

1958

# Orem City Corp. v. Joseph M. Tracey et al : Brief of Respondent State Engineer

Utah Supreme Court

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E. R. Callister; Robert B. Porter; Attorneys for Respondent, Utah State Engineer;

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# In the Supreme Court of the State of Utah

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OREM CITY CORPORATION, a municipal corporation,

*Plaintiff and Appellant,*  
vs.

JOSEPH M. TRACY, as State Engineer of the State of Utah, UNITED STATES OF AMERICA, through its Bureau of Reclamation, Department of the Interior, PROVO RIVER WATER USERS ASSOCIATION, PROVO BENCH CANAL & IRRIGATION COMPANY, a corporation, TIMPANOGOS CANAL COMPANY, a corporation, UPPER EAST UNION IRRIGATION 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, or SPRING CREEK COMPANY, an unincorporated association, PROVO CITY, a municipal corporation, and LAKE BOTTOM CANAL COMPANY, a corporation,

*Defendants and Respondents.*

UNIVERSITY UTAH

MAY 3 1958

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Case No.  
8767

## BRIEF OF RESPONDENT STATE ENGINEER

E. R. CALLISTER,  
Attorney General,  
ROBERT B. PORTER,  
Assistant Attorney General,  
*Attorneys for Respondent,*  
*Utah State Engineer.*

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ARROW PRESS, SALT LAKE

## TABLE OF CONTENTS

	Page
STATEMENT OF FACTS .....	1-6
STATEMENT OF POINTS .....	6
ARGUMENT .....	6-10
POINT I. THAT APPELLANT'S COMPLAINT DOES FAIL TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED .....	6-10
POINT II. THAT THE ACTION OF THE UTAH STATE ENGINEER IN REJECTING APPLI- CATION NO. 28194 WAS PROPER .....	6-10
CONCLUSION .....	10

### CASES CITED

Provo Bench Canal Company v. Linke, 5 Utah 2d 53, 296 P. 2d 723 .....	2, 4, 5, 8, 9, 10
United States v. Fourth District Court, 121 Utah 1, 238 P. 2d 1132, Rehearing Denied, 121 Utah 18, 242 P. 2d 774 .....	2, 4

### STATUTES CITED

73-3-14, Utah Code Annotated 1953 .....	3
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*Defendants and Respondents.*

Case No.  
8767

BRIEF OF RESPONDENT STATE ENGINEER

## STATEMENT OF FACTS

The appellant devotes one page of its brief to the facts of this case and, as a result of this over-simplification, pre-

sents a distorted picture. We are confident that a full factual picture will, in and of itself, be sufficient to show that the trial court's order of dismissal was entirely justified and that any other order would have been error.

The matters, which we desire to present, have already been before this Court twice and are matters of public record both in this Court, in the office of the State Engineer and in the Fourth District Court in and for Utah County on remand from this Court. The cases decided by this Court are *United States v. Fourth District Court*, 121 Utah 1, 238 P. 2d 1132, rehearing denied, 121 Utah 18, 242 P. 2d 774, and *Provo Bench Canal Co. v. Linke*, 5 Utah 2d 53, 296 P. 2d 723.

In June of 1945, the United States of America filed with the Utah State Engineer two change applications, designated in that office as Change Applications Nos. a-1902 and a-1903. Those applications sought to change the point of diversion and the place and nature of use of 52.492 second feet of water from the Provo River. This amount of water had by the Provo River Decree been awarded for the irrigation of lands along the Provo River below the towns of Midway and Charleston and admittedly a substantial part of this water returned to the river and was again used by lower diverters. The respondents in this case, other than the United States, the Provo River Water Users Association and the Utah State Engineer, were some of the principal users among those lower diverters.

This 52.492 second feet of water and the lands upon which it had been used were acquired by the United States

by purchase or condemnation as this is the land now inundated by Deer Creek Reservoir. The two change applications were filed to change the point of diversion to storage in Deer Creek Reservoir and use under the Deer Creek project, including use through the Salt Lake Aqueduct in both Utah and Salt Lake Counties for municipal, industrial and other uses in addition to that of irrigation.

Both of these change applications were protested by the respondents named here, except the State Engineer, the United States and the Provo River Water Users Association; and, parenthetically, it should be here noted that the interests of the United States and of the Provo River Water Users Association are identical as the latter is the contracting organization for the repayment of the construction costs of the Deer Creek project, consisting of the Deer Creek Dam and Reservoir and related items.

