

1954

## Salt Lake City v. Utah Lake Farmers Association : Brief of Respondents

Utah Supreme Court

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Christenson & Christenson; Clair M. Aldrich; Attorneys for Defendant;

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# In the Supreme Court of the State of Utah

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SALT LAKE CITY, a Municipal Corporation  
of the State of Utah, et al.,

Plaintiffs and Appellants,

vs.

UTAH LAKE FARMERS ASSOCIATION,  
an unincorporated association; PROVO CI-  
TY, a Municipal Corporation of the State of  
Utah, et al.,

Defendants and Respondents.

CASE  
NO. 8078

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## BRIEF OF RESPONDENTS

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## BRIEF OF RESPONDENTS

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### STATEMENT OF THE CASE

This is an intermediate appeal. The issues for determination are questions of law arising from the pleadings. They involve counterclaims filed by the defendants and respondents which the appellants assert state no claim upon which relief can be granted. Also involved is appellants' reply, portions of which were stricken by the trial court

and of which action appellants now complain. The case also involves a cross appeal filed by the defendants and respondents raising the question of necessary parties to the action and a claim of error on the part of the trial court in failing to strike a portion of the defense interposed thereto by the plaintiffs and appellants.

The case is a case of major importance, and defendants take the position, as do the appellants, that background information will probably prove helpful to the Court. The statement of facts in appellants' brief goes far afield, even on the theory of background information. It appears to disregard the very pleadings upon which this appeal must be determined. Appellants cite and quote from cases to which the respondents were not parties, and which have no determinative bearing upon the instant case. Respondents, therefore, find it necessary to comment at length upon the facts involved in the instant matter, and those facts will be treated herein under headings which substantially correspond to those set out in the appellants' statement.

The appellants will usually be referred to as plaintiffs and the respondents and the cross appellants will usually be referred to as defendants. The respondents include all of the named defendants except defendants W. A. Knight, H. B. Woodbury, and Ward C. Holbrook, all members of the Utah Lake Commission. Said members have not answered in any way and counsel appearing herein as attorneys for the defendants do not represent those individuals. All other defendants have responded.



## STATEMENT OF FACTS

### Geography

The general statements concerning the geography of Utah Lake set out in appellants' brief are substantially correct. It should be added, however, that hundreds of farmers own land adjacent to Utah Lake and that the level of the lake may determine whether those farmers can raise profitable crops or have pasturage or whether the lands will be flooded and the operations interrupted and the property destroyed. By virtue of the fact that there is a gradual incline of the shores of Utah Lake, and because of the shallowness of the lake, a slight variation in the surface elevation of the lake may and does affect hundreds of acres of surrounding land. It should also be noted that defendant, Provo City, is the owner of a golf course, airport, a city park, a boat harbor and club house and other properties and structures of great value, all of which are within the area affected when the level of the lake rises above the compromise elevation.

### Development of rights to the use of water from Utah Lake and Jordan River

Respondents take the position that the appellants' statements concerning the development of rights to the use of water must be qualified in two material respects, namely:

1. That extent of plaintiffs' water rights are questionable inasmuch as they have never been determined as against the defendants, and are believed to be grossly overstated.
2. That additional appropriations have been claimed by the plaintiffs and others since the date of the compro-



mise agreement, and while appellants assume to operate, control and administer such additional rights or claims on the basis of the compromise agreement, they have no authority whatsoever so to do.

### **Compromise Agreement**

Contrary to the plaintiffs' assertion, the compromise agreement did not "fully settle" the controversy arising from the plaintiffs' holding back and storing the water of Utah Lake. The compromise agreement contemplated liability on the part of plaintiffs if plaintiffs impounded waters in a manner and to an extent unauthorized by the terms of the agreement. That premise was recognized in **Salt Lake City vs Colladge**, 13 Utah 522, 45 Pac. 891, and in the corrected decree thereafter entered by the district court pursuant to the Supreme Court decision. The corrected decree contained the following provision:

"That this decree shall not in any way prevent the defendants or any of them from entering suits against the plaintiffs or any of them for future violations of the terms of the said contract or of this decree."

Manifestly, there were other unsettled questions concerning the use of Utah Lake by persons or firms not parties to the compromise agreement, or on their behalf, such as questions concerning the maintenance by plaintiff of the carrying capacity of the river and of the storage of water not contemplated by the compromise agreement, like trans-mountain diversions.

Contrary to the assumption and inference contained in the plaintiffs' statements, compromise agreement was designed not only to protect defendants from lake water in

excess of compromise elevation but also to afford defendants the use of their lands below that elevation except when such land was inundated up to compromise as a result of practices, structures and operations authorized by the compromise agreement itself.

The Utah Lake Commission, contrary to appellants' assertions, had no general authority to represent the parties as agents. The commission's discretionary power extends only to a determination of weather conditions and times under which the anticipated run-off would justify holding back the water in the lake without causing the same to exceed the compromise elevation. The instant case does not involve that discretionary power of the commission, but does involve unauthorized and excessive obstruction; the holding back of water when the lake was already above compromise, and the question of storage of water not contemplated by the compromise agreement, and other related matters. For example, the first paragraph of the compromise agreement grants the right to maintain the dam in the Jordan River, known as the Jordan Dam, situated at or near the boundary line between Salt Lake and Utah Counties, as constituted with an opening or water way through said dam **to be left at all times free and open except as hereinafter specified**, and also the right free from interference or liability for damage **to flow the lands of the defendants to the extent that the said dam, above described, may cause the same to be flowed by the waters of Jordan River, Utah Lake, or otherwise.** And, the right to flow the lands of the said parties **to the extent which might be caused by placing obstructions in the water way in said dam according to the limits therein specified for the purpose of holding back and retaining the water in Utah Lake at an elevation**

not to exceed 3 feet 3½ inches above the points theretofore established and recognized as low water mark. The commission provided for under the agreement was "for the purpose of better carrying the foregoing into effect." The agreement expressly provided that the board was empowered "as the legally constituted agents of the parties hereto, to determine and direct when and to what extent obstructions may be placed in the water way of the dam for the purpose of storing the lake with water for future use not to exceed the highest elevation hereinafter specified." The agreement specifies the manner in which the commission can exercise its authority and limits it in such activities dependent upon judgment as to the fall of snow and moisture during the winter. It is made clear in the agreement that the level of the lake cannot be maintained above compromise through manipulation of the dams or by other obstructions placed or permitted in the river. The power of the commission as agents of the parties is not involved in this law suit.

