

1956

## George C. Goodwin v. Joseph M. Tracy : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

E. R. Callister; Robert B. Porter; Attorneys for Respondent;

---

### Recommended Citation

Brief of Respondent, *Goodwin v. Tracy*, No. 8567 (Utah Supreme Court, 1956).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/2677](https://digitalcommons.law.byu.edu/uofu_sc1/2677)

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

---

---

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

IN THE MATTER OF THE GEN-  
ERAL DETERMINATION OF  
RIGHTS TO THE USE OF ALL  
WATER, BOTH SURFACE  
AND UNDERGROUND, IN  
THE ESCALANTE VALLEY  
DRAINAGE AREA,

In re: Water User's Claim No. 542,  
Underground Water Claim No.  
17173, R. L. Bradshaw Claimant,  
George C. Goodwin, Successor.

GEORGE C. GOODWIN,  
*Plaintiff and Appellant,*

— vs. —

JOSEPH M. TRACY, State Engi-  
neer of the State of Utah,  
*Defendant and Respondent*

UNIVERSITY UTAH

JAN 28 1957

LAW LIBRARY

Case  
No. 8567

**FILED**

OCT 6 1956

Clerk, Supreme Court, Utah

---

## Brief of Respondent

---

E. R. CALLISTER  
Attorney General

ROBERT B. PORTER  
Assistant Attorney General  
*Attorneys for Respondent*

# INDEX

	Page
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS.....	3
ARGUMENT .....	4
POINT I. THAT THERE IS SPECIFIC STATUTORY AUTHORITY FOR THE STATE ENGINEER AND THE COURT TO LIMIT THE ACREAGE TO BE IRRIGATED FROM A WELL DRILLED PRIOR TO THE ENACTMENT OF THE UNDERGROUND WATER LAW OF UTAH IN MARCH, 1935; AND THE CONTENTION OF THE RESPONDENT STATE ENGINEER THAT THE APPELLANT WAS ENTITLED TO NO IRRIGATION FROM SAID WELL WAS PROPER AND SHOULD HAVE BEEN UPHELD .....	4
POINT II. THAT AS A MATTER OF LAW THE CLAIMANT APPELLANT CAN BE LIMITED TO THE ACREAGE UNDER CULTIVATION IN 1942 AND THE INTERLOCUTORY ORDER OF THE TRIAL COURT IN AWARDED THE CLAIMANT 28 ACRES IS PROPER AND IS EN- TITLED TO AFFIRMANCE BY THIS COURT.....	14
POINT III. THAT THE ACTION OF THE TRIAL COURT WITH RESPECT TO APPLICATION NO. 11870 IS PROPER AND SHOULD BE AFFIRMED....	22
CONCLUSION .....	23

## Cases Cited

Beck v. Jeppesen, 1 Utah 2d 127, 262 P. 2d 760.....	16
Becker v. Marble Creek Irr. Co., 15 Utah 225, 49 Pac. 892.....	13, 16
Bishop v. Duck Creek Irr. Co., 121 Utah 290, 241 P. 2d 162.....	14
Gunnison Irr. Co. v. Gunnison Highland Canal Co., 52 Utah 347, 174 Pac. 852 .....	13, 19
Hague v. Nephi Irr. Co., 16 Utah 421, 52 Pac. 765.....	13, 17
Hanson v. Salt Lake City, 115 Utah 404, 205 P. 2d 255.....	9
Jensen v. Birch Creek Ranch, 76 Utah 356, 289 Pac. 1097.....	13, 20
Justesen v. Olsen, 86 Utah 158, 40 P. 2d 802.....	6
Malstom v. Consolidated Theatres, 4 Utah 2d 181, 290 P. 2d 689	16
Wrathall v. Johnson, 86 Utah 50, 40 P. 2d 755.....	6

