

1959

# Spanish Fork West Field Irrigation Co. et al v. USA : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

SPANISH FORK WEST FIELD  
IRRIGATION COMPANY, A  
Corporation, et al,

*Plaintiffs, Respondents,  
and Cross-Appellants,*

vs.

THE UNITED STATES, A  
Nation, et al,

*Defendants and Appellants.*

Case No. 8994

BRIEF OF APPELLANTS, STRAWBERRY  
WATER USERS ASSOCIATION, A  
CORPORATION, et al.

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Strawberry Water Users Association, et al.*

APPEAL FROM FOURTH JUDICIAL DISTRICT  
COURT OF THE STATE OF UTAH, IN AND FOR  
UTAH COUNTY

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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SPANISH FORK WEST FIELD IRRIGATION COMPANY, A Corporation, et al, <i>Plaintiffs, Respondents, and Cross-Appellants,</i> vs. THE UNITED STATES, A Nation, et al, <i>Defendants and Appellants.</i>	}	Case No. 8994
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BRIEF OF APPELLANTS, STRAWBERRY  
WATER USERS ASSOCIATION, A  
CORPORATION, et al.

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PRELIMINARY STATEMENT

In view of the numerous parties involved in this case, it is deemed advisable at the outset to designate the parties in whose behalf this brief is filed as follows: Strawberry Water Users Association, a Corporation, and the members of its Board of Directors, William Grotegut, George Q. Spencer, A. C. Page, Glen E. Davis, Laban Harding, Dell S. Hiatt, E. R. Nelson, George W. Lebaron, Jr., H. H. Farr, Sylvester Allen, Arthur Finley, Clifton Car-

son, and Reuben D. Gardner; Strawberry High Line Canal Company, a Corporation, and the members of its board of directors, Oral Stewart, Glen Davis, Andrew Larsen, George Q. Spencer, J. Angus Christensen, Ernest Hanks, Laban Harding, Arthur S. Wickman, and Dell S. Hiatt; Springville Irrigation District, a body corporate and politic, and its Board of Directors, Arthur Finley, Glen Sumsion, and Ruel Crandall; Mapleton Irrigation District, a body corporate and politic, and its Board of Directors, Sylvester Allen, Neil Whiting, Bryan Tew; and Payson City, a municipal corporation. Since the foregoing parties comprise the majority of defendants in this cause, they will be collectively referred to hereinafter as "defendants". The defendant Strawberry Water Users Association will be referred to hereinafter as "Association". Of the remaining defendants not included within the foregoing designation, the United States, a Nation, will be referred to hereinafter as "United States"; Douglas McKay, as Secretary of the Interior of the United States, will be referred to hereinafter as "Secretary"; Wilbur A. Dexheimer, as Commissioner of the Bureau of Reclamation of the United States will be referred to hereinafter as "Commissioner", and Joseph M. Tracy, as State Engineer of the State of Utah, will be hereinafter referred to as "State Engineer".

## STATEMENT OF CASE

This action was filed by plaintiffs pursuant to, and under the provisions of, the Declaratory Judgment Act of Utah, being Chapter 33, of Title 78, UCA 1953. (R. 5). Plaintiffs purport to represent all other water users similarly situated (R. 6), and they sue the defendants as representatives of all other water users similarly situated (R. 8). The petition for declaratory judgment contains 52 separate paragraphs (R. 5-23 incl.). The petition when stripped to its essentials seeks an interpretation of the provisions of certain contracts for the use of water under the Strawberry Valley Project. The relief prayed for in the petition, insofar as this appeal is concerned, was limited to a determination of (1) whether all water right applicants under the project should be charged in full against their project supply with all waters they received, whether it be from the natural flow waters of the Spanish Fork River, or from the stored water in the Strawberry Valley Reservoir (R. 23.), and (2) whether all parties should be limited to the amount of water provided in their respective contracts, except as they may show some other or additional water right (R. 23). The petition did not seek a determination of or an adjudication of any of the rights of any of the parties to the use of any water except the rights to the use of project water under the respec-

tive water right applications. (R. 23, 24).

