

1953

# Salt Lake City v. Boundary Springs Water Users Association and Joseph M. Tracy : Brief of Appellant

Utah Supreme Court

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E. R. Christensen; Homer Holmgren; Attorneys for Plaintiff;

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

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**SALT LAKE CITY**, a municipal corporation,

*Plaintiff and Appellant,*

— vs. —

**BOUNDARY SPRINGS WATER  
USERS ASSOCIATION**, a corporation,  
**JOSEPH M. TRACY**, State Engineer of the State of Utah,

*Defendants and Respondents.*

**FILED**  
AUG 20 1953

Clerk, Supreme Court, Utah

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**APPELLANT'S BRIEF**

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*Attorneys for Plaintiff.*

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# IN THE SUPREME COURT of the STATE OF UTAH

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SALT LAKE CITY, a municipal corporation,

*Plaintiff and Appellant,*

— vs. —

BOUNDARY SPRINGS WATER  
USERS ASSOCIATION, a corporation,  
JOSEPH M. TRACY, State  
Engineer of the State of Utah,

*Defendants and Respondents.*

Case No.  
8058

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## APPELLANT'S BRIEF

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### STATEMENT OF FACTS

Defendant, a non profit corporation of Utah, filed application with the State Engineer, No. 70, to exchange water. A copy of the application is in evidence as Exhibit 1 (R. 33). This exhibit shows that 1.5675 second feet of water was to be used for domestic, stockwatering uses and incidental irrigation of lawns and shrubs; that the water is to be piped from what is known as Boundary

Spring, a part of the natural flow of Mill Creek; that "in lieu of water so diverted" the applicant is "to exchange for continuous flow in Mill Creek a quantity equal to the water so diverted and which has heretofore been conveyed through the open ditches named."

Under its Article of Incorporation, Exhibit 4, the defendant association was incorporated for the purpose of constructing a culinary water system from Boundary Spring. Each share of stock issued by the defendant association entitled the holder to .01 of a second foot of water through the association's water system, the holder agreeing not to withdraw more than that quantity of water. The certificate empowers the defendant to apply to the State Engineer for a permit to change the point of diversion and use of water owned by the holder. There is apparently no transfer to the association of the stockholders' water rights.

Under date of August 1, 1913, in an action entitled *Martha Young, administrator of the estate of James Young, deceased, vs. William Gordon, executor, et al*, in the District Court of Salt Lake County, a decree was entered by Judge C. W. Morse, adjudicating the rights to all of the waters of Mill Creek and vesting title to the use thereof in the various persons, parties to said action. A copy of said decree is in evidence as Exhibit 2, and will be referred to hereafter as "Morse decree." The decree uses the term "house use streams" to describe the first and highest priority rights in the creek, allo-

cating the same to various ditches and persons, among which are the Chamberlain Ditch, Stillman & Hussey Ditch, Stillman & Russell Ditch and the Skidmore and Osguthorpe Ditch. The right to the use of water claimed by the defendant association arises solely from the house use streams so decreed to or through the above named ditches. However, the association does not claim the right to all the house use streams defined in the Morse decree. Exhibit 3 is an abstract of the title to the house use streams from the decreed owners to the present owners whom the defendant association claims to represent in filing the application here involved. These rights involve a total of 1.55 second feet (R. 35), although the Morse decree decrees a total of 2.3 second feet to house use streams (R. 39).

Counsel for applicant seemed to take the position that the term "house use streams" refer to waters used solely for domestic or culinary use. This is an erroneous conception. Paragraph 2 of the Morse decree defines the term as "being the streams having a constant flow, except when it is otherwise specified." That paragraph also shows that these streams are to be taken out of the main channel except when irrigating water is running in the named ditches and is then to be taken from the irrigation waters. The Findings of Fact, upon which the Morse decree is based, are in evidence as Exhibit 25. Paragraph 6 of the Findings, covering the use and ownership of these "house use streams" finds that the named defendants, for the various years stated, "have

used said amount of water constantly for culinary, stock-watering, domestic and *irrigating* purposes, being waters commonly known as house use streams." This clearly indicates that the "house use streams" are not confined to waters used exclusively for culinary or domestic use; but are irrigation waters as well.

That the so called "house use streams" are not confined to the four ditches relied on by defendants is evident both from the Morse decree and from the Findings of Fact which support that decree. Subparagraphs (f), (g), (h), (i), (j), (k), and (l) of paragraph 2 of the decree, define house use streams that are not taken from either of said four ditches and some of them are only for a certain number of hours in each 7 or 8 days. Furthermore, it appears in subparagraphs (i) and (k) of the decree and in subparagraphs (j), (k) and (l) of paragraph 6 of the Findings of Fact that the water therein referred to is taken through the Franklin Neff Ditch, the water from which ditch was taken over by the East Mill Creek Water Company and in turn transferred to Salt Lake City by the exchange agreement, Exhibit 22. So Salt Lake City has a direct interest in these house use streams.