## Statutes Cited

	Page
<b>Laws of Utah 1903</b>	
Section 34, Chapter 100.....	6
Section 35, Chapter 100.....	5
Section 72, Chapter 100.....	5
<b>Laws of Utah, 1935</b>	
Chapter 105 .....	6, 7
<b>Revised Statutes of Utah, 1933</b>	
100-3-1 .....	6
100-3-2 .....	6, 7
<b>Utah Code Annotated 1953</b>	
73-3-1 .....	7
73-3-2 .....	8
73-5-10 .....	11
73-3-13 .....	21

# IN THE SUPREME COURT OF THE STATE OF UTAH

---

IN THE MATTER OF THE GEN-  
ERAL DETERMINATION OF  
RIGHTS TO THE USE OF ALL  
WATER, BOTH SURFACE  
AND UNDERGROUND, IN  
THE ESCALANTE VALLEY  
DRAINAGE AREA,

In re: Water User's Claim No. 542,  
Underground Water Claim No.  
17173, R. L. Bradshaw Claimant,  
George C. Goodwin, Successor.

GEORGE C. GOODWIN,  
*Plaintiff and Appellant,*

— vs. —

JOSEPH M. TRACY, State Engi-  
neer of the State of Utah,  
*Defendant and Respondent*

Case  
No. 8567

---

## Brief of Respondent

---

### STATEMENT OF FACTS

The State Engineer of the State of Utah, as the respondent herein, is in complete agreement with the statement of the case and the statement of facts as set forth in the brief of the appellant, but we do differ both

as to the materiality of those facts and as to the conclusions to be drawn therefrom; and, at the outset, we feel compelled to call the Court's attention to the fact that the respondent here has no personal or individual interest in the subject matter and is the respondent solely by reason of his official capacity. If this were a matter involving a surface stream, we are confident that there would be a considerable number of lower users who would be contesting this cause along with the present respondent. However, the water source here involved is a rather large underground water basin and no one individual appears able to realize that every diversion therefrom, no matter how small, has some effect upon the water that will be available to him now and in the future. The District Court has, therefore, charged the office of the State Engineer with the defense of all matters of this kind in the area and this Court should view the problems here presented not in the light of the theory presented by the State Engineer as an abstract proposition but as an actual factual situation, the solution to which will have an immediate and substantial impact upon several hundred water users in this area.

We should also call the Court's attention to the fact that the interlocutory order of the trial court allowed the appellant the right to irrigate some 28 acres. The appellant claimed the right to irrigate about 70 acres, but the respondent State Engineer took the position that the appellant had no right to irrigate any land and we shall hereafter demonstrate that not only can the judg-

ment of the trial court be supported but the trial court actually went too far in allowing the 28 acres.

## STATEMENT OF POINTS

### POINT I

THAT THERE IS SPECIFIC STATUTORY AUTHORITY FOR THE STATE ENGINEER AND THE COURT TO LIMIT THE ACREAGE TO BE IRRIGATED FROM A WELL DRILLED PRIOR TO THE ENACTMENT OF THE UNDERGROUND WATER LAW OF UTAH IN MARCH, 1935; AND THE CONTENTION OF THE RESPONDENT STATE ENGINEER THAT THE APPELLANT WAS ENTITLED TO NO IRRIGATION FROM SAID WELL WAS PROPER AND SHOULD HAVE BEEN UPHELD.

### POINT II

THAT AS A MATTER OF LAW THE CLAIMANT APPELLANT CAN BE LIMITED TO THE ACREAGE UNDER CULTIVATION IN 1942 AND THE INTERLOCUTORY ORDER OF THE TRIAL COURT IN AWARDING THE CLAIMANT 28 ACRES IS PROPER AND IS ENTITLED TO AFFIRMANCE BY THIS COURT.

### POINT III

THAT THE ACTION OF THE TRIAL COURT WITH RESPECT TO APPLICATION NO. 11870 IS PROPER AND SHOULD BE AFFIRMED.

## ARGUMENT

### POINT I

THAT THERE IS SPECIFIC STATUTORY AUTHORITY FOR THE STATE ENGINEER AND THE COURT TO LIMIT THE ACREAGE TO BE IRRIGATED FROM A WELL DRILLED PRIOR TO THE ENACTMENT OF THE UNDERGROUND WATER LAW OF UTAH IN MARCH, 1935; AND THE CONTENTION OF THE RESPONDENT STATE ENGINEER THAT THE APPELLANT WAS ENTITLED TO NO IRRIGATION FROM SAID WELL WAS PROPER AND SHOULD HAVE BEEN UPHELD.

