

1956

# United States of America v. Provo Bench Canal and Irrigation Company et al : Brief of Fisher Harris as Amicus Curiae

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.*

Consolidated  
Cases

Nos. 8390 and  
8391

LED  
MAR 1 1955  
Clerk, Supreme Court.

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**BRIEF OF FISHER HARRIS**  
**AS AMICUS CURIAE**

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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,

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## BRIEF OF AMICUS CURIAE

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(Every indication of emphasis has been added)

## PRELIMINARY STATEMENT

These two cases, 8390 and 8391 in this Court, are here on appeal from decisions of the Fourth Judicial District Court in cases No. 15,462 and 15,463 which in that court were consolidated for trial.

Each was on appeal from a decision of the State Engineer approving an Application for Permanent Change of Point of Diversion, Place and Nature of Use of Water; and each appeal to this Court is from the decision of the Fourth Judicial District Court by which the decision of the State Engineer was "reversed and set aside" and he was "ordered and directed to set aside and vacate his previous order" of approval and "to enter an order disallowing and rejecting the said" applications. (R. 262 as to Case No. 15,462 relating to Application a-1903, and R. 248 as to Case 15,463 relating to Application a-1902.)

Both cases may be disposed of here on the Findings of Fact, Conclusions of Law and Judgments, and no more than three exhibits.

## THE FACTS

During the years from 1935 to 1943 the United States became the owner of certain lands and water rights. The lands, among others, were those since inundated by the waters stored in the Deer Creek Reservoir of the Deer Creek Division of the Provo River Project. The

total of the water rights was 52.492 second feet from the Provo River; they were those decreed to and exercised in the irrigation of those lands. (Finding of Fact No. 12, R. 238 as to Application a-1902, Case No. 15,463; and Finding of Fact No. 11, R. 250, as to Application a-1903, Case No. 15,462.)

If the United States had utilized the acquired water rights upon the lands for the purposes for which they were decreed to and utilized by the former owners, its predecessors, 9.33 second feet of them would have been consumed by evaporation and plant life, and the remainder would have returned to the river for use by Plaintiffs-Respondents and others with rights of diversion and use below. (Finding of Fact No. 12, R. 250-51 as to Application a-1903 and a consumptive use of 1.43 second feet; and Finding of Fact No. 13, R. 238-39 as to Application a-1902 and a consumptive use of 7.9 second feet; a total of 9.33 second feet of consumptive use "under pre-reservoir conditions," as just related.)

Instead, the United States, by its Applications Nos. a-1902 and a-1903 (Ex. 1 and 2) in the office of the State Engineer, proposed to store in the Deer Creek Reservoir and utilize elsewhere, not the entire amount of the waters the right to the use of which it had acquired, but only that part of them which was consumed by evaporation, plant life and transpiration, — that part of them which never had accrued to the river, and never had been available to users below the reservoir lands.

Application No. a-1902 as amended in the office of the State Engineer sought a Change of Point of Diversion, Place and Nature of Use of 10.30 second feet; and a-1903 of 1.524 second feet; but during the course of the hearing in the District Court it was discovered that a portion of the land described in the applications was above the flow line of the reservoir which, being eliminated from consideration, reduced the consumptive use under a-1902 to 7.9 second feet, and under a-1903 to 1.43, or to a total of 9.33 under both. (Finding of Fact No. 12, R. 250-51 as to Application a-1903; and Finding of Fact No. 13, R. 238-39, as to Application a-1902.)

Although doubtless inappropriate to a statement of facts, we suggest it as possibly helpful to a clear definition of the issues, as we understand them, that we give now our opinion of the legal effect of the facts so far related, found as such by the lower Court.

Their unequivocal effect, we think, is to direct the approval of the applications in question. The subject of both, the water the point of diversion, place and nature of use of which is by them proposed to be changed, is water to which the protestants before the State Engineer, "Plaintiffs" below and Respondents here, never did receive and were never entitled to receive. It is water which before the acquisition by the United States of the Deer Creek Reservoir area lands and water rights "went up in smoke"; was lost to the watershed by evaporation and transpiration.



Certainly, we suggest, the Change of Point of Diversion, Place and Nature of Use of THAT water cannot possibly "impair any vested right" of anyone. And that, as we see it, is the only issue: *Will the proposed change impair any vested right?*

Such was the view of the State Engineer who therefore approved the applications. But such was not the opinion of the Fourth Judicial District Court on appeal from his decision. It was its judgment that the issue was not thus limited; that on application for change of point of diversion, place and nature of use of water the inquiry is not confined to the question of impairment or not of water rights BY THE CHANGE, but that on such application there must be a general balancing of *all accounts* between the applicant and the protestants, as in case of general adversary litigation involving all water rights and water relationships of both.

The trial court therefore, and over objection and motion to strike, permitted testimony concerning matters unrelated to a determination of impairment or not by the proposed change alone, and thereupon found the following as facts which were by it concluded as decisive against approval of the Change Applications:

That the Deer Creek Reservoir is constructed on a fault zone, in consequence of which "the plaintiffs have been caused to lose water—in excess of any amount of water sought to be diverted away from them by the

United States by its applications.” (Finding of Fact No. 14, R. 239-40 as to Application a-1902, Case No. 15,463; and Finding of Fact No. 13, R. 251-52 as to Application a-1903, Case No. 15,462.)

