

1955

Tooele City v. Settlement Canyon Irrigation Co. : Brief of Respondent

Utah Supreme Court

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Ralph W. Millburn; Homer Holmgren; Attorneys for Respondent;

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Case No. 8395

IN THE SUPREME COURT
of the
STATE OF UTAH

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TOOELE CITY, a municipal corporation,
Plaintiff and Respondent,

— vs. —

SETTLEMENT CANYON IRRIGATION
COMPANY, a corporation,
Defendant and Appellant.

BRIEF OF RESPONDENT

FILED
OCT 27 1955

Supreme Court, Utah

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STATE OF UTAH

TOOELE CITY, a municipal corporation,
Plaintiff and Respondent,

— vs. —

SETTLEMENT CANYON IRRIGATION
COMPANY, a corporation,
Defendant and Appellant.

Case No.
8395

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Plaintiff filed a petition for declaratory judgment, in which it was alleged that it was the successor in interest to two contracts entered into by defendant as First Party and Thomas L. and Annie L. DeLaMare as Second Parties, dated, respectively, April 8, 1910 and October 4, 1910. Copies of these contracts were attached to the petition as Exhibits A and B and are nearly identical in language, the first covering 100 gallons of water

per minute and the second covering 160 gallons of water per minute. The execution of these contracts, and that the plaintiff is the successor in interest of the DeLaMares thereunder, is admitted by defendant in its answer.

For the convenience of the court we here set forth haec verba the first contract and those parts of the second contract which differ from the first.

“THIS AGREEMENT made and entered into this 8th day of April A.D., 1910, by and between SETTLEMENT CANYON IRRIGATION COMPANY, a corporation organized and exisiting under the laws of the State of Utah, with its principal place of business at Tooele City, Utah, the party of the first part, and THOMAS DE LA MARE and ANNIE L. DE LA MARE, his wife, of Tooele City, Tooele County, State of Utah, the parties of the second part, WITNESSETH:

WHEREAS, the parties of the second part have developed, by means of a tunnel and other work in Settlement Canyon, near Tooele City, Utah, a flow of water, and have turned the water, so developed, into Settlement Canyon Creek and thereby increased the volume of water naturally flowing in said Creek; and

WHEREAS, the first party is the owner of the right to use the larger part of said Settlement Canyon Creek water; and

WHEREAS, the following resolution was adopted and passed by unanimous vote of the Board of Directors of said Settlement Canyon Irrigation Company on the 12th day of November 1909, the owners of two thirds of all the capital stock in said corporation having consented to and authorized the same, to-wit:

BE IT RESOLVED by the Board of Directors of the Settlement. Canyon Irrigation Company that said Company hereby recognizes and declares the right of said Thomas De La Mare and Annie L. De La Mare to recover from said Creek a continuous and perpetual flow of one hundred gallons of water per minute, in lieu of the water developed and added to the natural flow of said creek by them, and that the said flow of one hundred gallons of water per minute, which the said Thomas De La Mare and Annie L. De La Mare are entitled to recover, as aforesaid, may be taken and diverted by them, their heirs and assigns from the water flowing out of that certain tunnel, situated in the Southwest $\frac{1}{4}$ of the Southwest $\frac{1}{4}$ of Section 34, Township 3 South, Range 4 West, of the Salt Lake Meridian, and from which the Tooele City Water Company now takes its water for supplying the inhabitants of Tooele City;

BE IT FURTHER RESOLVED, that the President and Secretary of this corporation be, and they are hereby

authorized to execute and deliver in the name of the Company, attested by its corporate seal a proper agreement between the said Company and said Thomas De La Mare and Annie L. De La Mare to carry this resolution into effect.

NOW, THEREFORE, in consideration of the premises and of the sum of one dollar by each of the parties to the other paid, the receipt whereof is hereby acknowledged, the said party of the first part agrees to and does hereby recognize and declare the right of the parties of the second part to recover from said Creek a continuous and perpetual flow of one hundred gallons per minute, of the water belonging to the party of the first part, in lieu of the water so developed and added to the natural flow of said Creek by the parties of the second part; and the first party further agrees that the said continuous and perpetual flow of one hundred gallons per minute of the water belonging to the party of the first part, to which the parties of the second part are entitled as aforesaid, may always be taken and diverted by them, their heirs or assigns, from the water flowing out of the certain tunnel, situated in the Southwest $\frac{1}{4}$ of the Southwest $\frac{1}{4}$ of Section 34, Township 3 South, Range 4 West of the Salt Lake Meridian, and from which the Tooele City Water Company now takes water for supplying the inhabitants of Tooele City.