Defendants rely on paragraph 2 (m) of the decree as showing that the water decreed to the five ditches, whose rights the City acquired under the three exchange agreements, was for irrigation purposes only and so the City acquired no culinary or domestic rights. This paragraph reads:



“(m) The aforesaid amounts of water specified in paragraphs (a) to (l) both inclusive, except where it is therein provided that the same shall be deducted from the portion allotted to some of the diverting ditches, shall be deducted from the amount of water to be distributed to the various irrigation ditches at all stages of the flow of said Mill Creek, and the amount of water remaining after the aforesaid deductions shall be the amount of water to be distributed in the manner herein set out for general irrigation purposes through the respective irrigation ditches.”

The corresponding matter is covered in paragraph 6 (n) of the Findings of Fact and it is there found “and the amount of water remaining after the aforesaid deductions has been the amount of water that has been distributed for the general purposes through the respective irrigation ditches.”

It is clear that the decree does not say that the water remaining after deducting the house use streams is to be distributed only for irrigation purposes. It says that the water so remaining shall be distributed in the manner set out for general irrigation purposes. “In the manner” must refer to the method of distribution. The language clearly indicates there is water to be so distributed in addition to the irrigation water, otherwise it would not be necessary to state that the water shall be distributed in the same manner as the irrigation water. The decree could have simply said all waters, other than the house use streams, are to be used solely

for irrigation purposes. But this would have been in direct conflict with the Findings of Fact hereinabove quoted, which show that the water remaining after deducting the house use streams is used for both domestic and irrigation purposes at all stages of the flow.

In subparagraphs (a), (aa), (b), (c) and (f) of the decree it is specifically provided that when irrigation water is running in the named ditches the house use streams are to be taken out of the ditch and are then to be deducted from the irrigation water allotted to the particular user. Then in subparagraph (n) it is decreed that the amounts of water specified in paragraphs (a) to (l) inclusive, excepting therefrom the amounts to be taken out of the irrigation ditches, as provided in (a), (aa), (b), (c) and (f), shall be deducted from the amount of water to be distributed to the various ditches. The amount so left, which would include the house use streams to be taken out of the irrigation ditches as provided in paragraphs (a), (aa), (b), (c) and (f), is the amount "to be distributed in the manner herein set out for general purposes through the respective irrigation ditches."

This completely destroys defendants' construction of said paragraph m. In addition, we submit that to make defendants' construction at all tenable it would be necessary to insert a comma before and after the words "for general irrigation purposes."

There is nothing in the Morse Findings of Fact or the Morse decree to indicate in what proportions the waters of these house use streams were to be used for culinary or domestic purposes and for irrigation purposes. Application No. 70 does not purport to apply for a change of use and no application for change of use has been made.

Several of the stockholders of defendant association testified they owned some interest in the house use streams through one or more of the four named ditches and that they approved of the filing of application No. 70 by defendant association (R. 45, 48, 50 and 51). It was stipulated that the other stockholders, if present, would similarly testify. The names of stockholders are given in Exhibit 6, 7, and 8, a total of 35.

As stated in the beginning, application No. 70 is an application for the right to exchange water. The application states its purpose as follows:

“It is the purpose of the applicant, a non profit corporation, to divert the waters of Boundary Spring to the extent of two cubic feet per second, which water has heretofore commingled with waters of Mill Creek Stream as referred to in the Morse decree, and to convey it as indicated through a pipe line to a point approximately 1,000 feet East of the West quarter corner of Section 36, T. 1 W, R. k E, S. L. B. & M. and there divide among the owners for culinary purposes and in lieu of water so diverted to exchange

for continuous flow in Mill Creek stream a quantity equal to water so diverted, and which has heretofore been conveyed through the open ditches named in paragraph 11."

A published notice to water users of the filing of the application and giving opportunity to protest within the stated time, Exhibit 16, stated that it was proposed to divert 2 second feet of water from Boundary Springs and convey it in pipes to applicant's distribution system for domestic, stockwatering and incidental irrigation of lawns and shrubs. "Water heretofore diverted at points of diversion described will be allowed to remain in the natural channel of Mill Creek to satisfy other rights diverting in common from Mill Creek."

Contrary to the statements thus made in the application and published notice, the defendant association did not and does not propose to exchange water at all. It has no water to exchange for the water taken out at Boundary Springs. There was no proof or offer to prove that the applicant had or would turn back into the stream or into the named ditches the same quantity of flow taken out at Boundary Springs. There is a total and absolute lack of proof of that essential element. So we have an application to exchange water approved without any proof that the applicant can deliver water in lieu of that which it proposes to take. When this fact became apparent at the trial counsel for defendant association made a motion to change the application by adding the words "change or exchange" to the application.

