

1955

# United States of America v. Provo Bench Canal and Irrigation Company et al : Brief of Appellant

Utah Supreme Court

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J. Lee Rankin; A. Pratt Kesler; William H. Veeder;

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**FILED**

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**Consolidated Cases No. 8390 and, Utah  
No. 8391**

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

**UNITED STATES OF AMERICA, APPELLANT**

**v.**

**PROVO BENCH CANAL AND IRRIGATION COMPANY, A CORPORATION; TIMPANOGOS CANAL COMPANY, A CORPORATION; UPPER EAST UNION CANAL COMPANY, A CORPORATION; WEST UNION CANAL COMPANY, A CORPORATION; EAST RIVER BOTTOM WATER COMPANY, A CORPORATION; FORT FIELD IRRIGATION COMPANY, A CORPORATION; LITTLE DRY CREEK IRRIGATION COMPANY, A CORPORATION; SMITH DITCH COMPANY, AN UNINCORPORATED ASSOCIATION; FAUCETT FIELD DITCH COMPANY, AN UNINCORPORATED ASSOCIATION; RIVERSIDE IRRIGATION COMPANY, AN UNINCORPORATED ASSOCIATION; AND PROVO CITY, A MUNICIPAL CORPORATION, RESPONDENTS**

**BRIEF OF APPELLANT, UNITED STATES OF AMERICA**

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**MAY 5 1955**

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Consolidated Cases No. 8390 and No. 8391

## In the Supreme Court of the State of Utah

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UNITED STATES OF AMERICA, APPELLANT

v.

PROVO BENCH CANAL AND IRRIGATION COMPANY, A CORPORATION; TIMPANOGOS CANAL COMPANY, A CORPORATION; UPPER EAST UNION CANAL COMPANY, A CORPORATION; WEST UNION CANAL COMPANY, A CORPORATION; EAST RIVER BOTTOM WATER COMPANY, A CORPORATION; FORT FIELD IRRIGATION COMPANY, A CORPORATION; LITTLE DRY CREEK IRRIGATION COMPANY, A CORPORATION; SMITH DITCH COMPANY, AN UNINCORPORATED ASSOCIATION; FAUCETT FIELD DITCH COMPANY, AN UNINCORPORATED ASSOCIATION; RIVERSIDE IRRIGATION COMPANY, AN UNINCORPORATED ASSOCIATION; AND PROVO CITY A MUNICIPAL CORPORATION, RESPONDENTS

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### BRIEF OF APPELLANT, UNITED STATES OF AMERICA

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#### PRELIMINARY STATEMENT

These cases, Civil No. 15462 and Civil No. 15463 in the Fourth Judicial District Court of the State of Utah in and for Utah County, involving identically the same factual situation and propositions of law were consolidated in that court for trial.<sup>1</sup> Those cases are consolidated here as Cases No. 8390 and No. 8391.

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<sup>1</sup> Reporter's Transcript, page 10, line 28.

## JUDGMENTS BELOW

There were entered judgments on May 27, 1955, in Civil Actions No. 15462 and No. 15463 reversing and setting aside the decision of the State Engineer permitting the change of point of diversion and place of use of rights to the use of water claimed by the United States. From those judgments and the findings of fact and conclusions of law upon which they are predicated, the United States of America appeals to this Honorable Court.

## STATEMENT OF FACTS

Deer Creek Reservoir, a major component of the Provo River Reclamation Project, is situated on the Provo River. That reservoir has given rise to legal questions, many of which have been propounded to this Honorable Court for resolution.<sup>2</sup> That it is of great importance to the economy of the valley which it serves needs no extended review. Reference is, however, made to the fact that the United States of America has expended large sums of money to divert water from the Weber and Duchesne Rivers to supplement the critically short supply of water in the Provo River Valley.<sup>3</sup> Those waters are impounded in the Deer Creek Reservoir.

A large area in the Provo River Valley has been submerged by the reservoir in question. Title to those inundated lands resides in the United States of

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<sup>2</sup> *Tanner v. Bacon*, 103 Utah 494, 136 P. 2d 957 (1943); *Lehi Irrigation Company v. Jones*, 115 Utah 136, 202 P. 2d 892 (1949).

<sup>3</sup> *Tanner v. Bacon*, 103 Utah 494, 136 P. 2d 957, 963 (1943).

America.<sup>4</sup> Appurtenant to those lands when acquired by the United States of America were rights to the use of water long exercised to irrigate them. As the rights to the use of water could no longer be utilized upon the lands to which they were appurtenant, it was essential that a change be made by the United States of America of the point of diversion and place of use of the rights in question. As those rights to the use of water were acquired as part of the Provo River Reclamation Project, alluded to above, it was determined that they should be transferred to the lands comprising that project bordering in part upon Utah Lake. To accomplish that change of point of diversion and place of use applications were filed on June 12, 1945, by representatives of the Bureau of Reclamation, Department of the Interior, United States of America.<sup>5</sup> The application to change the point of diversion and place of use, No. a-1902<sup>6</sup> embraced 43.292 cubic feet of water per second in the Provo River. Application No. a-1903 related to 9.20 cubic feet of water per second in the Provo River.

In conformity with the laws of the State of Utah a hearing was duly held respecting the proposed change of point of diversion and place of use of the rights

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<sup>4</sup> Civil No. 15463, Finding of Fact No. 12; Civil No. 15462, Finding of Fact No. 11.

<sup>5</sup> Appendixes A and B, Orders of State Engineer dated February 28, 1949, re Applications No. a-1902, a-2244 to and including a-2294; Defendant's Exhibit No. 1, Application No. a-1902; Defendant's Exhibit No. 2, Application No. a-1903.

<sup>6</sup> Though Application No. a-1902 included other separate rights to the use of water, reference to No. a-1902 is intended to include all the other rights.



in question.<sup>7</sup> Protests were made by the Respondents here alleging, among other things, that the State Engineer was without authority to grant the changes of point of diversion and place of use by reason of the judgment and decree of the Fourth Judicial District Court of the State of Utah in and for Utah County, Case No. 2888, Civil.<sup>8</sup> It was likewise contended by protestants before the State Engineer that the storage of the yield of the rights to the use of water in question would result in a greater loss of water than the predecessors in interest of the United States had consumed, to the detriment of protestants.<sup>9</sup>

Subsequent to the hearing before the State Engineer, a representative of the Bureau of Reclamation evidenced a willingness to reduce the rights of the United States of America for which the change was sought from 43.292 cubic feet per second to 10.30 cubic feet per second, insofar as Application No. a-1902 was concerned;<sup>10</sup> and to reduce the rights to the use of water involved in Application No. a-1903 from 9.20 cubic feet per second to 1.524 cubic feet per second.<sup>11</sup>

Predicated upon the reduction of the claims of the United States of America which in the aggregate totaled 52.492 cubic feet per second, to approximately 12 cubic

<sup>7</sup> Appendix A; Appendix B.

<sup>8</sup> Appendixes A and B; Decree No. 2888; Defendant's Exhibit No. 9.

<sup>9</sup> Appendixes A and B.

<sup>10</sup> Appendix A. Please refer to Findings of Fact No. 2 et seq. Civil No. 15463.

<sup>11</sup> Appendix B. Please refer to Findings of Fact No. 2 et seq. Civil No. 15462.

feet per second, the State Engineer for the State of Utah, by his orders of February 28, 1949,<sup>12</sup> granted Applications No. a-1902 and a-1903 to change the point of diversion and place of use of the rights to the use of water in question. There were filed by the Respondents, protestants below, on or about the 27th day of April 1949, complaints on appeal,<sup>13</sup> seeking to have reviewed by the Fourth Judicial District Court of the State of Utah in and for Utah County the orders of the State Engineer granting Applications No. a-1902 and No. a-1903 as described above. Those complaints spelled out in great detail questions of law, complex questions of fact and related data. Motions by the United States to dismiss the complaints filed by Respondents were denied. Proceedings were then initiated before this Honorable Court for a writ of prohibition to prevent the trial of the issues set forth in the complaints of Respondents. Emphasized to this Court was the jurisdictional ground that the United States of America had not waived its sovereign immunity from suits of the kind and character set forth in the complaints of Respondents. After a full review of this matter this Court declared, among other things, that, "If all of the defenses against the approval of that application [a-1902 and a-1903] set out in such complaint could be litigated and finally adjudicated in such action, then there would be much force to that [lack of jurisdiction of the trial

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<sup>12</sup> Appendixes A and B.

<sup>13</sup> Appendix C.

court] argument.”<sup>14</sup> This Honorable Court in that decision defined with great specificity the very limited scope of the proceedings from which this appeal is taken. It declared: “The district court’s judgment in reviewing the engineer’s decision is limited to the issues determinable by the engineer and in general has the same effect as though it were made by him.”<sup>15</sup> This Court then summarized: “Under our holding in this case, such a suit will be necessary regardless of the outcome of this case unless the district court should find that there is no reason to believe that any such change could be effected without impairing rights of others for the approval of such an application would not determine any question except that the United States could proceed to change the diversion place of such waters only to the extent that it can do so without impairing the rights of others.”<sup>16</sup> Respondents sought a rehearing in the words of this Court because “we too narrowly limited the issues which could be determined in such appeal.”<sup>17</sup> In denying that petition this statement was made: “If we are correct in our conclusion that the district court on an appeal from the Engineer’s decision only decides issues which the Engineer could have decided

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<sup>14</sup> *United States v. District Court of Fourth Judicial Dist. in and for Utah County, et al.*, — Utah —, 238 P. 2d 1132, 1138 (1951).

<sup>15</sup> *Ibid.*, 238 P. 2d 1132, 1136 (1951).

<sup>16</sup> *Ibid.*, 238 P. 2d 1132, 1140 (1951).

<sup>17</sup> *United States v. District Court of Fourth Judicial District in and for Utah County, et al.*, — Utah —, 242 P. 2d 774, 775 (1952).

and that it does not adjudicate any rights except those on which the Engineer's decision is final unless it is set aside, then the district court on this appeal cannot adjudicate the extent or priority of the right of the United States to the use of this water."<sup>18</sup>

In the light of the strict delineation of the jurisdiction of the court below the cases proceeded to trial. At the trial counsel purporting to represent the United States of America undertook to prove that the quantities of water actually consumed by the crops irrigated could be transferred from the flooded lands to the Provo River Reclamation Project without injury to protestants below.<sup>19</sup> Issue was taken by protestants below with that contention thus advanced seeking to prove that more water was lost through impoundment in the Deer Creek Reservoir than was sought to be changed.<sup>20</sup>

Contrary to the express instructions of Mr. J. Lee Rankin, Assistant Attorney General, Mr. E. J. Skeen, Attorney at law for the Bureau of Reclamation, Department of the Interior, appeared for the United States of America in the action and purported to represent it.<sup>21</sup> At the trial and contrary to the express Regulations of the Department of Justice, Mr.

