

1956

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1

 Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinne

Recommended Citation

Brief of Respondent, *US v. Provo Bench Canal and Irrigation Co.*, No. 8391 (Utah Supreme Court, 1956).
https://digitalcommons.law.byu.edu/uofu_sc1/2408

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

In the Supreme Court of the State of Utah

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.

Consolidated
Cases
Nos. 8390
and 8391

BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

This is an appeal by the defendants from two judgments below, namely in Civil Actions No. 15,462 and No. 15,463, Fourth Judicial District Court, in and for Utah County, wherein the decisions of the State Engineer of the State of Utah relative to applications No. a-1902 and No. a-1903, filed by the United States of America, were reversed and set aside. Inasmuch as the fact situations of the two indicated cases are identical, the matters were consolidated for the purpose of this appeal. The parties shall hereafter be referred to as plaintiffs and defendants, and although the two defendants have filed separate briefs, and even though the defendant, State Engineer of the State of Utah, does not join with the defendant United States of America in urging that the court below erred in failing to find that the United States of America was improperly and inadequately represented in the proceedings before the trial court and before the State Engineer of the State of Utah and in failing to grant the untimely demands of the defendant United States of America that the cases be reopened, both briefs of the defendants will hereby be answered together.

STATEMENT OF FACTS

The plaintiffs can generally agree with the Statement of Facts as presented in the brief of defendant State Engineer of the State of Utah, except as to the conclusions drawn from such facts, and although the Statement of Facts contained in the brief of the defendant United States of America correctly sets forth many of the facts pertaining to these matters, such facts as presented are so intermingled with

unwarranted assumptions and misconstructions that the statement as a whole is difficult to follow. Consequently, plaintiffs shall hereupon state the facts in this matter as they appear to them, and as they believe the record will show, and shall further point out the differences from the statements of the defendants.

Plaintiffs can agree that a large area of the Provo Valley, otherwise often known as Heber Valley, in Wasatch County, has been submerged by construction of the Deer Creek Reservoir, and that defendant United States of America has become the record owner of the lands so inundated. It is further agreed that said defendant has become the record owner of the water rights which were appurtenant to said lands prior to its inundation, but it is the position of the plaintiffs that such water rights are no greater than, and are subject to the same limitations in the hands of the United States of America as they were in the hands of its predecessors in interest. (Decree of the Fourth Judicial District Court of the State of Utah, in and for Utah County, Civil Case No. 2888; Defendants' Exhibit No. 9.) Plaintiffs agree that subsequent to the acquisition of said lands, defendant United States of America through its Bureau of Reclamation, Department of Interior, filed with the State Engineer of the State of Utah applications to change the point of diversion and place of use of approximately 53 cubic feet of water per second, which was the amount of water claimed to have been acquired by reason of the acquisition of the submerged land as above set forth. (Applications No. a-1902 and No. a-1903; Defendants' Exhibits Nos. 1 and 2, respectively). Objections were made by the plaintiffs to the granting of such applications, and in due course a hearing on the matter was had before the State Engineer of the

State of Utah. During the course of said hearing, said applications were amended by the defendant United States of America by reducing the amount of water for which a change was sought to approximately 12 cubic feet per second. (Defendants' Exhibits Nos. 1 and 2.) The basis for said amendments before the State Engineer as recognized by the defendants, and as in fact recognized by them throughout the trial below, was an acknowledgment that the rights of the defendant United States of America to the water in question could be no greater than that of their predecessors in interest, and that by reason of Decree No. 2888 (*supra*), plaintiffs were entitled to the return flow of all Provo River water used for irrigation upon land in the Heber Valley, and specifically the land inundated by the Deer Creek Reservoir. Consequently the defendant United States of America through its own experts determined that of the 53 cubic feet of water per second alleged to have been used upon the lands inundated by the reservoir, all but approximately 12 cubic feet per second would come down to the plaintiffs in Utah Valley through return flow, and that as a result the only water which the United States of America could really make claim to was the claimed approximate amount of 12 cubic feet per second which was lost by evaporation and transpiration under pre-reservoir conditions (Tr. 824-837).