A motion to strike and a motion to dismiss as against the corporate plaintiffs, Spanish Fork West Field Irrigation Co., East Bench Canal Company, and Spanish Fork South Irrigation Co., was filed by defendants on the grounds that such plaintiffs were not proper parties to this suit in that such plaintiffs had no contract covering the use of water under the Strawberry Valley Project, (R. 277, 278), and was again made at the close of plaintiffs' case in chief. (Tr. 197, 198). In addition thereto, defendants filed a motion for summary judgment against the foregoing corporate plaintiffs based upon the same grounds. (R. 279). The motions to strike and to dismiss, together with the motion for summary judgment were denied by the trial court (R. 283, Tr. 199).

During the course of the trial, the trial court indicated that it was going to adjudicate in this proceeding the relative collective rights between plaintiffs and defendants to the use of the waters of Spanish Fork River. (Tr. 425-457 incl.). Up until this point defendants had proceeded on the basis that this action was limited to an interpretation of the water right contracts covering project water (Tr. 442, 445, 446). When the Court took the view that it was going to adjudicate the relative collective rights to the use of the waters of the Spanish



Fork River (Tr. 447), a conflict of interest between some of the defendants represented by the firm of Christenson, Novak, & Paulson arose, and it became necessary to withdraw as counsel for some of the defendants (Tr. 450). A motion to withdraw as counsel was made (R. 289-290), and an order allowing such counsel to withdraw was accordingly entered by the trial court (R. 290, Fdg. 65). Proposed Findings of Fact, and Conclusions of Law were filed (R. 395-415 incl.), and Objections thereto were filed by defendants (R. 369-375 incl.). The trial Court thereafter made and entered its Finding of Fact and Conclusions of Law (R. 416-441 incl.) and Decree (R. 442-447 incl.). Defendants filed their motion for a new trial (R. 450), which was denied (R. 453-454). Thereafter defendants filed their Notice of Appeal (R. 456, 457).

## STATEMENT OF FACTS

Defendants herein accept and adopt the statement of facts set forth in the brief of appellants, United States of America, Secretary of Interior, and Commissioner of Reclamation heretofore filed. However, there are additional facts which defendants believe should be recited, and in so doing defendants will endeavor to refrain from a duplication of those facts already recited wherever possible.

The primary source of water for the Strawberry Valley Project is diverted from the Strawberry

River, Currant Creek, and Indian Creek, tributaries to Strawberry River, all of which are tributary to the Duchesne River. (Ex. 91, 92, 93, Fdg. 22) The water so diverted is stored in Strawberry Reservoir, having a capacity of approximately 283,000 acre feet (Tr. 206), with approximately 21,700 acre feet dead storage (Tr. 208). The water so stored is released when necessary into the Strawberry Tunnel and is conveyed thereby, transmountain, by gravity flow to the head of Diamond Fork Creek, tributary to the Spanish Fork River (Fdg. 22), and is discharged therein. The water is then conveyed by means of the natural channel of Diamond Fork Creek to its confluence with the Spanish Fork River, and is conveyed by means of the natural channel of the Spanish Fork River from which it is rediverted into the High Line Canal, Springville-Mapleton Lateral, and the other canals which divert water from the Spanish Fork River. (Fdg. 22). The High Line Canal, and Springville-Mapleton Lateral, were constructed by the United States as a part of the Strawberry Valley Project (Fdg. 22). The High Line Canal is operated and maintained by the Strawberry High Line Canal Company pursuant to a contract with the United States, dated April 7, 1916 (Fdg. 32, Ex. 12). The Springville-Mapleton Lateral is jointly operated by the Springville Irrigation District and the

Mapleton Irrigation District pursuant to separate contracts with the United States, dated December 29, 1917 (Ex. 15, Fdg. 34), and January 2, 1918 (Ex. 10, Fdg. 35), respectively. The Springville Irrigation District and the Mapleton Irrigation District jointly agreed to repay to the United States the construction charges of the Springville-Mapleton Lateral (Ex. 10, 15).

