

1955

United States of America v. Provo Bench Canal and Irrigation Company et al : Brief of Appellant, State Engineer of the State of Utah

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

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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 and Respondents,

—vs. —

HAROLD A. LINKE, as State Engineer of the State of Utah (Successor in office of 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 and Appellants.

FILED
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Clerk, Supreme Court, Utah

Cases
Nos. 8390
and 8391.

BRIEF OF APPELLANT, STATE ENGINEER OF THE STATE OF UTAH

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BRIEF OF APPELLANT, STATE ENGINEER OF THE STATE OF UTAH

STATEMENT OF FACTS

The record in this case is voluminous, consisting of some 1200 pages of reported testimony in addition to many exhibits and numerous pleadings; but, for the

purpose of this appeal by the State Engineer, only the complaint of the plaintiffs and the findings, conclusions and judgment of the trial court are of importance. They are found at R. 5 to 19 in Case No. 8390 and R. 5 to 19 in Case No. 8391, and R. 242 to 262 in Case No. 8390 and R. 229 to 248 in Case No. 8391, respectively.

This case came before this Court once before upon petition of the United States for an extraordinary writ to prevent the District Court from taking jurisdiction on the ground of the sovereign immunity of the United States. This Court denied the writ in *United States v. District Court*, 238 P. 2d 1132; and, a petition for rehearing was denied and this opinion is reported at 242 P. 2d 774 and at page 777 of 242 Pacific Reporter 2nd Series this Court said: "We know of no case of an appeal from the decision of an executive board or officer where the appellate tribunal adjudicates new issues not within the jurisdiction of the original tribunal to determine."

For the purpose of this appeal the necessary facts are almost matters of common knowledge among the citizens of this state. The United States through its Bureau of Reclamation constructed the Deer Creek Reservoir on the Provo River and contracted with the Provo River Water Users Association for repayment of the cost thereof. Stockholders in this Association are the Metropolitan Water Districts of the following municipalities: Salt Lake City, Orem, Provo, Lehi, American Fork and Pleasant Grove-Linden, as well as irrigation companies, some of whom are as follows: Provo Reservoir Water Users Company, Utah Lake Distributing Com-

pany, Hewlett Ranches, Victory Ranches, Provo Bench Canal and Irrigation Company (one of the plaintiffs in the present action), Dixon Irrigation Company, Washington Irrigation Company, South Kamas Irrigation Company and Beaver and Shingle Creek Irrigation Company. Prior to construction it was necessary to obtain title to those lands that would be inundated by the reservoir and, in so obtaining title the United States also purchased some 50 c.f.s. of water that had been awarded those lands under the Provo River decree. As in most river systems in this state, the return flow was important and the decree tied the seepage or drainage to the land for the benefit and protection of the lower users.

The United States through its Bureau of Reclamation filed with the State Engineer of Utah an application to change the place and nature of use of this 50 second feet, which amount was reduced by amendment during the hearing before the State Engineer to approximately 12.5 second feet, and thereupon the State Engineer approved this change application. This amount was further reduced during the trial to 1.54 c.f.s. and 7.9 c.f.s., respectively, or a total of 9.33 second feet. Paragraphs 11 and 12, and 13, respectively, of the Findings of Fact specifically show the action of the trial court in this regard. We should place emphasis upon the fact that we are concerned with a change application and not a savings application although the word savings is often used in the record, and we shall more thoroughly cover this point during the part of this brief devoted to argument. The Findings above referred to are of sufficient importance to be quoted here and read

as follows: "That the defendant, the United States of America, acquired for the Provo River Project, the land now comprising the Deer Creek Reservoir site, and certain water rights appurtenant thereto aggregating 9.20 second feet, as specifically described in Exhibit A to said application No. a-1902, and by reference made a part hereof; subject, however, to that certain decree of the Fourth Judicial District Court of Utah County, State of Utah, generally known and referred to as No. 2888, and herein referred to as such."