IN WITNESS WHEREOF, the parties hereto have caused these presents to be duly executed the day and year first above written.

(Seal)

SETTLEMENT CANYON
IRRIGATION COMPANY

/s/ Frank W. Frailey By /s/ John M. McKellar
 Secretary *President*

/s/ Wm. Marks /s/ Thomas DeLa Mare
 Witness /s/ Annie L. DeLa Mare

STATE OF UTAH }
COUNTY OF TOOELE } ss.

On this 8th day of April, A.D. 1910, personally appeared before me John M. McKellar and Frank W. Frailey who being by me severally duly sworn for himself, did say that the said John M. McKellar is President of the SETTLEMENT CANYON IRRIGATION COMPANY, the corporation whose name is subscribed to the foregoing instrument, and the said Frank W. Frailey is Secretary of said corporation; that such instrument was signed in behalf of said corporation by authority of a resolution of its board of directors, and the said John M. McKellar and Frank W. Frailey duly acknowledged to me that said corporation executed the same.

(Seal)

My Commission expires

/s/ Wm. S. Marks
 Notary Public

STATE OF UTAH
COUNTY OF TOOELE } ss.

On this 8th day of April, A.D., 1910, personally appeared before me Thomas De La Mare and Annie L. De La Mare, his wife, signers of the foregoing instrument, who severally duly acknowledged to me that they, and each of them, executed the same.

(Seal)

My Commission expires June 19, 1912

/s/ Wm. Marks
Notary Public

Recorded at the request of Henry Doremus, April 18th, 1910, at 30 minutes past 10 o'clock A.M. in book D of Bonds and Agreements page 438.

/s/ Fred Bryan
Recorder Tooele County, Ut.

Fees \$2.50

The resolution quoted in the third Whereas clause of the Second contract recites that the defendant "recognizes and declares the right of Thomas De La Mare and Annie L. De La Mare to recover from said Creek a continuous and perpetual flow of Four Hundred Fifty 450 gallons of water per minute in lieu of the water developed and to be developed and added to the natural flow of said Creek by them, and that the said flow of 450 gallons of water per minute which the said Thomas

De La Mare and Annie L. De La Mare are entitled to recover, as aforesaid, may be taken and diverted by them, their heirs and assigns from the water flowing out of that certain tunnel," describing the same tunnel.

The Second contract adds a new Whereas clause as follows:

"AND WHEREAS, since the passage of said resolution, said Thomas De La Mare has developed water so that he now has two hundred sixty gallons of water per minute in said tunnel, and that One Hundred gallons of said amount has already been transferred and set over to him, leaving one hundred sixty gallons per minute yet to be transferred, (only two hundred sixty of said four hundred fifty gallons having been developed) and the parties hereto mutually agreeing to annual said resolution as to the one hundred ninety gallons per minute not developed."

The "NOW, THEREFORE," part of the Second contract is identical with the same part of the first contract, except it specifies 160 gallons of water per minute and adds that that quantity is "in addition to the 100 gallons per minute heretofore transferred."

In addition to the foregoing, the following matters, alleged in the petition, are admitted by defendant's answer:

The DeLaMares, by means of tunneling and other works in Settlement Canyon developed and brought water into and commingled the same with the flow of

Settlement Canyon Creek thereby increasing the flow of said creek. After developing said water, the DeLaMares entered into the said contracts with defendant, and into contracts with other parties also entitled to use water from said creek, to define and compose the rights of the DeLaMares to the water so developed by them and to provide a point in the Canyon at which they should be entitled to divert and take the water developed by them. At all times since the execution of said contracts 260 gallons of water per minute have been taken by plaintiff's predecessors in interest, and by plaintiff, from the point of diversion fixed in the contracts (commonly known as Rench tunnel) until 1954, when a dispute arose as to the right of plaintiff to take 260 gallons per minute. Defendant contended that under the contracts plaintiff could take that quantity only if that quantity was flowing from the DeLaMares tunnel. It is the contention of the plaintiff that under the terms of the contracts it was entitled to a perpetual and unconditional flow of 260 gallons of water per minute from the diversion point fixed by the contracts regardless of the quantity flowing from the DeLaMares tunneling and workings, whether greater or less than 260 gallons per minute.