Points I and II of the respondent's brief are directed at Point I, subparagraphs (a), (b), and (c) of appellant's brief but we have separated them for argument as we feel that this adds clarity to the problems that require the consideration of this Court. The questions of law here involved can best be arrived at by a chronological statement of the statutes and the various changes that have been made and together with comment and citation of the cases that have been decided.

We would at the outset state that the issue before this Court is simply whether the enactment of the underground water law by the 1935 Legislature intended to retain the intent theory and permit enlargement of the underground water right indefinitely until that intent had been accomplished or whether the legislature abolished the intent theory and required all further enlargement of the right to be carried on under the supervision



and control of the State Engineer. We are convinced that the latter is the only correct theory and that, to give the legislative enactment any other construction, would lead to a most chaotic situation.

In 1903, the Fifth Regular Session of the Utah Legislature enacted what was designated as Chapter 100, consisting of 73 sections, and this was the first real water code under which water rights were initiated by application to the State Engineer; and section 35 of this chapter provided that “any person, corporation or association, to hereafter acquire the right to the use of any public water in the State of Utah, shall before commencing the construction, enlargement or extension of any ditch, canal or other distributing works, or performing similar work tending to acquire the said right or appropriation, make an application in writing to the State Engineer, which shall include a map, profile and drawings, as hereinafter provided.”

Section 72 of this same Chapter 100, Session Laws of Utah, 1903, provided for the repeal of all prior water laws and all other laws in conflict with this code, but it also provided as follows: “. . . but such repeal shall not affect any vested rights, and any person, corporation or association who may have heretofore filed notice of appropriation of water, or initiated any right under the provisions of said (repealed) laws, may complete and perfect such appropriation or right in the same manner and with like effect as if this repeal had not been made.” . . .

We should also note that Section 34 of Chapter 100, Session Laws of Utah, 1903, reads as follows: "Rights to the use of any of the unappropriated water in the State may be acquired by appropriation in the manner hereinafter provided, and not otherwise. The appropriation must be for some useful or beneficial purpose, and, as between appropriators, the one first in time shall be first in right."

These sections became Sections 100-3-2 and 100-3-1, respectively, in the Revised Statutes of Utah, 1933, and a careful comparison with that revision shows that no substantial changes in the above quoted portions had been made in either section during that thirty-year period; and it should be here noted that no concept of state ownership or control of underground water had yet been promulgated, although by 1933 the cases of *Wrathal v. Johnson*, 86 Utah 50, 40 P. 2d 755, and *Justesen v. Olsen*, 86 Utah 158, 40 P. 2d 802, were commenced and were on their way to this Court. And the decision of this Court in those two cases on January 2 and 10, 1935, respectively, made necessary the changes in the laws dealing with appropriation of water by the 1935 Legislature.

Section 100-3-1 of the 1933 Revised Laws was amended by Chapter 105 of the 1935 Session Laws to read as follows:

"Rights to the use of the unappropriated public waters in this state may be acquired only as provided in this title. *No appropriation of water may be made and no rights to the use thereof initiated*

*and no notice of intent to appropriate shall be recognized except application for such appropriation first be made to the state engineer in the manner hereinafter provided, and not otherwise.* The appropriation must be for some useful and beneficial purpose, and, as between appropriators, the one first in time shall be first in right; *provided*, that when a use designated by an application to appropriate any of the unappropriated waters of the state would materially interfere with a more beneficial use of such water, the application shall be dealt with as provided in section 100-3-8.”

This section has not since been changed except for the addition of the last sentence in the present section, which is now Section 73-3-1, Utah Code Annotated, 1953, which sentence was added by the Session Laws of 1939 and deals with adverse use.