"That prior to the construction of Deer Creek Reservoir, the owners of the land in said reservoir site diverted 43.292 second feet of water from the Provo River and tributaries under and by virtue of the rights described in said Exhibit A of application a-1902, was amended by the State Engineer's office, by which amendment it was proposed to change the point of diversion, place and nature of use of said 10.30 second feet of water from the land in the Deer Creek Reservoir site to the Provo River Project land described in Exhibit C to said application a-1902; that during the trial it was stipulated that a portion of the land described in said application lies above the flow line of the reservoir and that the water rights appurtenant thereto should be eliminated from the application and that by reason thereof the water right sought to be changed should be reduced from 10.30 to 7.9 second feet; that under the pre-reservoir conditions said 7.9 second feet of water was lost to the river and was consumed by evaporation and plant life."

And finally we should stress that paragraphs 12 and

13, respectively, of the Findings of Fact found that the said 9.33 second feet of water "under prereservoir conditions . . . was lost to the river and was consumed by evaporation and plant life." It is the United State's application to change the place and nature of use of this 9.33 second feet with which we are concerned here.

The trial court permitted the plaintiffs to introduce evidence concerning a fault zone passing across the reservoir area, concerning brecciated conditions on the floor and sides of the reservoir, concerning increased pressure of water on the fault zone and brecciated areas, concerning bank storage and concerning the raising of the water table around the perimeter of the reservoir. The trial court made findings and conclusions as to these matters and embodied them in paragraph numbered four in the judgment in each case below. To the introduction of this evidence, proper objection was timely made.

STATEMENT OF POINTS

POINT I.

THAT THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT CERTAIN DECREE MADE AND ENTERED IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, CIVIL NO. 2888, AND COMMONLY REFERRED TO AS THE PROVO RIVER DECREE, WAS RES ADJUDICATA AND BINDING UPON THE DEFENDANT UNITED STATES AND PREVENTED THE APPROVAL OF THE CHANGE APPLICATIONS FILED BY THE UNITED STATES; BUT ON THE CONTRARY THE CHANGE APPLICATIONS WERE ENTITLED TO BE APPROVED AND THE APPLICANT PERMIT-

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POINT II.

THAT THE TRIAL COURT RECEIVED EVIDENCE AND MADE FINDINGS AND CONCLUSIONS IN EXCESS OF ITS POWER SO TO DO AND ENTERED JUDGMENT ACCORDINGLY. THAT CONCLUSION NO. 4 AND THE PARAGRAPH NUMBERED 4 OF THE JUDGMENT IN BOTH CASES BELOW ARE ERRONEOUS IN THAT THEY ARE OUTSIDE THE ISSUES THAT COULD HAVE BEEN ENTERAINED AND HEARD BY THE STATE ENGINEER AND THEREFORE ARE BEYOND THE JURISDICTION OF THE TRIAL COURT.

ARGUMENT

POINT I.

THAT THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT CERTAIN DECREE MADE AND ENTERED IN THE FOURTH JUDICIAL DISTRICT COURT IN AND FOR UTAH COUNTY, STATE OF UTAH, CIVIL NO. 2888, AND COMMONLY REFERRED TO AS THE PROVO RIVER DECREE, WAS RES ADJUDICATA AND BINDING UPON THE DEFENDANT UNITED STATES AND PREVENTED THE APPROVAL OF THE CHANGE APPLICATIONS FILED BY THE UNITED STATES; BUT ON THE CONTRARY THE CHANGE APPLICATIONS WERE ENTITLED TO

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The trial court has in effect stated that a change application may not be approved if the water in question is the subject of a decree that has tied it to certain lands; and paragraph 3 of the judgment of the trial court recites that the United States is bound by the Provo River Decree, that the waters of said river cannot be "used upon any land other than that then irrigated at the time of the entry of said decree 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; 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." We respectfully submit that this paragraph of the judgment is contrary to the law of this state and cannot be upheld.

Section 73-3-3, Utah Code Annotated, 1953, reads as follows:

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.

This section then details the manner and method by which these changes may be accomplished in the State Engineer's Office.

And this statute has been interpreted and stated in the negative by this Court in *East Bench Irrigation Co. v. Deseret Irrigation Co.*, 2 U. 2d 170, 271 P. 2d 449, as follows:

Thus a change in place of diversion or the place or nature of use or a combination of such changes cannot be made if the lower users, whether prior or subsequent to the rights of the parties making the change, will thereby be deprived of the use of water which they would have had under the use which the upper appropriators made before the change. Such a change would enlarge the rights of the upper appropriators and impair the vested rights of the lower users because their rights were established on the basis that no such enlargement or changes of use would be made after the lower users had perfected their appropriation, and this is true of storage as well as direct flow waters.

