cited authorities it is evident that rights to the use of water are in the nature of interests in real property and that those rights together with the priorities asserted for them are substantive rights concerning which the United States Attorney was powerless to stipulate in the absence of specific authority from the Attorney General.

III

The action in the District Court was against the United States of America, involving its rights to the use of water

The action in the court below involved rights to the use of water claimed by the United States of

³⁴ *Nichols v. McIntosh*, 19 Colo. 22, 26, 27, 34 Pac. 278 (1893).

America and the priorities which it asserted in connection with those rights. From the authorities cited above, it is evident that those rights are in the nature of interests in real property. Suits of the character from which this appeal has been taken have been described by this Court to be actions for the purpose of determining rights to the use of water and to quiet title among numerous claimants on a stream. The issues, this Court has pointed out, involve the rights of the parties for and against each other to all of the waters of the stream system.³⁵ The Supreme Court of the United States has established the criterion pursuant to which a determination may be made as to whether a cause is against the sovereign. It declared if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration * * * the suit is one against the sovereign."³⁶ That precept has been recognized on numerous occasions by the Supreme Court of the United States.³⁷ Moreover: "A proceeding against property in which the United States has an interest is a suit against the United States."³⁸ Free from doubt, therefore, is the fact that the action is against the United States of America with all of the incidents arising from that fact.

³⁵ *Huntsville Irrigation Association v. District Court of Weber County*, 72 Utah 431, 270 Pac. 1090 (1928).

³⁶ *Land v. Dollar*, 330 U. S. 731, 738 (1946).

³⁷ *Stanley v. Schwalby*, 162 U. S. 255 (1895); *Larson v. Domestic and Foreign Corporation*, 337 U. S. 682 (1948).

³⁸ *Minnesota v. United States*, 305 U. S. 382, 386 (1938).

IV

The United States of America is immune from suit in the absence of specific waiver—anyone asserting there has been a waiver of that immunity must bring his case within the act upon which he relies

In the factual review set forth above the statement is made that the Attorney General of the United States of America has not been served in this action. In that regard this fact is respectfully emphasized: There was no authority and there is no authority in any official of the United States of America to authorize an appearance in proceedings of the character here involved under the circumstances which prevail, in the absence of service upon the Attorney General of the United States. In a subsequent phase of this brief that statement will be reiterated and reemphasized. Irrespective of that lack of authority, however, the then United States Attorney participated in the trial of the issues in the court below which was commenced on August 20, 1952, though the original proceedings were initiated several years earlier. The matter was not concluded at the date last mentioned but was continued until September 13, 1952. On August 27, 1952, a wire was sent to the then United States Attorney purporting to authorize him to appear in the cause to protect the interests of the United States.³⁹ There was no effort to confer

³⁹ WASHINGTON, D. C., *August 27, 1952.*

SCOTT M. MATHESON, Esquire,
*United States Attorney,
Salt Lake City, Utah.*

Re General Determination Rights to use of water Bear River Drainage Area, Rich County, and Randolph Land and Livestock Company, et al., pending in District Court of Rich County, Utah. You are authorized to appear in this matter to protect the interests of the United States in the use of waters claimed by it. It is

authority upon the Attorney for the Bureau of Reclamation who, the record reveals, conducted the proceedings on behalf of the United States. Neither was authority conferred upon the United States Attorney to stipulate in the manner revealed in Exhibit I of this brief.

It is necessarily concluded, therefore, that the participation of the then United States Attorney in the proceedings did not and could not constitute a submission of the United States to jurisdiction in the court below. Similarly the stipulation is without force and effect for reasons which have been expressed.

Quite aside from the lack of authority in the then United States Attorney to make an appearance in the action, are fundamental tenets of the law which preclude the Attorney General himself under the circumstances from subjecting the United States of America to jurisdiction. Necessarily, therefore, an Assistant Attorney General or the United States Attorney could not subject the United States of America to jurisdiction under the circumstances.