### **The Colladge case**

Obviously, excerpts from the decree of the court in the Colladge case (**Salt Lake City vs. Colladge**, 13 Utah 522; 45 Pac. 891) must be considered in connection with the particular issues involved in that case and in the light of other provisions of the decree. The excerpts quoted by the plaintiffs, whether taken in context or separately, do not have the effect ascribed them by the plaintiffs. The language of the decree dealing with the right of the plaintiffs to maintain the water of the lake at compromise point must be considered in the light of additional conditions added under the contract and in the light of the provisions of the

contract and the decree limiting the right to store water in accordance with the conditions and circumstances therein specified and prescribed. The language of the Colladge case referring to the commission as being "constituted the agents of both parties to the contract" must be considered in the light of the function of the commission, which certainly would not include the impairment or destruction of the very rights and limitations expressly established and provided for in the contract itself.

Appellants, in their brief (pages 7-10), refer to the decree as "very significant construction of compromise agreement as to the purpose, status and power of the Utah Lake Commission." We are at loss to understand the great significance attached thereto by the appellants, for the reason that here no claim is made that any obstructions causing damage during the flooding of 1952 were ordered in by the commission between October 1st and the following March 15, or at all. The important phase of the Colladge decision as far as the issues now before this Court are concerned is that part dealing with the right of plaintiffs to raise the sill of Indian Ford Dam by 22 inches because of the alterations by plaintiffs of the channel of the Jordan River after the compromise agreement had been made and executed. After the signing of the compromise agreement and prior to the decision in the Colladge case, sometime during the period 1885-1895, a bar in the Jordan River known as "New Bar" and a bar at the head of the river were removed by plaintiffs as a result of dredging operations in the river, and in the Colladge case plaintiffs asserted that the "New Dam" or Indian Ford Dam could be raised 22 inches without obstructing the flow any more than the bars purportedly removed by the plaintiffs would have obstructed the flow.

The trial court allowed the plaintiffs a raise of 14 inches. The Supreme Court determined that the plaintiffs were entitled to an increase of 22 inches above the original elevation, which said original elevation was six inches below the sill of the old dam authorized by compromise agreement. Neither the "Old" or "Jordan Dam" nor the "New" or "Indian Ford Dam" are now in operation. Assuming, however, that the sills or floors of the dams now used in place of those dams are not higher than the elevation authorized by the Colladge decision, the significant point is what has happened to the Jordan River channel since the plaintiffs secured this right to raise the floor of the Indian Ford Dam. The counterclaims allege that plaintiffs, since that time, and particularly during recent years, have permitted other and additional obstructions to fill the river and to retard the flow thereof. The very premise of the Colladge decision clearly indicates that since the plaintiffs acquired the right to raise the dam by reason of the increased carrying capacity of the river due to the removal of the bars that were in the river, the plaintiffs by that the very token will be required to relinquish or otherwise compensate for the extra dam height so acquired when other or similar obstructions have been permitted to retard the flow of the river. It follows that the significance of the Colladge case is not in the respects claimed by the plaintiffs but establishes the principle that the effect of the compromise agreement must be determined in view of matters then existing and then in reasonable contemplation of the parties. The plaintiffs obtained the extra 22 inches because of changes occurring in the bed of the river subsequent to compromise agreement. When additional obstructions in the river retard the flow and impound



the waters, the same principle requires a corresponding adjustment in favor of the defendants.

### **The Morse Decree—The Gardner Case**

The decree in **Salt Lake City, et al vs. Salt Lake City Water and Electric Power Company, et al**, 24 Utah 249, 67 Pac. 672, popularly known as the "Morse Decree", did not involve an action between Utah County landowners and the Salt Lake County users, but involved only certain claimants in Salt Lake County. No defendant in this action was there involved. Appellants mention the appointment of a commissioner to "superintend, and direct the measurement and diversion of all water distributed by this decree in accordance therewith; to direct, supervise and inspect all mains and appliances for the diversion, conveyance and use of the same and to report from time to time to the court any violation of the terms of this decree." The powers of the commissioner under the Morse Decree have no effect whatever on the rights of the Utah County land owners, and cannot in any way serve to extend the rights of the plaintiffs under compromise agreement, or otherwise, to store water upon the lands of the defendants. The decision of the Supreme Court in the Morse Decree recognized the limitations of the compromise agreement upon plaintiffs' right to store water in Utah Lake (see page 674). That decision is pertinent only to show the rights of the respective plaintiffs as among themselves. It cannot and does not purport to have the effect of extending the rights of the plaintiffs as against these defendants. The decision further holds that since some Salt Lake County users were not parties to the compromise agreement, the plaintiffs had no right to hold back their water in Utah Lake by an impounding dam, and it was held

that the plaintiff would have to let their water by-pass such dam. The decision expressly indicated that the plaintiffs' rights were subject to that limitation and "other conditions contained in the agreement of compromise entered into in 1885 between Joseph H. Colladge and others and the said city and canal and irrigation companies."

Another case not mentioned by appellants which touches upon the general problem is **Salt Lake City, et al. vs. Gardner, et al**, 39 Utah 30, 114 Pac. 147, which involved an appeal by the present plaintiffs from the decision of the trial court upholding a subsequent appropriation of water by one not a party to the compromise agreement as against said plaintiffs, and holding that at the time of such subsequent appropriation the lake contained unappropriated water when the limitations applicable to plaintiffs' rights were considered. The defendants herein were not parties to that litigation.

### **Diversion works and measuring devices in the Jordan River**

Plaintiffs seem to rely upon the supplemental decision in **Salt Lake City vs. Utah and Salt Lake Canal Company**, 43 Utah 591, 137 Pac. 638, to justify their diversion works and measuring devices in the Jordan River. Neither that decision or any other decision has authorized the transfer of the height of the Indian Ford Dam to any other dams, as has been attempted by the plaintiffs. Nor does that decision or any other decision since the Colladge case even purport to govern obstructions in the river as between the plaintiffs and defendants here. It is to be assumed that the diversion and measuring works constructed pursuant to the decision are satisfactory for diversion of



water among the Salt Lake City claimants; however, these works may not be so misused as to obstruct the flow of the river and cause the level of the lake to rise above the point limited in the compromise agreement. The supplemental decision herein mentioned did not involve any of these defendants nor any issue now before this Court. The fact that the structures may have been maintained in the river for a long period of time has no bearing upon the issues here, since defendants complain of their effect during unusual periods of high water and the operation of recent years. The distinction is pointed out in **Peay vs. Salt Lake City, et al**, 11 Utah 331, 40 Pac. 206, wherein Peay sued for damages by reason of the unlawful maintenance of structures in the Jordan River and wherein it was held that he could not recover for the maintenance of structures authorized by compromise agreement unless he amended his complaint and alleged and proved that such structures were beyond or above those authorized by such agreement.