Defendant association attempted, also, to show by witnesses and the rules and regulations of the State Engineer, Exhibit D-18, that the association really intended to file an application for change of point of diversion as to the 1.55 second feet controlled by it. See John Ward's testimony (R. 57, 65, 66) and Marvin S. Taylor's testimony (R. 64, 65) the latter testifying he took up a "change" application to the State Engineer's office, but a Mr. Cottrell had him fill out the exchange application No. 70 as filed, after Taylor had explained the purpose of the application.

It is apparent that the notice to water users, Exhibit 16, did not give notice that the purpose of the application was to change the point of diversion, but gave notice of the purpose to exchange water. The jurisdiction of the State Engineer and of the trial court to amend the application without republishing the notice to give notice of the real purpose was questioned. Counsel for defendant association finally withdrew his motion to amend the application, stating: "I have examined the notice of publication which is Exhibit 16, the application and the statutes, and I think the correct application has been filed and I withdraw my motion to amend." (R. 63). So it appears conclusively that we have here a situation where the State Engineer and the trial court approved an application to exchange water from four irrigation ditches for water in like amount, 1.55 second feet, for

water from Boundary Springs. But no such exchange was intended nor is the applicant capable of making such exchange.

The evidence of plaintiff shows the following without dispute: Salt Lake City entered into an exchange contract with East Mill Creek Water Company on July 19, 1923, Exhibit 22; with Lower Mill Creek Irrigation Company on March 14, 1927, Exhibit 23; White Ditch Company on September 6, 1928, Exhibit 24. As shown by its Articles of Incorporation, Exhibit 19, the East Mill Creek Water Company owned the water of Mill Creek conducted through the Brigham Young Ditch, the Franklin and John Neff Ditch and the Amos H. Neff Ditch referred to in the Morse decree. The exchange contract above referred to conveyed the rights of these three ditches to this water to Salt Lake City. The Articles of Incorporation of the Lower Mill Creek Irrigation Company, Exhibit 20, show that thirty one persons conveyed to that company their rights in Mill Creek. The contract shows these were the rights decreed to the Hoagland and Murphy Ditch referred to in the Morse decree and these rights were conveyed by the exchange agreement to Salt Lake City. The Articles of Incorporation of the White Ditch Company, Exhibit 21, show that it is the owner of the water rights of the "White Ditch" in Mill Creek stream and the exchange contract shows the company conveyed all its water rights under the Morse decree to the City.

The defendant association argued, and no doubt will contend on this appeal, that under the Morse decree the rights of these three companies in Mill Creek water were limited to use for irrigation purposes. Since the Morse decree fixes the irrigation season from April 1 to October 1, if the defendant association's position is correct then the City acquired nothing more by its exchange contracts than the right to substitute its irrigation water for the irrigation rights of these three companies. Under such a condition the exchange agreement would be void as the City would have no power to make a perpetual contract to deliver culinary water to the water companies named if it received no culinary water rights in exchange

Mathew Young, son of Martha Young named as plaintiff in the Morse decree, who was 83 years old, testified that as long as he could remember the people of the Brigham Young Ditch used the water for culinary purposes, some taking the water direct from the ditch and others diverting the water of the ditch into cisterns. He further testified that long before the exchange contract with Salt Lake City this use had been in effect and continued until they got culinary water from the City under the exchange agreement (R. 72, 73). It was stipulated that the witnesses present would testify that the same use of water for culinary purposes was made by the people of the White Ditch and Hoagland and Murphy Ditch, and they stopped such use only when the City supplied them culinary water under the exchange agreements. Under the terms of

these exchange agreements the three companies conveyed their water rights in Mill Creek to the City and the City in turn agreed to furnish culinary water in a pipe system under pressure and irrigation water at the ditches. In case of default by the city the water rights were to revert back to the companies. Under the exchange agreement with the East Mill Creek Water Company the city has the right to deliver through its culinary system for the benefit of the company's stockholders water of Mill Creek or other water of as good quality.

The Findings of Fact and Conclusions of Law made and entered by Judge Morse in support of the Morse decree were introduced in evidence as Exhibit 25. The Findings of Fact clearly show that each of the ditches covered by the exchange agreements owned and used water for domestic purposes. Paragraph 7 states that the primary users of the stream, when the flow was 29.03 second feet or less, "at periods between 25 and 50 years prior to commencement of this action, appropriated, diverted and used for irrigation and *domestic purposes* all of the waters of said stream, (excepting the house use streams) until the flow thereof amounts to 29.03 cubic feet per second, and ever since their appropriation they have so used said water." Then follows the proportions in which the various ditches have so used the water, naming among others, the four ditches through which the applicant claims, and also the Frank-



lin and John Neff Ditch, the Amos H. Neff Ditch, the Brigham Young Ditch, the Hoagland and Murphy Ditch and the White Ditch.

In paragraph 8 it is found that for 20 to 30 years prior to the commencement of the action, the owners of the second class water rights have appropriated, diverted, and used for irrigation and *domestic purposes* the water flowing in excess of 29.03 cubic feet per second and less than 41.93. The same four ditches relied on by applicant and the same five ditches relied on by plaintiff are named as having so used the water in proportions named.