The sovereign immunity from suit is a principle of law applied equally to the State and Federal governments. Respecting the immunity of the State of Utah from suit, this Court declared: “ * * * action[s]

understood that you are familiar with these proceedings and that you understand that the Bureau of Land Management and Forest Service both have rights which need protection. All necessary information re Bureau of Land Management claims can be procured from Regional Administrator and Regional Counsel that Bureau in Salt Lake City. Contact Forest Service re its claims. Department is advised hearing will be held Friday, August 29. Please give Department complete report.

RALPH J. LUTTRELL,
Acting Assistant Attorney General.

may not be maintained unless the state has, through legislative or constitutional action, given consent to be sued. * * * when there is statutory consent to sue [the State], the statute is the measure of the power to sue.”⁴⁰ Again, in regard to the immunity of the State of Utah from suit, this declaration was made: “We start with the assumption that the sovereign is immune from suit. To find authority for any action of whatever nature against the state, recourse must be had to the statutes. * * * There must be substantial compliance with the designated statutory procedure for bringing such actions.”⁴¹ Adhering to the principles expressed by Utah’s highest court, the Supreme Court of the United States commented as follows on the subject: “As we conclude that these suits are suits against Utah and that Utah has not consented to be sued for these alleged wrongful tax exactions in the federal courts, we express no opinion upon the merits of the controversy. * * * We conclude that the Utah statutes fall short of the clear declaration by a State of its consent to be sued in the federal courts which we think is required before federal courts should undertake adjudication of the claims of taxpayers against a state.”⁴²

In substance the Supreme Court of the United States and the Supreme Court of Utah have recognized, insofar as the sovereign State is concerned, that: “It is an established principle of jurisprudence in all civilized nations, resting upon grounds of public policy, that the sovereign cannot be sued in its own

⁴⁰ *Campbell Bldg. Co. v. State Road Comm.*, 95 Utah 242, 249, 252, 70 P. 2d 857 (1937).

⁴¹ *State v. District Court of Salt Lake County*, 102 Utah 284, 285, 115 P. 2d 913 (1941).

⁴² *Kennecott Copper Corp. v. State Tax Comm.*, 327 U. S. 573, 576, 579, 580 (1945).

courts or in any other court without its consent and permission.”⁴³

Identical principles with those enunciated above respecting the sovereign immunity of the State of Utah from suit are applicable to the United States. That conclusion has been recognized by the Supreme Court of the United States in these terms: “The exemption from direct suit is * * * without exception. * * * [The United States] cannot be subjected to legal proceedings, at law or in equity, without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress.”⁴⁴

With reference to the immunity of the United States of America from suit respecting rights to the use of water, this statement has been made: “The suit is essentially one to determine the validity of the claimed water right, which if valid, might present a question of priority and extent, * * *. * * * There being no consent by Congress to the suit, the bill must be dismissed * * *.”⁴⁵ Consistent with the principle that the immunity of the United States from suit is without exception, is the statement of the Supreme Court of the United States respecting the effort on the part of the State of Arizona to institute an action involving its claimed rights to water on the Colorado River. In dismissing Arizona’s petition the Court said this: “* * * we are of the opinion that in the circumstances disclosed by the bill of complaint there can be no adjudication of rights in the unappropriated water of the Colorado river without the presence, as

⁴³ 49 Am. Jur., States, Territories, and Dependencies, Sec. 91.

⁴⁴ *Belknap v. Schild*, 161 U. S. 10, 16 (1895).

⁴⁵ *United States v. McIntire*, 101 F. 2d 650, 653 (C. A. 9, 1939).

a party, of the United States, which, without its consent, is not subject to suit even by a state.”⁴⁶

In the light of the principles enunciated above, there arises the question of whether the filing of claims by the Forest Service and the Bureau of Land Management subjected the United States to the jurisdiction of the court below. Similarly the question is presented as to whether the acts of the United States Attorney could subject the National Government to the jurisdiction of the court under the circumstances revealed by the record.

V

Neither the United States attorney nor any other official would be empowered to subject the United States to suit absent a waiver of immunity from suit by Congress

As disclosed above, the immunity of the United States of America from suit is without exception. It is manifest that Congress and Congress alone has the power to waive that immunity. Clearly there is no authority in the United States Attorney or any other official of the United States of America to waive that immunity. That principle of sovereign immunity has been recognized in a vast variety of cases and circumstances. On the proposition it has been emphatically declared by the Supreme Court of the United States that: “Where jurisdiction has not been conferred by Congress, no officer of the United States has power to give any court jurisdiction of a suit against the United States.”⁴⁷

⁴⁶ *Arizona v. California*, 298 U. S. 558, 568 (1935).