The important change made in 1935 was the addition of the second sentence which has been italicized in the above quotation of the act and, for purposes of emphasis, may we point out that the legislature has said that “no notice of intent to appropriate shall be recognized”; and this is clearly an indication that the old theory of a right to complete an appropriation based upon the intent when it was first begun was rejected by the legislature in favor of appropriation only under the supervision and control of the State Engineer.

Further, Section 100-3-2 of the Revised Statutes of Utah, 1933, and the part with which we are concerned was amended by this same Chapter 105 of the 1935 Session Laws to read as follows:

“Any person who is a citizen of the United States, or who has filed his declaration of intention to become such as required by the naturalization laws, or any association of such citizens or declarants, or any corporation, in order hereafter to acquire the right to the use of any unappropriated public water in this state shall, before commencing the construction, enlargement, extension or structural alteration of any ditch, canal, well, tunnel or other distributing works, or performing similar work tending to acquire such rights or appropriation, or enlargement of an existing right or appropriation, make an application in writing to the state engineer.”

The remainder of this section, which is now Section 73-3-2, Utah Code Annotated, 1953, has since been changed in some detail, but the part above quoted has since remained the law and we desire to call attention specifically to the words contained in the last three lines above quoted, and, at the risk of repetition but in order to emphasize their importance in this issue, we again quote them as follows:

“or enlargement of an existing right or appropriation make an application in writing to the state engineer.”

Applying these statutes to the facts in the present case, we find that the claimant appellant had drilled a well in 1934 but had made no use thereof prior to the enactment of the above quoted acts in 1935 and their effective date of March 22, 1935; and the State Engineer has taken the position that the acts above quoted required that this claimant file an application before he

had any right to the use of water from this well for any irrigation purpose, as such use would clearly be an “enlargement of an existing right or appropriation.” We respectfully urge that this language of the statute, coupled with the clear and announced purpose of the legislature to reject and abolish the theory of intent as applied to the appropriation of water, specifically provides the procedure that must be followed by a water claimant and conclusively demonstrates that the position taken by the State Engineer in completely disallowing the claim was sound and proper and the only position consistent with the statute that could be taken.

This case is a matter of first import in this state and is of great importance not only to the office of the State Engineer but to all owners of water rights from underground sources. The State Engineer is most concerned as this Court’s decision will directly affect the action of that office in all adjudication proceedings now under way and those to be undertaken in the future. And each owner of a right to use water from underground sources is interested either as he may or may not be given the right to use more water and enlarge upon his right or as he may find the water in his particular area protected from further withdrawals or be subject to further depletion as the case may be.

The only case decided since 1935 touching upon this subject is *Hanson v. Salt Lake City*, 115 Utah 404, 205 P. 2d 255, and in this case the Court said:

“We, therefore, conclude and hold that the right to the use of underground waters which prior

to the Wrathall case were not considered the subject of an appropriation, but which were therein held to be subject thereto, could be acquired prior to the 1935 enactments and amendments of our statutes on that subject by merely diverting such waters from their natural source and placing them to a beneficial use and that the plaintiff had, prior to the filing of the application of the city with the State Engineer, acquired a vested right to the use of the waters flowing from his well to the extent that he had placed them to a beneficial use as hereinbefore indicated, and that by filing his claim to such right to use such waters in accordance with the 1935 statute he has established that right with a priority dating from his first use.”

The statement of the Court in this case limiting the right to the extent of the beneficial use made before the effective date of the 1935 amendment is clearly in accord with the position now taken by the State Engineer that there could be no enlargement of any “existing right or appropriation” after the 1935 amendment unless a proper written application was made to the State Engineer.

Some contention has and will be made that we are attempting to apply this 1935 amendment retroactively and that we are attempting to deprive this claimant of a vested right. This is not so. In the first instance the statutes above quoted are procedural in nature and are intended to provide for proper administration and distribution of water in this state to the end that there may be a better beneficial use thereof by all concerned. And, secondly, may we call attention to the fact that on March

22, 1935, every underground water user was given a full right to the extent of his beneficial use on that date. Nothing was taken from him; but he was thereafter required to make proper application to the State Engineer if he desired to enlarge upon his right, which is in reality a new appropriation.