That the impounding of water in the Deer Creek Reservoir increased bank storage and growth of vegetation around the perimeter, thus causing an increase in evaporation and transpiration “in excess of the claimed savings” etc. (Finding of Fact No. 16, R. 240 as to Application a-1902, Case No. 15,463; and Finding of Fact No. 15, R. 252 as to Application a-1903, Case No. 15,462.)

These findings close with “*on that account*” and “*therefore*” the Court finds that “said defendant is not entitled to any amount of water thus claimed and accordingly has no water right to change.”

The Fourth District Court, thus balancing all accounts between the applicant and the protestants, found that the credit of 9.33 second feet, the former consumptive use, the only subject of the applications, was offset by two separate debits of something “in excess of” of that, and accordingly, “that the said defendant” (the applicant) “has no water right to change.”

There is some purely speculative testimony of losses through a fault zone and from increased evaporation and transpiration under present conditions, but in neither case is there any as to the quantity or rate of loss, or as to whether it is more or less than or equal to the water

the point of diversion, place and nature of use of which is sought to be changed to Applications a-1902 and a-1903. The verity of this statement will or will not be of importance depending upon whether this Court decides that on such applications there must be a general litigation of all accounts of the parties and the striking of a balance; or that an application for change of point of diversion, place and nature of use of water gives rise to an administrative proceeding in which the inquiry is limited to the question of whether the proposed change will or will not impair any vested right.

Finding of Fact No. 12 (R. 238) as to Application a-1902, and Finding of Fact No. 11 (R. 250) as to Application a-1903, (both paraphrased above) are as follows:

“That the defendant, the United States of America, acquired for the Provo River Project, the land comprising the Deer Creek Reservoir site, together with certain water rights appurtenant thereto aggregating 43.292 second feet as specifically described in Exhibit A of said Application No. a-1902 (9.20 second feet, as specifically described in Exhibit A of said Application No. a-1903) and by reference made a part hereof; subject, however, to that certain decree in the Fourth Judicial District Court in and for Utah County, State of Utah, generally known and referred to as No. 2888 and herein referred to as such.”

But Finding No. 18 (R. 241-42) as to Application a-1902; and Finding No. 17 (R. 253-54) as to Application a-1903 is in this language:

"The Court further finds that the defendant, the United States of America, has failed to prove that it has received, or has, any water right obtained from its predecessors in interest," etc., because (as it finds) under Decree No. 2888 on the Provo River the water rights were appurtenant to the land, and since they cannot be exercised thereon nothing was acquired and nothing can be changed.

The "Findings" following are conclusions of the same effect, — reiterations of the conclusion that the Provo River Decree No. 2888 ties the water to the land, and so that none of it — *not even that formerly consumed* — may be used elsewhere, and that all of it — *even that formerly consumed by evaporation and by plant life* — must "be permitted to flow down Provo River for the benefit of the secondary users below, including plaintiffs in this action."

And so, in necessary effect, that the acquisition of the water rights formerly exercised for the irrigation of the reservoir lands, so far from accruing to any extent whatever to the advantage of the water users of the Provo River Project — EVEN to the relatively trifling extent sought to be changed by the applications — *must redound to the affirmative benefit and enlargement of the rights of the lower users.*

That the water rights formerly utilized on the Deer Creek Reservoir lands were and are subject to the terms of the Provo River Decree No. 2888 is not questioned by

anyone. Its provisions upon which the "Findings of Fact" just paraphrased are founded are these: (Finding No. 10, R. 236 as to Application a-1902 in Case No. 15,463; Finding No. 9, R. 248-49 as to Application a-1903 in Case No. 15,462.)

"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."

## ISSUES RAISED BY THE FACTS

1. Does the Provo River Decree, No. 2888 of the Fourth Judicial District Court, preclude the diversion from the Provo River watershed of ALL water decreed to the predecessors of the United States for use on the Deer Creek Reservoir lands — even that formerly consumed by evaporation and plant life — *even that which the lower users never before received?*

If so, the applications were properly disapproved, and the decisions of the Fourth District Court accordingly should be affirmed, and nothing else concerning them is of consequence.

If not, the following questions remain:

2. On application for change of point of diversion, place and nature of use of water is the application to be approved if the change will not impair any vested right, and disapproved if it does, or should approval or disapproval be irrespective of such impairment or not, and depend instead upon considerations unrelated to the change?

A. If the sole issue on such application is whether the change will impair the vested rights of others, then the applications now before this Court ought to have been approved, and the decisions of disapproval by the Fourth District Court should be reversed.

B. But if an application for change of the point of diversion, place and nature of use of waters is in the nature of a general adjudication suit involving all rights and grievances of the applicant and those who protest, then it was proper for the lower Court to permit testimony of losses through a fault zone and due to an increase in evaporation and transpiration under present conditions, and in such event it must be determined whether the findings as to such losses are supported by competent testimony.

If either of these findings is relevant *and* within the jurisdiction of the District Court to make *and* is so supported, then the applications were properly rejected, and the judgments of the lower Court should be affirmed.

If not relevant *or* if outside the jurisdiction invoked by the filing of the applications, the decisions of rejection should be reversed, *even if* the Findings were based upon sufficient competent testimony.

So also, if relevant and within jurisdiction but not sufficiently supported.

THE DECISIONS OF THE FOURTH JUDICIAL DISTRICT COURT DISAPPROVING APPLICATIONS a-1902 AND a-1903 IN THE OFFICE OF THE STATE ENGINEER SHOULD BE REVERSED FOR THE FOLLOWING REASONS.