Plaintiffs pressed their objections to the said applications as amended before the State Engineer on the theories that under Decree No. 2888 (*supra*) the rights of the plaintiffs to the waters of the Provo River were in fact preferred rights over water users in the Provo Valley, and that users of Provo River water in the Provo Valley were only entitled thereto so long as the water was used upon lands to which

it was made appurtenant under the terms of Decree No. 2888 (supra). Plaintiffs further contended and offered evidence before the State Engineer to support their further position that not only was there no less consumptive loss of water after construction of Deer Creek Reservoir, as contended by the United States of America, but that in fact more water was lost to the plaintiffs as lower users than had theretofore been the case. However, as a result of the hearing before the State Engineer, the said applications, as amended, were approved on February 28, 1949, subject to prior rights and junior rights that might be adversely affected (Defendants' Exhibits Nos. 3 and 4).

Thereupon, as stated in the brief of defendants, plaintiffs filed complaints on appeal (R. 5-19) seeking to have the said orders of the State Engineer reviewed by the Fourth Judicial District Court of the State of Utah, in and for Utah County. No appeal from such orders were sought by the United States of America, although, as stated in defendants' briefs, the United States of America did seek a writ of prohibition before this Honorable Court seeking to prevent plaintiffs' appeal to the District Court as above stated. This writ was denied and the causes were remanded to the District Court for trial. (United States vs. District Court of the Fourth Judicial District, in and for Utah County, et al, 238 P. 2d 1132). Plaintiffs' petition for a re-hearing in the latter case, in an effort to more clearly establish what matters might be determined upon an appeal to the District Court from a decision of the State Engineer, was denied, (United States vs. District Court of the Fourth Judicial District in and for Utah County, et al, 242 P. 2d 774), and the matter proceeded to trial before the Fourth Judicial District Court.

Upon the trial before the District Court, by reason of a failure of proof under the theory advanced by the defendants, to which reference has herein above been made, the defendants further reduced the claim of the United States of America to an aggregate of 9.33 cubic feet of water per second, (R. 240, Case No. 8391, and R. 252, Case No. 8390), such amount representing, under their theory, the amount of water lost under consumptive use in pre-reservoir times and now saved by reason of the construction of the reservoir. At the conclusion of the evidence and argument by counsel, the court entered its Findings of Fact and Conclusions of Law wherein the court determined that by reason of Decree No. 2888 (supra) the defendant United States of America had no right upon which to base their applications for a change, and that such decree was and is res judicata as to any such claimed right (R. 242-243, Case No. 8391). The court further found as an additional ground for reversing the decision of the State Engineer that instead of the defendant United States of America accomplishing a savings of water previously lost through consumptive use, by construction of the Deer Creek Reservoir, more water was actually lost to the plaintiffs than before, because of increased leakage, transpiration, and evaporation (R. 240-241, Case No. 8391).

Defendant United States of America, in its brief under its Statement of Facts (Pages 7, 8, 9, and 10), argues that the United States of America was not properly represented during the course of the proceeding below, and that counsel appearing for said defendant had no authority to do so. Plaintiffs' argument on this point will be set forth later in this brief, but in order that the record may be made clear at this point, attention is directed to the fact that during all stages of the proceedings below, said defendant was repre-

sented by the United States District Attorney, as well as by Mr. E. J. Skeen, Attorney for the Bureau of Reclamation, whom the United States District Attorney was expressly authorized to join as assistant counsel in representing the United States of America (Brief of the United States of America, Appendix D, page 60, lines 5 and 6. See also R. 108, 109, 111, 112, 153, 155, 161, 162, 163, 167, 168, 169, 172, 173, 174, 175, 176, 177, 178, 182, Case No. 8391).

Defendant United States of America, in its brief under its Statement of Facts (page 8), further argues that the Department of Justice had no knowledge of the conduct of the trial below by Mr. Skeen, but attention is again directed to the same brief and references to the record stated above. Said defendant makes emphasis on page 8 of its brief of a statement made by the trial judge, but the defendant fails to direct attention to the full context of the hearing at which such statement was made and from which it appears that such statement was made at a time when the court below was trying to determine the theory upon which said defendants' claims were based (Tr. 827-837).

Defendant United States of America, in its brief under its Statement of Facts (pages 9 and 10) complains of the lower court's failure to grant said defendants' belated motions to re-open the trial and to remand the cases to the State Engineer for further hearing, and then at page 11 of said brief, said defendant asserts that they are appealing from the judgments of the court below in reversing and setting aside the decisions of the State Engineer of the State of Utah. Consequently, it is difficult to determine from said brief just from what the defendant United States of America intends to appeal, but manifestly it could only ap-

peal from the lower court's judgments ordering a rejection of the said applications.