In paragraph 9 the surplus rights are designated as being water in excess of 41.93 cubic feet per second and these waters are likewise found to have been appropriated, diverted and used for *irrigation* and *domestic* purposes by these same ditches.

Thomas McDonald, acting as court commissioner under the Morse decree since and including 1931, testified that during all of this time he had distributed the water of Mill Creek under the decree. He had distributed to East Mill Creek Water Company, the waters decreed to the John and Franklin Neff Ditch, the Amos H. Neff Ditch and the Brigham Young Ditch; to the Lower Mill Creek Irrigation Company the water decreed to the Hoagland and Murphy Ditch and to the White

Ditch Irrigation Company the water decreed to the White Ditch (R. 81). The combined flow of these ditches comprises 75% of the flow of Mill Creek (R. 82).

Incidentally, Mr. McDonald testified too that 1.55 cubic feet per second amounts to over one million gallons a day and that the total number of houses getting house use water at the time application No. 70 was filed did not exceed 20. So that it appears defendant association is claiming culinary water at the rate of 50,000 gallons per day per house, which clearly indicates, as found by Judge Morse, that the purpose of the house use streams was not confined to furnishing culinary water but included irrigation water as well.

Salt Lake City used the water of Mill Creek acquired under these exchange agreements in its water distribution system until 1939. Because of the high degree of contamination it has not since used the water except to deliver it to the three companies for irrigation uses. In the meantime, however, the owners of the house use streams have used the same for their domestic uses notwithstanding this contamination.

From the testimony of Amber G. Knight, the City Sanitation Engineer, it appears that the water issuing from Boundary Springs is pure water meeting the requirements of the U. S. Public Health Service without treatment (R. 86). The water of the stream both above and below Boundary Springs is highly contaminated. How-

ever, the water of Mill Creek below the springs is slightly better. The general pattern shown by tests he conducted shows the water in the creek 100 yards below Boundary Springs was slightly improved over that above the springs "indicating that the water which has commingled with the stream below Boundary Springs as a result of overflow would improve the water because of it having commingled with the stream water." The natural result of commingling pure water with contaminated water would be to lessen the degree of contamination (R. 86, 87).

### SPECIFICATIONS OF ERROR

The court erred in granting the application for the following reasons:

(a) There was no evidence to warrant the granting of an exchange application.

(b) The evidence shows that part of 1.5675 second feet claimed by Boundary Springs Water Users Association, and sought to be diverted from Boundary Springs is irrigation water and no application for change of use has ever been made; and the court erred in granting the application to divert the full 1.5675 second feet for culinary use. Further, since there was no evidence as to what proportion was an irrigation water right and what was a culinary water right the application should have been denied in toto.

(c) The court had no jurisdiction or power presently in this proceeding to adjudge that the Boundary Springs Water Users Association is entitled to a State Engineer's certificate granting it a permanent right to divert up to 1.5675 second feet, or any other quantity, of water of Boundary Springs pursuant to said Application No. 70, even though subject to rights of protestants.

(d) The diverting of the water from Boundary Springs has the effect of modifying and changing the terms of the Morse decree.

(e) The evidence was without dispute that granting the application to take 1.5675 second feet at Boundary Springs would invade the rights of Salt Lake City and other owners owning rights in the waters of Mill Creek.

## ARGUMENT

POINT NO. 1. NEITHER THE STATE ENGINEER NOR THE COURT COULD GRANT APPLICATION NO. 70 TO EXCHANGE WATER IN THE ABSENCE OF PROOF OF AVAILABILITY OF WATER OF LIKE QUALITY AND QUANTITY.

As already pointed out in the Statement of Facts, the application before the State Engineer and the court in these proceedings is an application to exchange water. The application itself recites that the purpose of applicant is to divert waters of Boundary Springs to the

extent of 2 cubic feet per second and "in lieu of water so diverted to exchange for continuous flow in Mill Creek stream a quantity equal to water so diverted, and which has heretofore been conveyed through the open ditches named in Figure 11."

Under the heading "The Following Exchange is Proposed," paragraph 14, "1.5675 second feet of water represented by the foregoing right will be delivered January 1 to December 31 incl., of each year into Mill Creek at a point located. This water which is part of the natural flow of Mill Creek will remain in the creek to satisfy other rights."

Paragraph 16 says: "In exchange for the water delivered and described in paragraph 14, there will be 1.5675 feet of water diverted from January 1 to December 31, incl., of each year from Boundary Springs," describing the point of diversion.