<sup>18</sup> *Ibid.*, 242 P. 2d 774, 777 (1952).

<sup>19</sup> Reporter's Transcript, pages 29-30; Please refer to Finding of Fact No. 12 in Civil No. 15462; Finding of Fact No. 13 in Civil No. 15463.

<sup>20</sup> Please refer to Finding of Fact No. 14 in Civil No. 15463; Finding of Fact No. 13 in Civil No. 15462.

<sup>21</sup> See accompanying affidavit of J. Lee Rankin, Assistant Attorney General, Department of Justice which is marked Appendix D of this brief and by reference incorporated into it.

Skeen purported further to reduce by stipulation the rights to the use of water which are here involved.<sup>22</sup> The rights to the use of water involved in this action have been valued as high as \$50,000 a second foot.<sup>23</sup>

As revealed by the accompanying affidavit<sup>24</sup> the Department of Justice was not informed and had no information regarding the conduct of the trial by Mr. Skeen. The Department of Justice, moreover, had no information as to the basis or justification for the reduction of the approximately 53 cubic feet per second to approximately 9 cubic feet per second.<sup>25</sup> Significantly the trial judge in the court below presented this question:

The COURT. What I can't understand though is that if you purchased fifty-two second feet of water why you don't call for it all, claim it all.<sup>26</sup>

Presented to the Department of Justice was this basic problem: Should it in the light of the record;

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<sup>22</sup> United States Attorneys' Manual, Title 5, Lands Division, page 2, Stipulations: "In no case shall the United States Attorney or field Attorney enter into an agreed statement of facts or a stipulation to abide the result in another case or any stipulation concluding the substantive rights of the United States without specific authority from the Assistant Attorney General in charge of the Lands Division." Transcript of Record, page 219, disclosing reduction in the rights to the use of water claimed in Application a-1902 from 10.30 second feet to 7.9 second feet, and in Application a-1903 a reduction from 1.524 second feet to 1.43 second feet; for a total of 9.33 second feet.

<sup>23</sup> Reporter's Transcript, page 834, line 16.

<sup>24</sup> Appendix D.

<sup>25</sup> Please refer to Findings of Fact No. 2 et seq. in Civil No. 15462 and Findings of Fact No. 3 et seq. in Civil No. 15463, disclosing reductions in quantities of water claimed.

<sup>26</sup> Reporter's Transcript, page 835, line 7.

the relinquishment of approximately 43 cubic feet per second of water valued at about \$50,000 a second foot; the unauthorized appearance and conduct of the proceedings; ratify the action which was taken. Thus confronted the Department of Justice undertook a comprehensive investigation of the matter to determine the appropriate course to pursue.

At the conclusion of that investigation the United States of America advised the trial court by motion that the Department of Justice "does not now nor has it ever approved or authorized anyone representing the United States of America," to reduce the rights to the use of water claimed by the United States of America and "moves this Honorable Court to enter its order permitting the United States of America to reopen the trial of these actions and amend its pleadings and introduce further proof in support of its applications for all of the waters it believes it is truly entitled to, as evidenced by the original applications with the Engineer of the State of Utah above referred to as numbers A-1902 and A-1903."<sup>27</sup> By a motion dated October 28, 1954, the United States of America moved the court below to remand the matter to the State Engineer.<sup>28</sup> By its minute order dated December 8, 1954, the court below denied the motion of the United States of America to remand the matter to the State Engineer.

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<sup>27</sup> Motion filed October 20, 1954; Civil Nos. 15462 and 15463; See Suggestion to court dated September 7, 1954.

<sup>28</sup> "Motion Petitioning Court to Remand Case to State Engineer for the Purpose of Amending Applications Nos. A-1902 and A-1903 \* \* \*" dated October 28, 1954.

At a hearing before the court below, held May 12, 1955, for the purpose of considering proposed findings of fact and conclusions of law, the authority of counsel to represent the United States of America was, among other things, fully reviewed. Irrespective of the concerted efforts to reopen the matter, the court below nevertheless entered its order of May 27, 1955, overruling the objections of the United States.

On the date last mentioned the court below likewise entered its Findings of Fact and Conclusions of Law and Judgment in each of the consolidated cases. Respecting each of the applications a-1902 and a-1903 filed by the United States of America the court in its Judgments declared:

the decision of the State Engineer of the State of Utah be, and it is, hereby reversed and set aside, and that the said State Engineer be, and he is hereby, ordered and directed to set aside and vacate his previous order \* \* \* and \* \* \* he is hereby ordered and directed to enter an order disallowing and rejecting said application, and each and every part thereof.<sup>29</sup>

As revealed by the Findings of Fact and Conclusions of Law in the cases, the Judgments were based upon two principal factors:

1. The Decree in Civil Action No. 2888 is binding upon the United States of America "and that by virtue thereof none of said waters may be used upon any land other than that then irrigated at the time of the entry of said

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<sup>29</sup> Identical Judgments were entered in Civil Action No. 15462 which pertains to Application a-1903, and Civil Action No. 15463 which pertains to a-1902.

decree \* \* \* and that any water theretofore appurtenant to the lands inundated by said Deer Creek Reservoir must be permitted to flow down Provo River to satisfy the rights of lower users, including plaintiffs herein.”<sup>30</sup>

2. The evidence is insufficient to authorize or justify the granting of approval of the applications; that by the impounding of water in Deer Creek Reservoir there was a greater loss of water than the quantity which the United States of America seeks to change.<sup>31</sup>

It is from those Judgments in the consolidated cases that the United States of America for itself and the water users on the Provo River Reclamation Project takes this appeal.

**STATEMENT OF POINTS UPON WHICH UNITED STATES OF  
AMERICA RELIES FOR REVERSAL OF JUDGMENT**

**Point Number I**

No official of the United States of America is empowered to relinquish or stipulate away 43 c. f. s. of rights to the use of water in the Provo River valued at approximately \$50,000 a second foot, as was attempted in these cases. It was plain and serious error for the Court below to refuse to re-

<sup>30</sup> Conclusion of Law, Civil No. 15463, No. 3; Judgment paragraphs Nos. 3 and 4; Please refer to Findings of Fact Nos. 8, 9, 10, 11, 12, 13, 14. Civil No. 15462, Conclusions of Law Nos. 3 and 4; Judgment paragraphs Nos. 3 and 4; Please refer to Findings of Fact Nos. 8, 9, 10, 11, 12, 13, 14.

<sup>31</sup> Civil No. 15463, Judgment, paragraphs Nos. 2 and 4; Findings of Fact Nos. 13, 14, 15, 16, 17; Conclusions of Law Nos. 2 and 4. Civil No. 15462, Judgment, paragraphs Nos. 2 and 4; Findings of Fact Nos. 13, 14, 15, 16, 17, 18; Conclusions of Law Nos. 2 and 4.



open the cases as repeatedly requested by the United States of America.

### Point Number II

The Court below in rendering its judgments went far beyond its jurisdiction in these proceedings to change the point of diversion and place of use of rights to the use of water in that it ruled upon questions of law which could not be reviewed in strictly administrative proceedings of the character here involved.

### Point Number III

In attempting to pass upon questions of law, and in seeking to interpret the decree in Civil No. 2888 the Court below violated the express decisions of this Honorable Court which, respecting these proceedings, had specifically limited the jurisdiction of the Court below to "issues determinable by the [State] engineer" who is without power to determine questions of law (*United States v. District Court of Fourth Judicial District in and for Utah County, et al.*, 238 P. 2d 1132, 1136; 242 P. 2d 774).

### Point Number IV

It was plain and serious error for the Court below to deny the applications to change the point of diversion and place of use because respondents failed to sustain their burden of proof.

### Point Number V

Had the Court below jurisdiction to determine questions of law, it committed plain and serious error

in refusing to permit a change of point of diversion and place of use of water from flooded lands to the Provo River reclamation project.

### Point Number VI

The Provo River reclamation project has been deprived of invaluable rights to the use of water by the refusal of the Court below to reopen the cases.

#### ARGUMENT

**Rights to the use of water are interests in real property; the right to change the point of diversion and place of use is likewise an interest in real property**

**Rights to the use of water are interests in real property**

Few tenets of Western law relating to rights to the use of water are more firmly established than that which declares that rights of that character are interests in real property.<sup>32</sup>

This Honorable Court stated in the case last cited: "The terms 'land,' 'real estate,' and 'real property,' include land, tenements, hereditaments, *water rights* \* \* \*." [Emphasis supplied.] Very recently it stated: "The rights to the use of water which are the subject matter of this suit have been characterized by this and other courts as an interest in real property. As we said in *Cortella v. Salt Lake City*, 93 Utah 236, 72 P. 2d 630, the right itself is treated as an incorporeal hereditament and is real property. In *Elliot v. Whitmore*, 10 Utah 238, 37 P. 459, we held that an injunction requiring a defendant in possession to give

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<sup>32</sup> *Conant v. Deep Creek and Curlew Valley Irr. Co.*, 23 Utah 627, 66 Pac. 188, 189 (1901).

plaintiff part of the water of a stream is in effect a judgment for the delivery of the possession of real property.”<sup>33</sup> Continuing, this Court then pointed out that it had held proceedings involving rights to the use of water “are the same as in an action to determine title to real estate. And a suit to quiet title to water rights is in the nature of an action to quiet title to real estate.” As stated by Wiel; “The right to the flow and use of water, being a right in a natural resource, is real estate.”<sup>34</sup>

Accordingly, it is respectfully submitted, that the consideration of these causes will proceed upon the basis that the rights involved are real estate. Free from doubt likewise is this fact found by the court below: The title resides in the United States of America to those rights to the use of water which are the subject matter of these actions.

**The right to change the point of diversion and place of use of a right to the use of water is a right in real property; an incident to the ownership of rights to the use of water**

At this juncture the United States of America desires respectfully to emphasize the following proposition:

It asserts no powers to change the point of diversion or place of use in a manner that would invade the rights of others. Rights to the use of water are protected by the Constitution against encroachment by the United States

<sup>33</sup> *In Re Bear River Drainage Area, Randolph Land & Livestock Co., et al. v. United States, et al.*, 2 U. 2d 208, 211; 271 P. 2d 846, 848 (1954).