We should here emphasize two matters. First, the Provo River decree contemplated that the upper users could not make any changes in their practice that would decrease the return flow and the decree so states and this is consistent with the language quoted from the East Bench case, *supra*. But, this does not mean that any change is prohibited. The second point is the fact that there is no finding that the proposed change would impair the rights of the plaintiffs and an entire lack of

evidence to support such a finding if one were attempted to be made.

We submit that change applications filed by water users are entitled to grave consideration and should be rejected only if it is clear and beyond question that the rights of others will be impaired; and we will demonstrate that, even if other rights will be affected, change applications should still be approved with conditions attached to safeguard those rights of others. It should be here noted that approval of change applications is in no sense a final determination that the change will not affect others; but rather it is a determination only that the applicant may proceed with his proposed change on the probability that he may do so without harm to others.

Hutchins on the Law of Water Rights, at page 278, says:

It has long been the general rule that the appropriator may change the point of his diversion of water from the stream, or may change the place of use or even the purpose of his use of the water, so long as the rights of others are not thereby impaired.

We believe that a brief review of the Utah cases on this question will compel the conclusion that the trial court's rejection of the change applications in question was in error and cannot be sustained.

Changes in the manner and nature of use of water are becoming and will continue to become of paramount importance because of the rapidly diminishing supply

of unappropriated water within the state; and a number of rather recent cases have had occasion to discuss the change application.

In *Rocky Ford Irrigation Co. v. Kents Lake Reservoir Company*, 104 Utah 202, 135 P. 2d 108, rehearing denied 104 Utah 216, 140 P. 2d 638, the Court approved an application to change the place of storage from the tributary to the main channel of the Beaver River. Certain limitations were attached to the approval and the Court indicated that the approval only gave the applicant a right to proceed, and that the protesting parties were not "foreclosed from future actions for damages or injunctive relief if Kents Lake does interfere with their rights."

In *Whitmore v. Welch*, 114 Utah 578, 201 P. 2d 954, the Court called attention to the third paragraph of Section 73-3-3, Utah Code Annotated, 1953, which reads as follows:

Applications for either permanent or temporary changes shall not be rejected for the sole reason that such change would impair vested rights of others, but if otherwise proper, they may be approved as to part of the water involved or upon condition that such conflicting rights be acquired.

The Court then said:

If a change application must not be rejected merely because there might be some conflict with vested rights, it would seem to follow that an original application should not be rejected when there is unappropriated water and the only conflict is with respect to the point of return.

The case of *Lehi Irrigation Company v. Jones*, 115 Utah 136, 202 P. 2d 892, although it deals with an application to appropriate rather than a change application, does contain language that is particularly applicable to all applications before the State Engineer and directs their approval unless the evidence is clear and convincing that they must be rejected. The Court said:

To rule otherwise would be to foreclose the applicant in this case any opportunity to develop water if it in fact exists, and would have the effect of establishing a rule in this state not in conformity with the announced policy of the state to liberally construe rights toward the development and beneficial use of all waters of the state.

In *American Fork Irrigation Company v. Linke*, (Utah) 239 P. 2d 188, the irrigation company sought to change a direct flow early season right to storage in a dam for later use in irrigating more valuable later season crops. The State Engineer rejected the application but his action was reversed by the trial court which latter action was affirmed by this Court, saying:

Plaintiffs' proposal, if completed without impairing vested rights, contemplates the more beneficial use of water, a most desired result fully consistent with progress and change, and reflecting the established policy of this state. In a very scholarly and exhaustive document, counsel for defendants insist that plaintiffs' proposal most certainly would invade defendants' vested rights. If, in executing the plan, the plaintiffs interfere with or diminish the rights of others, a remedy is available, particularly since the trial court approved the application subject to the rights of

others and without prejudice thereto, and since approval of plaintiffs' application awards no vested rights but simply allows them to proceed with a plan specifically conditioned by the trial court on respecting the rights of others. The argument that this case may lead to multiplicity of litigation is negated when it is recognized that each case must rest on its own peculiar facts. Such argument should not foreclose the opportunity *and duty* to accomplish that optimum use of water demanded in this arid region when it appears, and the trial court found, and which we believe the facts tend reasonably to indicate, that defendants will not suffer by operation of the plan.