There was no attempt whatever at the trial to show that the applicant had water available to put into Mill Creek stream in exchange for the water it proposed to take at Boundary Springs. Such being the case, we submit that an essential and indispensable basis to the granting of the application is wholly lacking and for that reason the application could not be approved. Without a showing that water of like quality and quantity to that taken out at Boundary Springs would be put back into the stream at the points indicated there would be no basis for granting the exchange of water and there

is no showing that "the proposed plan is physically and economically feasible," as required by Section 73-3-8, Utah Code Annotated 1953.

POINT NO. 2. IF THE INTENTION OF APPLICANT IS MERELY TO CHANGE THE POINT OF DIVERSION THEN THE COURT ERRED IN APPROVING APPLICATION NO. 70, TO EXCHANGE WATER, AS UNDER THE STATUTES THE PROPER APPLICATION MUST BE FILED AND PROPER NOTICE THEREOF MUST BE GIVEN WATER USERS.

Under Section 73-3-3, Utah Code Annotated 1953, a change of the point of diversion "*shall be made in the manner herein, and not otherwise.*" It is further provided that "no permanent change shall be made except on the approval of an application therefor by the State Engineer. Such application shall be made upon blanks to be furnished by the State Engineer." Also, the same procedure applicable to applications to appropriate water shall be followed to secure a permanent change of diversion. According to these provisions to secure a change of the point of diversion there must be filed an application to change the point of diversion. Filing an application to exchange water does not meet this requirement and the right to change the point of diversion can be obtained "in the manner provided herein and not otherwise." Any water user examining this application would never be apprised that the actual purpose of the application was not to exchange water of like quantity and quality to that to be taken out at Boundary Springs,

as the application itself stated, but was to change the point of diversion from the 4 ditches named to the Boundary Springs and there take pure water and leave the contaminated water for the other users.

Furthermore, under Section 73-3-6, a notice to water users of the filing of the application must be published, and under Section 73-3-7, anyone interested has the right to file a protest within thirty (30) days after the last publication. This notice is jurisdictional. The notice must apprise the water users of the character of the application and its purpose.

The notice, as published, Exhibit 16, states that "water heretofore diverted at points of diversion described will be allowed to remain in the natural channel of Mill Creek to satisfy the rights diverting in common from Mill Creek." Could it be held that anyone reading such a notice would be given notice that the actual purpose of the application was not to leave in the channel the water theretofore diverted at the established points of diversion, but was to take that very quantity of water out at Boundary Springs and so prevent absolutely such water ever reaching the former points of diversion? Under the express language of Section 73-3-6, no amendment or correction could be made to the application, which involves a change of point of diversion, except on re-publication of notice to water users. This section has been amended since the decision in the case of *Whitmore v. Welch*, 114 U. 578, 201 P. 2d 954.

We have here the anomalous situation where the application filed with State Engineer is to exchange water heretofore delivered to four named ditches for water to be taken out at Boundary Springs. Such an application would properly come under Section 73-3-20, Utah Code Annotated, 1953. But it appears without dispute that if the water is taken at Boundary Springs no water will be available at the ditches to replace that so taken. How can the court approve such an application? It is not approving an application to change the point of diversion, for no such application to change the point of diversion was before it or the State Engineer. It is Application No. 70 that is approved which calls for an exchange of water but no exchange of water is either intended or possible. We submit there is no basis for the decree approving Application No. 70, the application before the court.

POINT NO. 3. THE COURT COULD NOT GRANT THE APPLICATION AS THE EVIDENCE SHOWED THAT PART OF WATER CLAIMED BY APPLICANT WAS APPROPRIATED FOR IRRIGATION AND THERE WAS NO EVIDENCE AS TO THE QUANTITY APPROPRIATED FOR CULINARY OR DOMESTIC USE.

The defendants have assumed that because the Morse Decree labeled the water in which the applicant claims an interest "house use streams," this means that all such water has been appropriated and used solely for culinary and domestic purposes. The decree does not



so state. On the contrary, the Findings of Fact made by Judge Morse, upon which the decree is based, makes the following findings:

“6. That the following named defendants or their predecessors at the times stated herein appropriated and diverted of the unappropriated waters of Mill Creek the amount stated after their respective names, and ever since have continuously, openly, notoriously, without interruption and under a claim of right, used said amount of water continuously for culinary, stockwatering, domestic and *irrigation* purposes, being waters commonly known as house use stream.”

Then follow through paragraphs (a) to (m) inclusive, the number of years theretofore appropriated and the ditches through which the water had been taken. These are identical with the house use streams described in the decree, and are the same streams in which the applicant claims rights under Application No. 70.

As against this finding as to the character of use involved in these house use streams there is no evidence that the irrigation rights have been discontinued since the decree, nor that an application for change of use has ever been filed with the State Engineer. How then can Application No. 70 be granted, which is simply an application to exchange water and contemplates taking the full 1.5675 second feet for culinary, domestic and stockwatering uses?