<sup>34</sup> Wiel, *Water Rights in the Western States*, Vol. 1, 3d ed., sec. 283, page 298.

of America.<sup>35</sup> It is on that background that this appeal is taken.

Respecting the right here involved this Honorable Court has declared: "It is a general rule of law that the owner of a right to the use of water may change the place of use so long as the rights of others in such water is not interfered with."<sup>36</sup> Provision is, of course, made for the change of point of diversion and place of use of rights to the use of water.<sup>37</sup> There it is provided that: "Any person entitled to the use of water may change the place of diversion or use and may use the water for other purposes than those for which it was originally appropriated, but no such change shall be made if it impairs any vested right without just compensation."

Thus both this Court and the State statutes accord to the owner the right to make a change of point of diversion and place of use of his rights to the use of water if it is accomplished without damage to others. Reasons for that rule are patent. Illustrative of the need for that privilege are these cases. The lands to which the rights here involved were appurtenant have been flooded. If a change is not permitted the invaluable rights acquired for the benefit of the water users of the Provo River Reclamation Project will be entirely dissipated and their value lost to those water users and the Nation as a whole.

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<sup>35</sup> *United States v. Gerlach Live Stock Company*, 339 U. S. 725 (1949).

<sup>36</sup> *Gianoulakis v. Sharp*, 71 Utah 528; 267 Pac. 1017, 1019 (1928). Please see cited cases and references in text.

<sup>37</sup> 7 Utah Code Annotated, 1953, Sec. 73-3-3.

Reason for permitting the change of point of diversion and place of use of rights to the use of water has been declared to be that such a right being an interest in property, the owner of it may exercise it as he desires subject only to the limitation that he may not injure the rights of others. This authoritative statement on the subject has been made:

The authorities seem to concur in the conclusion that the priority to the use of water is a property right. *To limit its transfer, as contended by appellee, would in many instances destroy much of its value. It may happen that the soil for which the original appropriation was made has been washed away and lost to the owner, as the result of a freshet or otherwise. To say, under such circumstances, that he could not sell the water-right to be used upon other land would be to deprive him of all benefit from such right.*<sup>38</sup> [Emphasis supplied.]

Citing the decision last referred to and adopting the tenet of the law there declared, our Highest Court has stated:

\* \* \* water rights acquired by appropriation are transferable, in whole or in part, either permanently or temporarily; and the use of the water may be changed from the irrigation of one tract to the irrigation of another, if the change does not injure other appropriators. *The rules in this regard are but incidental to the doctrine of appropriation.*<sup>39</sup> [Emphasis supplied.]

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<sup>38</sup> *Strickler v. Colorado Springs*, 16 Colo. 61, 26 Pac. 313, 316 (1891).

<sup>39</sup> *Wyoming v. Colorado*, 298 U. S. 573, 584 (1935).

Evident from the tenets of the law reviewed above are these two basic premises:

(a) A right to the use of water is an interest in real property;

(b) The right to change the point of diversion and place of use of rights to the use of water, is likewise an interest in real property—as the Supreme Court of the United States has declared—a right “incidental to the doctrine of appropriation.”<sup>40</sup>

Neither the basic rights nor the incidental right to change the point of diversion and place of use of water may be exercised in a manner that will injure others. That is, of course, true in regard to the ownership of any property.

**No official of the United States of America is empowered to relinquish the invaluable rights to the use of water as was attempted in these cases**

There was no power, no authority, no basis for the attempted relinquishment of approximately 43 c. f. s. of water valued at \$50,000 a second foot, title to which is in the United States of America

As revealed by Appendixes “A” and “B” of this brief, the United States of America originally sought to change the point of diversion and place of use of approximately 53 cubic feet per second of water of the Provo River. Subsequently and for reasons which the record fails to disclose, a representative of the Bureau of Reclamation agreed to reduce the approximately 53 cubic feet per second to approximately 12

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<sup>40</sup> *Ibid.*, 298 U. S. 573, 584 (1935); Please see also *Lehnitz v. Utah Copper Co.*, 118 F. 2d 518, 520 (C. A. 10, 1941) containing a review of Utah law relating to change of point of diversion and place of use of rights to the use of water.

cubic feet per second.<sup>41</sup> At the trial before the court below that representative of the Bureau of Reclamation further reduced the rights to the use of water to 9.3 cubic feet per second.<sup>42</sup> Moreover, at the trial, that representative of the Bureau of Reclamation offered to “quit-claim any interest to the forty-three second feet”<sup>43</sup> which the United States of America had acquired and had originally claimed in Applications No. a-1902 and No. a-1903 before the State Engineer of the State of Utah. Too great emphasis may not be placed upon this fact: \$50,000 a second foot is the value placed upon each of the 43 cubic feet per second the relinquishment of which was attempted.<sup>44</sup> It is no surprise, therefore, when the offer was made to relinquish 43 cubic feet per second of rights to the use of water valued at \$50,000 a second foot, that the trial judge presented this question:

What I can't understand though is that if you purchased fifty-two second feet of water why you don't call for it all, claim it all.<sup>45</sup>

Response to that pertinent question may now be made: No one had the right to relinquish the invaluable rights to the use of water title to which is in the United States of America: No one was empowered thus voluntarily to abandon those assets of such great value owned by the United States of America and held for the immediate beneficiaries of them, the water users on the Provo River Reclamation Project.

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<sup>41</sup> Appendixes A and B.

<sup>42</sup> Reporter's Transcript, pages 216 et seq.; page 284.

<sup>43</sup> Reporter's Transcript, page 834.

<sup>44</sup> Reporter's Transcript, page 834, line 16.

<sup>45</sup> Reporter's Transcript, page 835, line 7.

In the paragraphs which succeed there will be reviewed the authorities which fully support the conclusion thus expressed.

**Congress alone may authorize the disposition of properties of the United States of America; it has not authorized the relinquishment, as was attempted, of 43 cubic feet per second of water in the Provo River**

Justice Van Devanter in clear and unequivocal terms declared the rule, which it is respectfully submitted, controls here: "Not only does the Constitution (Art. IV, § 3, cl. 2) commit to Congress the power 'to dispose of and make all needful rules and regulations respecting' the lands of the United States, but the settled course of legislation, congressional and state, and repeated decisions of this court have gone upon the theory that

*the power of Congress is exclusive*

and that only through its exercise in some form can rights in lands belonging to the United States be acquired."<sup>46</sup> [Emphasis supplied.] There is not a scintilla of authority for any one voluntarily to relinquish the invaluable rights here involved. Justice Van Devanter, in the last cited decision, disposes of any grounds for asserting that the official of the Bureau of Reclamation who agreed to the abandonment of 43 cubic feet of water per second could bind the United States of America. There, referring to alleged unauthorized agreement by subordinate officials purporting to relinquish property rights of the United States of America, the distinguished Justice stated: "\* \* \* it is enough to say that the United

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<sup>46</sup> *Utah Power & Light Co. v. United States*, 243 U. S. 389, 404 (1916).



States is neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit.”<sup>47</sup>

More recently the Highest Court declared: “\* \* \* officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.”<sup>48</sup>

A different rule would, as in these cases, result in the dissipation of the Nation's assets; create a Nation of men and not of laws.

The conclusion is thus unavoidable, that the United States of America is not and could not be bound by the unauthorized relinquishment of 43 cubic feet per second of water in the Provo River as was attempted in these cases.

**The Attorney General of the United States of America did not authorize an appearance by the representative of the Bureau of Reclamation in these causes; did not authorize the attempted compromise of the invaluable rights of the United States of America; the appearance and attempted compromise did not bind the United States of America:**

Free from doubt is the fact that there resides in the Attorney General of the United States of America, in this type of litigation, the exclusive obligation and power to represent the United States of America.<sup>49</sup>

<sup>47</sup> *Ibid.*, 243 U. S. 389, 409 (1916). Please see *Jeems Bayou Club v. United States*, 260 U. S. 561, 563 (1922).

<sup>48</sup> *United States v. California*, 332 U. S. 19, 40 (1946).

<sup>49</sup> 28 U. S. C. 507 (b); 5 U. S. C. 300 et seq.; *In Re Bear River Drainage Area; Randolph Land & Livestock Company, et al. v. United States, et al.*, 2 Utah 2d 208, 271 P. 2d 846 (1954); 81 A. L. R. 124; *Sutherland v. International Insurance Co. of New York*, 43 F. 2d 969, 970 (C. A. 2, 1930); *United States v. San Jacinto Tin Co.*, 125 U. S. 273, 279 (1887).

As is revealed by the affidavit of J. Lee Rankin, Assistant Attorney General of the United States,<sup>50</sup> the representative of the Bureau of Reclamation who purported to represent the United States of America was without authority to appear in its behalf. Moreover, the attempt at the trial further to reduce by compromise the rights to the use of water of the United States of America was equally without authority.<sup>51</sup> The Regulations of the Department of Justice specifically prohibit the attempt to compromise the rights of the United States of America in the manner pursued at the trial. That prohibition is declared in these terms: "In no case shall the United States Attorney \* \* \* enter into \* \* \* any stipulation concluding the substantive rights of the United States without specific authority from the Assistant Attorney General in charge of the Lands Division."<sup>52</sup> As the affidavit of J. Lee Rankin, Assistant Attorney General reveals, the representative of the Bureau of Reclamation was without authority to stipulate away the rights of the United States of America; his attempted stipulation has not been ratified.<sup>53</sup> His acts were a nullity and could in no way bind the United States of America.

The law is firmly established by the Supreme Court of the United States:

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<sup>50</sup> Appendix D.

<sup>51</sup> Please refer to Appendix D, affidavit of J. Lee Rankin, Assistant Attorney General.

<sup>52</sup> United States Attorneys' Manual, Title 5, Lands Division, page 2, Stipulations.

<sup>53</sup> Appendix D.

In order to guard the public against losses and injuries arising from the fraud or mistake or rashness or indiscretion of their agents, the rule requires of all persons dealing with public officers, the duty of inquiry as to their power and authority to bind the government; and persons so dealing must necessarily be held to a recognition of the fact that government agents are bound to fairness and good faith as between themselves and their principal.<sup>54</sup>

This Honorable Court, citing the decision from which the quoted excerpt is taken, declared: "The Federal courts have held *without exception* that the United States does not undertake to guarantee the fidelity of any of its officers or agents whom it employs, and that it is not bound or estopped by the acts of such officers or agents not within the scope of their authority."<sup>55</sup> [Emphasis supplied.]