The foregoing matters being admitted, the sole issue involved in the action was a proper construction of the contracts; that is, whether the language of the contracts supports the plaintiff's or the defendant's contention. Accordingly, to have this issue determined, the plaintiff

filed a motion for a judgment on the pleadings. This motion was argued to and granted by the Lower Court. A judgment for plaintiff in harmony with plaintiff's contention was duly entered.

STATEMENT OF POINTS

POINT I

WHERE A CONTRACT IS UNAMBIGUOUS ITS MEANING MUST BE DETERMINED SOLELY FROM ITS CONTENTS.

POINT II

BY THE EXPRESS LANGUAGE OF THE CONTRACTS IT WAS AGREED THAT THE DELAMARES WERE, AND PLAINTIFF AS THEIR SUCCESSOR IN INTEREST IS, ENTITLED UNCONDITIONALLY TO A PERPETUAL AND CONTINUOUS FLOW OF 260 GALLONS OF WATER PER MINUTE.

ARGUMENT

POINT I

WHERE A CONTRACT IS UNAMBIGUOUS ITS MEANING MUST BE DETERMINED SOLELY FROM ITS CONTENTS.

The case of *City of Des Moines v. City of West Des Moines* 56 N.W. 2d 904, was an action for a declaratory judgment to construe a contract between the parties and was disposed of on a motion for judgment on the pleadings.

In 1925 the plaintiff City of Des Moines and the defendant City of West Des Monies entered into a contract

by which plaintiff "does hereby grant" to the defendant "the continuing right to connect the sanitary sewer system of said (defendant) to the sanitary system of the Southwest sewer as an outlet for the sanitary sewer system of" (defendant), the connection to be made at a described point. Defendant "may also connect its sanitary sewer system with said Southwest sewer system at any point where it is practicable and feasible so to do as an outlet." Defendant is to pay \$40,000 on November 1, 1925, and \$2000 annually for 10 years, \$2500 annually thereafter for 10 years on giving notice, and "thereafter there shall be due and payable, by (defendant) to (plaintiff) an annual sum equal to 50c per capita of population of defendant at time of giving said notice." Further extensions of 10 year periods could be made by giving like notice and paying like amount per capita annually thereafter. "It is agreed that the amounts stipulated in this contract shall constitute compensation in full for the perpetual use of said Southwest sewer system for emptying into said sewer system all sewage and liquids accumulating in the sanitary system of (defendant) for the treatment and disposal of the same."

Alleging that the rights of defendant city to use the sewer outlet under this contract were limited to defendant's 1925 boundaries, plaintiff brought suit for a declaratory judgment to adjudicate the rights of the parties under the contract, defendant's boundaries having been enlarged by annexations in 1940, 1948 and 1950. Plaintiff prayed that defendant's rights be limited to sewage

originating within its 1925 boundaries and that new contracts be required or plaintiff pay a reasonable sum for use of plaintiff's facilities by said portion of defendant city as became a part thereof subsequent to the 1925 contract, or that use be enjoined.

When the case was at issue defendant moved for judgment on the pleadings, which was sustained. The court says :

"No language in the contract specifically limits the rights of defendant city to its 1925 geographical boundaries. Nor may such inference properly be drawn from any of its provisions. The provisions fixing the compensation for use of the outlet indicate the parties expected defendant city would grow.

"The language of the contract is plain and unambiguous. It clearly includes all sewage accumulating in the sanitary sewer system of defendant and does not exclude defendant's sewers within the boundaries of defendant city as thereafter extended. We hold plaintiff was not entitled to relief predicated on the terms of the written contract."

Duhamel v. United States, 119 Fed. Supp. 192. The question in this case was the construction of the following contract provision :

"If in the case of an increase of any existing tax or imposition of a new tax the contractor has paid such tax or charge to the Federal government, or any person, then the prices herein will be increased accordingly and will be charged to the government."

Plaintiff contends the word “or any person,” created an ambiguity which would permit proof that the parties intended to include state taxes. The court says:

“All material facts needed for a decision on the issue presented are undisputed, and since the sole issue is one of law that is, interpretation of a contract provision, we believe that it presents a proper situation for disposition on a motion for judgment on the pleadings. The opposing party cannot defeat its use by merely alleging that an issue of fact exists (107 Fed. Supp. 84). While a motion for judgment on the pleadings admits all facts well pleaded it does not admit, inter alia, facts pleaded which would be inadmissible in evidence at the trial. (60 F. Supp. 729). Having found the provision in question unabiguous, we have no need in this case of extrinsic evidence which plaintiffs propose to introduce. (Neale v. Hinchcliffe, 20 Ariz. 452, 189 P. 1116). Therefore defendant’s motion is granted and plaintiffs’ amended petition on those counts is dismissed.”