And in a very recent case, *Salt Lake City v. Boundary Springs Water Users Assn.*, 2 Utah 2d 141, 270 P. 2d 453, a change application was approved in the following language:

If the evidence shows that there is reason to believe that the proposed change can be made without impairing vested rights the application should be approved. The owner of a water right has a vested right to the quality as well as the quantity which he has beneficially used. A change application cannot be rejected without a showing that vested rights will thereby be substantially impaired. 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.

And in *East Bench Irrigation Co. v. Deseret Irrigation Co.*, *supra*, this Court makes the following statement in connection with change applications:

We conclude that the applications must be allowed but only on condition that the applicants make the changes outlined above in the use of their water in accordance with their testimony on that question so that such changes into storage and use on other lands will be made without increasing the amount or quantity of water *consumed* under such changes over the amount and quantity of water which would have been *consumed* had no change in the use been made. (Italics ours)

The language above quoted from the East Bench case is, we submit, particularly appropriate to the issues here and we have emphasized the use of the word “consumed” for that reason. And we also believe that the trial court, in its findings, conclusions and decree, has lost sight of the real significance of an approval of an application by the State Engineer. This approval in no sense establishes a right but merely permits the applicant to proceed with his proposed plan, and all of the cases that we have cited place emphasis upon this. As we will hereafter demonstrate, the trial court has gone beyond what the State Engineer had power to do and has adjudicated water rights, priorities and other matters that were not necessary for its decision here. May we again say that the only matter before the State Engineer and before the trial court was the question as to whether there was probable cause to believe that the change as proposed by the United States could be made without impairment of the rights of others.

As we pointed out in the Statement of Facts, this case has been before this Court before upon the petition of the United States for the issuance of an extraordinary

writ, which was denied. The opinion of this Court had occasion to discuss the problem here presented and in *United States v. District Court*, supra, and on page 1137 of 238, Pacific Reporter 2d Series, this Court said:

The engineer in granting an application does not determine that the applicant's rights are prior to the rights of the protestant but only finds there is reason to believe that the application may be granted and some water beneficially used thereunder without interfering with the rights of others. Under such a holding, the Engineer rejects applications only when it is clear that the applicant can establish no valuable rights thereunder, he does not adjudicate claims but decides only that there is probable cause to believe that applicant may be able to establish rights under his application without impairing the rights of others. Such a decision is administrative in nature and purpose and the decision of the court on review, except for the formalities of the trial and judgment is of the same nature and for the same purpose. The object of the engineer's office is to maintain order and efficiency in the appropriation, distribution and conservation of water and to allow as much water to be beneficially used as possible. So construed, the law provides a period of experimentation during which ways and means may be sought to make beneficial use of more water under the application before the rights of the parties are finally adjudicated. If we were to finally adjudicate applicant's right to change or to appropriate water at the time that such application was rejected or approved, he would get only such rights as he could establish by a preponderance of the evidence that he could use beneficially without interfering with the rights of others and in such hearing he would not have the

benefit of any opportunity to experiment and demonstrate what he could do. Such a system would cut off the possibility of establishing many valuable rights without a chance to demonstrate what could be done.

And again on page 1138 this Court said:

The United States answered the protests stating that it proposed to use only such waters as it could use without interfering with the rights of such plaintiffs and offered to modify its application so as to protect such rights. After a hearing before the State Engineer, the United States modified its application in accordance with its interpretation of the evidence and such offer by reducing the quantity of water which it applied to change from 43.292 cubic feet per second (c.f.s.) to 10.30 c.f.s. The engineer approved the application subject to all rights which might be adversely affected. Thus it is clear that the engineer's decision did not purport to determine how much water the applicant could red divert and use from the Provo River without impairing the rights of others, but merely found that there was reason to believe that some of such waters could be so red diverted and used. Such approval of the change of place of diversion and use was expressly limited to such waters as could be so red diverted and used without impairing the rights of others.

May we add that the actual amount of the water that could be so diverted and used in the present case could not and would not be determinable until after the plan of the applicant had been put into effect and the proof of such use submitted to the State Engineer.

We respectfully submit that Findings of Fact Nos.