⁴⁷ *Minnesota v. United States*, 305 U. S. 382, 388, 389 (1938).

Particularly relevant to this phase of the consideration is one of the principal decisions of the Supreme Court of the United States on the subject.⁴⁸ Seldom will a case be found which is more precisely in point on a proposition under consideration. In that case, as here, an effort was made to authorize the United States Attorney to appear in an action instituted in a State court against properties of the United States. That suit, as here, was in substance an action to quiet title to real property against claims asserted by the United States. In declaring that the official in question was without authority to subject the rights of the United States to jurisdiction of the State court the Supreme Court of the United States declared in these specific terms: "It is a fundamental principle of public law, affirmed by a long series of decisions of this court, and clearly recognized in its former opinion in this case, that no suit can be maintained against the United States, or against their property, in any court, without express authority of Congress. 147 U. S. 512. See also *Belknap v. Schild*, 161 U. S. 10. The United States, by various acts of Congress, have consented to be sued in their own courts in certain classes of cases; but they have never consented to be sued in the courts of a State in any case. Neither the Secretary of War nor the Attorney General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States or their property, to the jurisdiction of the court in a suit brought against their officers. *Case v. Terrell*, 11 Wall. 199, 202; *Carr v. United States*, 98 U. S. 433, 438; *United States v. Lee*, 106 U. S. 196, 205."⁴⁹ Turning then to the action

⁴⁸ *Stanley v. Schwalby*, 162 U. S. 255 (1895).

⁴⁹ *Stanley v. Schwalby*, 162 U. S. 255, 269-270 (1895).

taken by the United States Attorney who filed responsive pleadings in the cause before the State court, this succinct and pertinent statement was made: "*The answer actually filed by the District Attorney, if treated as undertaking to make the United States a party defendant in the cause, and liable to have judgment rendered against them, was in excess of the instructions of the Attorney General, and of any power vested by law in him or in the District Attorney, and could not constitute a voluntary submission by the United States to the jurisdiction of the court.*"⁵⁰ [Emphasis added.]

Important in connection with this matter are the distinguishing elements between the appropriation of rights to the use of water and the adjudication of them. On the subject this statement has been made: "The acquiring of water rights for the purpose of irrigating land, and the determination by courts of what those rights are, after acquirement, are entirely different subjects, * * *."⁵¹ Where there is involved the question of the adjudication of rights, the immunity of the United States from suit in the absence of waiver, is a bar to bringing an action. In the case last cited this comment was made: "The suit being one against the United States, the court is without jurisdiction, in the absence of an act of Congress waiving immunity from suit."⁵² An examination of the statutes fails to reveal any basis upon which the filings by the Forest Service or the Bureau of Land Management could subject the United States to jurisdiction in a State court.

⁵⁰ *Stanley v. Schwalby*, 162 U. S. 255, 270 (1895).

⁵¹ *North Side Canal Co. v. Twin Falls Canal Co.*, 12 F. 2d 311, 314 (D. C. S. D. Idaho, 1926).

⁵² *North Side Canal Co. v. Twin Falls Canal Co.*, 12 F. 2d 311, 313 (D. C. S. D. Idaho, 1926); *U. S. v. McIntire*, 101 F. 2d 650.

Section 208 of the Department of Justice Appropriation Act of 1952 has no application to this case (43 U. S. C. 666)

The Attorney General of the United States of America has not been served in this case. Yet the act cited in the caption of this phase of the brief contains this requirement: "Summons or other process in any such suit [adjudication of rights to the use of water] shall be served upon the Attorney General or his designated representative." Important here is the fact that the Attorney General of the United States of America has not and in view of the authorities cited above, it is respectfully submitted, could not waive the requirements regarding process. Also, as emphasized above, the Attorney General of the United States of America has not authorized any officer of the Department of Justice or of any other Department to waive the requirement that process be served upon him. Thus the purported authorization to the then United States Attorney was a nullity and could not effectuate a submission of the National Government to the jurisdiction of the court below or of this Court.