These protests were the subject of a full hearing before the Utah State Engineer and the finding was made that the amount of water finding its way back into the Provo River constituted the return flow to which the lower users were entitled. The conclusion was reached that the United States should be permitted to change only that amount of water that under pre-reservoir conditions, would be wholly lost to the lower users by reason of evaporation and by plant transpiration. The State Engineer determined that this amounted to 11.824 second feet of water and the two change applications were approved for this reduced amount.

The lower users were not satisfied with this decision and, pursuant to Section 73-3-14, Utah Code Annotated 1953, appealed to the Fourth District Court. The Utah

State Engineer and the United States of America were named as defendants. The United States challenged the District Court's jurisdiction by motion to quash service of summons and, after an adverse decision by the trial court, sought a writ of prohibition by the Supreme Court of Utah. This Court upheld the trial court, holding that the filing of an application with the State Engineer made the federal agency susceptible to the judicial review provided by the state statute for the aggrieved party after the administrative ruling. *United States v. Fourth District Court*, supra.

Thereafter, commencing in the fall of the year 1953 and continuing intermittently until January 7, 1954, a trial on the merits of the appeal from the State Engineer was had in the Fourth District Court. Following this extended hearing, the trial court further reduced the amount of water consumed under pre-reservoir conditions by evaporation and transpiration to 9.33 second feet by a finding to that effect. (We have italicized this figure for emphasis and in order to specifically refer to it again in this statement.) But the trial court also arrived at the conclusion that more water was lost to the reservoir for other causes than was sought to be changed and held, therefore, that both change applications were to be rejected in toto.

Both the Utah State Engineer and the United States of America appealed said decision to this Court and the Provo River Water Users Association was permitted to file a brief amicus curiae. This Court, in *Provo Bench Canal Co. v. Linke*, supra, reversed the trial court and ordered that the change applications be approved to the extent of 9.33 second feet of water. (We have again italicized the figure.) Upon the issuance of the remittitur from this Court, the

Fourth District Court made and entered new Findings of Fact and Conclusions of Law and Decree wherein these change applications, as originally filed by the United States Bureau of Reclamation, were ordered approved and the right granted to change the point of diversion, place and nature of use of this 9.33 second feet of water.

Thereafter, and on May 22, 1956, the appellant, Orem City Corporation, filed its application, which was designated as No. 28194, in the office of the State Engineer and under which it sought to appropriate for municipal purposes this same 9.33 second feet of water. This application was rejected by the State Engineer on January 15, 1957, on the grounds that this water had long since been the subject of an appropriation and that the right to the use of this water now belonged to the United States. A copy of this ruling by the State Engineer was attached to and made a part of appellant's complaint before the trial court.

On March 15, 1957, appellant filed its complaint in the Fourth District Court for review of the ruling of the State Engineer. The defendants below, respondents here, interposed motions to dismiss on the grounds that the complaint failed to state a claim for which relief could be granted. The trial court on August 30, 1957, granted these motions and on October 2, 1957, a judgment of dismissal was entered.

The fact situation heretofore recited in some detail is the same as that found and summarized by this Court in *Provo Bench Canal Co. v. Linke*, supra, as follows:

“In the construction of the Deer Creek Reservoir the U. S. A. acquired certain lands most of



which are at times covered by the water stored in such reservoir. *It also acquired a maximum total water right of 52.492 second feet which prior thereto had been used to irrigate such lands.* In June of 1945, the U. S. A. filed with the State Engineer two applications to change the place of diversion and use of such waters to a place below the mouth of Provo Canyon. During the hearing of the protests of the lower water users before the State Engineer and in the District Court, the applications were reduced from 52.492 second feet to 9.33 second feet which amount the District Court found that under the pre-reservoir conditions was consumed by evaporation and transpiration of plant life without increasing or enhancing the amount of water available to the lower users." (Italics ours.)

## STATEMENT OF POINTS

### POINT I.

THAT APPELLANT'S COMPLAINT DOES FAIL TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

### POINT II.

THAT THE ACTION OF THE UTAH STATE ENGINEER IN REJECTING APPLICATION NO. 28194 WAS PROPER.

## ARGUMENT

### POINT I.

THAT APPELLANT'S COMPLAINT DOES FAIL TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

## POINT II.

THAT THE ACTION OF THE UTAH STATE  
ENGINEER IN REJECTING APPLICATION  
NO. 28194 WAS PROPER.