11 and 12 and Nos. 12 and 13, respectively, in the Court below and quoted in full on pages 3 and 4 of this brief conclusively show that the applications here involved were properly approved by the State Engineer, and that this approval should have been affirmed by the District Court.

ARGUMENT

POINT II.

THAT THE TRIAL COURT RECEIVED EVIDENCE AND MADE FINDINGS AND CONCLUSIONS IN EXCESS OF ITS POWER SO TO DO AND ENTERED JUDGMENT ACCORDINGLY. THAT CONCLUSION NO. 4 AND THE PARAGRAPH NUMBERED 4 OF THE JUDGMENT IN BOTH CASES BELOW ARE ERRONEOUS IN THAT THEY ARE OUTSIDE THE ISSUES THAT COULD HAVE BEEN ENTER-TAINED AND HEARD BY THE STATE ENGINEER AND THEREFORE ARE BEYOND THE JURISDIC-TION OF THE TRIAL COURT.

We are concerned here with Section 73-3-14 and 73-3-15, Utah Code Annotated, 1953; Section 14 provides for civil actions in the district court for plenary review of decisions of the State Engineer. Section 15 provides that "the hearing in the district court shall proceed as a trial de novo and shall be tried to the court as other equitable actions." The question then presents itself as to how far the district court may go in the introduction of evidence concerning the application before it. We should again bear in mind that the sole question for decision is as to whether there is probable cause to believe that these change applications may or may not be approved without impairing other rights. It is, of

course, impossible to demonstrate with any reasonable positiveness that what is proposed will have this or that definite effect and the importance of the words "probable cause" thus becomes apparent.

The plaintiff protestants in this case sought to and did introduce a very considerable amount of evidence dealing with fault zones, with brecciated areas, with bank storage, and with the raising of the water table around the perimeter of the reservoir. None of this evidence was presented in terms of second-feet or acre-feet, but only that there might be some loss of water by reason of these elements.

Also, the record in this case is full of reference to "savings" and "savings applications." This is a misnomer, as no savings application is involved and no question of saving of water is involved. The United States sought by the change applications here to make other use of the water that had theretofore been consumed by transpiration and evaporation on the land inundated, but they did not make any savings of any water as the term should be properly used; and we believe that any reference to savings in this record should be carefully examined and in almost every instance the reference should either be to water theretofore consumed or to the change applications themselves. A savings application seeks to appropriate water, not to change its place and nature of use.

This Court has discussed the problem here presented in *United States v. District Court*, supra, and in the denial of a petition for rehearing of that same case, and also in *Eardley v. Terry*, 94 Utah 367, 77 P. 2d 362, in

Tanner v. Bacon, 103 Utah 494, 136 P. 2d 957, and in *Whitmore v. Murray City*, 107 Utah 445, 154 P. 2d 748.

In *Eardley v. Terry*, *supra*, an applicant appealed to the district court from a decision of the State Engineer rejecting an application to appropriate water from Beaver Dam Wash. The district court reversed the State Engineer, ordered the application approved and then proceeded to adjudicate to the parties their respective water rights. On appeal to this Court, the action of the trial court in approving the application was affirmed but the adjudication procedure was disallowed and ordered deleted as “the court had no power in the cause to decree to the respondent (applicant) any water he may be able to obtain in the future by conserving and increasing the flow of the stream involved.” In discussing the power of the State Engineer and that of the district court on appeal, this Court said:

“It should be remembered that the proceeding in the district court was by way of appeal from the decision of the state engineer rejecting respondent’s application to appropriate water. Under the statute, section 100-3-8, R.S. Utah 1933, when an application is filed, the state engineer is required to determine whether there is unappropriated water in the proposed source of supply and whether the water sought to be appropriated can be put to a beneficial use and can be diverted from the source of supply without doing material injury to the prior rights of others. While the statute, R.S. 1933, 100-3-7, also provides for the filing of protests to any application to appropriate water, this does not enlarge the scope of the proceedings before the state engineer beyond the determination of the question above stated. The