Having failed to serve the Attorney General or in any way to bring that official before the court, it is evident that the principles respecting the immunity from suit which have been reviewed at length above constitute a bar to the joinder of the United States in the case. As discussed above, " * * * whoever institutes such proceedings [against the United States] must bring his case within the authority of some act of Congress."⁵³ Further, as stated above, any waiver of immunity of the United States from suit must be

⁵³ *Belknap v. Schild*, 161 U. S. 10, 16 (1895).

strictly construed.⁵⁴ Respecting actions against States this authoritative statement has been made: “ * * * most courts hold that statutes waiving the state’s immunity from suit and permitting suit to be brought against it, being in derogation of sovereignty, must be strictly construed.”⁵⁵ In conformity with that doctrine as revealed above, the consent of the State of Utah to be sued for an occupation tax refund “in any court of competent jurisdiction” was not construed by the highest tribunal as a consent to be sued in federal court.⁵⁶ Conforming to the principle enunciated by the Supreme Court of the United States, it has been held that a statute is jurisdictional which requires a notice to be filed with the Attorney General of the State prior to bringing a claim against the State of New York.⁵⁷

A correlative principle militating strongly against the joinder of the United States in the action are basic tenets of statutory construction. Fundamental in that connection is the precept that: “Retrospective operation [of a statute] is not favored by the courts, * * * and a law will not be construed as retroactive unless the act clearly, by express language or necessary implication, indicates that the legislature intended a retroactive application.”⁵⁸ It has likewise been declared that: “Because of the intuitive belief that there is something inherently bad in retroactive legislation, some states have adopted express constitutional provisions against retroactive laws.”⁵⁹ While

⁵⁴ *United States v. Shaw*, 309 U. S. 495, 502 (1939).

⁵⁵ 49 Am. Jur., States, Territories, and Dependencies, Sec. 97, p. 314.

⁵⁶ *Kennecott Copper Corp. v. State Tax Commission*, 327 U. S. 573 (1945).

⁵⁷ *Buckles v. State*, 221 N. Y. 418, 117 N. E. 811 (1917).

⁵⁸ Sutherland, *Statutory Construction*, 3rd ed., vol. 2, page 115.

⁵⁹ Sutherland, *Statutory Construction*, 3rd ed., vol. 2, page 119.

the State of Utah is not among those States mentioned, there is no reason to assume that this Honorable Court would find retroactive laws less repugnant than other courts have found them. Yet only by treating Section 208 of the Department of Justice Appropriation Act of 1952 as being retrospective is it possible to apply it to this case. That act was enacted ten years subsequent to the initiation of the subject case. Certain of the claims—the so-called “diligence claims”—were filed ten years subsequent to the initiation of the suit.

Predicated upon the above principles, it is respectfully submitted that the United States was not before the district court below and any action taken there is without effect insofar as the interests of the United States are concerned.

VII

**Assuming the District Court had jurisdiction, which is denied,
this Court will not consider moot questions**

A consideration of the record in the case reveals that there is no actual controversy—no justiciable issue before the Court. There is nothing in the record which reveals that either the Bureau of Land Management or the Forest Service are utilizing water which the appellants claim they are entitled to receive. Thus it is manifest that there is no conflict in fact between the United States of America and the appellants. Moreover, assuming that the stipulations had validity, or that the district court had jurisdiction over the properties of the United States, it is clear that the United States Attorney had stipulated in a manner which removed any possible conflict among the parties. It is evident as a consequence of those facts that the appellants have presented to this court

a moot question. That an appellate court will not assume jurisdiction of moot questions is a tenet of the law too well established to contend against. The Supreme Court of the United States has long adhered to that fundamental tenet. On the subject it has stated:

To predetermine, even in the limited field of water power, the rights of different sovereignties, pregnant with future controversies, is beyond the judicial function. The courts deal with concrete legal issues, presented in actual cases, not abstractions.⁶⁰

Again the same Court declaring that the fundamental principles limiting adjudications to actual cases and controversies are not affected by the fact that it would be convenient to the parties and to the public to have a particular matter resolved stated:

We deal, however, not with the theoretical disputes but with concrete and specific issues raised by actual cases. * * * "Constitutional questions are not to be dealt with abstractly." * * * They will not be anticipated but will be dealt with only as they are appropriately raised upon a record before us. * * * Nor will we assume in advance that a State will so construe its law as to bring it into conflict with the federal Constitution or an act of Congress.⁶¹

This Court adhering to the same principles enunciated above declared in regard to an action to quiet title: "We see no merit" in this appeal in connection with a request by an appellant to have reviewed a

⁶⁰ *United States v. Appalachian Electric Power Co.*, 311 U. S. 377, 423 (1940), rehearing denied, 312 U. S. 712.

⁶¹ *Allen-Bradley Local v. Board*, 315 U. S. 740, 746 (1941); see also *Arizona v. California*, 283 U. S. 423, 463, 464 (1930).

quiet title decree which revealed that there was no substantial controversy among the parties.⁶² The opinion of this Court in a more recent decision contained this statement:

Even courts of general jurisdiction have no power to decide abstract questions or to render declaratory judgments, in the absence of an actual controversy directly involving rights.⁶³

That doctrine has been adhered to by this Court in litigation involving rights to the use of water.⁶⁴ There it is declared:

Before the plaintiff in this suit can be heard to complain because he has been deprived of the use of the water flowing from the springs in question, he must establish some right to the use of such water or a part thereof. * * * The plaintiff, being without any right in the water here in controversy, cannot be heard to complain because the owner so uses the water that plaintiff derives no benefit from such use. The trial court properly entered judgment dismissing plaintiff's complaint.

As the record in this case reveals no conflict between the appellants and the United States of America, the doctrine of the last cited case, it is respectfully submitted, is controlling.

More recently, this Court reiterated the same principle.⁶⁵ That principle has been adhered to by courts in other Western States.⁶⁶

⁶² *Fitzpatrick v. Brown*, 41 Utah 139, 142, 124 Pac. 769 (1912).

⁶³ *University of Utah v. Industrial Commission of Utah*, 64 Utah 273, 229 Pac. 1103, 1104 (1924).

⁶⁴ *Gianulakis v. Sharp*, 71 Utah 528, 267 Pac. 1017, 1019 (1928).

⁶⁵ *Gill et al. v. Tracy et al.*, 80 Utah 127, 13 P. 2d 329, 333 (1932).

⁶⁶ *Binning v. Miller*, 55 Wyo. 451, 102 P. 2d 54, 62 (1940); *Denver & Rio Grande Western R. Co. v. Himonas*, 190 F. 2d 1012 (C. A. 9, 1951).

As emphasized by the Supreme Court of the State of Wyoming:

The discussion is wholly academic. Before a party may attack the right of another, either on constitutional or other grounds, he must first show that he himself has a right which has been invaded thereby. He must have an interest which is affected.⁶⁷

The principles reviewed uphold the judgment below of Judge Lewis Jones.⁶⁸ Those cited opinions bear out this conclusion on the general proposition: "The province of a court is to decide real controversies, not to discuss or give opinions on abstract propositions or moot questions. The duties and powers of courts are, therefore, limited to the determination of rights actually controverted in particular cases before them. * * * courts have neither the right nor the inclination to express an opinion upon moot questions or questions not arising on the facts before them, since such questions require no answer. * * * An appellate court will not give an opinion upon the request of the parties and for their guidance in a case not properly before it and in which it has no jurisdiction."⁶⁹

As appellants are unable to disclose any invasion of their rights the matter presents no issue to this Court. They allege no present injury and vaguely refer to the possibility that the United States of America proposes to dominate and to control privately-owned property through applications for appropriations. There is not a scintilla of evidence that there is such an intention on the part of the United

⁶⁷ *Campbell et al. v. Wyoming Development Co. et al.*, 55 Wyo. 347, 100 P. 2d 124, 140 (1940).

⁶⁸ *Huntsville Irr. Assn. v. District Court*, 72 Utah 431, 270 Pac. 1090 (1928).