During the planning stage of the Strawberry Valley Project, it became apparent that during the period of high water of the Spanish Fork River, there was some unappropriated water over and above that necessary to satisfy prior existing rights which could be used on the project lands under the High Line Canal and Springville-Mapleton Lateral to the benefit of the whole project. Accordingly, the United States filed with the State Engineer Application No. 2259 in 1909, for 300 second feet of water for use under the High Line Canal (Ex. 1, Fdg. 24), and Application No. 5910 in 1914, for 100 second feet of water for use under the Springville-Mapleton Lateral (Ex. 5, Fdg. 24). Proof of appropriation was made on such lands, and Certificate No. 2117 was issued by the State Engineer for use of such water under the High Line Canal (Ex. 2), and Certificate No. 2118 (reduced to 90 second feet) was issued by the State Engineer for use under the Springville-Mapleton Lateral (Ex. 6). Use of

the waters under the foregoing certificates does not include use on the lands in the Spanish Fork Division under the canals of the plaintiff companies, but is limited to use on the lands under the High Line Canal and Springville-Mapleton Lateral.

The use of water under the Strawberry Valley Project is divided into the Spanish Fork Division (comprising the plaintiff-type users) and the High Line Division (comprising the defendant-type users). The High Line Division is divided into the High Line Canal Unit, Springville-Mapleton Unit and Canyon Unit. There is in evidence a form of each different type of water right contract, which has been executed for use of water under each unit or division of the Strawberry Valley Project (Ex. 10, 15-22 incl., 24-39 incl.).

The United States managed and operated the Strawberry Valley Project until September 28, 1926, when the operation and management thereof, except for the High Line Canal and the Springville-Mapleton Lateral, was turned over to the Strawberry Water Users Association, pursuant to a contract with the United States of the same date. (Ex. 11, Fdg. 33). Title to the project property remained in the United States. (Ex. 11, Par. 11). On November 20, 1928, a supplemental contract was entered into between the United States and the Strawberry Water Users Association. (Ex. 48). On

October 9, 1940, a new contract for the management and operation of the project was entered into between the United States and the Strawberry Water Users Association. (Ex. 49). The latter contract was made pursuant to the Reclamation Act of 1939 (43 Stat. 1187), and specifically abrogated the provisions of the contract of September 28, 1926, as amended by the Supplemental Contract of November 20, 1928, unless such provisions were specifically confirmed therein. The terms of the contract of October 9, 1940, relieved the Association as a fiscal agent for the United States, and instead made the Association a guarantor for the repayment of the cost of construction of the project to the United States.

In an effort to fully inform this Court of the number and different forms of water right contracts sought to be interpreted in this action, defendants believe it advisable to set out the following brief summary of each form of water right contract as a part of their statement of facts.

The first form of water right contract for users under the High Line Canal is designated "Form B-Approved February 23, 1914" (Ex. 16). There have been 452 of such contracts executed. (Tr. 41). Such contracts, covering lands in private ownership, provide in substance in paragraph 2 thereof, that the quantative measure of the water

right contracted for is that quantity which can be beneficially used up to but not exceeding two acre feet per acre measured at the head of the High Line Canal, and in no case exceeding the share proportionate to the irrigable acreage as determined by the project manager, during the irrigation season.