It is, of course, elementary that unauthorized acts of attorneys purporting to represent the United States of America, absent express authorization in that regard, cannot bind the United States.<sup>56</sup>

Under the circumstances of these cases it is respectfully submitted that:

The attorney who purported to represent the United States of America, having no authority from the Attorney General of the United States of America, could not bind it; could not relinquish 43 cubic feet of water per second valued at \$50,000 a second foot as was attempted.

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<sup>54</sup> *Hume v. United States*, 132 U. S. 406, 414 (1889).

<sup>55</sup> *Petty, et al., v. Borg*, 106 Utah 531, 150 P. 2d 776, 779 (1944).

<sup>56</sup> *Stanley v. Schwalby*, 162 U. S. 255 (1895).

**It was plain and serious error by the Court below in refusing to consider the repeated efforts to bring to its attention the lack of authority of the person who attempted to represent the United States of America; in failing to remand the matter to the State Engineer as requested**

Upon being fully advised of the unauthorized acts at the trial, all as described above, the United States of America immediately challenged the authority of counsel for the Bureau of Reclamation to represent it.<sup>57</sup> Moreover, the United States of America petitioned the Court below to remand the matter to the State Engineer for the purpose of rectifying the grave damage which ensued from the voluntary abandonment of 43 cubic feet per second of water.<sup>58</sup> The matter was fully argued to the trial court.<sup>59</sup>

From the record these facts are manifest: When the United States of America was advised of the course taken in the matter resulting in the abandonment of 43 cubic feet of water per second, it undertook in every practicable way to correct the error. The trial court steadfastly refused to permit the United States of America to protect its rights against the unauthorized and wholly irregular acts, all of which have been reviewed at length above.

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<sup>57</sup> Please see affidavit of J. Lee Rankin, Assistant Attorney General, Appendix D; Motion dated October 20, 1954, denying authority in any official to relinquish rights as was attempted, all as above described.

<sup>58</sup> Please see Suggestions to the court below.

<sup>59</sup> Please see order of May 27, 1955, Civil Nos. 15462 and 15463, reciting objections but overruling request of the United States of America.

It is respectfully submitted that the judgments below should be reversed and the United States of America be permitted to preserve its rights to the use of water to the extent that may be accomplished without injury to other users on the Provo River.

**This Honorable Court defined the limits of the jurisdiction of the Court below in these causes; that Court ignored the opinions of this Court and sought to determine matters concerning which it had no jurisdiction**

This Honorable Court with great specificity declared the jurisdiction of the court below.<sup>60</sup> It did so in regard to these proceedings. Squarely presented to this Honorable Court were the complex and far-reaching questions of law presented by the complaints of protestants below.<sup>61</sup> At length the matter was briefed and argued to this Honorable Court in the challenge to the jurisdiction of the court below to hear the causes presented to it by protestants in their complaints. Emphasized was the fact that the title of the United States of America to the rights to the use of water would be tried if the cases were permitted to proceed on the basis of the complaints of protestants. As the complaints reveal, the principal issues of law pertain to an interpretation of the meaning of the decree entered in the case in the District Court of the Fourth Judicial District in and for Utah County, Civil No. 2888. However, this Honorable Court denied that those complex issues could be tried

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<sup>60</sup> *United States v. District Court of Fourth Judicial District in and for Utah County*, — Utah —, 238 P. 2d 1132; (1951); — Utah —, 242 P. 2d 774 (1952).

<sup>61</sup> Appendix C.

in proceedings to change the point of diversion and place of use. For it declared:

The district court's judgment in reviewing the engineer's decision is limited to the issues determinable by the engineer and in general has the same effect as though it were made by him.<sup>62</sup>

That the State Engineer has no jurisdiction to determine questions of law has been repeatedly declared by this Court. "The office of state engineer was not created to adjudicate vested rights between parties \* \* \*." <sup>63</sup> To the challenge by the United States of America to the jurisdiction of the court below to entertain the actions presented by protestants' complaints, this Court stated: "If all of the defenses against the approval of that application set out in such complaint could be finally adjudicated in such action, then there would be much force to that argument [that the United States had not waived its immunity from suit]." <sup>64</sup> However, this Court ruled in effect that issues, in fact tried by the court below, could not be tried.

Recognizing that there might possibly be legal questions in need of resolution but not susceptible of determination in the court below in the present proceedings, this Court declared:

Under our holding in *this* case, such a suit will be necessary regardless of the outcome of this

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<sup>62</sup> *United States v. District Court of Fourth Judicial District in and for Utah County*, — Utah —, 238 P. 2d 1132, 1136 (1951).

<sup>63</sup> *Ibid.*, 238 P. 2d 1132, 1136 (1951).

<sup>64</sup> *Ibid.*, 238 P. 2d 1132, 1138 (1951).

case unless the district court should find that there is no reason to believe that any such change could be effected without impairing rights of others for the approval of such an application *would not determine any question* except that the United States could proceed to change the diversion place of such waters only to the extent that it can do so without impairing the rights of others.<sup>65</sup>

Protestants sought a rehearing on the grounds that the court below had jurisdiction to determine the broad questions presented by their complaints. This Court reaffirmed its earlier declaration that the court below was without jurisdiction other than that of the State Engineer.<sup>66</sup>

In complete disregard of those two opinions; at complete variance with the law of Utah that in actions of this character the district court has the same jurisdiction as the State Engineer; ignoring the fact that the proceedings are administrative in character,

the court below undertook to adjudicate the precise questions that this Court stated it had no jurisdiction to determine.<sup>67</sup>

It determined that the decree in Civil Action No. 2888 precluded the change which the United States must make or lose its invaluable rights to the use of water. Clearly those determinations that the United States of America could not change the point of diversion

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<sup>65</sup> *Ibid.*, 238 P. 2d 1132, 1140 (1951).

<sup>66</sup> *United States v. District Court of Fourth Judicial District in and for Utah County*, — Utah —, 242 P. 2d 774 (1952).

<sup>67</sup> Please see Judgments May 27, 1955, paragraph 3; Findings of Fact and Conclusions of Law.



and place of use by reason of the decree in Civil Action No. 2888 were judicial determinations. Manifestly that adjudication of the rights of the United States of America was not within the jurisdiction of the court below in the subject proceedings. Certainly the Judgments below from which this appeal is taken are at variance with this Honorable Court's express decisions on the precise question.<sup>68</sup>

Under the circumstances this Honorable Court is respectfully petitioned to reverse those Judgments, permitting the United States of America fully and properly to try the question of whether it may change the point of diversion and place of use of the invaluable rights which are involved.

**The Court below erred in that it did not require the protestants to prove that they would be damaged by the proposed change of point of diversion and place of use of the rights to the use of water**

It is denied that the counsel who purported to represent the United States of America could appear as was attempted. It is likewise denied that the court below had jurisdiction to pass on the question of law as it attempted in construing the decree in Civil Action No. 2888. Quite aside from those errors, are others equally adverse to the interests of the United States of America.

There resided with the Respondents the burden of proving that they would be injured if the proposed change of point of diversion and place of use was

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<sup>68</sup> *United States v. District Court of Fourth Judicial District in and for Utah County*, — Utah —, 238 P. 2d 1132, (1951); — Utah —, 242 P. 2d 774 (1952).



permitted. On the subject this Honorable Court has recently declared:

While the applicant has the general burden of showing that no impairment of vested rights will result from the change, the person opposing such application must fail if the evidence does not disclose that his rights will be impaired.<sup>69</sup>

That principle of law has long been adhered to by this Court.<sup>70</sup>

There is not a scintilla of evidence that the protestants below would have been injured by the change. Their entire case was predicated upon alleged losses through impounding of water in the reservoir. What the effect of the changed point of diversion and place of use would have upon their rights remains undisclosed and protestants below in fact offered no substantial evidence to prove the point. Under the circumstances and based on the cited decisions the Judgments, it is respectfully submitted, should be reversed.

**It was plain and serious error to deny an owner of rights to the use of water the right to change the point of diversion and place of use when the lands to which they were appurtenant are flooded**

The court below had no jurisdiction as revealed above, to pass upon the questions of law as it attempted. In passing upon those questions it ignored the basic precept of water law that where condi-

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<sup>69</sup> *Salt Lake City v. Boundary Springs Water Users Ass'n, et al.*, — Utah —, 270 P. 2d 453, 455 (1954).

<sup>70</sup> Please refer to *Tanner v. Humphreys*, 87 Utah 164, 48 P. 2d 484, 488 (1935), and cited cases.

ditions have changed from the situation that prevailed when the decree was entered, the decree may be amended.<sup>71</sup> This Court has recognized that tenet of the law.<sup>72</sup> Based upon the cited authorities the court below was empowered to modify the decree. Clearly where lands are flooded the owner of the lands may change the point of diversion and place of use of rights to the use of water. To construe the decree in Civil Action No. 2888 as the court below did is violative of all principles of justice. That conclusion is buttressed by and underscored when consideration is given to the fact that the court below was wholly without jurisdiction to pass on the question.<sup>73</sup>

**The Court below should have reopened the cases as requested  
by the United States of America**

This Honorable Court has recognized the great increment of water into Utah Lake by reason of the importation by the United States of America of large quantities of water from foreign watersheds into the Provo River.<sup>74</sup> The United States moved to have the

<sup>71</sup> Wiel, *Water Rights in Western States*, Vol. 2, 3d ed., page 1137.

<sup>72</sup> *Salt Lake City v. Utah & Salt Lake Canal Co.*, 43 Utah 591, 137 Pac. 638 (1913); *Salt Lake City v. Salt Lake City Water & Elec. Power Co.*, 54 Utah 10, 174 Pac. 1134 (1918); *Big Cottonwood Tanner Ditch Co. v. Shurtliff*, 56 Utah 196, 189 Pac. 587 (1920).

<sup>73</sup> *United States v. District Court of Fourth Judicial District in and for Utah County*, — Utah —, 238 P. 2d 1132; 242 P. 2d 774.

<sup>74</sup> *American Fork Irr. Co., et al., v. Linke, et al.*, — Utah —, 239 P. 2d 188, 192 (1951); *Lehi Irrigation Co. v. Jones, et al.*, 115 Utah 136, 202 P. 2d 892 (1949); *Tanner v. Bacon*, 103 Utah 494, 136 P. 2d 957 (1943).

causes remanded to the State Engineer to permit it to demonstrate the effect of that importation.<sup>75</sup> Yet without apparent reason the court below refused to grant the motion. The action in question may have basic and far-reaching effect upon the many water users on the Provo River Reclamation Project. The court below was clearly in error when it refused the United States the right of adducing facts of the character alluded to in this phase of the brief.