1. The Provo River Decree No. 2888 does not prohibit a change of point of diversion, place and nature of use of the water which under pre-reservoir conditions was lost to the Provo River watershed by evaporation and plant life.

2. The change of point of diversion, place and nature of use of the water lost to the Provo River by evaporation and plant life under pre-reservoir conditions could not impair the vested rights of anyone, and the applications should therefore have been approved.

3. The only question raised by an application for change of point of diversion, place and nature of use is whether the change will impair the vested rights of others, and the findings of losses through a fault zone in the Deer Creek Reservoir site, and from an increase in evaporation, etc., under present conditions were therefore irrelevant and immaterial, and were not within the

jurisdiction invoked by the filing of the Applications, and in any event are, as to their extent, unsupported by testimony.

## ARGUMENT

### POINT 1

THE PROVO RIVER DECREE NO. 2888 DOES NOT PROHIBIT A CHANGE OF POINT OF DIVERSION, PLACE AND NATURE OF USE OF THE WATER WHICH UNDER PRE-RESERVOIR CONDITIONS WAS LOST TO THE PROVO RIVER WATERSHED BY EVAPORATION AND PLANT LIFE.

The Decree provides "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."

This adds nothing to what would have been the law of the River had it not been made. It prohibits nothing not forbidden by the Common Law of Waters in the Arid Region States. It is in perfect accord with the Statute, U.C.A. 1953, 73-3-3, neither adding to nor detracting from its clear import.

"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."

And it is a sufficient refutation of the "Findings," Conclusions and Judgments of the Fourth District that the Provo River Decree No. 2888 is decisive against approval of Applications a-1902 and a-1903 — it is sufficient in impeachment of those Findings, Conclusions and Judgments to merely call attention to the fact that the applications do not seek to "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 irrigated thereby.*"

Neither application as finally submitted suggests approval of a change of the "place of use of" or a diversion "from the channel of said river" "or from the lands heretofore irrigated thereby" of any part whatever of the "seepage or drainage" of "said waters" decreed for the irrigation of the reservoir lands. Instead, they ask nothing other than the approval of a change of the place of use of water formerly consumptively used, of water formerly consumed by plant life and evaporation, thus leaving to the lower users ALL of the "seepage or drainage" — *precisely what they had*, exactly what the Decree and the Common and Statute Law assures to them — *neither a diminution nor enlargement of their rights.*

Finding of Fact No. 13, R. 238-39, as to Application a-1902 in Case No. 15,463, and Finding No. 12, R. 250-51

as to Application a-1903 in Case No. 15,462, are clear-cut as to this, viz: That, as finally presented, the applications seek approval of a change of the place of use of no part of that which is prohibited from change by the Decree, but only of that which the lower court users never have received, and to which they are not or ever have been entitled.

"13. That prior to the construction of Deer Creek Dam and Reservoir the owners of the land in said reservoir site, predecessors of the United States, diverted 43.292 second feet of water from the Provo River and tributaries under and by virtue of the water rights described in said Exhibit A of application a-1902, and caused their said lands to be irrigated therewith; that of the water so diverted 10.30 second feet was consumed by evaporation and plant life as a result of irrigation, and the remaining 32.992 second feet returned to the Provo River for use by downstream water users; that the United States, as successor in interest to said land owners, proposed by said Application a-1902 (as amended in the State Engineer's office) 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 B to said application a-1902 which exhibit is by reference made a part hereof; that during the trial it was stipulated that a portion of the land described in said Exhibit A lies above the flow line of the reservoir; that the water rights appurtenant thereto should be eliminated from the application and that by reason thereof the water right sought to be changed would be reduced from 10.30 to 7.9 second feet; that under pre-

reservoir conditions said 7.9 second feet of water was lost to the river and was consumed by evaporation and plant life.”

(Finding No. 12 as to application a-1903 is identical except that it relates to a total water right of 7.9 second feet, and a consumptive use of 1.43 second feet.)

## POINT 2

THE CHANGE OF POINT OF DIVERSION, PLACE AND NATURE OF USE OF THE WATER LOST TO THE PROVO RIVER BY EVAPORATION AND PLANT LIFE UNDER PRE-RESERVOIR CONDITIONS COULD NOT IMPAIR THE VESTED RIGHTS OF ANYONE, AND THE APPLICATIONS SHOULD THEREFORE HAVE BEEN APPROVED.

This has in effect been covered under point No. 1, but even if it were not, it is difficult to elaborate the obvious; and the validity of this proposition is, we think, so perfectly apparent as hardly to admit of embellishment. To say that the water rights of anyone are impaired by a change in the place of use of water which never was available to him is to utter an absurdity.

This Court has held again and again — recently in *United States v. District Court*, 238 P. 2d, 1132 — that the State “Engineer (and the District Court on appeal) 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.”

In spite of which the Fourth District Court rejected applications a-1902 and a-1903 when it is perfectly clear that the applicant can establish valuable rights thereunder, and when there is not only probable cause to believe, but absolute certainty that this may be done without impairing the rights of anyone. And not only that: not only did the lower court deprive the applicant of that to which it is clearly entitled; *but it, unlawfully and unjustly, awarded to the protestants the water the subject of the applications.* (Last three lines of paragraph 3 of Judgments, R. 247 as to application a-1902, case 15,463; and R. 261 as to application a-1903, case 15,462.)