On August 13, 1914, the Reclamation Extension Act was enacted (38 Stat. 686) which extended the period of repayment and authorized the Secretary of Interior to promulgate rules and regulations governing the use of water in the irrigation of the lands within the project. Thereafter practically all, if not all, of the above 452 water right applicants executed an instrument whereby they accepted the terms of the Reclamation Extension Act as a part of their original contracts, including the extended period of repayment and a schedule of delivery of the water during the irrigation season subject to such rules and regulations as the Secretary may prescribe from time to time. (Ex. 17, Tr. 41). The following year a new form of water right contract for users under the High Line Canal was prepared, and is designated "Form B—Approved May 27, 1915" (Ex. 18). The foregoing form was a modified original "Form B" (Ex. 16), which revised the same to incorporate therein the terms of the Reclamation Extension Act. (38 Stat. 686). There were executed 138 of such contracts. (Tr. 42). Such

contracts, covering land in private ownership, provided in substance in paragraph 2 thereof, that the quantative measure of the water right is the quantity which can be beneficially used up to but not exceeding two acre feet per acre measured at the head of the High Line Canal, and in no case exceeding the share proportionate to the irrigable acreage as determined by the project manager. This form defined the irrigation season by providing that the water is to be delivered during the irrigation season from *May 1, to October 1, inclusive.*

Some of the users under the High Line Canal who were in need of additional water, executed supplemental contracts for such additional water. (Ex. 28). There were 49 supplemental contracts executed (Tr. 51), which amended their original "Form B Contracts", (Ex. 16), by striking out of Section 2 of the original contract the words "and in no case exceeding the share proportionate to irrigable acreage of the water supply actually available", and substituting therefor the words, "and in no case more than that proportion of the amount of water actually available, that the total number of acre feet contracted for by this applicant is of the total number of acre feet contracted for by all applicants under the Strawberry Project". In addition thereto a new paragraph 3(a) was inserted providing for additional water, and providing that the water shall



be delivered during the irrigation season from *May to September*, inclusive.

The next form of water right contract executed by users under the High Line Canal was "Form A—Approved November 7, 1914", (Ex. 20). There were 35 of such water right contracts executed covering about 2,000 acres of land. (Tr. 46). Such contracts covered lands taken up under Homestead Entries pursuant to the Act of August 9, 1912, (37 Stat. 265). The quantitative measure of the water right as shown in paragraph 2 thereof is the quantity of water which can be beneficially used, but in no case exceeding the share proportionate to the irrigable acreage as determined by the project manager during the irrigation season. Such contracts provide for a reasonable allowance for seepage losses in conveying the water to the land.

A general form of contract designated as "Form A 7-272—Approved July 27, 1922" was executed by a water user under the High Line Canal. (Ex. 19). The quantitative measure of the water right is worded in considerably different language than any of the forms discussed above. Paragraph 3 thereof provides in substance, that the quantity of water is that which may be applied beneficially in accordance with good usage and that in time of shortage it shall be the equitable proportionate share of water actually available as determined by the



project manager. There is no limitation in acre feet, and no mention made of the period of delivery.

A special form of contract was executed by users under the Power Canal segment of the High Line Canal. (Ex. 22). The quantitative measure of the water right in this type of contract, is that which can be beneficially used up to an amount not exceeding two acre feet per acre measured at the turnout, and in no case exceeding the share proportionate to the irrigable acreage. The water is delivered during the irrigation season from *May 1 to October 1*, under a schedule of delivery specified therein.

Four separate water right contracts were executed by the City of Payson, and the Town of Salem pursuant to Section 4, of the Act of April 16, 1906, (34 Stat. 116), for water deliverable through the High Line Canal. (Ex. 24-27 incl.). All of such contracts provide for a specific quantity of water in acre feet to be delivered during the irrigation season from *May 1 to October 1, inclusive*, at a rate not to exceed 35 per cent in any one month. The same form of water right contract was executed by Spanish Fork City for delivery of water under the Spanish Fork Division (Ex. 31, 32).

After the Association assumed the management and operation of the project, a new form of contract

was used. (Ex. 21, Tr. 47). Such form was used both under the High Line Division, and the Spanish Fork Division. (Tr. 47). There were 37 Association contracts executed by users under the High Line Canal (Tr. 47). Paragraph 3 thereof specifies the quantity of water in acre feet, and in case of shortage an equitable proportionate share of the water available. Paragraph 5 thereof provides that the water will be delivered during the irrigation season from *May 1 to October 1, inclusive*.