state engineer is required to determine whether the application should be rejected or approved by a consideration of the elements above stated. He does not, and has no authority in such proceeding, to fix and determine the rights of the parties to the proceeding. He simply determines whether there is unappropriated water which can be beneficially used without injury to or conflict with prior rights. If the application is approved, the applicant must thereafter construct his works, make beneficial use, and, by actual use of the water, fix the nature and limits of the rights which can be claimed and granted under the application. The approval or rejection of the application is simply a preliminary matter and is not intended to, and does not, fix the rights of the parties before the state engineer in such proceeding. When an appeal is taken from the decision of the state engineer in such a case, the trial court is required to determine the same questions de novo. It determines whether the application should be approved or rejected and does not fix the rights of the parties beyond the determination of that matter. The issues remain the same upon an appeal to this court. All that the district court or this court, on appeal from the district court, is called upon to do is to determine whether the application should be rejected or approved. If it appears that there is unappropriated water which the applicant seeks to appropriate and which he can beneficially use without injury to or conflict with the prior rights of others, then the application should be approved by the court; otherwise, it should be rejected. If the application is approved, then the applicant must proceed to perfect his appropriation as provided by law and make proof thereof under section 100-3-16, R.S. 1933. Until it is so perfected, he cannot be decreed or given present rights as under a completed

appropriation. It may be that, although the application is approved, the applicant may not be able to perfect his appropriation. The mere approval of the application does not assure that an actual appropriation of water will result.

Were section 100-3-8, R.S. 1933, to be considered by itself, it might be thought that in determining whether an application to appropriate water should be approved, or rejected, the state engineer, and the district court upon an appeal from the state engineer's decision, should proceed to hear and dispose of the matter and impose upon the applicant the same burdens as if it were making a final disposition of all questions growing out of the filing of the application. But section 100-3-8, *supra*, does not stand alone. Sections 100-3-16 and 100-3-17 must be considered in connection therewith. By those sections it is clear that no final rights are acquired until the proof required by section 100-3-16 is made and a certificate has been issued by the state engineer. Section 100-3-16 contemplates that the works, by which the water applied for must be put to a beneficial use before a completed appropriation giving rights to the use of the water can be effected. It is also clear that the original approval of the state engineer has no efficacy except that it shows that the applicant had the right to proceed with his application. Furthermore, it must be conceded that any adjudication involved in the approval by the state engineer of an application cannot be carried over to the proceedings on final proof as a binding determination of such issues raised by the final proof as would be said to be involved in approving the application."

In *Tanner v. Bacon*, *supra*, the applicant again appealed from a decision of the State Engineer rejecting

an application. The rejection in this case was on the ground that approval would have been detrimental to the public welfare in that it would have been a serious obstacle to the Deer Creek project. The district court again reversed the State Engineer and ordered the application approved but made that approval and the application subject to the filings upon which the Deer Creek project was based. This Court affirmed and held that such approval on condition was proper and was not an enlargement of authority as the State Engineer was vested with the same right and power. The following language seems appropriate:

“These statutes may not vest the state with the proprietary ownership of the water but they clearly do enjoin upon the state the duty to control the appropriation of the public waters in a manner that will be for the best interests of the public. The precise question involved in this case has never been passed on by this court but similar questions have been before the courts of other states, under statutes much like ours, where it has been invariably held that the state may reject or limit applications to appropriate its unappropriated waters. *Young & Norton v. Hinderlinder*, supra; *In re Commonwealth Power Co.*, 94 Neb. 613, 143 N.W. 937; *Kirk v. State Board of Irrigation*, 90 Neb. 627, 134 N.W. 167; *Cookingham v. Lewis*, 58 Or. 484, 114 P. 88, 115 P. 342; *In re Willow Creek*, 74 Or. 592, 144 P. 505, 146 P. 475; *East Bay Utility District v. Department of Public Works*, 1 Cal. 2d 476, 35 P. 2d 1027, 1029.”