In a number of cases decided by this court the rule of construction as applied in the two preceding cases is adhered to.

Ruthrauff v. Silver King Western Mill and Mining Company, 95 Ut. 279, 80 P. 2d 338. Ruthrauff acquired an interest in the Augusta mining claim. He also attempted to acquire an additional interest by a tax sale purchase of a $\frac{3}{4}$ interest. He then gave a quit claim deed to Rose Brown, which stated that he and wife “do hereby remise, release and quitclaim to party of the second part,

her heirs and assigns forever, all an undivided $\frac{1}{4}$ interest in that certain lode mining claim known as the Augusta," etc. Plaintiff contends that the deed only intended to convey the tax title interest and not that already held. He tried to show this beyond the face of the deed. The court says:

"This is not permissible, unless the intent and meaning of the deed is upon its face uncertain and obscure. In determining intent, we are restrained to the language employed — to the chosen vehicle of the thought and purpose of its author. If the meaning is clear, we may not resort to extraneous aids to interpret, modify, add to, or subtract from its meaning. To do so would be to assume the function of making contracts for the parties under the guise of interpretation, a power not delegated to the courts."

Johnson v. Geddes, 49 Utah 187, 161 P. 660. Plaintiff sold defendants some mining property for which defendants agreed to pay \$21,000, \$12,000 in money and \$9,000 out of the net proceeds of the mine. The money was paid but no mining operations were conducted and no further payments made, although the deed, as agreed, was delivered upon payment of the \$12,000. The net proceeds were defined in the contract and the defendants were to determine the extent and manner of managing and developing the property. The plaintiff contended the defendants had a reasonable time to perform and when that time elapsed the \$9,000 became due and owing, and brought suit for that amount. The lower court adopted

plaintiff's position and found that defendants, at the time the contract was made had stated they would immediately work and develop the claims, that an examination of the claim revealed ore sufficient to pay off the \$9,000. Reversed.

The Supreme Court held the contract was plain and the language so apt as to leave no room for construction.

“It is quite true that when the terms of a contract are uncertain or obscure the court not only may, but it ought to, avail itself of all legitimate legal evidence which will shed light upon the intention of the parties and upon the rights granted upon the one side and obligations assumed upon the other. A court may, however, not receive evidence for the sole purpose of enlarging the rights upon the one side and increasing the obligations upon the other. Nor may a court do that simply because the provisions of the contract in its judgment should have been made more equitable.”
Case dismissed.

To the same effect are the following cases: *Erickson v. Bastian*, 98 Utah 587, 102 P. 2d 310; *Starley v. Deseret Foods Corporation*, 93 Utah 577, 74 P. 2d 1221; *Mifflin v. Shike*, 77 Utah 190, 292 P. 1.

POINT II

BY THE EXPRESS LANGUAGE OF THE CONTRACTS IT WAS AGREED THAT THE DELAMARES WERE, AND PLAINTIFF AS THEIR SUCCESSOR IN INTEREST IS, ENTITLED UNCONDITIONALLY TO A PERPETUAL AND CONTINUOUS FLOW OF 260 GALLONS OF WATER PER MINUTE.

In the light of the authorities above referred to let us examine the language of the contracts here involved.

1. Both contracts recite in the first Whereas Clause that the DeLaMares have developed by tunnel and other work in Settlement Canyon, a flow of water and have turned the water so developed into Settlement Canyon Creek and thereby increased the volume of water naturally flowing in said creek.

2. The first contract, in the third Whereas Clause refers to a resolution of the Board of Directors of the Settlement Canyon Irrigation Company wherein the Board "hereby recognizes and declares the right of said Thomas DeLaMare and Annie L. DeLaMare to recover from said creek a continuous and perpetual flow of 100 gallons of water per minute, in lieu of the water developed and added to the natural flow of said creek by them, and that the said flow of 100 gallons of water per minute, which the said DeLaMares are entitled to recover, as aforesaid, may always be taken and diverted by them, their heirs and assigns, from the water flowing out of that certain tunnel from which the Tooele City Water Company now takes its water for supplying the inhabitants of Tooele City.