⁶⁹ **14 Am. Jur., Courts, Sec. 49.**

States. Appellants' efforts to secure a ruling on these abstract questions fall squarely within the precept of the law that the courts deal only with legal issues presented in actual cases in which there exists a genuine controversy. Under those circumstances, it is respectfully submitted, this Honorable Court should dismiss the appeal on the grounds that there is no justiciable issue, thus sustaining the judgment of Judge Lewis Jones in the court below.

Though the appeal should be dismissed for want of a justiciable issue it is reiterated and reaffirmed on the principles reviewed above that the district court was without jurisdiction by reason of the fact that the United States had not waived its immunity from suit under the circumstances which prevail. It is likewise reiterated that the officers who sought to represent the United States of America and to bind it by the stipulations alluded to, acted without authority in the matter.

VIII

Neither the officials of the Bureau of Land Management nor the officials of the Forest Service were empowered to subject the United States to jurisdiction under the circumstances

Appellants cite no authority, and it is respectfully submitted that there is no authority, which would permit representatives of the Bureau of Land Management or of the Forest Service to subject the United States of America to the jurisdiction of the district court by the mere filing of applications with the State Engineer. It is likewise respectfully submitted that the properties of the United States are not controlled by the legislature of the State of Utah.⁷⁰ Similarly it is respectfully submitted that, "State laws cannot affect titles vested in the United States of America."⁷¹

⁷⁰ *Camfield v. United States*, 167 U. S. 518 (1896).

⁷¹ *United States v. Utah*, 283 U. S. 64, 75 (1930). See also **Enabling Act for the State of Utah, Act of July 16, 1894** (28 Stat. 136).

That the United States of America is not subject to the police regulations of the State is too well established for question.⁷² Thus the laws relied upon by the appellants have no bearing upon the rights or interests of the United States.

Irrespective of those fundamental tenets of the law the appellants urge that the United States of America has no rights to the use of water for the thousands of head of livestock which graze upon the lands of the National Government administered by the Bureau of Land Management and the Forest Service. Their assertions, however, are purely academic for the record reveals no encroachment or threat of encroachment by the United States of America upon the vested rights of the appellants. As emphasized above, there was no justiciable issue presented in the court below nor is there an issue here in regard to the respective rights of the United States of America and the appellants.

CONCLUSION

Predicated upon the authorities reviewed above, this Honorable Court is respectfully requested to dismiss this appeal for want of jurisdiction.

J. LEE RANKIN,
Assistant Attorney General.

A. PRATT KESLER,
United States Attorney.

107) ; Constitution of Utah, Article III; *Utah Power & Light Co. v. United States*, 243 U. S. 389 (1916).

⁷² *Hunt v. United States*, 278 U. S. 96 (1928) ; *Arizona v. California*, 283 U. S. 423 (1930) ; *Light v. United States*, 220 U. S. 523 (1911). See also 13 A. L. R. 2d 1095.

EXHIBIT I

In the District Court of Rich County, State of Utah

IN THE MATTER OF THE GENERAL DETERMINATION OF
RIGHTS TO THE USE OF WATER OF BEAR RIVER DRAIN-
AGE AREA IN RICH COUNTY, UTAH

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) applications 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 gen-

erally 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 downstream 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'		Source	United States'	
Claim	Page		Claim	Page
682	166	Upper Otter Creek Spring.....	779	328
508	166	Upper Otter Creek.....	779	328
275	129	Little Crawford Spring.....	780	327
499	173	Hawk Spring.....	784	328
495	152	Old Canyon Spring.....	795	328
500	155	Otter Creek Spring.....	774	326

(S) MILTON A. OMAN,

(S) PAUL E. REIMANN,

BY MALL,

Counsel for Objectors, Randolph Land and Livestock Company, Deseret Livestock Company, Bountiful Livestock Company, Harold Selman, Nick Chournos, Orvil Johnson, William Johnson.

(S) Scott M. Matheson,

SCOTT M. MATHESON,

U. S. Attorney.

(S) J. LAMBERT GIBSON,

Attorney for State Engineer.

No. —.

In the District Court of the First Judicial District
of the State of Utah, in and for the County of Rich.
Filed September 10, 1952.

(S) ADOLPH W. LARSON,
Clerk.

By ——— ———,
Deputy.