As to the defendant State Engineer of the State of Utah, it is apparent that his appeal is based on the lower court's determination that the United States of America had no water to change, both by reasons of said Decree 2888 (*supra*) and as a matter of fact from the evidence produced at the trial.

ARGUMENT

POINT I

THE RIGHT TO CHANGE THE POINT OF DIVERSION AND PLACE OF USE OF WATER IS NOT AN UNQUALIFIED RIGHT, BUT CAN ONLY BE MADE WITHIN THE INHERENT LIMITATIONS OF THE BASIC RIGHT INVOLVED AND THEN ONLY IF THE CHANGE CAN BE MADE WITHOUT IMPAIRMENT OF ANY VESTED RIGHTS WHETHER PRIOR OR SUBSEQUENT.

Argument as to whether or not 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 would seem to be entirely irrelevant and immaterial to the correct solution of these cases. Whatever the character of such a right may be, both by reason of statute (Section 73-3-3, Utah Code Annotated, 1953) and prior decisions of this Honorable Court (*United States vs. Caldwell*, 64 U. 490, 231 P. 434; *Moyle vs. Salt Lake City*, 111 U. 201, 176 P. 2d 882; See also *Lehmitz vs. Utah Copper Co.*, 118 F 2d 518), a change of point of diversion and place of use of the right to the use of water may be made only if such change does not impair the vested

rights of others. Upon application for such a change being made to the State Engineer, it would seem to be incumbent upon him, as well as upon the District Court upon an appeal from a decision of the State Engineer, to inquire into and receive competent evidence aimed at showing the existence of the right sought to be changed and the basis therefor. As an example to illustrate the point sought to be made, if an application were made to the State Engineer seeking to change the point of diversion of 1 cubic foot of water per second and a deed calling for such an amount of water was offered as evidence of the water right, but the State Engineer or the District Court knew of, or had called to his attention by introduction of evidence, a subsisting decree of a District Court showing that such water right had actually been determined to be only $\frac{1}{2}$ cubic foot of water per second, would not the State Engineer or the District Court be obliged to confine their considerations to the lesser amount? Thus, in this case, it is the position of the plaintiffs that when the defendant United States of America offered in support of its said applications to change, Decree No. 2888 (*supra*) as the basis of its right, the State Engineer and the District Court were bound to look to that instrument to see if there was any right to the use of water existing which could even be the subject of change, and when it appeared upon the face of such decree that such rights as the applicant may have acquired thereunder were conditioned upon use of the water upon lands in the Provo Valley, the return flow from which would drain back into the Provo River, the State Engineer and the District Court were bound to reject the applications on the grounds that there was no right in the first place which could be the subject of such a change as contemplated by the United States

of America whereby the claimed water would be entirely removed from the Provo River drainage area.

Decree No. 2888 (*supra*) was and is binding upon all parties thereto and their successors in interest. Into this latter category, as a successor in interest, defendant United States of America falls. Consequently, plaintiffs contend that the finding of the court below, to the effect that said Decree 2888 (*supra*) was and is *res judicata* and is determinative of the rights of the defendant United States of America is correct. (Findings of Fact Nos. 17, 18, and 19 in Civil Case No. 15,462, and Nos. 18, 19, and 20 in Civil Case No. 15,463 in the court below). Plaintiffs respectfully submit that the court below did not attempt to adjudicate the water rights of the parties, but only recognized the obvious import of an already existing decree (Decree No. 2888 *supra*).

As to the further basis for the decision of the court below, namely that even if the defendant United States of America had a right to the use of water which could properly be the subject of a change application, such changes as proposed by the United States of America in these cases could not be made without impairing the vested rights of the plaintiffs (Findings Nos. 13, 15, and 16, Case No. 15,462, and Nos. 14, 16, and 18, Case No. 15,463 in the court below), the plaintiffs submit that the said court properly entertained evidence as to whether or not such changes as contemplated could be made without impairing vested rights, and the evidence was overwhelming in compelling the conclusion reached by the court (Tr. 59, 59-60, 126-129, 143, 213-219, 233, 240-242, 249, 250-251, 279-281, 284-285, 322, 385-386, 468-472, 474-476, 477-478, 498-500, 506-508, 558-

559, 564-568, 570-571, 585-589, 602, 606, 627-644, 648, 670-677, 682-691, 707-709, 711-713).