And in further support of our contention may we quote Section 73-5-10, Utah Code Annotated, 1953, which section was first enacted by the 1935 legislature as a part of the then new underground water code, and which reads as follows:

*“Within one year after the date of the approval of this act, all claimants to rights to the use of underground waters shall file notice of such claim or claims, with the state engineer on forms furnished by him, setting forth such information as the state engineer may require, including but not limited to the following:*

The name and postoffice of the person making the claim; the location of the well or tunnel or other means of diversion with reference to a United States government survey corner; the nature and extent of use on which claim of appropriation is based; the flow of underground water used in cubic feet per second or the quantity in acre-feet; the time during which underground water has been used each year and the date when underground water was first used.

Failure to file notice of claim or claims, as provided in this section, shall be prima facie evidence of intent to abandon such claimed right or rights, and in the distribution of the underground waters of this state, the state engineer may disregard any claim not so filed.”



In connection with this section, we have italicized certain words and phrases that again preclude any thought that the claimant had any unlimited time in which to complete his appropriation; and, certainly, the fact that he was to file within the year a statement of his claim can have no significance and no meaning if that same claimant were entitled to an additional fifteen years, as claimed by the present appellant, to complete his appropriation and fulfill what he claims to have been his original intention.

And, finally, in connection with this matter, may we reiterate that in 1903 the legislature specifically provided for completion and perfection of rights that had theretofore been initiated without compliance with the water code then enacted. No similar provision is contained in the 1935 act and we believe that this is a complete answer to appellant's statement on page 21 of his brief and is again conclusive proof that it was the legislative intention to require all use of water from that date on to be under the supervision and control of the State Engineer.

At this point we would refer the Court to the Proposed Determination of Water Rights in the Escalante Valley Drainage Area which was filed with the District Court in Iron County on April 1, 1949, and which is a part of the record in this cause. Contained within this Proposed Determination and commencing on page 204 and concluding on page 269 are listed the rights to the use of underground water that were initiated prior to 1935. It has been computed that the total of these rights



is for the irrigation of 6300 acres with a right of withdrawal of 107 second-feet of water. The right here claimed of 1.0 second-foot to irrigate 70 acres seems small in comparison, but becomes of considerable magnitude when one considers that there are a considerable number of water users, each of whom seek by similar protest, the right to enlarge over the use that existed in 1935.

There is in the present matter before the Court no complaint by any junior appropriator or any other user of water within this underground area as to this claimed right to enlarge his use by the appellant herein; but the State Engineer believed, and the District Court confirmed this belief into a fact, that in these general adjudication proceedings, and particularly where underground water was concerned and a contest has developed, the State Engineer not only represents the State of Utah but of necessity represents all other water claimants in the area. We are required to take and defend such a position as the claimants within the area expect that we will defend and uphold the Proposed Determination as presented and we are also vitally interested in all matters of this type inasmuch as the final ruling will do much to determine the existence or non-existence of unappropriated water within the source.

The cases of *Becker v. Marble Creek Irrigation Co.*, 15 Utah 225, 49 Pac. 892, *Hague v. Nephi Irrigation Co.*, 16 Utah 421, 52 Pac. 765, *Gunnison Irrigation Co. v. Gunnison Highland Canal Co.*, 52 Utah 347, 174 Pac. 852 and *Jensen v. Birch Creek Ranch*, 76 Utah 356, 289 Pac. 1097,

are each discussed under Point II of this brief, but we feel that the language used and hereafter quoted in those cases is equally applicable to the matters herein discussed and we earnestly hope that this Court will so consider it.

And, in conclusion of this part of the argument, may we refer to the recent case of *Bishop v. Duck Creek Irrigation Co.*, 121 Utah 290, 241 P. 2d 162. In that case the proof available went back only to 1906 and the court accepted such use and adjudicated the rights based on such use. No reference was made to any right of enlargement or to any reasonable period therefor, but this Court did make this statement: "Since there are no filings with the State Engineer either by Bishop or his predecessors, whatever right he has to the water must necessarily rest upon appropriation by beneficial use before 1903. Prior to that time the law allowed appropriation by such use, and statutes enacted that year preserve such appropriations."