#### CONCLUSION

The United States of America respectfully petitions this Honorable Court to reverse the Judgments below to the end that the invaluable rights which it has acquired in the Provo River may be adequately protected.

UNITED STATES OF AMERICA,

*5 / J. Lee Rankin*

J. LEE RANKIN,

*Assistant Attorney General.*

A. PRATT KESLER,

*United States Attorney.*

*5 / William H. Veeder*

WILLIAM H. VEEDER,

*Special Assistant to the Attorney General.*

*Sept 30, 1955*

<sup>75</sup> Please see motion to remand to State Engineer.

(Defendant's Exhibit No. 3)

APPENDIX A

THE STATE OF UTAH

OFFICE OF STATE ENGINEER

Ed H. Watson, State Engineer.

SALT LAKE CITY, *February 28, 1949.*

Re Applications Nos. a-1902, a-22-44 to and including  
a-2294

UNITED STATES OF AMERICA, DEPARTMENT OF INTERIOR,  
BUREAU OF RECLAMATION,  
*32 Exchange Place, Salt Lake City, Utah.*

PROVO BENCH CANAL & IRRIGATION COMPANY; TIM-  
PANOGOS CANAL COMPANY; UPPER EAST UNION IRRI-  
GATION COMPANY; WEST UNION CANAL COMPANY;  
EAST RIVER BOTTOM WATER COMPANY; FORT FIELD  
IRRIGATION COMPANY; LITTLE DRY CREEK IRRIGA-  
TION COMPANY; SMITH DITCH COMPANY; FAUCETT  
FIELD DITCH COMPANY; RIVERSIDE IRRIGATION COM-  
PANY; PROVO CITY; c/o Christenson & Christenson,  
Attorneys at Law, 32 West Center Street, Provo,  
Utah

GENTLEMEN: This will serve as a record and will  
advise both applicant and protestants of the action  
which has been taken by this office with respect to the  
applications above captioned.

These applications were filed on one form jointly  
in this office June 12, 1945; under them it is proposed  
to change the points of diversion and places of use of  
a total of 43.292 sec. ft. of water rights acquired by

decree involving 52 separate rights diverting from Provo River and its tributaries at about 20 different points of diversion. Water has heretofore been used for irrigation, domestic and stock-watering purposes, by individual owners of land now inundated by Deer Creek reservoir and acquired by the applicant, which rights were transferred to the applicant by warranty deed. It is proposed under the applications to impound water under the rights so acquired in Deer Creek reservoir, and to release it as needed into the natural channel of Provo River from whence it will be rediverted into existing canals diverting from Provo River and into the Salt Lake aqueduct at four points of rediversion, and to use it as a supplemental supply for the irrigation of 70,000 acres of land in Salt Lake and Utah counties. The applicant alleges that it is not intended by the change to increase the quantity of water heretofore used under the decreed rights. Under the rules of the State Engineer's office a separate application is set up under the application for each separate perfected right. Thus each right is covered by a separate change application, but all are incorporated in one document.

Notice to water users was published in accordance with the law in the Provo Herald of Provo, Utah from May 21 to June 20, 1947. The applications were subsequently protested jointly July 29, 1947, by Provo Bench Canal & Irrigation Company, Timpanogos Canal Company, Upper East Union Irrigation Company, West Union Canal Company, East River Bottom Water Company, Fort Field Irrigation Company, Little Dry Creek Irrigation Company, Smith Ditch Company, Faucett Field Ditch Company, Riverside Irrigation Company and Provo City through their joint counsel, Christensen & Christensen, Attorneys at Law, Provo, Utah.

In the protests it is alleged that the State Engineer has no authority to grant the changes because of stipulations entered in determination, judgment and decree of the Fourth Judicial Court for Utah County, Case No. 2888, Civil. By these stipulations applicant's predecessors in interest were allowed prior rights to Provo River system as against protestants' rights provided that points of diversion and places of use would not be changed in order that seepage water and return flow might benefit protestants. It is also alleged that if these applications are allowed the protestants will have more water than they need during the high water period and will not have the benefit of return flow and seepage later in the irrigation season when water is badly needed. It is also alleged that approval of the application will cause damage and interference with protestants' constitutional rights and therefore, the application should be rejected.

In answer, the applicant denies the State Engineer has no jurisdiction to granting approval of these applications and denies the allegations concerning agreement between predecessors in interest of applicant, and predecessors in interest of protestants because of lack of knowledge thereof, admits allegations concerning decree and stipulation, denies the allegation of the protestants as to the use of the water for lack of information concerning such use, and denies all other allegations of protestants. Applicant alleges that it is seeking to change the point of diversion, place and nature of use of water to which it is entitled without prejudice to the rights of other appropriators and if it should be determined that the proposed change will decrease the return flow to Provo River the applicant will consent to the

modification of the applications to protect existing rights of the protestants.

A hearing was requested and subsequently held on the applications. Subsequent to the hearing, attorneys for the applicant and protestants filed briefs in the matter. It does not appear that the State Engineer could refuse to accept the applications for the reason that stipulations provide that in exchange for certain benefits no change of point of diversion or place of use would be sought. These matters are purely a matter to be determined by the District Court and not the State Engineer. In the present case, the water covered by the proposed changes was applied to lands which are now inundated by Deer Creek reservoir, and to deny the applications would have the effect of destroying the rights for the reason the water would not be applied to beneficial use to lands now inundated. While on the other hand, to allow the applications in their full amount would have the effect of enlarging the rights for the reason that there would be no contribution to the River system and other users therefrom by reason of nonuse by applicant when it could not use the water beneficially by direct diversion. Applicant, subsequent to the hearings, has evidenced willingness to reduce the quantity of water sought to be changed so as to take care of this situation by reduction under the applications and Application No. a-1903 from a right to use of 52.492 sec. ft. so as to reduce it to a flow of 12.5 sec. ft. The protestants could claim only a right to the use of water that came to them as a result of return flow plus water that applicant's predecessors did not use, which they could have used from time to time as the supplying stream yielded the water and could claim no right to water consumptively used.

Protestants' contention that more water might be lost by escape through brecciated zones in the reservoir than was used consumptively prior to the construction of the reservoir is not substantiated by evidence. As pointed out in the applicant's brief, water in the reservoir owned by applicant is measured out of the reservoir in like amount as it is measured into the reservoir. Return flow or other inflow in the form of springs, seeps, drains or other sources in the reservoir is passed down the river to supply vested rights. It is indeed difficult to understand how protestants' rights would be impaired by approval of the change applications if the quantity of water sought to be changed is limited to past consumptive use. However, this quantity can only be determined theoretically, since the change is an accomplished fact at the present time. No evidence has been submitted that would cast any serious doubt on the reliability of the method used to compute past consumptive use and the quantity of water arrived at appears reasonable.

Since submitting the applications the quantity of water sought to be changed has been reduced in the applications by the applicant from 43.292 sec. ft. to 10.30 sec. ft. and other reducing amendments have been made. With this reduction it is deemed that there would be no enlargement of the rights heretofore enjoyed.

These applications as subsequently amended, therefore, are approved as of this date subject to prior rights and junior rights that might be adversely affected.

Under Sec. 100-3-14, Utah Code Annotated, 1943, protestants have 60 days from date hereof in which to bring an action in any court of competent jurisdic-



tion for a plenary review of my decision if it so desires.

Yours very truly,

(Unsigned) ED. H. WATSON,

FWC/eb.

*State Engineer.*

[Reverse side]

(# 15,463.) Fourth Judicial District Court of the State of Utah in and for Utah County. Filed April 27, 1949.

(Signed) VERL G. DIXON, *Clerk.*

ODESSA SNOW, *Deputy.*

(Defendant's Exhibit No. 4)

APPENDIX B

THE STATE OF UTAH

OFFICE OF STATE ENGINEER

Ed. H. Watson, State Engineer.

SALT LAKE CITY, *February 28, 1949.*

Re Application No. a-1903

UNITED STATES OF AMERICA, DEPARTMENT OF INTERIOR,  
BUREAU OF RECLAMATION,  
*32 Exchange Place, Salt Lake City, Utah.*

PROVO BENCH CANAL & IRRIGATION COMPANY; TIM-  
PANOGOS CANAL COMPANY; UPPER EAST UNION IRRI-  
GATION COMPANY; WEST UNION CANAL COMPANY;  
EAST RIVER BOTTOM WATER COMPANY; FORT FIELD  
IRRIGATION COMPANY; LITTLE DRY CREEK IRRIGATION  
COMPANY; SMITH DITCH COMPANY; FAUCETT FIELD  
DITCH COMPANY; RIVERSIDE IRRIGATION COMPANY;  
PROVO CITY, c/o Christenson & Christenson, Attor-  
neys at Law, 32 West Center Street, Provo, Utah

GENTLEMEN. This will serve as a record and will  
advise both applicant and protestants of the action  
which has been taken by this office with respect to  
the above captioned application.

This application was filed June 12, 1945, by United  
States of America, Department of Interior, Bureau  
of Reclamation. It is proposed under the application  
to change the point of diversion and place of use of  
9.20 sec. ft. of water acquired by the applicant by  
reason of a purchase of stock in the defunct Charles-

ton Irrigation Company and the new corporation which was incorporated July 15, 1939, and decreed to the Charleston Irrigation Company in Case No. 2888 Civil. The water has heretofore been diverted from April 15th to October 15th into the Upper Canal and into the Lower Canal and used to irrigate 649.95 acres of land. It is proposed hereafter that the above quantity of water will be impounded from April 15th to October 15th in Deer Creek reservoir and released during the same period into the Provo River and rediverted at four points of diversion and used as a supplemental supply in irrigating 70,000 acres of land in Salt Lake and Utah Counties. The application provides that the applicant does not intend by this change to increase the use of water under the rights proposed to be changed or to otherwise prejudice existing rights. The applicant purports to have determined the quantity of water it owns by applying the ratio of the water owned by the applicant to the quantity of water decreed to the Upper and Lower Canals in the old corporation and the new corporation. This totals 9.2 sec. feet.