It is no sufficient answer to say some part of the 1.5675 second feet is a culinary, domestic and stockwatering right. The applicant is going to take out 1.5675 second feet at Boundary Springs for those uses and the approval of the application permits such taking. It has, and can have, no right to do so until and unless an application for change of use, changing the irrigation water to culinary, domestic and stockwatering uses, has been approved and certificate issued. Unless the quantity of water to which the culinary, domestic and stockwatering right attaches is known how can there be a proper distribution of irrigation water? In the absence of such determination how can it be determined that no rights will be interfered with? Surely there was an obligation on the applicant's part to show the quantity of flow to which it was entitled for the proposed uses other than for irrigation. Certainly it should not be left wholly to the applicant to determine what quantity up to 1.5675 cubic feet shall be taken for culinary, domestic and stockwatering purposes at the Springs. Either the application should have been denied in toto or the approval should have specified that it was limited to that part of the total 1.5675 second feet that had been appropriated for culinary, domestic and stockwatering purposes and should have required the applicant to establish that quantity before taking any water whatsoever.

POINT NO. 4. THE COURT ERRED IN DECREERING THAT APPLICANT IS ENTITLED TO A STATE ENGINEER'S CERTIFICATE GRANTING A PERMANENT RIGHT TO DIVERT UP TO 1.5675 SECOND FEET OF WATER OF BOUNDARY SPRINGS PURSUANT TO APPLICATION NO. 70.

What has been said under Point No. 3 is likewise pertinent here, as Application No. 70 contemplates taking the entire quantity for culinary, domestic and stock-watering purposes while the evidence shows that a part of the water is an irrigation water right. In addition to this proposition we also add the following:

In paragraph 2 of the decree is the following: "That the said defendant Boundary Springs Water Users Association be and it is hereby entitled to a State Engineer's certificate granting a permanent right to divert and use up to 1.5675 cubic feet of the waters of Boundary Springs pursuant to said Application No. 70." In paragraph 5 of the decree the court states: "The State Engineer is directed to issue a certificate showing authority to make the change."

It is elementary that no water right is obtained or vested by reason of the approval of an application filed with State Engineer. On appeal from the State Engineer's approval of an application it is not for the court to decree to applicant any particular rights in any of the water involved. It should simply determine whether the application was rightfully approved. This would involve

a determination from the evidence whether there was probable cause to believe that the purpose applied for, in this case, exchange of water, could be accomplished without injury to or conflict with prior rights. The court does not, nor could it, decide that such purpose can be or has been so accomplished. The effect of the parts of the decree above quoted is to decree to applicant presently a permanent right to divert up to 1.5675 feet for Boundary Springs. This the court could not do. *Eardley v. Terry*, 94 U. 367, 77 P. 2d 362.

Certainly no such certificate was forthcoming upon the approval of the application. There must be further proof submitted later, under Section 73-3-17, Utah Code Annotated 1953, that the purpose applied for has been perfected in accordance with the application.

**POINT NO. 5. THE DIVERTING OF THE WATER AT BOUNDARY SPRINGS HAS THE EFFECT OF MODIFYING AND CHANGING THE TERMS OF THE MORSE DECREE.**

Under the terms of the Morse Finding of Fact and decree the house use streams in which applicant claims a right are streams having a constant flow, except as otherwise provided. The water is to be taken through certain named ditches and deducted from the irrigation water allotted to the ditches, otherwise from the main channel of the stream. Under paragraph 8 of the decree it is provided "that in distributing at all stages of the flow of said stream of Mill Creek the water shall be measured and apportioned to each of the ditches by

measurements made in each of them at or near the intakes thereof," with one exception not pertinent here.

The withdrawal of the water allotted to these various ditches at a place other than at the head of the ditches as provided in the Morse decree will have the effect of modifying the terms of the decree above referred to. This is especially true as part of the water to be taken at the Springs is in fact irrigation water as we have heretofore demonstrated. The taking at the Springs will reduce the amount of water to be turned into the various ditches and will reduce the quantity of flow in those ditches. This can only have the effect of requiring the water that is left in the ditches to bear all the loss from evaporation and seepage as the water flows therein. The smaller the stream the greater proportionately will such loss be.

Under the terms of the Morse decree the rights of all parties having rights in the water of Mill Creek were set at rest and a system of distribution established. A taking of water at Boundary Springs, rather than as decreed by the court, could only unsettle the terms of the decree and create confusion and uncertainty in the distribution of the creek flow.

POINT NO. 6. THE COURT ERRED IN APPROVING APPLICATION NO. 70 AS THE CHANGE PROPOSED THEREIN, WHETHER DEEMED AN EXCHANGE OF WATER OR A CHANGE OF POINT OF DIVERSION, WOULD INEVITABLY INVADE THE RIGHTS OF SALT LAKE CITY AND OTHER OWNERS OWNING RIGHTS IN THE WATERS OF MILL CREEK.