We have asserted above that “to say that the water rights of anyone could be impaired by a change in the place of use of water which never was available to him would be to utter an absurdity”; and so it would be. It is proper to add, however, that the Fourth District Court has not done any such thing. It is true that in case No. 15,462 only there is a “Finding of Fact” (No. 21) “That to make said change as proposed by Defendant United States of America, or any part thereof, would impair the vested rights of the Plaintiffs.”

It is nevertheless perfectly clear that this is a barren and unsupported legal conclusion, and that the actual Findings show beyond doubt that such is not in any sense the ground of decision. Instead it is a necessary inference that the lower court was satisfied that the *proposed change* would NOT impair any vested rights, but only

that *other results entirely independent of and unrelated* to the change would or have impaired those rights. We say that such is necessarily inferable because the Court concludes as a part of its Findings as to these other results that “*therefore*” and “*on that account* said defendant is not entitled to any amount of water thus claimed and accordingly has no water right to change.”

It may be noticed here that the original protests presented to the State Engineer and protestant’s “complaints” (Par. 18, R. 16, Case 15,462) before the District Court say something of the operation of the Provo River since the construction of the Deer Creek Reservoir; that the amount of “return flow” released will accrue during high water, when it cannot be used, and will not be available during low water when needed.

*There is no Finding as to this.* But suppose there were; it would have to do with administration of the river by the State Engineer’s Commissioner on the Provo. If for any reason whatever the lower users do not receive the return flow in the amount, at the rate and at the time they may be entitled to receive it, perhaps the Engineer ought to be asked to do something about it. (There is no intimation that he ever has been.) The applications a-1902 and a-1903, however, *do not seek permission to change any part of the return flow*; do not ask the Engineer for permission to change any part of what the lower users formerly received, *but only of water the lower users never did receive*, of water the disposition

of which can be of no concern to them; and if it were true, as alleged but not found, established or so much as attempted to be, that protestants do not or will not receive the return flow to which they may be entitled, what has that to do with impairment or not of any vested right of theirs by reason of a change of the place of use, etc., of water to which they are *not* entitled?!!!

Which brings us to our third point.

### POINT 3

THE ONLY QUESTION RAISED BY AN APPLICATION FOR CHANGE OF POINT OF DIVERSION, PLACE AND NATURE OF USE IS WHETHER THE CHANGE WILL IMPAIR THE VESTED RIGHTS OF OTHERS, AND THE FINDINGS OF LOSSES THROUGH A FAULT ZONE IN THE DEER CREEK RESERVOIR SITE, AND FROM AN INCREASE IN EVAPORATION, ETC., UNDER PRESENT CONDITIONS WERE THEREFORE IRRELEVANT AND IMMATERIAL; WERE NOT WITHIN THE JURISDICTION OF THE STATE ENGINEER INVOKED BY THE FILING OF THE APPLICATIONS, AND IN ANY EVENT ARE, AS TO THEIR EXTENT, UNSUPPORTED BY TESTIMONY.

The right of the owner of a water right to change his original point of diversion and place and nature of use when that may be done without prejudice to the rights of others has always and everywhere existed independently of statute — as matter of course. Why not!

“The law is settled beyond all question that where an appropriation has been once legally consummated, or before the consummation of the right, for that matter, and the appropriator is entitled to the use of a certain quantity of the water

flowing in a natural stream, he may originally take out the same at any point on the stream that he may see fit, if the vested rights of others are not injured thereby. Again, under the same limitation he may change his point of diversion at pleasure, provided in so doing the rights of others, either prior or subsequent in time to him, are not materially injured by the change. The authorities upon the subject hold that, in all changes of this nature the effect of the change upon the rights of others which have vested at the time is the controlling consideration, and that, in the absence of any injurious consequences to the rights of others, any change an appropriator desires to make is legal and proper. The use to which the water is applied makes no difference as to the right to change the point of diversion, so long as the rights of others are not injured."

*Kinney on Irrigation and Water Rights in the Western States*, Vol. 2, page 1501.

In Utah, however, an orderly procedure of record has been provided, and, though the basic right as at Common Law is affirmed, such changes may not be made except on application to the State Engineer.

"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. . . .

"No permanent change shall be made except on the approval of an application therefor by the State Engineer."

U.C.A. 1953, 78-3-3.

*The statute defines the issue upon applications under this section.* The United States was therefore bound to show itself as a “person entitled to the use of water” the subject of these applications and, *prima facie*, that the proposed change would not “impair any vested rights.”

Nothing else is required as a condition to the granting of the applications. The United States was not required to prove, for example, that it was not indebted to the protestants or any of them; was not liable to any of them for damages for this or that action or neglect; nor was it bound to notice, nor could the Engineer or the District Court properly notice, any of the other completely irrelevant matters by which protestants have complicated a proceeding of the utmost simplicity.

An application filed in the office of the State Engineer is not an *Action at Law or in Equity against anyone*. It does not initiate a proceeding of any nature *against* anyone. Instead it is precisely what it is denominated; it is an APPLICATION, an application directed to the Engineer who either approves or disapproves it, protested or not, in response to considerations imposed by the Legislature and the decisions of this Court.

“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."

*United States v. District Court*, 238 P. 2d 1132, at 1137.