## POINT II

THAT AS A MATTER OF LAW THE CLAIMANT APPELLANT CAN BE LIMITED TO THE ACREAGE UNDER CULTIVATION IN 1942 AND THE INTERLOCUTORY ORDER OF THE TRIAL COURT IN AWARDING THE CLAIMANT 28 ACRES IS PROPER AND IS ENTITLED TO AFFIRMANCE BY THIS COURT.

The matters discussed under this point would become moot if the Court were to agree with the position

taken by the respondent under Point I, but we also earnestly contend and urge that the decision of the District Court can and should be upheld without regard to Point I as far as the Appellant is concerned although the acreage so allowed is contrary to the position taken by respondent and in excess of that which which the respondent believes should have been allowed.

We believe it patently unfair to the trial court to assume that he chose a seven-year period as a reasonable time to call a halt to further enlargements solely because the State Engineer had surveyed the acreage in question at the end of such period. The trial court had before him not only the protest of this claimant appellant but a considerable number of other protests from other water users within the area covered by the Proposed Determination and he had before him that Proposed Determination which constituted an exhaustive survey and compilation of all water rights in the area; and these matters, coupled with the known reluctance both then and now of State Engineers to approve applications in this underground area because of the belief that the area may be overappropriated, would in and of themselves furnish sufficient grounds to support the trial court's finding that a seven-year period was a sufficiently long period in which the appellant should and must have completed his original intention. To hold otherwise in an area where the development was proceeding at a rapid pace and where a great number of other water users were also involved, would be to invite chaos and confusion.

This Court has many times stated and held that it will not on appeal disturb the findings of the trial court if there is any substantial evidence supporting those findings; and we believe that this statement is the more compelling when the decision of the trial court concerns the question of the reasonableness of a particular matter or thing. This Court has on many occasions stated that the evidence must be viewed in the light most favorable to the findings of trial court and two of the latest cases so stating and holding are *Beck v. Jeppesen*, 1 Utah 2d, 127, 262 P. 2d 760, and *Malstrom v. Consolidated Theatres*, 4 Utah 2d. 181, 290 P. 2d 689. And for these compelling reasons, Finding No. 2 by the trial court is proper and it and the conclusion that it supports are entitled to affirmation by this Court. It appears proper to comment here that what might be a reasonable time to complete an appropriation in an area where development was slow and the area isolated and the water users few, could very well be an unreasonable time in an area of large development by a great number of water users; and the Milford underground water basin is a small area that has had a large development by many water users.

There have been no cases decided by this Court that have specifically covered this question of a reasonable time for development even under the surface water rights, but we are convinced that the cases cited under Point I on page 13 of this brief are most indicative of the view that has been taken and are most compelling as to the ruling that ought to be made. The early case of *Becker v. Marble Creek Irrigation Co.*, *supra*, decided in

1897, is of the utmost importance, and in that case this Court said:

“The waters of a prior appropriator are fixed by the extent of his appropriation for a beneficial use, and others may subsequently appropriate any water of a stream not so used by a prior appropriator; and such latter appropriation becomes a vested right, and entitled to as much protection as the former, and a right of which he cannot be deprived except by voluntary alienation, or forfeiture by abandonment. The rights of the former being thus fixed, he cannot enlarge his rights to the detriment of the latter by increasing his demands, or by extending his use to other lands, even if used for a beneficial purpose.”

One year later in 1898, the case of *Hague v. Nephi Irrigation Co.*, supra, was decided by this Court and the following quotation, although somewhat lengthy, so clearly states the proposition for which we are contending that we are compelled to quote it:

“The object and intention, under the law, in diverting water, must be to apply it to some useful purpose, and if by means of ditches more is diverted than is necessary for such purpose, the excess cannot be regarded as a diversion for a useful purpose; for, as matter of fact, such excess merely runs to waste, and its diversion cannot result in a vested right. If, therefore, A., who owns and intends to irrigate but one acre of land, diverts all the water of a natural stream, which is sufficient to irrigate two acres, he obtains a right only to sufficient water to irrigate his one acre, and B., who also owns an acre, may appropriate the excess. If, in this arid region, the law were otherwise, it would

be a menace to the best interests of the state as well as to its citizens, because it would enable a few individuals, or association of individuals, by diversion of water in excess of use, to greatly limit the area of the public domain which could be cultivated, and thus deprive the state of its revenue, and citizens of homes within its borders. This is exemplified in the case at bar, where 19 families settled upon public lands, and are now represented as then having, in cultivating a comparatively few acres of land, diverted all the water of the stream, which was then and is now sufficient to irrigate thousands of acres, and to supply the inhabitants of the city of Nephi with water for culinary and domestic purposes. No such extravagance in the use of water was ever intended by the enactment of the laws relating to the appropriation and use of water in the arid belt of the country. The extent of the appropriation is limited, no matter how much water may have been diverted, to the quantity necessary for the purposes for which the appropriation is made, and the intention to apply it to some useful purpose, without unnecessary delay, must also appear, in order to confer upon the appropriator a vested right thereto. If there is no intention, on the part of the appropriator, to apply the water to such purpose, within a reasonable time, there is no valid appropriation, and the water remains subject to appropriation by others. So, where there is more diverted than is necessary for the object of the appropriation, there can be no intention to apply the excess to a useful purpose, and such excess remains subject to appropriation. In *Kin. Irr. S.* 150, it is said: 'This intention goes to the very foundation of the act of appropriation, and must be evidenced by a constancy, or steadfastness of purpose or labor, as is usual with men engaged in like enterprises, who desire a speedy accomplish-



ment of their designs.' In *Ortman v. Dixon*, 13 Cal. 34, it was said: 'The measure of the right, as to extent, follows the nature of the appropriation or the uses for which it is taken. The intent to take and appropriate the outward act go together. If we concede that a man has right by mere priority to take as much water from a running stream as he chooses, to be applied to such purposes as he pleases, the question still arises, what did he choose to take? And this depends upon the general and particular uses he makes of it. If, for instance, a man takes up water to irrigate his meadow at certain seasons, the act of appropriation, the means used to carry out the purpose, and the use made of the water should qualify his right of appropriation to a taking for a specific purpose, and limit the quantity to that purpose, or so much as necessary for it.' So in *Canal Co. v. Kidd*, 37 Cal. 282, Mr. Chief Justice Sawyer, after reference to a number of cases, observed: 'The doctrine is that no man shall act upon the principle of the dog in the manger, by claiming water by certain preliminary acts, and from that moment prevent others from enjoying that which he is himself unable or unwilling to enjoy, and thereby prevent the development of the resources of the country by others. Anybody else may divert and use all the water, be it more or less, that a prior claimant is not in a present condition to use, and, by lack of diligence on his part in pursuing a perfecting a prior inchoate right, many acquire rights even superior to his.' *Kin. Irr.* pp. 151, 1953; *McKinney v. Smith*, 21 Cal. 374; *Combs v. Ditch Co.*, 17 Colo. 146, 28 Pac. 966; *Macris v. Bicknell*, 7 Cal. 262; *Water Co. v. Powell*, 34 Cal. 110; *Simpson v. Williams*, 18 Nev. 432, 4 Pac. 1213."

*In Gunnison Irrigation Co. v. Gunnison Highland Canal Co.*, supra, this statement was made:

“In short, the rights of a prior appropriator are measured and limited by the extent of his appropriation and application to a beneficial use. If he diverts more water than under this doctrine he is entitled to, he must return such surplus to the stream for the use of subsequent appropriators. No extension or enlargement of his rights as determined by the doctrine of beneficial use can be made so as to interfere with the vested rights of others.”

And in *Jensen v. Birchr Creek Ranch*, supra, this Court said:

“It is also the settled law in this jurisdiction that a prior appropriator of water from a natural stream may not so increase his demand and use of the water appropriated by him as to deprive a subsequent appropriator of any right which he may have acquired before such increased demand and use is made by a prior appropriator.”