POINT II

THE STATUTES OF THE STATE OF UTAH PROVIDE THE NECESSARY PROCEDURE FOR A CHANGE OF THE POINT OF DIVERSION AND PLACE OF USE, TO WHICH PROCEDURE, INCLUDING ACTIONS FOR PLENARY REVIEW ON APPEAL TO THE STATE DISTRICT COURTS, THE UNITED STATES OF AMERICA AS CLAIMANT TO WATER RIGHTS IS SUBJECT.

This Honorable Court has already determined in connection with the applications herein involved that the United States of America, by invoking the jurisdiction of the State Engineer upon the filing of applications Nos. a-1902 and a-1903, also became subject to the laws of the State of Utah respecting the taking of an appeal to the State District Court from a decision of the State Engineer (Section 73-3-14, Utah Code Annotated, 1953; *United States vs. Fourth District Court*, supra; See also Title 43, Section 372, Utah Code Annotated; Title 43, Section 383, Utah Code Annotated; *Rank vs. Krug*, 90 Fed. Supp. 773; *State of Nebraska vs. State of Wyoming*, 295 U. S. 40, 55 Sup. Ct. 568, 79 L. Ed. 1289; *State of Nebraska vs. State of Wyoming*, 325 U. S. 589, 65 Sup. Ct. 1332, 89 L. Ed. 1815; *Mason Co. vs Tax Commission*, 302 U. S. 186, 58 Sup. Ct. 233, 82 L. Ed. 187; *U. S. vs. Humboldt Lovelock Irrigation Light and Power Co.*, 97 F 2d 38, certiorari denied 59 Sup. Ct. 94, 305 U. S. 630, 83 L. Ed. 404; *Pioneer Irrigation District vs. American Ditch Association (Ida.)* 1 Pac. 2d 196; *United States vs. Beebe*, 127 U. S. 338, 8 Sup. Ct. 1093, 32 L.

Ed. 121; City and County of Denver vs. Northern Colorado W. C. District, 276 P 2d 992). Plaintiffs further respectfully submit that by reason of the above, and particularly by reason of Section 73-3-14, Utah Code Annotated, 1953, the motions and suggestions made by the defendant United States of America to the court below (R. Case No. 15,463 below, pages 187, 188-190, and pages 195-196, 200-204, Case No. 15,462) to re-open the cases and remand them to the State Engineer for further proceedings were untimely made. If the defendant United States of America was dissatisfied with the decision of the State Engineer, its remedy was to appeal from that decision to the District Court, a course which said defendant elected not to follow. As stated by this Court in the case of Smith vs. Sanders, 189 P. 2d 701, the only manner in which a decision of the State Engineer may be reviewed is by way of appeal. Said defendant was well satisfied with the decisions of the State Engineer in these matters, until they were set aside by the court below, and then the United States' representatives began complaining that their case had been bungled from the beginning, and they should be permitted to start all over again.

POINT III

THE QUESTION OF WHETHER THE CHANGE APPLICATIONS OF THE UNITED STATES OF AMERICA SHOULD BE APPROVED OR REJECTED WAS PROPERLY BEFORE THE DISTRICT COURT FOR PLENARY REVIEW AND THAT COURT HAD FULL JURISDICTION TO REVERSE OR AFFIRM THE DECISIONS OF THE STATE ENGINEER.

As previously outlined by this Honorable Court in the case of United States vs. Fourth District Court, *supra*, and

as directed under Sections 73-3-14 and 73-3-15, Utah Code Annotated, 1953, the District Court's judgment in reviewing the decisions of the State Engineer is limited to the issues determinable by the Engineer, and in general has the same effect as though it were made by him. As expressly stated under the cited statutes, under an appeal to the District Court from a decision of the State Engineer there shall be a trial de novo, and while the ultimate issue is the same, namely: Is there reasonable cause to believe that the proposed change can be made without impairing the vested rights of others?, the trial court is not bound to accept the State Engineer's interpretation of the evidence submitted to him, nor to limit the evidence to that submitted to the State Engineer, but the trial court has the right and the duty to receive all competent evidence bearing upon the ultimate issue. As will more fully be covered elsewhere in this brief, plaintiffs contend that evidence as to the inherent nature of the right sought to be changed and then evidence going to the question of impairment of vested rights were proper matters for the court below to consider, and further that the court considered only such matters in reaching its decision to reverse the State Engineer.