3. In the Second contract the resolution of the Board of Directors of the Settlement Canyon Irrigation Company reads that the company recognizes the right of the DeLaMares to recover from said creek a continuous and

perpetual flow of 450 gallons of water per minute, in lieu of the water developed and to be developed and added to the natural flow of the creek by them, and that the 450 gallons per minute, which the DeLaMares are entitled to recover, as aforesaid, may be taken and diverted by them, their heirs and assigns, from the water flowing out of that certain tunnel, describing the same tunnel as in the first contract.

The Second contract contains an additional Whereas clause which recites that since the passage of said resolution DeLaMare has “developed water so that he now has 260 gallons of water per minute in said tunnel, and that 100 gallons of said amount *has already been transferred* and set over to him leaving 160 gallons of water yet to be transferred (only 260 of said 450 gallons have been developed) and the parties hereto mutually agreeing to annul said resolution as to the 190 gallons per minute not developed.”

4. Both contracts then conclude, in consideration of the premises and of the sum of \$1.00, the Company “agrees to and does hereby recognize and declare the right of” the DeLaMares “to recover from said creek *a continuous and perpetual flow* of (100) (160) gallons per minute of the water belonging to the” Company, “in lieu of the water so developed and added to the natural flow of said creek by” the DeLaMares. The Second contract then stipulates that the 160 gallons per minute is “*in addition to the 100 gallons per minute heretofore transferred.*”

It is further stipulated in both contracts that the company “agrees that *said continuous and perpetual flow* of (100) (160) gallons per minute of the water belonging” to the company to which the DeLaMares “are entitled, as aforesaid, may *always* be taken and diverted by them, their heirs and assigns, from the water flowing out of that certain tunnel from which the Tooele City Water Company now takes its water for supplying the inhabitants of Tooele City.”

It is apparent that these contracts cannot be interpreted by simply resorting to a dictionary definition of the words “recover” and “in lieu of”, as is attempted by the appellant in its brief. The contracts must be considered as a whole. From the foregoing resume of the provisions of the contract it is clear that the appellant recognized and agreed that the DeLaMares had actually developed a total of 260 gallons of water per minute by their workings and that they had added that quantity to the flow of the creek. This was a fixed, definite quantity so agreed upon. There is not the slightest intimation that that quantity might vary above or below that quantity. If there should happen to be variations, the parties eliminated all questions and disputes as to their respective rights contingent upon fluctuations either above or below 260 gallons per minute by agreeing in unequivocal language that that was the quantity they would each recognize. In other words, the parties first agreed that the flow of the creek had been augmented by the DeLa-

Mares workings to the extent of 260 gallons per minute and that that quantity of water belonged to the DeLaMares.

Instead of agreeing that the DeLaMares could take the 260 gallons per minute so diverted and turned into the creek by them at some point at or below the juncture of the developed water with the creek, the parties agreed that the equivalent quantity of water could be taken by the DeLaMares from the Company's water at the Rensch tunnel, from which the Tooele City Water Company then was taking its water. By so taking, the DeLaMares would recover and take the quantity of water they had developed. They could not thus recover, in the literal dictionary sense, the water they put into the creek, for that water was spilled into the creek way below the Rensch tunnel. They could only get an equivalent quantity at another point of diversion, and this would be in lieu of the water they turned into the creek some distance below.

The all important element in the construction of these contracts is, that by definite, certain, clear and unambiguous language, the Company agreed that the DeLaMares had acquired by their development work a fixed quantity of water in the amount of 260 gallons per minute. That being the fixed quantity basis of the rights of the DeLaMares the words "recover" and "in lieu of" can only mean that same quantity.

The language of the second contract is very significant, wherein it states that DeLaMares has "developed water so that he now has 260 gallons of water per min-

ute in said tunnel and that 100 gallons of said amount *has already been transferred and set over to him, leaving 160 gallons per minute to be transferred.*" That is very clear, definite, and unambiguous language. Not a word is said about fluctuating quantities or the rights of parties if the water developed in the DeLaMare workings at any time either exceeded and became less than the 260 gallons per minute. Nor is a word said to indicate that the DeLaMares could only take such quantity as their tunneling produced in the event it was less than 260 gallons per minute at any particular time. The plain language is that 260 gallons per minute are to be transferred and set over to the DeLaMares.