By letter dated January 21, 1949, the applicant, through its attorney, E. J. Skeen, makes an amendment to the application by the following document:

Re Application No. a-1903

STATE ENGINEER,  
*State Capitol,*  
*Salt Lake City, Utah.*

DEAR SIR: You are hereby authorized to decrease the water sought to be changed by Application a-1903, which is evidenced by stock in the existing Charleston Irrigation Company, consisting of  $29\frac{1}{2}$  shares in the Upper Canal and 98 shares in the Lower Canal. On the basis of the modification of the application

made at the hearing the quantity of water now involved in the proposed change is 1.524 sec. ft.

The application therefore is considered to have been amended in this respect to the extent stated.

Notice to water users was published in accordance with the law in the Provo Herald of Provo, Utah, from May 23 to June 20, 1947. The application was subsequently protested jointly July 29, 1947, by Provo Bench Canal & Irrigation Company, Timpanogos Canal Company, Upper East Union Irrigation Company, West Union Canal Company, East River Bottom Water Company, Forth Field Irrigation Company, Little Dry Creek Irrigation Company, Smith Ditch Company, Faucett Field Ditch Company, Riverside Irrigation Company, Provo City through their counsel, Christenson & Christenson, Attorneys at Law, Provo, Utah. In the protests it is alleged that the State Engineer has no authority to grant the change because of stipulations entered in determination, judgment and decree of the Fourth Judicial Court for Utah County, Case No. 2888 Civil. By these stipulations applicant's predecessors in interest were allowed prior rights to Provo River system as against protestants' rights provided that points of diversion and places of use would not be changed in order that seepage water and return flow might benefit protestants. It is also alleged that if this application is allowed the protestants will have more water than they need during the high water period and will not have the benefit of return flow and seepage later in the irrigation season when water is badly needed. It is also alleged that approval of the application will cause damage and interference with protestants' constitutional rights and therefore the application should be rejected.

In answer, the applicant denies the State Engineer has no jurisdiction to granting approval of this application and denies the allegations concerning agreement between predecessors in interest of application, and predecessors in interest of protestants because of lack of knowledge thereof, admits allegations concerning decree and stipulation, denies the allegation of the protestants as to the use of the water for lack of information concerning such use, and denies all other allegations of protestants. Applicant alleges that it is seeking to change the point of diversion, place and nature of use of water to which it is entitled without prejudice to the rights of other appropriators and if it should be determined that the proposed change will decrease the return flow to Provo River to applicant will consent to the modification of the application to protect existing rights of the protestants.

A hearing was requested and subsequently held on the application. Subsequent to the hearing, attorneys for the applicant and protestant filed briefs in the matter. It does not appear that the State Engineer could refuse to accept the application for the reason that stipulations provide that in exchange for certain benefits no change of point of diversion or place of use would be sought. These matters are purely a matter to be determined by the State Engineer. In the present case the water covered by the proposed change was applied to lands which are now inundated by Deer Creek reservoir and to deny the application would have the effect of destroying the rights for the reason the water could not be applied to beneficial use to lands now inundated. While on the other hand, to allow the application in its full amount would have the effect of enlarging the right for the reason that there would be no contribu-

tion of the River system and other users thereon by reason of nonuse by the applicant when it would not use the water beneficially by direct diversion. Applicant, subsequently to the hearings, has evidenced willingness to reduce the quantity of water sought to be changed so as to take care of this situation by reduction under the application as set forth herein-after. The protestants could claim only a right to the use of water that came to them as a result of return flow plus water that applicant's predecessors did not use, which they could have used from time to time as the supplying stream yielded the water and could claim no right to water consumptively used.

Protestants' contention that more water might be lost by escape through brecciated zones in the reservoir than was used consumptively prior to the construction of the reservoir is not substantiated by evidence. As pointed out in the applicant's brief, water in the reservoir owned by applicant is measured out of the reservoir in like amount as it is measured into the reservoir. Return flow or other inflow in the form of springs, seeps, drains or other sources in the reservoir is passed down the river to supply vested rights. It is indeed difficult to understand how protestants' rights would be impaired by approval of the change application if the quantity of water sought to be changed is limited to past consumptive use. However, this quantity can only be determined theoretically, since the change is an accomplished fact at the present time. No evidence has been submitted that would cast any serious doubt on the reliability of the method used to compute past consumptive use and the quantity of water arrived at appears reasonable.

Since submitting the application the quantity of water sought to be changed has been reduced in the

application by the applicant from 9.20 sec. ft. to 1.524 sec. ft. and other reducing amendments have been made. With this reduction it is deemed that there is no enlargement of the right heretofore enjoyed.

The application as subsequently amended, therefore, is approved as of this date subject to prior rights and junior rights that might be adversely affected.

Under Sec. 100-3-14, Utah Code Annotated 1943, protestants have 60 days from date hereon in which to bring an action in any court of competent jurisdiction for a plenary review of my decision if it so desires.

Yours very truly,

(S) ED. H. WATSON,  
FWC/eb. *State Engineer.*

## APPENDIX C

In the Fourth Judicial District Court of the  
State of Utah in and for Utah County

PROVO BENCH CANAL AND IRRIGATION COMPANY, A CORPORATION; TIMPANOGOS CANAL COMPANY, A CORPORATION; UPPER EAST UNION CANAL COMPANY, A CORPORATION; WEST UNION CANAL COMPANY, A CORPORATION; EAST RIVER BOTTOM WATER COMPANY, A CORPORATION; FORT FIELD IRRIGATION COMPANY, A CORPORATION; LITTLE DRY CREEK IRRIGATION COMPANY, A CORPORATION; SMITH DITCH COMPANY, AN UNINCORPORATED ASSOCIATION; FAUCETT FIELD DITCH COMPANY, AN UNINCORPORATED ASSOCIATION; RIVERSIDE IRRIGATION COMPANY, AN UNINCORPORATED ASSOCIATION; AND PROVO CITY, A MUNICIPAL CORPORATION, PLAINTIFFS

v.

HAROLD A. LINKE, AS STATE ENGINEER OF THE STATE OF UTAH (SUCCESSOR IN OFFICE TO ED. H. WATSON, FORMER STATE ENGINEER OF THE STATE OF UTAH) AND UNITED STATES OF AMERICA, THROUGH ITS BUREAU OF RECLAMATION, DEPARTMENT OF THE INTERIOR, DEFENDANTS

COMPLAINT ON APPEAL IN THE MATTER OF APPLICATION NO. A-1902 (A-2244 TO AND INCLUDING A-2294 IN THE OFFICE OF THE STATE ENGINEER)

NOTE.—(Identical with Complaint on Appeal in the Matter of Application No. a-1903 except as to rights involved.)



Come now the above-named plaintiffs and appeal to the above-entitled court from the order and decision of the State Engineer of the State of Utah dated February 28th, 1949, and served by mailing on or about March 7th, 1949, in the matter of application No. a-1902 (a-2244 to and including a-2294) by which order and decision the said State Engineer approved the application of the United States of America to change the point of diversion and place of use of 10.30 second feet flow of waters of Provo River as made by said numbered application as amended, and as grounds for such appeal and as a cause of action herein, the above-named plaintiffs allege:

1. That Harold A. Linke is now the duly appointed, acting and qualified State Engineer of the State of Utah, and that as Such State Engineer he is the successor in office of Ed. H. Watson, who, when said decision order was made and served, was the State Engineer of the State of Utah.

2. That the defendant, United States of America, was and is the claimant of the water rights upon which said application is based, and by and through its Bureau of Reclamation, Department of the Interior, and by and through its attorneys, filed said application, appeared before said State Engineer in support thereof and secured the approval of said application by said State Engineer of the State of Utah, subject to the right of the plaintiffs by this appeal to, and proceedings in, the District Court, to have as against said applicant and said Engineer a plenary review of said decision and order approving said application for the change of 10.30 second feet of water aforesaid.

3. That the plaintiffs, Provo Bench Canal and Irrigation Company, Timpanogos Canal Company, Upper

East Union Irrigation Company, West Union Canal Company, East River Bottom Water Company, Fort Field Irrigation Company, and Little Dry Creek Irrigation Company, respectively, have been during all times herein mentioned, and are, corporations duly organized, existing, and operating pursuant to and by virtue of the laws of the State of Utah; that the plaintiffs, Smith Ditch Company, Faucett Field Ditch Company, and Riverside Irrigation Company, respectively, have been during all times mentioned herein, and are, unincorporated associations, duly organized, existing, and operating pursuant to and by virtue of the laws of the State of Utah; that the plaintiff, Provo City, has been during all times mentioned herein, and is, a municipal corporation, duly organized, existing, and operating pursuant to and by virtue of the laws of the State of Utah; that all of said plaintiffs have been during all times mentioned herein, and are, entitled to appropriate, acquire, hold and utilize water, and rights to the use of water within the State of Utah as provided by law.

4. That Provo River is a natural stream of water, having its headquarters principally in Summit County and fed by various tributaries from said County, Wasatch County and Utah County; and that portion of said Provo River is located in Utah County, State of Utah; that the lands on which the predecessors in interest of the United States claim to have appropriated said waters on which its application is based, are in Wasatch County, being above the lands of the plaintiffs in Utah County for which the plaintiffs divert water from said River at, or below, the mouth of Provo Canyon in Utah County.

5. That the plaintiffs are water users in Utah County, and in severalty are the owners of the right to the use of a large part of the flow of Provo River

Come now the above-named plaintiffs and appeal to the above-entitled court from the order and decision of the State Engineer of the State of Utah dated February 28th, 1949, and served by mailing on or about March 7th, 1949, in the matter of application No. a-1902 (a-2244 to and including a-2294) by which order and decision the said State Engineer approved the application of the United States of America to change the point of diversion and place of use of 10.30 second feet flow of waters of Provo River as made by said numbered application as amended, and as grounds for such appeal and as a cause of action herein, the above-named plaintiffs allege:

1. That Harold A. Linke is now the duly appointed, acting and qualified State Engineer of the State of Utah, and that as Such State Engineer he is the successor in office of Ed. H. Watson, who, when said decision order was made and served, was the State Engineer of the State of Utah.

2. That the defendant, United States of America, was and is the claimant of the water rights upon which said application is based, and by and through its Bureau of Reclamation, Department of the Interior, and by and through its attorneys, filed said application, appeared before said State Engineer in support thereof and secured the approval of said application by said State Engineer of the State of Utah, subject to the right of the plaintiffs by this appeal to, and proceedings in, the District Court, to have as against said applicant and said Engineer a plenary review of said decision and order approving said application for the change of 10.30 second feet of water aforesaid.