POINT IV

THERE IS NO SHOWING BY DEFENDANTS THAT THE EVIDENCE WAS IN ANY MANNER INSUFFICIENT TO SUPPORT THE FINDINGS OF THE COURT, BUT IN FACT SUCH FINDINGS ARE FULLY SUPPORTED BY THE EVIDENCE.

In their briefs, both defendants herein complain that the court below exceeded its powers in receiving evidence

which was outside the issues that could have been entertained and heard by the State Engineer, but there is little if any, reference to just which evidence they consider to be objectionable. As a reading of the transcript of the trial will show, most of the witnesses appearing before the court below also appeared before the State Engineer, and generally testified to the same things in both instances. Decree No. 2888, supra, was introduced before the State Engineer as a basis of the right claimed and was as well introduced before the trial court, and while the evidence as to the impairment of existing rights was more complete and involved before the court below than it was before the State Engineer, it all went to the same ultimate issue. The very fact that the statute provides for a hearing on the matter dictates that the Court must make inquiry into the facts before reaching its decision. It would appear that the defendants' main complaint is that the court below was too thorough in getting at the facts. As stated by this Honorable Court in *United States vs. Fourth District Court*, supra, "Of course, if they (plaintiffs) 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", it is plaintiffs' position that the court below so found the issues in favor of the plaintiffs, and that the record fully supports such a finding, (reference is particularly made to that portion of the transcript of testimony indicated under the argument on Point I of this brief), and that consequently the decisions of the court below should be affirmed.

POINT V

THE DISTRICT COURT HAD THE RIGHT TO CONSIDER EVIDENCE GOING TO THE QUESTION OF WHETHER THE REQUESTED CHANGE APPLICATIONS COULD BE GRANTED WITHOUT THE IMPAIRMENT OF VESTED RIGHTS OF OTHERS AND IN CONNECTION THEREWITH COULD RECEIVE EVIDENCE AS TO (a) THE INHERENT LIMITATIONS OF THE RIGHT SOUGHT TO BE CHANGED, and (b) AS TO THE EFFECT OF THE ATTEMPTED CHANGE IN WORKING A NET DEPRIVATION OF WATER AS AGAINST THESE PLAINTIFFS.

As outlined under the argument on Point I of this brief plaintiffs contend that it is the duty of the State Engineer and a District Court upon appeal from a decision of the State Engineer when an application to change the point of diversion and place of use of a claimed water right is filed, to make some finding of the existence of the claimed right in the first place. Section 73-3-3, Utah Code Annotated, 1953, *supra*, which is the basic statute in situations of the kind under consideration here, begins with the following words: "Any person **entitled** to the use of water . . ." (Boldface ours). Such words certainly require inquiry into the existence and inherent nature of the right sought to be changed. In these cases, the defendant United States of America offered as its evidence of claimed right Decree No. 2888, *supra*, which decree upon its face discloses that the said defendant had no right at all to do what it sought to do. The court below didn't attempt to adjudicate the rights of the said defendant; it merely recognized that the matter had already been determined by a valid and subsisting decree.

As stated in the concurring opinion of Chief Justice Wolfe in the second United States vs. Fourth District Court case, *supra*:

“When the United States obtained water rights as appurtenant to lands to be used for the Deer Creek Reservoir, it obtained title not to the fee, but only to the use right in the water. The use right which it obtained was exactly the sort of right, and no more, than any individual or corporation could attain; a right to use the water beneficially, and the basis, the measure, and the limit of that right was beneficial use. It obtains by virtue of its sovereignty no different title, nor a different right, nor a right with a different content than that possessed by its predecessors.”

As appears from the decision of the court below (paragraph No. 4 of the Decrees below) it made the further finding that even if the defendant United States of America had such a right as could be the subject of change applications, such changes as contemplated could not be made without impairing the vested rights of the plaintiff.