Both contracts provide that the Company agrees to and does hereby declare and recognize the right of the DeLaMares to recover from said creek a continuous and perpetual flow of 100 gallons per minute in the first contract and 160 gallons per minute in the other of the water belonging to the Company. This is in lieu of the water developed and added to the natural flow of the stream by the DeLaMares. Here again the language admits of no uncertainty or equivocation. The flow to be taken by the DeLaMares is a continuous and perpetual flow in the quantities specified, 100 gallons per minute in the one contract and 160 gallons per minute in the other.

To further emphasize that the parties were agreeing to exact, unchanging and unfluctuating flows, the contracts *use* again the terms "*continuous and perpetual*"

by finally providing that such continuous and perpetual flow of 100 gallons per minute in one contract and 160 gallons per minute in the other, to which the DeLaMares are entitled, as aforesaid, "*may always be taken and diverted by them, their heirs and assigns from the water flowing out of the*" Rench tunnel. This clearly indicates a continuous and perpetual condition, running to and for the benefit of the heirs and assigns of the DeLaMares, and gives the DeLaMares a definite and fixed quantity that they could dispose of to their heirs and assigns.

Could any language be more certain, clear and definite? How can there be any room for reading into that language a meaning that the DeLaMares could only take such quantity as their tunnel produced if their tunnel produced less than the 260 gallons per minute? To so read the contracts would require a flagrant violation of the principles announced under Point I and would, in effect, be making a new contract for the parties for the first time in forty-four (44) years.

That the fixed quantities agreed to were not inequitable and were not based on poor judgment is attested by 44 years experience. But no matter what present conditions may be, as stated by this court in *Johnson v. Geddes*, supra, a court may not enlarge the rights upon the one side or increase the obligations upon the other "simply because the provisions of the contract in its judgment should have been more equitable."

If the parties had intended to provide that the DeLaMares could only take at the Rench tunnel the equivalent quantity produced and emptied into the creek by the DeLaMares, they could easily have said so. In such event fixed quantities need not have been mentioned at all, as that would only confuse the matter. However, if they should use fixed quantities under such conditions, it would be expected that they would provide for the taking by the DeLaMares of water in excess of the fixed quantities, as well as less than the fixed quantities, if the tunnel produced more than the fixed quantities.

If you assume the contracts were intended to provide for a condition wherein the DeLaMare tunnel produced less than the quantities mentioned in the contract, you must also assume that it was intended to provide for a condition wherein such tunnel produced more than such quantities. But significantly enough, the contracts do not provide for either contingency. They fixed the quantity of developed water and they fixed that quantity as the quantity to which the DeLaMares are entitled and which they may take at the Rench Tunnel.

CONCLUSION

It is clear from the contracts that the DeLaMares and the Company sought to do two things: First, they agreed between themselves as to the exact quantity of water that each would recognize that the DeLaMare workings had

produced and added to the stream and so belonged to the DeLaMares. This, undoubtedly, was a compromise, the chance of the DeLaMare works producing in excess of 260 gallons per minute being at least as great as the chance that they would produce less than that quantity. The parties assumed that the water coming from the DeLaMare tunnel would be as constant in flow as the water coming from the Rench tunnel. They made no provision in the contract for the contingency that either would fluctuate or that either would produce less or more than enough to fulfill the contracts. Second, they agreed that that quantity of water could forever be taken by the DeLaMares, and their successors and assigns, from the water the Company owned coming from the Rench tunnel, the Company thereby getting the water augmenting the creek through the DeLaMares works. It was in effect an exchange of water in a definite fixed quantity.

No provision was made for making any measurement at any time to determine whether and when the water produced at the DeLaMare works exceeded or became less than the ³⁶⁰~~260~~ gallons per minute. No provision was made to provide any measuring devices to measure the flow into the creek from the DeLaMare tunnel. No provision was made to adjust the flow to be taken by the DeLaMares at the Rench tunnel to the flow coming into the creek from the DeLaMare tunnel. During all of these 44 years no such provision has been made or requested.

We respectfully submit that the contracts are unambiguous. At the hearing in the Lower Court appellant conceded this was the fact. It now seems to take the position that there is ambiguity, but wholly fails to point out wherein such ambiguity lies. Under the plain language of these contracts the City, as successor in interest to the DeLaMares, is entitled unconditionally to 260 gallons of water per minute. The judgment of the Lower Court is correct and should be sustained with costs to the respondent.

Respectfully submitted,

RALPH W. MILLBURN
HOMER HOLMGREN

Attorneys for Respondent

.....copies of the Brief of Respondent received
the day of October, 1955.

Attorneys for Appellant