It may be helpful to the Court at this point to clarify the location of the structures now in the river in relation to the old structures mentioned in the compromise agreement and in the cases herein mentioned. The lowest structure on the river bearing on the issues of this case is the so-called "diversion dam" of the plaintiffs. This dam is in the northerly portion of the Jordan Narrows just over the line into Salt Lake County. The canals of the plaintiff canal companies head there. A short distance up stream from said dam is the site of the "Old" or "Jordan Dam." This is the original dam placed by plaintiffs or their predecessors and was utilized both as an impounding and diversion dam. The compromise agreement refers to the sill of that dam and stated that it could be maintained as its existing level.

This dam is referred to as being near the line between Salt Lake and Utah Counties. Said dam is no longer in existence. About three-quarters of a mile farther up the river, immediately east of Camp Williams, is the "New" or "Indian Ford Dam." This was a dam constructed in about 1895 to replace the Jordan Dam as an impounding dam. It was the elevation of the sill of this dam which was determined in the Colladge case. At least the superstructure of the Indian Ford Dam has now been removed and the elevation of its original sill has been sought to be transferred from that dam to the existing diversion and impounding dam now situated lower down the river. In addition, the plaintiffs have constructed a dam at the head of the Jordan River. It is the contention of defendants that both the dam at the head of the Jordan River, as well as other obstructions caused or permitted by the plaintiffs in the Jordan River, have, of recent years, been increasingly utilized or permitted to restrict the flow of water in the river, and have thus been enlarging the storage of water on the lands of the defendants. The "New Bar" referred to in the Colladge case was located about one mile above the Indian Ford Dam Site.

### **General Adjudication of water rights in Utah Lake, Jordan River and tributaries**

The general adjudication suit referred to by the plaintiff in the statement of facts, **Salt Lake City vs. Anderson**, 106 Utah 350, 148 Pac. 2d 346, does not involve the same issues as are in this case, and is not a bar to this proceeding. The Supreme Court of Utah has ruled on that question in **Smith vs. District Court**, 69 Utah 493, 256 Pac. 539. Moreover, even though the present case did involve issues in common with those in the general adjudication suit, the

Fourth Judicial District Court in and for Utah County, would not be thereby deprived of jurisdiction. This was decided by the Supreme Court in **Ernest W. Mitchell vs. Spanish Fork West Field Irrigation Company, et al**, \_\_\_\_\_ Utah\_\_\_\_\_, 265 Pac. 2d 1016. Actually, there is little, if any, connection between these two cases. The general adjudication is for the adjudication of water rights between the claimants thereto. This case involving entirely different parties partakes more of the elements of trespass and rights of flowage.

The Water Commissioner appointed pursuant to the order of the district court functions only in connection with the distribution of water, and has no power to grant, adjudicate, or withhold flowage rights affecting the lands of these defendants, or to disregard the limitations applicable thereto as established by compromise agreement or to disregard the inherent property rights of the defendants.

### **Outline of issues in present case**

Utah Lake, the Jordan River, and the diversion works for distributing the waters thereof are in some respects one complete and entire water system as claimed by plaintiffs. However, as shown by the very case cited by them to sustain this proposition, **Salt Lake City vs. Utah and Salt Lake Canal Co.**, supra, they are separate in other respects. In that case the district court's order requiring a sharing of expenses among Salt Lake users for all diversions, on appellants' theory, was reversed. Moreover, while the various elements mentioned are interrelated in many ways, in others they are separated. Only a part of the Salt Lake County users were parties to compromise agreement, and only a part were parties to the Colladge case. The Utah County

landowners were not considered sufficiently involved for plaintiffs to make them parties to **Salt Lake City vs. Utah and Salt Lake Canal Co.**, supra. Finally, only a part of the users from Salt Lake County were joined in this suit now before the Court or were made parties by plaintiffs herein. If in all respects the whole system is inseverable and all problems must be handled in unit fashion, as plaintiffs infer, this Court must declare that plaintiffs have failed to join indispensable parties such as the numerous other claimants using Jordan River Water and not parties to compromise agreement and not now joined by plaintiffs herein. The only reason this may not be so is because the rights are separable, but certainly, on any theory, plaintiffs cannot control the diversions of these other parties by plaintiffs' dams and other obstructions as they have done and are doing without being responsible in this lawsuit themselves, apart from the question of whether they should have joined other parties or not.

Ever since shortly after compromise agreement was reached the plaintiffs have endeavored, on one pretext or another, to raise the elevation of compromise point so as to make it possible for them to store increased amounts of water on defendants' lands. In the Colladge case itself, the original pleadings show that the plaintiffs' major contention was that compromise point was 3 feet 3½ inches above the "meander line" of Utah Lake, rather than above low watermarks as fixed in the compromise agreement and as tied to the red sandstone at the head of the Jordan River. This contention, after the original answers of the defendants in the Colladge case, relying upon the red sandstone mark, were filed, was abandoned by plaintiffs in the Colladge case, and the claim with respect to the lowering of the

bars in the river as a basis for raising their dam was introduced by plaintiffs by way of amendment to the original complaint. (See abstract of record in the Colladge case on file in the library of this Court).

As shown by paragraph 11 of the second defense in this case, after the destruction of the Snail Island monument, which plaintiffs were charged by the decree in the Colladge case with maintaining, the plaintiffs made further attempts to raise compromise point. Up to 1945 a gauge mark located at the pumping plant at the head of the Jordan River in the vicinity of the original monument, and a gauge at Pelican Point, on the western shore of the lake, and other gauges on or near the lake were used to check and record the level of Utah Lake with reference to compromise point. All of said gauges up to 1945 were established, maintained and based up on the said stone monument near the head of the Jordan River and fixed compromise point at four feet six inches below the top of this original monument. In that year or in 1946, however, the association of plaintiff companies, known as the Association of Canal Presidents, raised the gauges .32 of a foot, so that the compromise elevation recorded as compromise point and acted upon by the Commissioner of Utah Lake, retained as consulting engineer by such association, was in effect thereby raised correspondingly without the consent of the defendants. Thereafter, representatives of the State Engineer's Office, as defendants allege, without any authority whatsoever, and contrary to the rights of the defendants and those similarly situated, assumed to again raise said gauges .21 of a foot higher. Now, by the present legal action, plaintiffs are attempting, in effect, to again raise compromise point higher than the points involved in the previous attempts, that

is, to a total of more than six and a half inches above the point originally designated as compromise point, as defendants claim.