We believe it proper to combine the argument as to both points as appellant has done for the reason that the same argument is applicable to each point.

In our statement of facts, we have stressed the figure "9.33" second feet as we are convinced that it is determinative of the problem. We would also comment that appellant in its brief has used the figure only once in the first paragraph of its statement of facts. This is not consistent either with Application No. 28194 as filed with the Utah State Engineer or with appellant's complaint as filed with the trial court.

A copy of Application No. 28194 was filed as Exhibit "C" and attached to appellant's complaint. Paragraph 3 of that application states that the quantity of water to be appropriated is 9.33 second feet and paragraph six states that the direct source of supply is the Provo River. Under explanatory in this application the following statement is made: "The 9.33 second feet pertaining to this application refers to water as determined and defined under the decision of the Supreme Court of the State of Utah, No. 8390 & 8391, *Provo Bench Canal & Irrigation Co., et al. v. Harold A. Linke*, as State Engineer of the State of Utah and United States of America, through its Bureau of Reclamation, Department of Interior."

In order that there may be no doubt, we make the positive assertion that *Provo Bench Canal Co. v. Linke*, as heretofore cited in this brief, is the identical case as the one identified in the quotation as Nos. 8390 and 8391 before the Supreme Court of Utah.

Appellant's complaint as filed with the District Court contains this statement in paragraph eight:

"That on the 22nd day of May, 1956, the plaintiff, Orem City Corporation, a municipal corporation, filed application number 28194 in the office of the State Engineer of Utah, under which it made application to appropriate 9.33 second feet of water for municipal purposes, which said source and supply of water was duly determined and defined under the decision of the Supreme Court of the State of Utah, in the case of Provo Bench Canal and Irrigation Company, a corporation, et al., 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, which said case bears file number 8390 and 8391."

And again in paragraph 13 of this complaint, the appellant alleged:

"That in the Supreme Court Decision of the State of Utah wherein Provo Bench Canal and Irrigation Company, a corporation, et al., was plaintiff and respondent, said case bearing file number 8390 and 8391, which said Supreme Court decision is referred to in paragraph 8 above; that said decision determined that there was 9.33 second feet of water

from the flow of waters in the Provo River and Deer Creek Reservoir that was available as a result of the impounding of the waters in the Deer Creek Reservoir; that as a result there is available unused water not heretofore appropriated, nor has an application to appropriate said 9.33 second feet of water been filed by other than plaintiff; that plaintiff can appropriate said water and put the same to beneficial use; that plaintiff made application to the Utah State Engineer to appropriate *said 9.33* second feet of water, which is unused and available for plaintiff to appropriate; that a copy of said Supreme Court decision, marked Exhibit 'B' is attached hereto and made a part hereof; \* \* \*." (The italics are again ours.)

We have attempted to show that the appellant has wholly and completely misread and misunderstood the import of the decision of this Court in the *Provo Bench* case, *supra*. It has attempted both by its application and by its complaint on appeal from the rejection of that application to read into that decision language and meaning that exist only in its imagination.

The appellant seeks to appropriate 9.33 second feet of water and it is more than just a coincidence that this is the same amount of water that this Court found to belong to the United States and for which this Court ordered the change applications as filed by the United States approved. It is exactly the same water and from the application, as filed by appellant in the State Engineer's office and from which we have heretofore quoted, there can be no doubt in the mind of anyone that it is the same water. The appellant in its brief would now infer a slightly different meaning. We

can find absolutely no basis for such an inference after a careful examination of the application and the complaint.

### CONCLUSION

The application filed by appellant before the Utah State Engineer sought to appropriate the 9.33 second feet of Provo River water that this Court, according to appellant, found to be unused and available for appropriation in the decision in *Provo Bench Canal Co. v. Linke*, supra. We have demonstrated that this Court did not so rule, but on the contrary sustained the ownership of this water right in the United States Bureau of Reclamation and approved its applications for change of point of diversion and of place and nature of use. We respectfully submit that this water was not available for appropriation, that the rejection of the application by the Utah State Engineer was proper and that the judgment of dismissal by the trial court is entitled to the full affirmance of this Court.

Respectfully submitted,

E. R. CALLISTER,  
Attorney General,

ROBERT B. PORTER,  
Assistant Attorney General,  
*Attorneys for Respondent,*  
*Utah State Engineer.*