U.C.A. 1953, 78-3-3, provides that "The procedure in the State Engineer's office and the rights and duties of the applicants with respect to applications for permanent changes of point of diversion, place or purpose of use shall be the same as provided in this title for applications to appropriate water," thus requiring notice by advertisement and opportunity to "any person interested" — "to protest against the granting of an application." Opportunity "to protest against the granting of an application" on the ground specified by the statute; not to *litigate* and have adjudicated, or even have noticed, all matters of difference between protestants and the applicant; surely not on the grounds that the applicant is a rascal or deadbeat or that he has been guilty of this or

that wrongful act against the protestant — not even wrongful acts affecting the protestant's water rights for the redress of which recourse to the Courts may be had in an appropriate action.

The protest must relate to the application. In case of one to appropriate water the ground of objection to its approval must be that there is no reason to suppose there is unappropriated water in the proposed source; and, as to a change application, that there is no "probable cause to believe" that the change may be made "without impairing the rights of others."

*United States v. District Court*, 238 P. 2d 1132 at 1137.

"Such a decision (of the State Engineer) 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."

*United States v. District Court*, 238 P. 2d 1132 at 1137.

But this is somewhat of digression; for the point to which our comment is presently directed is not merely that the Fourth District Court was without jurisdiction to adjudicate, as it did, to take testimony, Find, Conclude and enter Judgment, as it did, that certain acts of the United States unrelated to the applications had deprived protestants of water in excess of that as to which it had made applications to the Engineer to change the point of

diversion, place and nature of use, and “therefore” and “on that account” reject them; but rather that the acts and their results (as found) are of no significance whatever to the inquiry, are as irrelevant, as foreign to the subject as the fact, if it were such, that the applicant is indebted to the protestants in money in excess of the value of the water permission for the change of which has been asked of the Engineer.

And this not because, but entirely independent of lack of authority in the Engineer and District Court to adjudicate water rights, and independent also (in the instant case) of any immunity of the United States; but because such matters are in no sense or degree pertinent to the “narrow question” as Chief Justice Wolfe put it, “presented to the Engineer.” *United States v. District Court*, 242 P. 2d 774, at 781.

“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.”

*United States v. District Court*, 242 P. 2d 774 at 777.

There is no pretense in the Record that if applications a-1902 and a-1903 are approved any “existing right will thereby be impaired.” And suppose it were true, as improperly as well as erroneously found, that the Deer

Creek Reservoir leaks: no one has or will suggest that it was the filing of the applications that caused the leakage, or that it will be augmented or that the consequence will be affected by their approval. Neither has nor will anyone contend that if the construction or the practical operation of any part of the Provo River Project does now or hereafter adversely affect the Protestants or anyone else, that they are without remedy. It is nevertheless pertinent to notice that the Provo River is not administered by the United States or the water users of the Provo River Project, but by the State Engineer.

The Findings of losses due to a fault zone in the reservoir site and from an increase in evaporation and to plant life and transpiration in excess of the water the change of place of use of which is sought by the applications are not supported by any testimony.

This subject is so far afield that we are reluctant to enter upon it. It occurs to us, however, that the Findings and the Judgments in accord with them ought not to be repudiated on the sole grounds of irrelevancy and lack of jurisdiction to make them, but on the further ground that they are not substantiated.

The only protestant's testimony as to losses due to a fault zone in the Deer Creek Reservoir site was from the witness Hansen. It closes with this: "Q. You have no idea what this loss would be?" "A. I have no idea." (Tran. 702, lines 8 and 9.)

As to losses due to bank storage and increased plant life around the perimeter of the reservoir, we are unable to find anything except the testimony of Edwards (Tran. 704-713) who says something of increase in vegetation and a higher water table since the reservoir has been in operation. But he says nothing we can find as to the loss of water either as to amount or at all.

Looking at these Findings from the point of view just taken serves to accentuate, if accent were possible, their remoteness from the question submitted by the applications; for what we have just done is to show them to be without basis in fact when, even if well authenticated, they would be of no significance to the inquiry.

If a mere application to the State Engineer for approval of a change of point of diversion or place or nature of use may be distended and distorted from its strictly limited nature and purpose, and may, even by possibility, suffer a metamorphosis of such drastic effect as to change it into a lawsuit of a scope and hazard to the applicant limited by nothing except the whim or the will of another, then no one would have the temerity to address the Engineer at all.

But that is the alteration to which the applications a-1902 and a-1903 in the office of the State Engineer were subjected in the Fourth District Court. After finding that the applications sought the change of no more than the water consumed by evaporation and plant life, the court,

instead of concluding as of course that the change of point of diversion, etc., of that water, since it had never been available to use below, could impair no rights and therefore that the applications ought to be approved — the Court rather than closing the proceeding at that point, as the Engineer had done and as this court in practical effect directed, *went beyond and outside the proceeding before it* and the sole issue of impairment or not of rights by the change, and tried a law suit—Found, Concluded and entered Judgment to the effect, *not that by the proposed change it would*, but that the United States by constructing the Deer Creek Reservoir and impounding water therein has deprived the protestants of water to which they are entitled — something completely without the scope of the question submitted, irrelevant and immaterial to the issue, and beyond the extent of the limited jurisdiction invoked by an application addressed to the State Engineer.

But there it is in the Record: “Ordered, Adjudged and Decreed,” and if allowed to stand, if not repudiated and eradicated by this Court, may well be of even more serious consequence to the water users of the Provo River Project than the wrongful denial of the applications themselves.