There are other background circumstances which must be considered in order to understand the issues in this case. Between the time of the filing of the complaint in this case and the time defendants' answers were filed, August 22, 1952, Utah County had experienced one of the most disastrous floods in the history of the valley from a rise in the waters of Utah Lake. Large areas of farm land belonging to the defendants and those similarly situated had been inundated, crops of 1952 destroyed, and the productivity of the land impaired for future years. Provo Airport, the Provo Boat Harbor and House, and many other improvements and recreational facilities of Provo City were completely surrounded and in some instances covered with water, and it was only by almost superhuman last-minute efforts and an outlay of a large amount of money by Provo City, that the dike protecting the Provo Airport was saved at all.

The defendants, when confronted with plaintiffs' suit, by which plaintiffs sought the right to store additional water upon their land, determined that all matters going to the storage, and the resulting damage, including plaintiffs' violation of compromise agreement by the maintenance of unauthorized obstructions in the river; the failure to keep the river, so adopted as the private channel for water claimed by plaintiffs, in an unobstructed condition; the holding back of water not contemplated by compromise agreement and for interests not parties to compromise agreement; and all other matters properly going to the plaintiffs' rights to store water on the lands of the defendants should be in-



terposed as a permissive counterclaim and would probably have to be interposed as a compulsory counterclaim at the risk of having such claims forever barred should this not be done. Certainly it appeared that a counterclaim could be filed by the named defendants sued by plaintiffs individually, and it appeared reasonable that those sued as representatives of all of the owners of land surrounding Utah Lake could counterclaim on their behalf by reason of such representation, since to hold otherwise will necessitate the filing of hundreds of individual suits for damages, contrary, it would seem, to the spirit of the new Utah Rules of Civil Procedure.

The counterclaims in addition to the allegations of the answers and affirmative defenses preceding them, set out on behalf of the defendants individually named and all others in a similar situation, the facts claimed by them concerning the lands involved; their value when clear of water; the damage which inundation or saturation causes; the contemplation of compromise agreement that only natural drainage and snow and rain run-off from this watershed would be held back in Utah Lake; the subsequent trans-mountain diversions and plaintiffs' acts and claims with respect to the storage thereof; the new claims to water initiated by plaintiffs and others since compromise agreement was entered into and the wrongful claim of plaintiffs that compromise agreement covers them. It is further alleged that plaintiffs have wrongfully raised or caused to be raised the gauges by means of which the permissible levels of Utah Lake have been determined. It is further alleged that the channel of Jordan River has been adopted by plaintiffs as a private channel for the transportation of their water and that in effect their rights under compromise agreement are



based upon said channel being kept clear except as to obstructions expressly authorized by compromise agreement. It is alleged that in recent years, and particularly just prior to flooding complained of, there were landslides along the Jordan River which materially obstructed the flow of water and raised the level of Utah Lake, and that plaintiffs have failed, neglected and refused to clean out said channel. It is further alleged that during previous years, to increase carry-over water, and after October 1st, 1951, and during 1952 to the present time, the plaintiffs without right or authority and in violation of the terms of compromise agreement, caused planks and other obstructions to be placed and maintained in the Jordan River and have maintained dams without the openings required by said compromise agreement, and that even while the level of Utah Lake was far above compromise point during the year 1952 and with unprecedented runoffs in Utah Lake anticipated and experienced, the plaintiffs, without authority or right, continued to so obstruct said Jordan River, thereby unreasonably and wrongfully retarding the flow of water from Utah Lake and causing large areas of valuable land surrounding Utah Lake belonging to defendants and those similarly situated to be and remain inundated, to the great and irreparable damage of the owners thereof.

It is further alleged that by reason of the matters set out and referred to in the answers and counterclaims and the matters set out in the complaint, a dispute has arisen as to the location of compromise point and as to the monuments determining the same; as to the rights of the plaintiffs to store foreign and other waters in Utah Lake and concerning the level at which the waters of said lake may be maintained; as to the effect of the compromise agree-

ment upon property owners adjacent to Utah Lake and as to responsibilities of the plaintiffs, in using Jordan River as a private channel, to keep said channel clear of obstructions; as to the rights of plaintiffs to maintain planks or other obstructions in said river and in plaintiffs' dams and as to whether said dams in their present state are authorized by said compromise agreement; as to the liability of plaintiffs to defendants and those similarly situated for damages from flooding; and as to the other matters set out and referred to in the counterclaim; also that it is necessary that the Court declare the rights of the respective parties concerning all these matters in order to avoid a great multiplicity of suits, to permit the proper administration of the waters of Utah Lake, and to avoid further irreparable injury to the defendants and others similarly situated.

In addition to a declaration of rights, injunctive relief restraining the plaintiffs and those in privity with them from committing or suffering any of the acts or conditions complained of is sought. It is further alleged that by reason of the unlawful and improper storage of waters upon the lands of defendants and other persons similarly situated and the unlawful flooding, inundation and saturation of their lands, the named defendants, and other persons similarly situated, have suffered damages of more than \$950,000.00. It is further alleged that until the various elements of right and liability are herein determined, and because of the large number of claimants in the same position as the defendants named, it is impracticable to make specific claims on the part of each claimant except defendant, Provo City, for damages at this time, but that it is reasonable, proper and necessary that the Court retain jurisdiction for the purpose of entertaining and adjudicating, either directly or through

a master, specific claim for damages in favor of the other named defendants, and all other persons similarly situated, after a determination and declaration by this Court of the various elements of liability as against the plaintiffs and of the respective rights of the parties.

As pointed out by appellants, the trial court granted defendants' motion to strike certain portions of plaintiffs' reply to the counterclaims of defendants, and also a portion of plaintiffs' answer to the affidavit of defendants for a preliminary injunction. Since the latter ruling involves one of the points involved in the first mentioned ruling, and since the matter of a preliminary injunction, after the subsiding of the flood, was continued without date and has probably become moot, we shall not specially note this matter hereafter.

Upon the filing of the petition for an intermediate appeal by plaintiffs, the defendants, without waiving any of matters set out in their answer to the petition for intermediate appeal, but for consideration by the Court in the event it should determine that plaintiffs raised questions of which the Court finds it should take jurisdiction, for the purposes of an intermediate appeal, asked this Court to consider the following matters:

1. That on or about the 15th day of November, 1951, after the plaintiffs' complaint on file herein had been filed with the court and served upon the named defendants, the named defendants filed a motion to dismiss, on the ground, among others, that there were indispensable parties omitted by plaintiffs, and for the reason that the defendants named were not proper representation of all persons similarly situated or interested in the lands surrounding Utah Lake.