As shown by the Statement of Facts the waters of Mill Creek decreed in the Morse decree to Brigham Young Ditch, Franklin and John Neff Ditch and the Amos H. Neff Ditch, were acquired by the East Mill Creek Water Company; the waters decreed to Hoagland & Murphy Ditch were acquired by the Lower Mill Creek Irrigation Co., and the waters decreed to White Ditch were owned by the White Ditch Irrigation Company. In the years 1923, 1927 and 1928, respectively, the City acquired these water rights under written agreements. These rights were decreed to be for domestic and irrigation purposes. While it is true no application has been filed by Salt Lake City to change the irrigation use to domestic use, still part of the water was already appropriated and used for domestic purposes. Salt Lake City acquired these rights for domestic purposes, and it can at any time apply for a change of use as to the irrigation water. The owners of the house use streams and the applicant can not in any wise be affected by such use or change of use as their water is delivered from the channel into other ditches or is taken directly from the channel of the creek. Under the Morse decree all water users take from the creek identically the same quality of water. No one is granted any preference in quality. All take the water as it is as it reaches the respective ditches, so that all get a share of the water coming from the various sources making up the creek flow as it emerges from the canyon.

The evidence shows without dispute that the water emerging from Boundary Springs is pure water, meeting the standards of the U. S. Public Health Service without any treatment. It also shows that the water both above and below the Springs is so contaminated as to require treatment to meet the standards of the U. S. Public Health Service. It appears, however, that the water below the Springs is slightly better, on the average, than the water above the Springs, showing that the commingling of the pure spring water with creek water lessens the degree of contamination. This is the natural result of mixing pure water with contaminated water. The results of tests made by Mr. Knight, the City Sanitation Engineer, are tabulated and are in evidence as Exhibits 30, 31 and 32.

Salt Lake City used the waters of Mill Creek, acquired under these exchange agreements, until 1939. Because of its increased contamination the water of the creek has not since been used in the City water system. The City is now in the process of planning and providing for the treatment of the water from Big Cottonwood Creek, which will take in Mill Creek and treat its water at the same time (R. 100). However, there has never been a time since 1939 when the water of Mill Creek has not been used by the companies to the exchange agreements in the same manner as it was used before the agreements were made, except that the City has supplied these companies with culinary water through the pipe systems constructed under said exchange agreements.

At this point we desire to point out that 1.55 second feet of water amounts to more than one million gallons per day. At the time Application No. 70 was filed, there were not more than 20 houses using the house use streams (R. 83). At the rate of 300 gallons per day per person this stream would supply a community of 3333 persons. Twenty families using the water would each have 50 thousand gallons per day. Exhibits 6, 7 and 8 list the stockholders in the Boundary Water Users Association as 35 in all. This 1.55 cubic feet would supply each stockholder with nearly 30 thousand gallons a day.

We come, therefore, to this question. Can one set of common users from a stream be permitted to go up stream and select a source that produces pure water, and preempt that source, leaving the other users the contaminated water? It should be remembered, that applicant does not represent all of the owners of house use streams, and that Salt Lake City is the owner of at least 2 such streams under its exchange agreement with East Mill Creek Water Company. Furthermore, all of the ditches involved in the exchange agreements have domestic water rights.

That the natural effect of taking the pure water and preventing it from commingling with the creek water is to leave the creek water in some degree more highly contaminated and less fit for domestic use than if diluted by the pure water, must be conceded. Each owner of a water right is entitled to have is preserved in quality as



a property right. No one can take that right away or invade it to any degree. The State Engineer cannot say that because the degree of contamination is slight, and the cost of eliminating the same is slight, the invasion is legally permissible. He has no power to fritter away anyone's rights. The process adopted by the applicant here could be repeated over and over again by those having the means to do it and each might only slightly affect the quality of the water remaining in the stream until the only water left to those who could not, either from lack of means, or lack of uncontaminated sources, would be the dregs.

In three cases involving the condemnation of water by a City, the court has held that although the water was being used only for irrigation purposes, still the owner was entitled to compensation on the basis of the value of the water for culinary use. *Shurtleff v. Salt Lake City*, 95 U 21, 82 P. 2d 56; *Sigurd City v. State*, 105 U 278, 142 P. 2d 154; *Moyle v. Salt Lake City*, 111 U 201, 176 P. 2d 882.

In the Sigurd case the court points out that under Section 73-3-3, Utah Code Annotated, 1953, the owner of the irrigation right has the right to apply for a change of use. The effect of these decisions is that the right to change from an irrigation to culinary use is a vested right of which the owner may not be deprived without compensation.

So it would appear that even as to water used for irrigation purposes, no one would have the right permanently to cause it to be less fit for culinary use in violation of the owners' right to change the use at some future time to a culinary use.