Though their interests were the same, though both the writer of this and the Attorney General of the United States desired the Engineer’s approval of Applications a-1902 and a-1903, the writer, through counsel for the

water users of the Provo River Project, affirmatively disapproved of and devoted his best effort against an attempt, on any grounds, to deprive the protestants of their right of appeal to the District Court, and sought to dissuade the Attorney General from making it.

Failing in this, he felt that the decision and the supporting clarifying opinions in *United States v. District Court*, 238 P. 2d 1132, and 242 P. 2d 774, were as they ought to have been — that the writ sought by the United States was properly denied on each and every ground stated. Holding in the first instance “that by filing and relying upon its approved application the United States has submitted to the jurisdiction of the District Court to review the Engineer’s decision,” this court in 238 P. 2d and, on Petition for Rehearing, in 242 P. 2d, made a comprehensive statement of the law applicable to applications made to the State Engineer: such applications do not commence a suit at all, but only an administrative proceeding; water rights or priorities may not be adjudicated.

The Court at considerable length reassured the Attorney General that the extraneous issues sought to be injected by the protestants had not been considered by the Engineer and could not be by the District Court on appeal from his decision.

“The protestants thereupon commenced the action in the district court to review such decision. In their complaint, many technical, legal and equi-

table grounds are set up to defeat the application and the right of the United States to such waters, thereby indicating that such plaintiffs proposed to litigate in that action the validity of all such claims. The engineer recognized that he had no authority to adjudicate many of those claims, and, as previously pointed out, the issues before the district court in reviewing his decision are limited to those which the engineer had the right to determine. So the district court in reviewing the engineer's decision also has no right to adjudicate the rights of the parties to the use of this water but can only determine whether there is reason to believe that some of this water can be diverted and used as proposed by the application without impairing the rights of others . . ."

"Since the only issues that the district court can determine in that action are those which are inherent in the engineer's decision which only requires a determination of whether there is reason to believe that sometimes some of such waters may be diverted at the new diversion place and used as the application proposes without impairing the rights of others, the United States is subject to no greater risk in the review by the district court than it was in filing its application with the state engineer. In other words, this is merely an appeal to the court from an administrative decision, and the United States does not risk an adjudication of its rights on such appeal."

*United States v. District Court*, 238 P. 2d 1132, at 1138-39.

This is in strict accord with the uniform pronouncements of this court, and ought to have been perfectly ade-



quate to assure the impossibility of each of the several errors of the Fourth District Court which are the occasion of this appeal.

Nevertheless it must be admitted that, except for this appeal, the apprehensions of the Attorney General would have been well founded.

### CONCLUSION

Applications a-1902 and a-1903 do not seek or permit a general accounting, do not ask or permit the Engineer or the District Court to determine the effect of the construction and operation of the Provo River Project; they seek nothing except approval of a change of point of diversion, place and nature of use of water lost to the Provo River by evaporation, etc., and never available to users below. Such approval follows as matter of course from the indisputable establishment of the former consumptive use and the limitation of the scope of the applications to it. The change of that water, the right to the use of which is vested in the applicant, could not possibly impair the vested rights of anyone.

We suggest it as rather obvious from the Findings, Conclusions and Judgments in these cases 15,462 and 15,463 that the Fourth District Court, though finding facts logically impelling the approval of the applications, completely misapprehended the nature and scope of the inquiry presented by them, and thus fell into flagrant and palpable errors compelling reversal.

## COMMENT ON BRIEF FILED BY THE UNITED STATES OF AMERICA

The conduct of this proceeding by the Department of Justice of the United States has been and still is the occasion of considerable anxiety to the actual water users of the Provo River Project. They approve of very little of what has been done by J. Lee Rankin, Assistant Attorney General of the United States, and William H. Veeder, Special Assistant, concerning Applications a-1902 and a-1903. With very much of it they strongly disagree; and they are greatly concerned and anxious as to what ought to have been done by them but was not—concerned and anxious, for example, that no brief was filed by the United States in the Fourth District Court; that the case there was thus virtually let to go by default; and that the brief here has little to say of the merits.

Instead, much is attempted to be made of an alleged lack of authority of Mr. E. J. Skeen to appear for the United States in the District Court and that he was, so they say, without authority to reduce the water sought to be changed from a total of 52.492 second feet under both applications to a total of 9.33.

The applications were filed in the office of the State Engineer by the Bureau of Reclamation, Department of the Interior. They originally sought to change the point of diversion, place and nature of use of 52.492 second feet, the full water right purchased by the United States

with the Deer Creek Reservoir lands. Mr. Skeen as Attorney for the Bureau of Reclamation presented the matter to the Engineer. The Department of Justice, at that stage, had neither duty nor authority touching the matter. The Bureau of Reclamation had both. (Sec. 8 of the Act of June 17, 1902, 33 Stat., 388-90.)

Thereafter it became apparent that no more than the former consumptive use could be changed without impairment of the rights of users below on the Provo River, and Mr. Skeen therefore amended the applications accordingly. It was his duty as a member of the Bar and as attorney for the Bureau of Reclamation to do so, to ask for his client what he thought it was justly entitled to receive — no more and no less.

This we think is perfectly obvious that to seek approval of a change of point of diversion, etc., of no more than the consumptive use was appropriate in justice to the lower users, and that to ask for change of less would have been an injustice to the United States and the Provo River Project water users.