The case of *Whitmore v. Murray City*, supra, was an action for declaratory judgment as to priorities following approval by the State Engineer of an applica-

tion filed by Murray City to change the points of diversion and return of water under its power filings. This Court discussed the powers of the State Engineer and said:

“A literal reading of the portion of the above section which we have italicized would lead one to believe that the determination of the state engineer, approving or denying an application for change of point of diversion adjudicated the rights of parties, since the act provides, that no such change shall be made ‘if it impairs any vested right, without just compensation,’ and it would appear that a necessary implication is that the state engineer must determine the existence or nonexistence of such vested rights before he acts, and that when he does act and approves an application, that in so doing he has found that no vested rights are impaired. However, such a construction would fail to take cognizance of the purposes of our Water and Irrigation Act and the rights and duties of the state engineer as there set out. The office of state engineer was not created to adjudicate vested rights between parties, but to administer and supervise the appropriation of the waters of the state. In *Eardley v. Terry*, 94 Utah 367, 77 P. 2d 362, this court considered the rights and duties of the state engineer in approving or denying an application for appropriation of water rights and we there held that in fulfilling his duties he acts in an administrative capacity only and has no authority to determine rights of parties. The same reasoning applies to the extent of the state engineer’s authority when he determines to grant or deny an application for change of diversion, use or place. It follows that in granting Murray City the right to change its point of diversion and return, the state engineer did not adjudicate the

priority to the use of the water at that point of diversion, but merely determined that it could use the water at that point as long as it did not interfere with the prior rights of others. The determination of the priority of rights is a judicial function and not among the powers of the state engineer."

In the first *United States v. District Court*, supra, at page 1136 of the Pacific Reporter, this Court said:

"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. The question to be determined is whether or not under the facts established in that court the engineer's decision should be upheld or reversed taking into account the statutory powers of the engineer but the court may not determine issues not within the power of the engineer to determine. In the case of an application to appropriate or to change the place of diversion or use, it merely approves or rejects the application without determining the priorities of the parties, although often the facts recorded or shown by the engineer's records may be conclusive as to the priorities of the rights of the parties. Usually, the date of the application determines its priority on the basis of the first in time is first in right but this is not always so. Plaintiff's counsel cites *Eardley v. Terry*, supra, and quotes from *Whitmore v. Murray*, supra (107 Utah 445, 154 P. 2d 750), to the effect that 'The office of state engineer was not created to adjudicate vested rights between parties, * * *' and that 'The determination of the priority of rights is a judicial function and not among the powers of the state engineer.' He seems to conclude therefrom that the deci-

sions of the engineer are administrative but those of the court in reviewing them somehow become a judicial function. The import of these cases are exactly opposite from that conclusion. Whether or not we call the engineer's decision administrative and the district court's decision judicial, no rights to the use of water accrue by the mere approving or rejecting of an application, the only thing thereby determined is whether the applicant may proceed in accordance with the statute to perfect the right applied for. *Riordan v. Westwood, Utah, 203 P. 2d 922.*"

In the second *United States v. District Court*, *supra*, the defendants, although the successful parties in the first case, sought the rehearing, and the following language clearly delineates the claims made and the ruling of this court thereon:

"Defendants further contend that some language of the opinion should be reconsidered because it involves questions not before the court and not argued. That language in substance holds that the judgment of the district court on an appeal from the State Engineer's decision only decided issues which the Engineer could have decided and such decision has no more force nor effect than the same decision would have had if made by the Engineer; that neither determines nor adjudicates the extent or priority of the claims of either the applicant or protestants, that each determine only whether to approve or reject the application based on whether or not it finds reason to believe that the application can be approved and the change to some extent effected without impairing the rights of others. Of course, in determining such question the claims of both the applicant and protestants must be considered but this does not

require that such claims must be adjudicated. Some of such claims may have already been adjudicated and in making such decision this must be taken into consideration; others may be somewhat speculative and doubtful and such claims do not have to be adjudicated before reaching a decision, for the decision is based on law and facts which are required to only show reason to believe, and not on definite findings or conclusions of fact or law. The Engineer is an executive officer, he is not required to be trained in the law nor competent to pass on or adjudicate such legal questions.

The protestants, both in the hearing before the Engineer and by their pleading in the district court, raise highly technical legal questions, and on appeal seek to adjudicate the extent of the right of the United States to use the water claimed by it and the priority as between it and the protestants to such use. They claim that their rights are prior to the rights of the predecessors of the United States, that they consented to the use of such waters by such predecessors only if used on the lands now covered by the waters of the Deer Creek Reservoir where they would receive the benefit of the return flow and that under the circumstances surrounding the construction of the Deer Creek Reservoir the United States abandoned its right to the use of such waters and is estopped from now asserting the right to divert them at the new place of diversion. It is clear from their pleadings that the protestants now seek to adjudicate the rights of the United States to the use of these waters at the new diversion place, and do not concede that the decision on whether to grant the application should be based merely upon whether the court finds reason to believe that such change will not impair their rights. Of course, if they make a strong enough

case so that there is no reason to believe that the change can be made without impairing existing rights, it will be the duty of the court to deny the application, even though it does not adjudicate such rights.