POINT VI

THE ONLY QUESTION THAT THE TRIAL COURT DETERMINED WAS THE SAME QUESTION WHICH WAS BEFORE THE STATE ENGINEER, to-wit: SHOULD THE SAID APPLICATIONS BE APPROVED OR REJECTED?, AND THE DISTRICT COURT HAD THE RIGHT TO LOOK TO THE LAW AND THE EVIDENCE RELEVANT AND MATERIAL TO THAT WHOLE QUESTION, ITS DETERMINATION BEING IN AGREEMENT WITH THE LAW OF THIS CASE AS PREVIOUSLY ANNOUNCED BY THIS COURT.

As stated by this Honorable Court in *United States vs. Fourth District Court*, supra, the only issues before the court below in these cases were the same as might have been determined by the State Engineer. However, as heretofore pointed out in this brief, the trial court was under no obligation to accept the findings of the State Engineer on said issues (73-3-15, *Utah Code Annotated*, 1953, supra). The court could and did first look to the existence of a right in the United States of America (*Bates vs. Hall*, 44 Colo. 360, 98 P 3; *Federal Land Bank of Spokane vs. Union Century Life Insurance Co.*, 51 Idaho 490, 6 P 2d 486), and finding that because of prior adjudication (*Decree No. 2888*, supra), it had already been determined by competent authority that there was no right in existence, reversed the decisions of the State Engineer (Paragraph No. 3 of court's Decrees below, supra). As a further basis for the decision of the court below, the trial judge determined, as the State Engineer could have done, and as plaintiffs contend should have done, that the proposed change would impair the vested rights of plaintiffs, (paragraph No. 4 of the court's Decrees below, supra), and consequently that the decision of the State Engineer should be reversed (*United States vs. Fourth District Court*, supra; *East Bench Irrigation Company vs. Deseret Irrigation Company*, 2 Ut. 2d 172, 271 P. 2d 449).

POINT VII

THE ATTEMPT OF THE UNITED STATES OF AMERICA TO EXTEND THE EFFECT OF THIS APPEAL TO QUESTIONS BEYOND THAT OF WHETHER THE JUDGMENT OF THE DISTRICT COURT IN REVERSING THE DECISIONS OF THE STATE ENGINEER WAS PROPER, IS UNSUPPORTABLE AND UNJUSTI-

FIED IN THAT THE UNITED STATES OF AMERICA DID NOT ITSELF APPEAL OR CROSS-APPEAL FROM THE ORIGINAL DECISIONS OF THE STATE ENGINEER AND IT HAS NO BASIS WHATSOEVER IN FACT, OR IN LAW, FOR MAKING ITS PRESENT CLAIMS.

This Honorable Court has already determined that the defendant United States of America, having filed applications with the State Engineer to change the point of diversion and place of use of a claimed right to the use of water, has become subject to all statutory procedures applying to such matters, the same as any other applicant (*United States vs. Fourth District Court*, supra). As provided in Section 73-3-14, Utah Code Annotated, 1953, supra, anyone aggrieved by a decision of the State Engineer may within 60 days after notice of such decision appeal to the District Court for a plenary review thereof. Such an appeal is the only way that a decision of the State Engineer may be reviewed (*Smith vs. Sanders*, supra). The United States of America sought no such appeal within the time required. In fact, over a period of several years while this matter was before the courts, they have vigorously defended the decision of the State Engineer in approving the requested change limited to the amount of water consumptively used as being correct and proper, and it was only after the final argument before the court below, during which argument, the trial judge, while trying to pinpoint the theory of the United States, made the observation that if the United States had purchased 52 cubic feet of water per second, why didn't they claim it all, that the defendant, the United States of America, first expanded its claim to include all water previously used on the inundated lands as possibly being the

proper subject of change applications. The amendments to the applications under consideration, the major ones being made when the matters were before the State Engineer, have been to cause the applications to conform to the theory upon which such applications were based from the start; that is, if the said defendant was entitled to change the point of diversion of any water, it was only such amount as was consumptively used under pre-reservoir times (Tr. 105-106, 140-144, 830-833). The assertion on the part of the Assistant Attorney General (Appendix D. brief of the defendant United States of America) that the Department of Justice was not informed about the conduct of the trial below, or of the reduction in the amount of the claimed right cannot be supported by the record. As heretofore pointed out, the major reductions in the original applications were made when the matters were before the State Engineer, (January, 1949, as shown in defendants's Exhibits 3 and 4, *supra*), and such reductions at that time were made by those whom it is supposed the United States would agree had the authority to make the applications in the first place, and as heretofore pointed out, such reductions were made so as to make said applications conform to the theory upon which they were based. From that time on until the conclusion of the evidence before the court below, with the further minor reduction being made at the trial as above set forth as a result of their own expert evidence, the reduced amounts upon said applications were before the court, a period of some 5 years. During all of that time, as the record will show, appearance was made at every proceeding by the United States District Attorney, in addition to the appearance of Mr. Skeen; and on at least one occasion, December 16, 1949, an appearance on behalf of the United States of

