

1958

# Orem City Corp. v. Joseph M. Tracey et al : Brief of Respondent Provo River Water Users Association

Utah Supreme Court

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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.*

Case  
No. 8767

BRIEF OF RESPONDENT  
PROVO RIVER WATER USERS ASSOCIATION

FISHER HARRIS  
*Attorney*

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# IN THE SUPREME COURT of the STATE OF UTAH

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*Plaintiff and Appellant,*

vs.

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*Defendants and Respondents.*

Case  
No. 8767

## BRIEF OF RESPONDENT PROVO RIVER WATER USERS ASSOCIATION

(All indications of emphasis have been added)

### STATEMENT OF FACTS

The Fourth Judicial District Court dismissed Appel-

lant's complaint on appeal from a decision of the State Engineer on the ground that it did not state any facts upon which relief could be granted.

Appellant's application denied by the State Engineer was to appropriate the 9.33 second feet of water identified as such in the application as that the subject of this court's decision in the case of *Provo Bench Canal and Irrigation Company v. Linke*, 5 Utah 2d, 53; 296 P. 2d, 723:

"The 9.33 second feet pertaining to this application refers to water as determined and defined under the decision of the Supreme Court of Utah No. 8390 and 8391, *Provo Bench Canal and Irrigation Company, et al, v. Harold A. Linke, et al.*"

The identification was amplified by the complaint the dismissal of which by the Fourth District Court is the occasion of this appeal.

Paragraph 8 of the said complaint reads as follows:

"8. 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 the State 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." (Provo Bench Canal and Irrigation Co. v. Linke, *supra*)

Paragraph 13 of said complaint reads as follows:

"13. 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 . . .*"

#### ISSUE RAISED BY THE FACTS

It is thus clear that the "source of supply" of the water the subject of the application is that identical 9.33 second feet which was before this court in *Provo Bench Canal and Irrigation Co. v. Linke*, and it is thus clear that the sufficiency of Appellant's complaint depends upon whether or not it is true as alleged that "as

a result" of the decision in that case "there is available unused water not heretofore appropriated."

#### POINT I.

APPELLANT'S COMPLAINT DID NOT STATE ANY FACTS UPON WHICH RELIEF MIGHT BE GRANTED.

The facts and issues before this court in the case of *Provo Bench Canal and Irrigation Co. v. Linke* are stated as follows in the opinion of Mr. Justice Wade at pages 55 and 56 of 5 Utah 2d:

"This appeal involves two applications by the United States of America to the State Engineer to change the place of diversion and use of many water rights acquired by it in the construction of the Deer Creek Reservoir in Provo Canyon. Over the protest of the lower water users the State Engineer approved these applications from which the protestants appealed by commencing this action in the District Court. The District Court rejected the applications and the State Engineer and the U.S.A. appeal from that decision. We must determine whether there was a showing of reason to believe that such changes can be made without impairing vested rights of others. We have twice previously determined questions growing out of this litigation.

"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. We are required to determine only whether the evidence requires the approval of these applications for the change of the place of diversion and use of these 9.33 second feet of water."

The decision of the court appears at page 58 of Utah 2d:

"In view of the foregoing considerations we conclude that there was a showing of reason to believe that these changes to the extent of 9.33 second feet could be made without impairing vested rights of others and the District Court erred in its refusal to approve such applications to that extent."

### CONCLUSION

The water rights under consideration were those found to have been acquired by the United States, and the decision of this court concerning them did not "result," as appellant alleges, in a determination that "there is available unused water not heretofore appropriated," but only that the point of diversion of part of the water already appropriated, might be changed.

Respectfully submitted,

FISHER HARRIS

*Attorney for Respondent*  
Provo River Water Users  
Association.