There was no surrender of rights, as Messrs. Veeder and Rankin assert. No more was done than to limit the amount of water approval of the change of which was sought by certain applications; and if the Attorney General of the United States can bring himself to do so, he and his assistants are still free to claim the remainder. It is our opinion, of which he is well aware, that any such

attempt would be as unreasonable and unconscionable as the attempt of the protestants here to deprive the Provo River Project of the water formerly consumed by the irrigation of the Deer Creek Reservoir lands, to thus augment their water rights, and so to unjustly enrich themselves at the expense of the water users for whose benefit it was constructed.

Regardless of that, however, the Assistant Attorney General and his Special Assistant were fully informed of the amendment of Applications a-1902 and a-1903 in the office of the State Engineer long before the commencement of the hearing concerning them in the Fourth District Court. (Record in *United States v. District Court*.) They were fully and completely cognizant of the fact that the applications brought before the Court had been limited to the former consumptive use, and yet they gave neither direction, advice, or so much as a bare suggestion that any other course ought to have been or ought to be taken until after the hearing before the District Court had been concluded.

It was not until then that "Washington" intruded to still further cloud and obscure a simple proceeding already subverted by the diversionary tactics of the protestants.

As to the authority of Mr. Skeen: the brief states (page 20) that "The Attorney General of the United States of America did not authorize the appearance by the representative of the Bureau of Reclamation in these

causes." It goes on (page 21) however, to show by citing (pages 58-61) an affidavit of J. Lee Rankin, that he did. It appears therefrom that Mr. A. Pratt Kesler, United States Attorney, had asked if E. J. Skeen could be authorized to represent the United States. Mr Rankin replied that "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.*"

Mr. Skeen, *thereby explicitly authorized so to do*, did assist Mr. Kesler "in representing the United States." Both Mr. Kesler and Mr. Skeen were present on every day of the hearing, Mr. Skeen assisting to the extent as shown by the Record. There was no limit placed upon the quantum of the assistance authorized.

And yet Messrs. Rankin and Veeder now assert that (page 23) "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."

This, we submit, is sheer nonsense.

The brief states at page 24 that "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.”

As to this everyone concerned, except the protestants and Fourth District Court, seems to be in perfect agreement.

The lack of jurisdiction may be stated on three separate grounds:

1. An application to the State Engineer for his approval of a change of the point of diversion, etc., of water raises one simple question: Will the change impair vested rights of others? Anything outside of that single issue is of course irrelevant and immaterial, and, in that sense, beyond the jurisdiction invoked by the filing of the application.

2. An application addressed to the State Engineer does not authorize him or anyone to adjudicate water rights, but only to decide whether “there is probable cause to believe that applicant may be able to establish rights under his application without impairing the rights of others.”

3. While the exercise of Utah water rights of the United States may be subject to the administrative regulations of the State Engineer, neither he nor anyone else may adjudicate its rights without its consent. Certainly not in response to a mere application addressed to the State Engineer.

The Brief at page 28 asserts that “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.*”

This is undoubtedly true. Under the unique facts as to the applications in question there could be no evidence of or even pretense of injury by the change for the approval of which they were filed with the Engineer; and the protestants were therefore compelled either to accept the decision of the State Engineer and abandon their appeal or, in the District Court, to divert attention from them and from the narrow question presented by them—to completely withdraw from a hearing on the applications and to enter a field of controversy foreign and unrelated, one far outside the jurisdiction (in every sense) of the Engineer and District Court.

Brief of the United States of America, pages 29-30:

“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. The United States moved to have the causes remanded to the State Engineer to permit it to demonstrate the effect of that importation. 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."

This again is unmitigated nonsense and, except for the austerity of this Court, it would be difficult, perhaps impossible, for the writer to refrain from the use of even more forceful and opprobrious nouns and modifying adjectives.

"The United States moved to have the cause remanded to permit it to demonstrate the effect of that importation."

Such demonstration could not possibly be of any significance to the hearing before the State Engineer or before the District Court or in any event except on the theory of counsel for the United States that it was entitled to change the point of diversion, etc., of the entire 52.492 second feet, apparently conceding that to change more than 9.33, the former consumptive use, would impair vested rights, but proposing that the impairment be made good by exchange of all or part of the increment to the Provo River due to the importation and use of foreign waters on Project lands.

In this Counsel for the United States has misapprehended the nature of and the question presented by the applications a-1902 and a-1903 in much the same effect as the Fourth District Court did, the one treating them



as though they were "Savings Applications" and the other as though they were either already applications to exchange or, if remanded to the Engineer, they might be amended to such purpose as to the difference between 52.492 and 9.33.

The motion and its object were completely foreign to the matter before the Court, were in relation to something which, if worthy of notice at all, must be the subject of an application of very different nature than a-1902 and a-1903.

It is in fact already the object of an application of very different nature: Application No. 12144 filed in the office of the State Engineer in 1936, which was before this court in *Tanner v. Bacon, State Engineer*, 103 Utah 494.

It is one which may very well be of importance in future relationships between the water users of the Provo River Project and the protestants of the applications now under consideration, just as the effect of the construction of the Deer Creek Reservoir may be; but neither matter is relevant in any sense or degree to the applications a-1902 and a-1903: simple applications to change the point of diversion, place and nature of use of water *which in practical effect always has been diverted from the Provo River watershed.*

## COMMENT ON RESPONDENTS' BRIEF

This Brief raises few, if any, questions not answered in full by our analysis above (Pages 1 to 29). What it does accomplish is to accentuate, by explicit iteration, the fundamental fallacies which induced the Lower Court to virtually ignore the matter brought before it and to enter upon a field of inquiry in every sense foreign to the question submitted.