2. On or about the 14th day of December, 1951, the trial court denied defendants' motion, which order of the court is as follows:

"Defendants' motion to dismiss having been argued to the court and the court having taken the question presented thereby under advisement, and having examined the statutes, rules and authorities touching the questions presented, and being now fully informed, ordered that the said motion be, and the same is hereby, denied and overruled, without prejudice, however, to the defendants at any time during the pendency of the cause, to raise the question either as a matter of law or fact, as to whether or not the named parties defendant do, or do not, constitute proper representation of all the owners of titles to, or interest in, lands likely to be affected by the relief sought in the complaint on file herein. It is further ordered that a copy of this minute be transmitted by the clerk of the court to respective counsel for the parties."

3. If the affirmative defenses and counterclaims of these defendants are held not to be properly maintainable herein as class actions, then the trial court erred in denying defendants' motion to dismiss plaintiffs' complaint on the ground that the plaintiffs failed to join indispensable parties; failed to join all parties having a joint interest in the subject matter as required by Rule 19, Utah Rules of Civil Procedure; failed to join all parties owning or interested in land bordering Utah Lake who would be severely affected by a change in the level thereof; failed to comply with the requirements of Rule 19 (c), Utah Rules of Civil Procedure; and the plaintiffs' action was not a proper class action within the contemplation of Rule 23, Utah Rules of Civil Procedure.

4. That if it be held that for purposes of these defendants' affirmative defense to the complaint, and their counterclaim, or as argued by the plaintiffs in support of their petition for an intermediate appeal herein, that this action will affect users of water from Utah Lake other than the named defendants herein, then the trial court erred in denying defendants said motion to dismiss on the ground that plaintiffs failed to join indispensable parties. In such event this Court should declare that plaintiffs have failed to join indispensable parties in that they have failed to join such other users of the waters of Utah Lake of whose claims in the office of the State Engineer the Court will take judicial notice. These users would be affected by a determination herein of compromise point as sought in plaintiffs' complaint, in that any storage they make would be under the plaintiffs herein and subject to the control of Utah Lake by the plaintiffs.

5. In plaintiffs' reply to defendants' counterclaim, they alleged as their purported tenth defense that "the claims asserted by the said defendants in said counterclaim and the issues made by said counterclaim are such as are not subject to determination and adjudication in the action." That the defendants moved to strike said purported defense and the trial court denied said motion. Error was thereby committed by the trial court.

6. That each and all of the errors herein above specified are at least as fundamental to the rights of the parties and to the public interest, and probably more so, than the alleged errors claimed in plaintiffs' petition (for intermediate appeal); that their consideration by this Court upon intermediate appeal would be equally as vital as the consideration of any other problems raised by their appeal and would



be equally, or more, helpful to the trial court when considering the merits as would be a determination of any points raised by the plaintiffs in their petition for an intermediate appeal.

Based upon these factors, defendants' cross petition for intermediate appeal asked that if plaintiffs' petition were granted in whole or in part the Court include among the issues to be considered on such intermediate appeal (1) whether plaintiffs' action is properly maintainable as a class action; (2) whether plaintiffs have failed to name indispensable parties, either plaintiff or defendant; (3) whether the defendants, as a class or by reason of their representation, by, or in the name of, Utah Lake Farmers Association, may have their claims adjudicated under the counterclaim herein, and (4) whether the individual landowners who are not specifically named by plaintiffs as parties defendant must file individual, separate and independent actions for their damages or for the other relief to which they may be entitled.

The Supreme Court of Utah, in its order of November 2, 1953, granted, at least in part, the petition for intermediate appeal in the following language:

"The petition for an interlocutory appeal by plaintiffs herein having been considered, it is ordered that an interlocutory appeal be granted from the orders entered on the 27th day of June, 1953, by the District Court of Utah County, granting defendants' motion to strike certain portions from plaintiffs' replies and granting defendants' motion to strike certain portions from plaintiffs' answer to defendants' affidavit and petition for a preliminary injunction."

Literally the order seems to indicate that the plaintiffs petition for intermediate appeal, except as to the rulings on the motions to strike there involved, was denied, and this would in such event make impertinent plaintiffs' argument that the court erred in failing to dismiss defendants' counterclaim. The foregoing order, limited by its terms to the petition for intermediate appeal by plaintiffs, does not purport to cover the cross petition for a consideration of other points by the defendants, and apparently a ruling on this cross petition has not been expressly made. However, we hope that since the matters are closely related, and because a consideration by this Court of all of the basic matters of law that may be involved at the trial will be most helpful to the parties and the trial court, this Court will consider both the matter of plaintiffs' motion to dismiss the counterclaims and the matters mentioned above in connection with defendants' cross appeal. This, among other things, will permit appropriate amendments to the pleadings if such are indicated, and will permit the numerous land owners to bring their separate suits against the plaintiffs on the subject matter of the counterclaims herein, within the period of the statute of limitations, should it be held that they cannot secure redress by reason of the representation of the defendants individually named by plaintiffs as representative of the class.

### **STATEMENT OF POINTS**

1. Defendants' counterclaims are valid claims for declaratory and injunctive relief, as well as valid claims on behalf of the defendants individually named, and are valid claims for damages to be established by numerous persons who the plaintiffs allege are members of a class in a sim-



ilar situation. The trial court properly refused to dismiss said counterclaim, and the action of the trial court in so refusing to dismiss was correct.

2. There was no error on the part of the trial court in striking from plaintiffs' replies the third and fourth purported defenses therein contained, for the reason that laches and estoppel, under applicable rules, must be specifically pleaded. There is nothing pleaded in said purported defenses tending to show that the authorities cited are binding as an estoppel, or otherwise, upon these defendants or that the matter therein alleged as estoppel or laches relate to any point complained of by the defendants.

3. The trial court did not err in striking the purported fifth defense since obviously the claim of adverse user was sham and frivolous, since the lake reached such high stage only once in every decade or so, and since the defendants were not complaining of any act authorized by the compromise agreement.

4. The trial court did not err in striking the plaintiffs' tenth defense to the counterclaim of defendant, Provo City, and the eleventh defense to the counterclaim of the other defendants, for the reason that under the rules of civil procedure the claim is certainly one pleadable as a permissive counterclaim and, in all probability, the counterclaim is mandatory. The individual defendants clearly have the right to plead the counterclaim on their own behalf, and since they are also named as representatives of a class, and in order to avoid a multiplicity of suits and in view of common issues, a counterclaim for and in behalf of the unnamed defendants should be interposed for their damages as well as for declarative and injunctive relief. Plaintiffs having relied upon the class representation to afford the jurisdiction to pro-

ceed are estopped from questioning the representation in connection with the counterclaims. The plaintiffs' position ignores the pleadings before the court which show that the acts complained of are directly the acts of the plaintiffs, and there is nothing to show or to establish that the Utah Lake Commissioner or any other officer has any interest in compromise agreement or can assent any power in connection therewith except for and at the behest of the plaintiffs. If plaintiffs claim there are other parties in interest to this proceeding or any phase thereof, it should be their duty to make them parties to the proceeding.