3. That the plaintiffs, Provo Bench Canal and Irrigation Company, Timpanogos Canal Company, Upper

East Union Irrigation Company, West Union Canal Company, East River Bottom Water Company, Fort Field Irrigation Company, and Little Dry Creek Irrigation Company, respectively, have been during all times herein mentioned, and are, corporations duly organized, existing, and operating pursuant to and by virtue of the laws of the State of Utah; that the plaintiffs, Smith Ditch Company, Faucett Field Ditch Company, and Riverside Irrigation Company, respectively, have been during all times mentioned herein, and are, unincorporated associations, duly organized, existing, and operating pursuant to and by virtue of the laws of the State of Utah; that the plaintiff, Provo City, has been during all times mentioned herein, and is, a municipal corporation, duly organized, existing, and operating pursuant to and by virtue of the laws of the State of Utah; that all of said plaintiffs have been during all times mentioned herein, and are, entitled to appropriate, acquire, hold and utilize water, and rights to the use of water within the State of Utah as provided by law.

4. That Provo River is a natural stream of water, having its headquarters principally in Summit County and fed by various tributaries from said County, Wasatch County and Utah County; and that portion of said Provo River is located in Utah County, State of Utah; that the lands on which the predecessors in interest of the United States claim to have appropriated said waters on which its application is based, are in Wasatch County, being above the lands of the plaintiffs in Utah County for which the plaintiffs divert water from said River at, or below, the mouth of Provo Canyon in Utah County.

5. That the plaintiffs are water users in Utah County, and in severalty are the owners of the right to the use of a large part of the flow of Provo River

during the low-water season under the decree as more particularly hereinafter referred to, in addition to other rights for irrigation, domestic, culinary, and municipal purposes; that the predecessors in interest of the plaintiffs appropriated said waters and applied the same to beneficial uses and became the owners to the right to the use of the same, together with additional waters from Provo River, long prior and that their rights were, and are, superior to the claimed rights of the defendant, United States of America, and their predecessors in interest, as described in the application hereinafter more particularly referred to; that the said claimed rights of the United States of America are based upon claimed appropriations for use of water in Wasatch County which said appropriations were initiated and perfected subsequently, and were, and are, inferior and subordinate to the said vested rights of the plaintiffs; and that prior to the entry of the decree in Civil Cause 2888 hereinafter more particularly referred to, the said rights of the plaintiffs had prior claims, and were recognized as being superior in point of right and law, to the said claimed rights of the defendant, United States of America and its predecessors in interest.

6. That in the year 1915, there was filed in the office of the Clerk of the Fourth Judicial District Court of the State of Utah in and for Utah County, an action No. 2888, in which said action Provo Reservoir Co., a corporation, was plaintiff and all of the predecessors in interest of the defendant, United States of America, herein, and the plaintiffs and their predecessors in interest, were defendants, among other defendants; that in said action, which was an adversary proceeding as between the plaintiff and all of the defendants and as between each defendant and every other defendant, there was involved the claims

of each of the parties to said action to the right to the use of the waters of Provo River, particularly during the period April 15th to October 1st of each year; that during the proceedings in that said cause, it was established and determined that the plaintiffs and their predecessors in interest and other parties in Utah County involved in said litigation had the first and primary right, by reason of prior appropriation to the normal flow of Provo River and its tributaries and that the rights of the predecessors in interest of the United States to said flow were subsequent and inferior thereto; that in order to promote the general interests of the water users in Wasatch and Utah Counties, it was stipulated and agreed by written stipulation filed in said cause by and between the predecessors in interest of the United States of America and these plaintiffs and their predecessors in interest and other water users in Utah County, all of which Utah County water users, including these plaintiffs, were entitled to the prior rights to the waters of Provo River, that such prior rights would be relinquished to the predecessors in interest of the defendant, United States of America, and other Wasatch County users, parties to said suit, and would permit the said Wasatch County users to, at all times, divert through their own canals and ditches at their existing points of diversion, the waters of Provo River to the full extent of their needs as determined by the decree in said cause, without subjection to, or proration with, the rights of the said Utah County users, in consideration, on condition and provided, that the said Wasatch County users, including the predecessors in interest of the United States of America would not at any time, use said waters decreed to them in said cause upon any lands other than those then irrigated, so as to cause

any of the seepage or drainage therefrom to be diverted away from the channel of Provo River or from the lands theretofore irrigated thereby; that said stipulation was duly made and entered into by said parties in good faith, and that the decree thereafter made in said cause No. 2888 Civil was based upon said stipulation and agreement to the extent that it permitted any of said Wasatch County users to exercise a prior claim or right as against the said Utah County users to the waters of Provo River.

7. That thereafter, Findings of Fact, Conclusions of Law and Decree in said cause No. 2888 Civil were duly made and entered and became final; that as a part of the Findings of Fact in said cause the stipulation of the parties was found in paragraph 25, p. 59, thereof, to provide:

It is further stipulated and agreed that for the purpose of equitably dividing and distributing the waters of said river so that the parties interested therein, as herein provided, may receive the quantity to which they are entitled, none of the parties hereto (diverting and using water in Wasatch and Summit Counties) shall have the right to extend the use of the waters awarded to them upon other lands than upon those now irrigated, so as to cause the seepage or drainage therefrom to be diverted away from the channel of said river or from the lands heretofore irrigated thereby.

That it was further found in paragraph 9, p. 26, as follows:

That for the purpose of equitably dividing and distributing the waters of said river so that the parties hereto may receive for use the quantity to which they are entitled, all of the waters of said river and canals shall be measured in such a way so as to include, so far as practicable, all the seepage water and inflow

water, so that the same may be distributed among the parties entitled thereto as a part and portion of the waters of said river.

That in accordance with the stipulation and findings therein, it was decreed, among other things, in paragraph 116, p. 72, of said decree as follows:

It is further ordered, adjudged, and decreed that for the purpose of maintaining the volume of flow of Provo River available for use of the parties and to maintain to the parties hereto the respective rights herein awarded and decreed, none of the parties shall change the place of use of said waters so as to cause the seepage or drainage therefrom to be diverted away from the channel of said river or channels, or from the lands heretofore irrigated thereby.

That the said stipulation, findings of fact, decree and the pleadings, papers and proceedings in said cause, as the same were filed and had in said cause No. 2888 Civil are hereby referred to and made a part hereof by reference.

8. That as a result of said contract and stipulation and the decree hereinabove referred to, the predecessors in interest of the said United States of America have, during each and every year, used and enjoyed during the entire irrigation season, and applied to their lands in Wasatch County, a full water right, that is, one hundred percent or more of this award under said decree, as the plaintiffs are informed and believe, even during the drouth years; and that since said decree, although plaintiffs and other users in Utah County had a prior right to the flow of Provo River, except for said stipulation, plaintiffs have rarely enjoyed the full amount of their awarded rights during the irrigation season, except during the high-water period, and have received toward the



satisfaction of their said rights during the low-water season only the return flow, seepage, and percolating waters entering the channel of Provo River from the lands of the Wasatch County users; that during the high-water season, these plaintiffs generally have ample water to satisfy their decreed rights and in addition have acquired and utilized sufficient high-water rights over and above their said decreed rights to satisfy their normal irrigation needs during high-water periods, but that they, in good faith, subjecting themselves to said stipulation and decree, have received only a portion, varying generally between 50% and 75% of their decreed rights during the dry or low-water seasons, while the predecessors in interest of the defendant, United States, claiming and having the benefit of said stipulation have received all of their decreed rights as a prior award under said decree even during dry or low-water seasons and have greatly benefited by virtue of said stipulation and the decree based thereon.

9. That prior to the year 1945 the United States of America and the organizations acting in cooperation therewith caused to be constructed across Provo River and Provo Canyon in Wasatch County, State of Utah, a certain dam known as Deer Creek Dam, and, by means of said dam, caused the surface waters of Provo River, which had theretofore ran in a well-defined natural channel through Wasatch County and down Provo Canyon into Utah County, to be impounded above said dam into a reservoir, known as Deer Creek Reservoir, from which reservoir a portion of the waters to which the plaintiffs have been entitled under said stipulation and decree have been released into the natural channel of Provo River below said dam and into which said reservoir the said United States and its agencies have brought addi-

tional waters, which they have claimed and have been given credit for, and have, and are diverting, in the management of said reservoir project; that prior to the impounding of said reservoir, the natural flow of Provo River, principally confined to a relatively narrow channel, except as diverted by artificial diversions, together with seepage, percolating and return waters, flowed down Provo Canyon and became and was available to satisfy the rights of the said Utah County users with no substantial diminution or loss by reason of a brecciated fault area traversing the lands over which said reservoir was subsequently impounded; that, as plaintiffs allege upon information and belief, upon the impounding of said reservoir, the enlarged spread of the waters of Provo River and their increased pressure across said fault zone as a result thereof, a substantial amount of said waters to which plaintiffs are entitled to have, seeped and continued to seep through the floor of said reservoir along and through said brecciated fault zone and have become, and continue to be, lost to these plaintiffs, and that as a result of the impounding of said reservoir, as aforesaid, the plaintiffs allege upon information and belief that they have thereby been caused to lose water through said fault zone greatly in excess of the amount of water sought to be diverted away from them by the United States under its application hereinafter specifically mentioned.

10. That on or about June 12th, 1945, the defendant, United States of America, filed in the office of the State Engineer of the State of Utah, applications numbered a-2244 to and including a-2294, under one joint form and number, to wit: a-1902, under which it was proposed to change the points of diversion and places of use of a total of 43.292 second feet of water rights claimed to have been awarded by the decree in

said cause 2888 for use on land in Wasatch County over which said reservoir was impounded; that after the filing of said application, the same was amended by the applicant with the consent of the State Engineer to reduce the quantity of water for which a change is sought under said application to 10.30 second feet; that a copy of said application is herewith annexed, marked Exhibit "A".

11. That after publication of notice to water users, the said applications were duly protested by the plaintiffs herein in the office of the State Engineer, and that a copy of said protest as filed on or about July 29th, 1947, is hereunto annexed, marked Exhibit "B"; that thereafter, an answer to said protest was filed by the defendants, United States of America, and that a copy of said answer is herewith annexed, marked Exhibit "C".