The fallacy that the applications a-1902 and a-1903 are "Savings" applications (applications to appropriate) instead of applications to change the point of diversion of water a very small part of the total amount bought and paid for by the United States for the benefit of the Provo River Project; the fallacy that the water instead of being a small part of that acquired for such purpose is claimed as "now saved by reason of the construction of the reservoir." (Resp. Br., page 6.)

"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 the Deer Creek Reservoir there was less consumptive use of water in connection with the inundated land than existed prior to construction of said reservoir." (Resp. Br., page 21.)

That this is basic error is perfectly obvious from a mere glance at the applications themselves. The United States at no time attempted to establish the effect of the

construction of any part of the Provo River Project. On the contrary, it persistently resisted inquiry as to that as something entirely irrelevant to the question raised by its applications: simple applications to change the point of diversion, place and nature of use of water which in practical effect always has been diverted from the Provo River watershed, to change the point of diversion, place and nature of use of water that lower users never have received, water the point of diversion of which and the place and nature of use of which cannot, by any conceivable possibility, be of legitimate concern to them.

It must be conceded, must be taken as matter of course, that if the construction and operation of the Deer Creek Reservoir has, or if at any time in the future it does, interfere with or adversely affect the use of water to which lower users are entitled, that the State Engineer will correct his distribution accordingly. Certainly; but as we stated in our original analysis, "What has that to do with the impairment or not of any vested right of theirs by reason of a change in the place of use, etc., of water to which they are *not* entitled?!!!" And that lower users never received or were entitled to receive the water the subject of the applications here cannot be denied. That has been found as a fact which is not and cannot be questioned.

The other fallacy which, being iterated and reiterated again and again in Respondents' Brief, may be taken as the basic ground of their case, is that the Provo River

Decree No. 2888 precludes the use of any part of the water rights acquired by the United States elsewhere than upon the lands for the irrigation of which they were originally decreed.

This, urged throughout their Brief, seems to be the principal if perhaps not the sole foundation upon which Respondents have chosen to rest, and it is none at all.

The Decree provides:

“ . . . 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 from the channel of said river or channels, or from the lands heretofore irrigated thereby.”

We believe we have completely refuted the claimed effect of this in our original analysis at pages 12 to 15 above, by pointing to the fact that applications a-1902 and a-1903 do not seek the doing of anything prohibited by the decree, but leave the seepage and drainage untouched, for use as always before, of “the lands heretofore irrigated thereby.” The prohibition is not and could not be absolute; its purpose and effect is clearly that of the Statute (73-3-3, U.C.A. 1953), to inhibit changes that would impair vested rights, and not, as here, such as could not possibly affect them.

The Brief of the Attorney General of Utah in behalf of the State Engineer also affords adequate refutation of

Respondents' claims in this regard (Point I of his Brief, pages 6 to 16), pointing out that 73-3-3, U.C.A. 1953, expressly authorizes a change of place of diversion and place and nature of use if no vested rights will be thereby impaired, that the Decree upon which Respondents rely is in accord with the Statute rather than opposed, but that if opposed it is the Statute which must govern. He goes on to review the pertinent decisions of this court uniformly supporting his proposition.

We suggest it is significant and worthy of notice that Respondents' Brief makes no attempt whatever at reply to that filed for the State Engineer.

That Respondents protested Applications a-1902 and a-1903 as originally presented to the State Engineer is understandable, for they first sought permission to change the point of diversion, place and nature of use of *all* water formerly utilized on the Deer Creek Reservoir lands, both the return flow to which Respondents as lower users were entitled to receive *and* the amount formerly consumed, to which they were not. But that they persisted after the applications were amended to limit the change to water which in practical effect always had been diverted is scarcely credible unless for the sole object that its amount or rate be established—as it actually was by Findings which they do not seek to impeach.

But that was not their sole object nor is it the only effect of the Judgments rendered by the Fourth District Court. Their further object and the further effect of

those Judgments has been, not only to deny the diversion and use for the benefit of the Provo River Project of the water never before received by Protestants, but to have it awarded to them—as it was—their rights so far from being impaired, being thus affirmatively and substantially and unlawfully and unconscionably enlarged.

## FINAL CONCLUSION

Respondents' Brief (page 14) calls attention to a statement of this court "in *United States v. Fourth District*, supra":

"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."

But so far from having made a strong case, protestants made no case at all. The Provo River Decree No. 2888 affords nothing in aid of it; and as to the impairment or not of any rights of theirs by the approval of applications a-1902 and a-1903 we repeat from our comment on the Brief filed by the United States of America (practically the only part of it with which we agree) :

"The Brief at page 28 asserts that '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.*'"

“This is undoubtedly true. Under the unique facts as to the applications in question there could be no evidence or even pretense of injury by the change for the approval of which they were filed with the Engineer; and the protestants were therefore compelled either to accept the decision of the State Engineer and abandon their appeal or, in the District Court, to divert attention from them and from the narrow question presented by them—to completely withdraw from a hearing on the applications and to enter a field of controversy foreign and unrelated, one far outside the jurisdiction (in every sense) of the Engineer and District Court.”

Respectfully submitted,

FISHER HARRIS

*Amicus Curiae*