5. The trial court did not err in striking plaintiffs' twelfth defense to the counterclaim of the Utah County farmers for the reasons stated under point 4, and for the additional reason that the authority relied upon by plaintiffs deals with problems arising prior to the new rules of civil procedure, and for the reason that, in any event, there is a unity of interest among the defendants as a class. With respect to the complaint for damages, there are adequate means in this suit to permit individual claims to be filed and adjudication based upon common interests and common rights with a great saving of time and expense, and thereby to avoid a multiplicity of suits in the interest of all parties concerned, as well as in the interest of the courts of the State of Utah.

6. The trial court did not err in striking the plaintiffs' eleventh defense to the counterclaim of defendant, Provo City, and plaintiffs' thirteenth defense to the counterclaim of the other Utah County landowners. The plaintiff initiated the action going into the question of storage in Utah Lake, and if new parties, not named by the plaintiff, are indispensable the plaintiff should be required to bring them

in. As far as the counterclaims are concerned, we are seeking an adjudication of rights between plaintiffs and defendants as a class, and the defendants individually named, and if plaintiffs wish an adjudication involving other parties, it is their responsibility to see that those interests are brought into the proceeding. The State Engineer has no interest whatever in these issues, and since the plaintiffs did not wish to make the State Engineer a party they may not now complain thereof.

7. The trial court did not err in striking plaintiffs' twelfth defense to the counterclaim of defendant, Provo City, and fourteenth defense to the counterclaim of the other defendants for the reason that the general adjudication proceeding referred to is not a bar to the suit involving such issue as construction of contracts, trespass and the flowage rights. **Smith vs. District Court**, 69 Utah 493, 256 Pac. 2d 539; **Mitchell vs. Spanish Fork Westfield Irrigation Company, et al**, 69 Utah 493, 265 Pac. 2d 1016.

8. The trial court did not err in striking portions from plaintiffs' answer to defendants' affidavit for a preliminary injunction for the reason that such matters were not binding upon these defendants, or any of them, and were not material to this proceeding for the reason stated in connection with other points herein treated and, in any event, such question is now probably moot.

9. If the Supreme Court should determine that such counterclaims are not maintainable as a class action for and in behalf of the unnamed defendants, then, and in that event, the Court should consider defendants' cross petition for intermediate appeal, and the Court should determine that the district court erred in failing to dismiss plaintiffs' complaint for the reason that the complaint did not name in-

dispensible parties and the plaintiffs, in such event, should be required to name all individuals and other interests concerned in the question of the level of Utah Lake, so that they will have a standing in court to counterclaim for declaratory, injunctive and other relief, including damages, arising in connection therewith.

## ARGUMENT

### POINT 1

In their brief, on page 19, plaintiffs set forth only paragraph 15 of defendants' counterclaim, and then assert that the counterclaim should be dismissed on four grounds, namely: (1) Because one of the dams complained of was installed in the river under an order of the District Court for Salt Lake County in 1914; (2) Because the plaintiffs claim the right to flow the lands of defendants up to compromise point at all times, irrespective of the source of the water; (3) Because a Water Commissioner appointed by the State Engineer has charge of the distribution of the water among the various claimants; and, (4) Because the Jordan River is a natural channel and authority to remove obstacles therefrom is vested in the Board of County Commissioners. In this brief defendants will treat these points in the order above named.

At the outset it must be noted that plaintiffs have merely referred to one of the allegations of the complaint and have picked a few isolated facts, without mention of many others, which they want the Court to find and interpret against defendants. They cite no statutes or decided cases which preclude the counterclaims.

Paragraph 15 of the counterclaims, referred to on page 19 of plaintiffs' brief, is simply one of many allegations contained in the counterclaims as a basis for defendants' claim. In essence, all of the allegations emphasize the fact that the plaintiffs have used the Jordan River just as freely as they would one of their own canals. The counterclaim alleges that the plaintiffs have placed dams and obstructions in the river contrary to compromise agreement; that they have changed the natural course of the river; that they have elevated gauging devices on Utah Lake and have otherwise wilfully and knowingly, caused the waters of the lake to be impounded therein to the damage of these defendants. Plaintiffs, in effect, ask the Court to disregard all of defendants' allegations except paragraph 15 and to rule as a matter of law that that paragraph is vitiated and rendered innocuous because the particular dam therein referred to was allegedly installed under a court order.

Plaintiffs do not allege nor do they contend that these defendants were parties to the proceedings they rely upon. None of the defendants were parties and no order issued as a result of such proceedings could be binding as against these defendants. **Tanner vs. Provo Reservoir Co.**, 78 Utah 158; 2 P. 2d 107. In that case it was held that a decree was not binding upon one who was not a party to the action, either directly or through his predecessor, even though he might be interested in the subject matter thereof. Moreover, the plaintiffs do not allege nor anywhere contend that the dam in question cannot be used as an impounding device to hold back the waters in Utah Lake. The fact is that the dam in question is so designed that it can, by a simple adjustment to the gates, stop the flow of the river, and that carries with it the power to cut down or retard the flow of



the river. Even though the dam structure itself, when the gates are properly open, may be harmless to these defendants, it would indeed be anomalous to hold that these defendants are precluded by a court order in a proceeding to which they were not parties or bound, from raising the question of improper operation of dam to the defendants' great damage. The compromise agreement preserves the right of the defendants to bring any suits against the plaintiffs or any of them for any future violations of the agreement or of the decree in the Colladge case. **Salt Lake City v. Colladge, 13 Utah 522, 45 Pac. 891.**

Plaintiffs assert that they have the right to flow defendants' land up to compromise elevation at all times, irrespective of the source of water, and in support of their position quote one sentence from compromise agreement (Plaintiffs' Brief, page 24). The next sentence of the agreement shows the limited application of the sentence quoted by plaintiffs. It provides as follows:

“Also the right in addition to the foregoing, free from liability or damage, to flow the lands of the parties of the first part, or either of them, to the extent which may be caused by placing obstructions in the water way in said dam hereinbefore mentioned **according to the limitation hereinafter specified** for the purpose of holding back or retarding the waters in Utah Lake at an elevation or height not to exceed 3 feet 3½ inches above the points heretofore established as low water mark in said lake (compromise)\*\*\*.” (1)