12. That during hearings before the State Engineer, at which the said United States of America, as applicant, and these protestants, were represented, evidence was developed and received by the State Engineer showing that in addition to other objections and grounds of protest to the granting of said application, the applicant already had caused great loss to the protestants through the impounding of their waters over a brecciated fault zone, more particularly hereinbefore mentioned and in the annexed Exhibit "E" set out; that the defendant, United States of America filed with the State Engineer on or about the 23rd day of August, 1948, a further statement with respect to the geological features of the protests and objections of the plaintiffs herein, a copy of which statement is hereunto annexed marked Exhibit "D"; that thereafter, to-wit, on or about November 15th, 1948, the plaintiffs herein, included in its brief, filed with the State Engineer, a reply to the statement of

said applicant concerning the geological features of the case, a copy of which said reply as it related to the geological features, and omitting other matters argued in the respective brief, is set out in the annexed Exhibit "E".

13. That the State Engineer following hearings, and the filing of briefs by the respective parties, under date of February 28th, 1949, made its decision on said change applications; that notice in the form of a copy of said decision was mailed by, and from the office of the State Engineer, as plaintiffs are informed and believe, on or about March 7th, 1949, and was received by the protestants through their attorneys on or about the 8th day of March, 1949; that a copy of said decision is hereunto annexed marked Exhibit "F".

14. That the plaintiffs are aggrieved by said decision of the State Engineer, and that if the said proposed changes are permitted to be accomplished, the result will be to deprive the plaintiffs of substantially the whole of the amount of water for which a change is sought in said applications as amended.

15. That the said purported change applications are not in fact applications to change any point of diversion or place of use, but are for the purpose of diverting from water that is, and otherwise would be, available to these plaintiffs and other Utah Valley users, the quantity specified in said amended application as a prior right to be satisfied in whole before the plaintiffs would be furnished any of the flow of Provo River and that said purpose is unlawful and contrary to the vested rights of plaintiffs.

16. That the State Engineer has no authority or jurisdiction to grant said applications by reason of the said stipulation and decree in civil cause 2888, and by reason of the fact that no modification or application has ever been made to authorize such

claimed changes in said cause, and by reason of the further fact that such claimed changes are in violation of said stipulation and decree and impair the vested rights of the plaintiffs thereunder.

17. That the said defendant, United States of America, is estopped and debarred from making or claiming the right to make said proposed changes by reason of the acceptance by the predecessors in interest of said defendant of the benefits of said stipulation and decree in said cause 2888 civil and by reason of the fact that they claimed and accepted the benefits thereof under varying conditions over more than twenty years, particularly with respect to the waiver of plaintiffs' priorities in their favor at all times, leading the plaintiffs to believe that they intended in good faith to be bound and controlled thereby, and that no attempt would be made to transfer or change said water as now sought; that during said period many persons who had first-hand knowledge of the prior rights of the Utah County users have died, or their testimony otherwise has become unavailable; that the United States by reason of impounding said Deer Creek Reservoir has destroyed and made unavailable to plaintiffs, evidence as to the flow and seepage of water in and from said inundated area, all during the time it had not made said change application, and had led plaintiffs to believe it was not claiming such rights as against them; and that to now permit the United States to effectually disaffirm said obligations and limitations of said stipulation and decree and to accomplish such claimed change would be highly inequitable and unjust.

18. That if the applicant shall be permitted to change the point of diversion and place and nature of use of the water set out in their application during

the high-water period, and turn the same down the channel of Provo River, such amount thus transferred from the lands upon which it was agreed it should be applied, will be in excess of the necessities of these protestants and will be of little or no use to them, and if such change is made and the water involved is diverted into the channel of Provo River, these protestants will be deprived of any return flow therefrom that would otherwise augment the low water or normal flow in the channel of Provo River, to which these protestants in years past have been entitled, and which under said stipulation and decree hereinabove mentioned they are entitled to receive.

19. That to grant said application would deprive protestants of their property without due process of law, in contravention of their basic rights and the guarantees of the fifth and fourteenth amendments to the Constitution of the United States, and Section 7 of the Constitution of the State of Utah.

20. That to grant said application would take and damage the private property of these plaintiffs without just compensation in violation of Amendment V of the Constitution of the United States and Section 22, Article 1 of the Constitution of the State of Utah.

21. That to grant said application would be in violation of Article I, Section 10 of the Constitution of the United States and Article I, Section 18 of the Constitution of the State of Utah by impairing the obligation of the contract entered into between the predecessors in interest of applicant and these protestants with respect to the contract and stipulation entered into as hereinabove alleged.

22. That the said decree in cause 2888 Civil was and is res judicata on the right of the said applicant to change the point of diversion and place of use of

said water and bars and precludes such change in accordance with the intent, effect and letter thereof.

23. That to grant said application by reason of the matters and things hereunder alleged would impair and diminish the vested rights of these protestants, contrary to the governing statutes and the fundamental rights of these protestants.

24. That as plaintiffs are informed and believe, and so allege, the said water rights mentioned in said application upon which the application to change herein is based are not valid or subsisting rights, and have been abandoned by the United States and its predecessors in interest and have not been used for a period of more than five years, and that by said attempted "change" the said defendant is seeking to enlarge its rights.

25. That the United States by impounding the waters of Provo River across a major fault area as aforesaid, has caused a loss of water to the plaintiffs in excess of any amount which might be saved by evaporation or transpiration, and even without such change being made or any right to diversion of waters awarded to said defendant by virtue of said applications, the physical conditions created by the United States already have deprived these plaintiffs of a substantial amount of the water to which they are entitled.

26. That the proposed change will impair the vested rights of these plaintiffs; will interfere with a more beneficial use of said water and conflicts with their existing rights.

Wherefore, plaintiffs pray that the court reverse the decision of the State Engineer and order and decree the disapproval and rejection of said appli-

cations; award plaintiffs their costs and grant to them such other and further relief as may be just.

(S) D. H. YOUNG,  
*Provo City Attorney.*

(S) CHRISTENSON & CHRISTENSON,  
*Attorneys for Plaintiffs.*

STATE OF UTAH,  
*County of Utah, ss:*

Thomas Ashton, being first duly sworn, deposes and says: that he is an officer of the Upper East Union Irrigation Company, a corporation, to-wit: its president, one of the above-named plaintiffs; and that he makes this verification for and on behalf of said corporation, and for and on behalf of the other plaintiffs herein; that he has read the foregoing Complaint and knows and understands the contents thereof and that the same is true of his own knowledge, except as to matters stated therein upon information and belief and as to such matters, he believes it to be true.

(S) THOMAS ASHTON.

Subscribed and sworn to before me this 27th day of April 1949.

[SEAL] (S) PHYLLIS M. ARMSTRONG,  
*Notary Public,*  
*Residing at Provo, Utah.*

My commission expires November 17th, 1950.



## APPENDIX D

### AFFIDAVIT OF J. LEE RANKIN, ASSISTANT ATTORNEY GENERAL

DISTRICT OF COLUMBIA, ss:

I, J. Lee Rankin, Assistant Attorney General, Department of Justice, United States of America, being first duly sworn, upon my oath depose and say:

That I am the Assistant Attorney General having supervision of the case alluded to in the brief to which this affidavit is Appendix D;

That, as revealed by the attached letter dated October 7, 1953, I specifically stated that the United States Attorney alone could appear for the United States of America in the subject case in the trial court;

That contrary to my express instructions, E. J. Skeen purported to appear for the United States of America and purported to try the case on its behalf;

That without authority in that trial, E. J. Skeen purported to stipulate away rights to the use of water title to which was then and now is in the United States;

That E. J. Skeen was without authority either to appear or to stipulate in regard to the rights of the United States of America;

That upon being notified of E. J. Skeen's unauthorized acts I at once directed an investigation of the matter and when convinced the rights of the United States of America had been prejudiced, I sought to have the cases reopened to correct the errors

and to preserve the rights of the United States of America all as set forth in the brief to which this affidavit is Appendix D.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 1955.

*J. Lee Rankin*  
J. LEE RANKIN,  
*Assistant Attorney General.*

Subscribed and sworn to before me this 30 day  
of \_\_\_\_\_, 1955.

[SEAL]

*s/ Emily M<sup>o</sup>C Ireland*  
Notary Public, D. C.

My commission expires \_\_\_\_\_ 1959

AIR MAIL

OCTOBER 7, 1953.

A. PRATT KESLER, Esquire,  
*United States Attorney,  
Salt Lake City 1, Utah.*

DEAR MR. KESLER:

Re: *Provo Bench Canal and Irrigation Company, et al. v. Harold A. Linke and United States of America*—Cases Nos. 15462 and 15463—4th Judicial District Court, Provo, Utah—Nos. C-1705 and C-1706 WHV—90-1-2-429

This will refer to the above entitled matter and to your letter of October 2, 1953, relating to it. In your conversation with Mr. Veeder of the Department, you inquired as to whether Mr. E. J. Skeen, Attorney, Bureau of Reclamation, could be authorized to represent the United States of America in this action, which is to come on for trial October 26,

1953. In the opinion of the Department, the responsibility for the protection of the interests of the United States and any appearance on its behalf in this cause must necessarily rest with and be made by you. You, however, are authorized to have Mr. Skeen assist you in representing the United States.

Two factors are of utmost importance in connection with this matter:

1. It is not a judicial proceeding. Rather it is administrative in character and its scope is strictly limited to the question of the probability of injury to the Provo Bench Canal and Irrigation Company and other parties by the change of point of diversion proposed by the United States.

2. The United States is not subjected to the jurisdiction of the Court in the sense that a decree or judgment may be entered against it in the proceeding.

Accordingly, there should be prepared a motion to strike each and every allegation of the Complaint having reference to any matters beyond the narrow issue referred to above. Moreover, there should be prepared a proposed pretrial order to be offered at the pretrial conference which delineates and carefully limits the proceeding to the sole question which may properly be considered. All allegations which in any way affect or tend to affect the right, title, interest and property of the United States of America to the rights to the use of water may not properly be heard in this cause. Prior to filing the motion or proposed pretrial order, those documents should be submitted to the Department for review and comment.

Reference in regard to this matter is made to the case of *United States of America v. District Court of the Fourth Judicial District*, — Utah —, 238 Pac. 2d 1132 (1951); — Utah —, 242 Pac. 2d

774 (1952). In that connection, there is enclosed for your files a copy of the Department's brief filed in the case last mentioned. It will be observed that the objectionable features of the Complaint are reviewed at length and the principles discussed in those decisions, particularly the latter, should constitute the guide in the preparation of the motion to strike and the pretrial order.

Sincerely,

J. LEE RANKIN,  
*Assistant Attorney General,  
Office of Legal Counsel.*

Enclosure No. 66749.