America was made by William H. Veeder, Special Assistant to the Attorney General of the United States and one of the signers of the brief of the United States now before this Court. (See references to the record in this regard under plaintiffs' Statement of Facts, and specifically to R. 161, Case 8391). As even a cursory examination of the record will show, all pleadings on behalf of the defendant United States of America were signed by the United States District Attorney, who would appear by the brief of the said defendant to be an authorized person.

Plaintiffs respectfully submit by reason of the above that the assertion of the defendant United States of America that responsible persons were not advised of the course and progress of these cases is erroneous; that said motions and suggestions to re-open the cases and remand them to the State Engineer were untimely; that there is no authority under the law for such procedure, and that the claimed basis for such demands has no foundation in fact.

It appears significant in this regard that the defendant State Engineer did not join in the other defendants' "Suggestions" to the court below (R. 195-196, 200-204, Case No. 8390), but specifically joined in plaintiffs' motion to dismiss the same as being sham and frivolous (R. 183-184, Case No. 8391).

POINT VIII

NO ONE, WITH OR WITHOUT AUTHORITY, STIPULATED AWAY ANY RIGHT OF THE UNITED STATES OF AMERICA, AND THE REPRESENTATION OF THE UNITED STATES OF AMERICA AT THE TRIAL WAS WHOLLY ADEQUATE AND WITH FULL AUTHORITY FROM THE ATTORNEY-GENERAL OF THE UNITED STATES.

The assertion that anyone stipulated away the rights of the United States is without basis in fact, since as above pointed out, the theory upon which the said applications of the United States were predicated and upon which they were approved by the State Engineer was that by reason of the construction of Deer Creek Reservoir there was less consumptive use of water in connection with the inundated land than existed prior to construction of said reservoir. (Tr. 105-106, 140-144, 830-833, *supra*). Such amendments as were made to said applications were made to conform to that theory and resulted from a lack of proof even under the theory advanced. As testified to by Mr. Larsen, witness for the defendants, (Tr. 142), there never was any intention to claim the amounts of water originally stated in said applications, but such figures were used because of lack of information, and amendments were made at the times hereinabove stated to make said applications conform to what the defendants thought their proof would support.

For the United States of America to now come before the Court after five years and claim that during all of such time it was not represented by anyone in authority appears preposterous. In fact, as above pointed out, two of the very ones who now sign the brief making such an assertion have heretofore appeared for the United States. It is true that Mr. Skeen handled the interrogation of witnesses for the defendant United States, but always under the supervision of the United States District Attorney, and as heretofore pointed out, the District Attorney was expressly authorized by the Assistant Attorney General, the third signatory to the brief now before the Court, to procure the assistance of Mr. Skeen in representing the United States (Appendix D, brief of the United States, *supra*).

CONCLUSION

In conclusion, the plaintiffs respectfully submit that the decisions of the Court below, reversing the decisions of the State Engineer should be affirmed (First) because the trial court correctly determined that by reason of prior adjudication, the United States of America had no right to the use of water which could be the subject of the proposed applications, and (Second) because the evidence conclusively shows that even if such right did exist, the change sought could not be made without impairing the rights of the plaintiffs.

Plaintiffs further submit that the United States of America has now known for more than five years the theory upon which their applications have been predicated, and there is now no valid reason under the law, or as a matter of conscience and equity, why it should now be permitted to re-open these matters.

Respectfully submitted,

A. H. Christenson, Phillip V. Christenson,
and Cullen Y. Christenson,
for CHRISTENSON & CHRISTENSON,
Attorneys for all Plaintiffs except
Provo City

DALLAS H. YOUNG, JR.,
Attorney for Plaintiff Provo City