The sentence relied upon by plaintiffs gives them storage rights only to the extent that the waters of the Jordan River are retarded by the bottom of the dam as then con-

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(1) Emphasis ours

structed, plus 6 inches (Compromise Agreement). In other words, under that provision plaintiffs were protected only if the Jordan River was permitted its almost then free flow. The subsequent sentence above set forth in this brief makes the question of whether other obstructions can be placed in the river dependent upon whether or not the fall of snow during the past winter has been heavy or light. (See Compromise agreement). Obviously, the agreement relative to snow fall contemplated only the natural drainage area of Utah Lake. It was not and could not have been in the contemplation of the parties that water from foreign watersheds would be brought into Utah Lake for storage, and that other waters or sources of water, then unknown, would be tapped and stored in Utah Lake by the plaintiffs and others in privity with the plaintiffs. The grant of an easement contemplates the then known factors and uses only. Defendants are not seeking damages arising more than three years before the filing of the counterclaim, but we are primarily seeking to recover damages for 1952 and to prevent any recurrences of damages by unlawful flowage of defendants' lands in future years.

Plaintiffs make much of the fact that the distribution of the waters of Utah Lake and the Jordan River have been under the supervision of a commissioner appointed by the court in 1914, and later by a commissioner appointed by the State Engineer. The function of the Water Commission appointed by the court in 1914 in a proceeding to which these defendants were not parties, was stated by the court in **Salt Lake City, et al., vs. Salt Lake City Water and Electric Power Company, et al.**, 24 Utah 249; 67 P. 672, as follows:



“\*\*To superintend and direct the measurement and division of all water, distributed by this decree in accordance therewith; to direct and supervise and inspect all means and appliance for the diversion, conveyance, and use of the same,\*\*\*\*”.

The only responsibility of the Water Commission is to see that the claimants of the water receive, by accurate measurements, the waters awarded to them. The so-called “Morse Decree,” as pointed out in plaintiffs’ brief (pages 10 and 12), involved only the right of the users of water in Salt Lake County, and dealt only with the problem of the maintenance of some proper facility for measuring and distributing the waters as awarded under the decree. The compromise agreement and storage rights involving the interest of these defendants was not an issue in the proceedings. Moreover, these plaintiffs have neglected to point out to the Court that the Water Commissioner is also retained by the plaintiffs as a consulting engineer. The Water Commissioner has no right, by any authority whatever, in the exercise of his duties as such, to interfere with the flow of the river contrary to the provisions of the compromise agreement. Nor can these plaintiffs hide behind the Water Commissioner in the operation of a dam devised and built by them in the guise of a diversionary works but so installed and constituted that it can be used as an impounding dam, and the water taken by plaintiffs when they want it.

Finally, plaintiffs contend that the Jordan River is a natural channel, and that the right to remove natural obstacles therefrom is vested in the Board of County Commissioners. Plaintiffs thus seek refuge in a statutory provision giving County Commissioners a power to do something if the Commission desires to exercise it. There is nothing

mandatory in the language quoted, nor can it be assumed therefrom that power to remove natural obstacles is limited to the county. It should also be noted that the power granted to counties is only exercisable in connection with "natural" obstacles. Defendants complain not only about slides that have been permitted to retard the flow of the river which might be called "natural" obstacles, but defendants also complain about obstacles and changes attributable directly to the efforts of the plaintiffs. The plain fact of the matter is, as the evidence will show, these plaintiffs have taken over the Jordan River as completely as they could if it were a private channel. They have, without consulting anyone, placed dams and obstructions as they saw fit; they have changed the natural course of the river as they desired; they have left the old Indian Ford Dam, except the superstructure thereof, in the river; they have set up pumping apparatus as fit their whims, they have elevated gauge heights which were designed to show the level of the lake in relation to compromise; they have removed obstructions that it suited their purpose to remove and have left others that it suited their purposes to leave. The plaintiffs dredged the river and then claimed and secured the right to increase the dam height. That increase carries with it the duty on the part of the plaintiffs to see that the river does at all times carry the water it purportedly carried at the time they secured the rights to raise the level of their dam.

It is understandable that the plaintiffs would like to have the counterclaim dismissed on some alleged technicality. However, as determined by the trial judge, these conjectures of the plaintiffs do not furnish basis for such dismissal, and the counterclaim should be heard by the

Court and a determination should then be made upon the merits of the evidence.

## POINT 2

Plaintiff claims that the trial court erred in striking their third and fourth defenses to the counterclaim.

The third defense is premised upon the fact that the so-called "diversion works" in the Jordan Narrows were installed pursuant to a decree of the District Court for Salt Lake County entered February 13, 1914. As heretofore pointed out, none of these defendants were parties to the proceeding in question, and could not be bound by any decision therein rendered. **Tanner vs. Provo Reservoir Co.**, *supra*. The trial court so held, and the plaintiffs have not been able to cite any decided case or authority to bolster their claim. Plaintiffs' purported third defense does not state a defense by way of estoppel, or on any other basis.

The defendants are not dependent upon the Utah Lake and Jordan Dam Commission to protect their rights. The **Colladge case**, *supra*, expressly points out that the decree "Shall not in any way prevent the defendants or any of them from bringing any suits against the plaintiffs or any of them for any future violation of the terms of the said contract (Compromise Agreement) or of this decree." The claims of defendants are based upon violations of the compromise agreement.

The fourth defense, which the plaintiffs claim was erroneously stricken, appears to a claim of laches. Like estoppel, laches must be specifically pleaded. Plaintiffs pleaded mere conclusions. Plaintiffs cite no authority whatever for their contention.

## POINT 3

Under this point plaintiffs contend that the court erred in striking their fifth defense to the defendants' counterclaim. That defense claims a prescriptive right to flow the defendants' lands and again cites the Morse Decree—a proceeding to which none of the defendants were parties, as authority. The defense itself states that the lands have been flowed "at such times and under such conditions as specified and set forth under compromise agreement." In other words, they claim a prescriptive right to comply with compromise agreement. The plain fact is that the claimed defense just doesn't state a defense at all. A permissive use cannot mature into a right through adverse possession, nor can an adverse right be acquired if the claimed adverse use is of irregular or infrequent occurrence. **56 Am. Jur. 768 and 772.** Moreover, recovery for trespass is not barred because perchance there have been previous, long separated, trespasses.