Since the construction of the water pipe line system contemplated by the exchange agreements, the City has supplied the three companies with culinary water from sources other than Mill Creek. Up to 1939 the City put the water of Mill Creek into its domestic water system in the winter time and turned down to the three companies the creek water for irrigation water as no Utah Lake has been delivered in place thereof. Since 1939 the City has not made use of the winter water and it appears that such water has been allowed to flow down the creek to be used by anyone so desiring or not used at all. As to water permitted to so run, it is conceded that the City cannot complain if someone uses it. But we do contend that no-one could acquire the right to compel a continuance of such flow and that the City can, when it needs the water, retake it. In other words, as to the City there can be no abandonment or forfeiture of its water rights merely by not using the water over certain periods of the year.

Since the Legislature specifically provided in Chapter 111, 1939 Session Laws, Section 73-3-1, Utah Code Annotated 1953, that no rights can be acquired by adverse use or adverse possession, that element is not

here involved. Furthermore, the applicant is not trying to take or claim any of the City's or other persons' water rights. It does contend here that the City has no standing to protest Application No. 70 because the City has not used this water for culinary purposes since 1939, and so does not own culinary rights. We have already shown that the City does own culinary water and that it has a vested right to change the irrigation use to a culinary use.

There is yet another important aspect to this question which should be considered. Under Section 6, Article XI of the Utah Constitution, "No municipal corporation shall directly or indirectly lease, sell, alien or dispose of any waterworks, water rights and sources of water supply, now or hereafter to be owned or controlled by it; but all such waterworks, water rights and sources of water supply now owned or hereafter to be acquired by any municipal corporation shall be preserved, maintained and operated by it for supplying its inhabitants with water at reasonable charges."

Section 73-1-4, Utah Code Annotated 1953, provides that when an appropriator ceases to use water for a period of five years the right shall cease unless he gets extensions of time, upon a showing of reasonable cause, from the State Engineer. It is also provided that "the holding of a water right without use by any municipality to meet the reasonable future requirements of the public shall constitute reasonable cause of such non use."

In *Rocky Ford Irrigation Co. v. Kent's Lake Irrigation Co.*, 104 U 216, 140 P. 2d 638, it was held that where water is used beneficially for any purpose, there can be no loss of water rights and reversion to the State under Section 73-1-4. There has never been a year when the waters to which the City is entitled under its exchange agreements have not been put to beneficial use. There is no dispute on this point.

If a City under the constitution may not, directly or indirectly, divest itself of a water right how can it be divested merely by neglecting to apply to the State Engineer for an extension of time to put water held for future use to use? Certainly, if the officers of the City cannot by positive act, directly or indirectly, divest the City of a water right they could not, by merely neglecting to act, accomplish a divestment of a right held by the City in trust for the public.

Common prudence, as well as actual necessity, demands that a city, such as Salt Lake City, naturally destined to rapid and expansive growth, acquire as early as possible all of the water that its future growth will reasonably require. The possible sources are limited in this arid region and can soon be absorbed. It would not be unreasonable in 1923 to provide for double its then population and in the meantime acquire still more water. No community could long survive that attempted to

balance its water sources with its water needs from day to day or year to year. It ought not to take any argument to establish such a proposition.

If then a City has the right, not to say duty, presently to acquire water rights in excess of its present ability to put them to beneficial use, and Section 73-1-4 expressly so recognizes, then what is to be done with the surplus? May not the City select what water it will presently use? May it not elect to hold for future use that water which presently needs expensive treatment and so postpone to a more favorable time the expenditure of the cost of such treatment? It now appears that the City must give full treatment to the water of Big Cottonwood Creek that supplies the City with more than half its water and that Mill Creek can be included in the process. This would no doubt result in a saving over two separate establishments and proves the wisdom of postponement of the separate treatment plant for the waters of Mill Creek.

If, while a City holds more water than it is presently consuming, other parties may take it away from the City on the theory that no present use is being made of the water, then the City could never provide for future growth, nor could it determine which water it would hold in reserve, for no matter what water was so held others might take it away. But this is exactly the position that

must be taken to hold, as did the State Engineer and the trial court, that the prior rights of the City would not be invaded or substantially impaired by granting Application No. 70 since the City was not presently using the water for culinary purposes.

The simple fact is that the defendant Boundary Springs Water Users Association is attempting to discontinue the only right with which the stockholders were vested, namely, to take water of a quality common to all other users, and to preempt a pure source of supply. The net result can only be detrimental to the rights of the other users on the stream for they are losing entirely that pure water and the benefits which that pure water gives them by being commingled with the waters of the stream.

## CONCLUSION

We respectfully submit that the court erred in approving Application No. 70 because it is an exchange application and no exchange is contemplated or possible and no notice of any application to change a point of diversion was ever given. The granting of the application changes the Morse decree which adjudicated the rights of all parties; the applicant cannot take water for culinary use under a right to use for irrigation without

filing an application for a change of use, so the court could not grant a permanent right to take the water at Boundary Springs; and granting the application adversely affects the rights of Salt Lake City and others. The judgment should be reversed and the application rejected.

Respectfully submitted,

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..... copies of the foregoing Brief received  
this ..... day of August, 1953.

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