The above language is particularly appropriate with respect to the issues now before this Court.

The appellant has laid considerable stress upon the failure of the State Engineer to lapse applications even though there may have been as much as twenty years elapse since the actual filing of the application. We would urge upon the Court that the difference between a controlled and supervised procedure under an application and the unlimited, uncontrolled and unbounded right as claimed by the appellant is so great as to compel the conclusion that there can be and should be no attempt at comparison. To state the proposition is to answer it. Under appellant's theory, the amount of water he claims



a right to pump from the well, the period during which he claims a right of use and the total acreage he claims a right to irrigate are tightly locked within his mind to be revealed only when his full intention has been accomplished. It is indeed impossible to show a similarity between that approach and the orderly procedure under an application, which in and of itself declares the limit beyond which the appropriator may not enlarge and which requires either proof of appropriation at the end of a specified period or a request for an extension of time based upon an affidavit that the statute intends should show a diligent effort towards completion of the appropriation. If the State Engineer is too lax in permitting extensions, other water users in the area have an absolute right to take the initiative under Section 73-3-13, Utah Code Annotated, 1953, which section has been the law since 1919 and reads as follows:

“Any other applicant or any user of water from any river system or water source may protest to the state engineer that such work is not being diligently prosecuted to completion, whereupon the state engineer shall give the applicant doing such work or his assigns sixty days’ notice by registered mail to his last recorded address to appear on a date to be designated and show cause, if any he has, why his application shall not be declared forfeited in whole or in part, and on such date such applicant or his assigns shall be permitted to produce any lawful evidence tending to show compliance on his part with the law. At such hearing the state engineer may hear and consider any and all competent evidence tending to show whether or not the applicant or his assigns have complied with the law. If diligence is not

shown by the applicant the state engineer may declare the application and all rights thereunder forfeited. The decision of forfeiture shall be final unless an action to review it is filed as provided by section 73-3-14.”

We submit that, except as the action of the trial court exceeds what the respondent believes to be the law as set forth in Point I, the findings and conclusions of the trial court are proper, are fully supported both by the facts and by the law and should be affirmed.

### POINT III

THAT THE ACTION OF THE TRIAL COURT WITH RESPECT TO APPLICATION NO. 11870 IS PROPER AND SHOULD BE AFFIRMED.

Appellant discusses this matter under his Point 1-d and in effect says that he has been misled by the actions and interpretations of the State Engineer to his damage and that he should be made whole. In answer to this contention we would first say that, if the Court were to find that this was true, we would greatly prefer that any award to this appellant be made in this manner, as we are fully and firmly convinced that to allow the appellant any relief in any other manner does violence to the statutes and to the cases that we have cited; and we earnestly hope that this Court agrees with our conclusion in this respect. But we are not convinced that there was any misleading as it clearly appears to us that all of the

known facts were equally known both to the water users and to the State Engineer at all times. We would specifically refer to Conclusion No. 3 made by the trial court in this matter and also to page 12 of appellant's brief; and it would appear that the belief of the then State Engineer in 1935 that there was no unappropriated water and the reversal of that belief by a later State Engineer in about the year 1944 were both widely communicated to all water users within the area. Each user had similar and identical facts before him and to hold that one was misled would compel a conclusion that all were so misled; and this is, of course, not correct. It would appear that the correct conclusion is that the appellant in this matter failed to exercise proper diligence both in his initial development and in not protecting himself with a proper application following the change in practice in 1944.

## CONCLUSION

The State Engineer did not appeal from the decision of the District Court even though that holding was in a way contrary to the position taken by the State Engineer in that court as set out under Point I of this brief; but we urge upon this Honorable Court that the decision of the District Court should be affirmed for the reasons we have set forth under either Point I or Point II of this brief. With respect to the position of the appellant under his Point 1-d and our answer under Point III of this brief,

we urge that this Court give due consideration to the matters submitted and exercise its sound discretion in arriving at a conclusion.

Respectfully submitted:

E. R. CALLISTER  
Attorney General

ROBERT B. PORTER  
Assistant Attorney General  
*Attorneys for Respondent*