## POINT 4

Plaintiffs argue that the counterclaims are not subject to determination and adjudication in this proceeding. It is their position that only the compromise elevation question can be considered, because on that question the rights of the parties will turn. That proposition is not the fact at all. Plaintiffs and defendants are in dispute over a difference in compromise level of between 6 and 7 inches over the surface of the lake. The defendants, however, have alleged in their counterclaims that the plaintiffs were responsible for the rise in the water of the lake to an elevation of several feet above compromise. Therefore, even if compromise point should be determined to be where plaintiffs claim it

is, there remains the question of the unlawful flooding by the plaintiffs in excess of that elevation. Hence the counterclaim is not contingent for its total failure or success upon the outcome of the compromise level question. This case is then clearly distinguishable from the authority cited by plaintiffs. Even though the Court holds that the counterclaims cannot be maintained as a class action upon the issue of damages, this would only make in order an amendment to enlarge the allegations as to class representation or an order that the additional numerous defendants be brought in personally, as the rules permit.

There can be no escape from the fact that defendants Provo City and the other named defendants are in this law suit in their own individual capacity, even though they may also be labeled, in addition, as representatives of a class. So far as Provo City is concerned, there can be no question but that the counterclaim is so stated as to entitle it to judgment upon default of the plaintiffs. Even if plaintiffs prevail in their principal action, the counterclaim here stated will not fall for that reason alone, as was the situation in **Fidelity & Casualty Company of New York v. Coffelt**, 11 Fed. Rules Dec, 443, cited as authority by the plaintiffs. Other authorities cited by plaintiff are not in point. **Taylor v. E. M. Royle Corp.**, a Utah case at 264 P. 2d 279, was a suit on a contract where recovery was allowed under quantum meruit, and where the court held that the defendants had not had an opportunity to meet the issue.

## POINT 5

Here plaintiffs attempt to avoid the impact of the counterclaim by the Utah Lake Farmers Association and individual defendants, except Provo City, by asserting that the



individual claims for damages cannot be determined or adjudicated in a class action. They rely upon **Nunnely et al. v. First Federal Bldg. & Loan Assoc. of Ogden, et al.**, 107 Utah 347, 154 P. 2d 620, 107 Utah 379, 159 P. 2d 141, a Utah case decided prior to the adoption of the New Utah Rules of Civil Procedure. That case permitted the plaintiffs therein, in effect, to proceed with their class action, or in representative form, up to a point where it became necessary to establish the validity of the individual claims. Then each individual claimant should be given an opportunity to come into the suit and claim the benefits thereof up to that point. Defendants in this case see no reason whatever why the same rationale should not apply in this instance, especially in view of the adoption of the New Rules. Even under the old practice it was decided in **Gray v. Defa**, 103 Utah 339, 135 P. 2d 251, that a counterclaim for ordinary relief was proper in declaratory judgment action.

## POINT 6

By their argument under this point plaintiffs assert that there are other additional indispensable parties to the adjudication of the counterclaim who are not necessary parties to the action instituted by plaintiffs. The arguments of plaintiffs are specious and with no particularity whatever, and are not supported by any authority whatever. Defendants are not required to join all joint-tort feasons in any event. If plaintiffs claim indispensable parties, they can bring them in. These defendants were not parties to any proceeding giving the Water Commissioner power or authority to regulate the flow of the Jordan River. Plaintiffs do not specify the additional parties whom they claim should be brought in. Their pleading is insufficient in that respect,



because it should specify particularly the names of those deemed by them to be indispensable, so that the Court could act upon the information so presented and make a specific order as to those particular parties. (See URCP 19).

#### POINT 7

This point raises the question as to whether the instant case involving alleged flooding of defendants' land by the plaintiffs in this action must be held in abeyance pending the outcome of a general adjudication proceeding. **Salt Lake City v. Anderson**, 106 Utah 350, 148 P. 2d 346. The issues are not even contended to be identical or inter-dependent. The Supreme Court of Utah, in **Mitchell vs. Spanish Fork Westfield Irrigation Company**, 265 P. 2d 1016, completely disposes of the question by holding that a general adjudication proceeding does not have the effect argued by the plaintiffs herein. Also, in **Smith v. District Court** supra, the question was decided adversely to plaintiffs' contention. There the Supreme Court held that a general adjudication suit pending was not a bar because other questions were involved and other relief sought which were not involved in the general adjudication proceeding.

#### POINT 8

The trial court did not err in striking portions from plaintiffs' answer to defendants' affidavit for preliminary injunction, for the reason that the matters therein stricken were not binding on these defendants, as has been previously herein pointed out. The matters stricken were redundant and absolutely immaterial as far as these defendants and the case is concerned. In any event, the point is now moot.

## POINT 9

Prior to the filing of the answers and counterclaims these defendants moved the trial court to dismiss plaintiffs' complaint for the reason that it failed to include indispensable parties parties, both plaintiff and defendant, and that the named defendants were not representative of the class, and for ther reasons. The trial court denied that motion. Defendants raised the problem in this appeal by their cross appeal on file herein.

Defendants take the position that if the Court should determine that the unnamed defendants are not entitled to have the damage question maintained as a class action, then the Court should also determine that the trial court erred in refusing to dismiss plaintiffs' complaint as requested by the named defendants. In such event the plaintiffs should be required to name all individuals concerned with the level of the water of Utah Lake so that they will have a standing in Court to counterclaim for declaratory, injunctive and other relief, including damages, arising from the flooding of their lands.

As we have pointed out in the Statement of Facts, the order of the Court permitting the intermediate appeal seems to have been limited. We hope, however, that since all of these matters are so closely related, and because a decision would be helpful to the parties and to the trial court, this Court will consider defendants' cross appeal if it determines that the damage question cannot be maintained as a class action. A decision thereon will permit the numerous land-owners to bring their separate suits against the plaintiffs on the subject matter of the counterclaim within the period of the statute of limitations should it be held that they cannot

secure redress through representation by the named defendants up to the point where it becomes necessary to establish the amount of their individual damages.

## CONCLUSION

The counterclaims filed by the defendants are proper claims for declaratory, injunctive and other relief, including the actual damages of the named defendants, and as a basis for proof of the actual damages of the unnamed defendants at a later stage in the proceeding. The defenses interposed by the plaintiffs, which were stricken by the trial court, were all redundant and immaterial and not binding on any defendant in this action. If the unnamed landowners do not have any standing before the trial court with respect to the question of their individual damages, the trial court erred in refusing to dismiss the plaintiffs' complaint for their failure to bring in indispensable parties, and the plaintiffs should be required to bring each individual in as a party, so that there can be a full adjudication of all rights in this action.

Respectfully submitted,

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