Defendants correctly assert that they did not argue the questions discussed in the language objected to. But the United States, contrary to our decision, argued that the so called appeal to the district court is a new and different action from the one determined by the Engineer, and that many issues which the Engineer refused, was not qualified, and had no jurisdiction to determine will, under the pleadings in this case be adjudicated in the district court, and thus the United States will have been sued contrary to its sovereign immunity without consenting thereto. The defendants in their arguments did not answer this contention, apparently conceding that the issues before the district court would be greatly enlarged on the appeal. But we carefully considered these arguments of the United States and have grave doubts that if the issues may be so expanded on the appeal to the district court that such court can acquire jurisdiction to litigate such matters against the United States on account of its immunity as sovereign from being sued without its consent. We also recognize that this is not the court of last resort on that question but the federal courts have the final word thereon. We felt after studying the cases relied upon by the United States that it had misconstrued them to allow an enlargement of the issues on an appeal from the Engineer's decision to the court. We had no doubt that if the issues on such an appeal are limited to the issues before the State Engineer, then Congress has required the Reclamation Department to submit to such an appeal.

Without reaching this conclusion, there is no basis for our decision found in the opinion. To arrive at our decision, we had to rely upon the conclusion reached in the language objected to in our decision or decide other questions which we did not feel were necessary to decide in view of the conclusion reached by such language. So those questions were before us and necessary for our decision under the view we adopted. A modification of the language complained of in accordance with defendants' petition would require us to determine the question of whether the United States is immune from a suit to determine its right to the use of this water which we were not required to determine under the view we took.

The reasons supporting the conclusions objected to are sound. The term "appeal" indicates a re-examination by a higher tribunal of issues determined in the original trial, or at least issues which could have been so determined. It is a misnomer to call it an appeal where the appellate tribunal may hear and determine issues which the original could not have determined and where such determination has the effect of adjudicating such issues which could not be adjudicated by the decision of the original officer or tribunal. We know of no case of an appeal from the decision of an executive board or officer where the appellate tribunal adjudicates new issues not within the jurisdiction of the original tribunal to determine.

* * * * *

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 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. The statute makes no provision for the determination of the priorities of the applicant and the protestants or the extent of their rights. It merely requires an approval or rejection of the application and, if approved, authorizes the applicant to proceed with his proposed work and forbids him to proceed if rejected. See Sec. 100-3-10, U.C.A. 1943. It leaves the adjudication of the rights which the applicant may have or may acquire under the application, and the rights of the protestants, to the courts in another kind of a proceeding and not to the Engineer who is merely an executive officer. Neither the decision of the Engineer nor of the court on an appeal therefrom are based on a determination of the facts or the law applicable thereto but the application must be approved in both cases if the tribunal concludes that there is reason to believe that no existing right will thereby be impaired. * * *

We respectfully submit that the evidence presented was improper, that it sought a balancing of accounts as between the parties prematurely and that it involved matters of law with respect to the rights of the parties. The State Engineer could not and did not rule upon these matters and it was not proper for the trial court to have passed upon them.

CONCLUSION

It is our contention that there was only one issue presented to the district court namely, could the appli-

cant, the United States, change the point of diversion, place and nature of use of the water here involved without impairment of the rights of lower users. The trial court found that this amount of water under prereservoir conditions was consumed and was lost to the river and to the lower users and it is not possible to conceive of a situation wherein these lower users could be hurt by a change of this water. And it is our further contention that the conclusion as to the loss of water through leakage, seepage, evaporation and transpiration was not a proper consideration for the trial court, that it broadened the issues beyond the scope of the State Engineer and attempts to adjudicate the rights of the parties prematurely.

We respectfully submit that the judgment of the trial court should be reversed and that the applications should be approved but limited specifically to the amount of water actually found by the trial court to have been consumed and lost to the river under the conditions that existed before construction of Deer Creek Reservoir.

Respectfully submitted,

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