The water right contracts for the use of water under the Springville-Mapleton Lateral were executed between the Mapleton Irrigation District and the United States (Ex. 10, 34, 35, 36), and between the Springville Irrigation District and the United States (Ex. 15, 33). The first contract between the United States and the Mapleton Irrigation District (Ex. 10), provides for the construction of the Mapleton Lateral and for the purchase of 3600 acre feet of water annually. The contract between the United States and the Springville Irrigation District (Ex. 15), also provides for the construction of the Mapleton Lateral and for the purchase of 2400 acre feet of water annually. Both of the foregoing contracts are very similar in their terms and provide for the management and operation of the lateral jointly between the Mapleton Irrigation District and the Springville Irrigation District. Each contract pro-

vides for the purchase of a specific quantity of water in acre feet or their proportionate share of the amount of water actually available in proportion to the number of acre feet contracted for. No mention is made of the period of delivery. It is provided in paragraph 4 thereof, that the water supply to be delivered *may* be furnished out of the natural flow of the Spanish Fork River at times when sufficient water is available. The supplemental contracts (Ex. 33, 34, 35 & 36) contain substantially the same language as Exhibits 10 and 15 with respect to the water contracted for. Such water right contracts stand in the name of the districts and are not in the names of the individuals who use water within the district.

There were three separate forms of water right contracts executed for use in the Canyon Unit (Ex. 37, 38, 39). Each of the foregoing contracts were executed pursuant to the Reclamation Act, and the Act of February 21, 1911 (36 Stat. 925), commonly referred to as the "Warren Act". Two of the foregoing forms of "Contract and Mortgage" are almost identical in terms and provide for delivery of water to certain canyon users from Diamond Fork Creek (Ex. 38), and canyon users from the Spanish Fork River (Ex. 39). The other form of "Contract and Mortgage" (Ex. 37) provides for an exchange of water with users from Crab Creek in the vicinity

of Thistle, Utah. Each of the foregoing contracts specify a definite quantity of water in acre feet and provide that such water will be delivered during the period from *May to September*, inclusive, which shall be measured at the government rating flume situated approximately 2 miles below the west portal of the Strawberry Tunnel.

There are principally three different forms of water right contracts which have been executed by the users in the Spanish Fork Division. The first form of water right contract is designated "Form B—Approved December 23, 1914", for use in the Lake Shore Unit (Ex. 29). There were 119 of such contracts executed for lands in private ownership under the Lake Shore Unit (Tr. 52). The quantitative measure of the water right as shown by paragraph 2 thereof, is that quantity which can be beneficially used, up to, but not exceeding one-half, one, or one and one-half acre feet per acre, (depending upon the individual contract), and in no case exceeding the share proportionate to the irrigable area as determined by the project manager. The water is delivered at the head of the canal during the months of May to September inclusive, and not to exceed 40% in any one month.

The next form of water right contract executed by users under the Spanish Fork Division is designated "Form B—Approved March 17, 1915"

for use in all units thereof. (Ex. 30). There were 953 of such contracts executed (Tr. 53), which contained the same paragraph with respect to the quantitative measure of the water right as shown by Exhibit 29. Such form of water right contract covers the irrigated land situated under any of the established irrigation company canals in the Spanish Fork Division (Tr. 52).

In addition to the above, 45 Association contracts (Ex. 21), have been executed by users under the Spanish Fork Division (Tr. 48). Such contracts are identical in form with those Association contracts executed by users under the High Line Canal. Spanish Fork City executed two contracts for delivery of water through the established canals in the Spanish Fork Division (Ex. 31, 32). Such contracts are identical in form to the contracts of Payson City, and the Town of Salem (Ex. 24-27 incl.).

Contracts for the conveyance of project water through the existing canals of the irrigation companies in the Spanish Fork Division for delivery to individuals having water right contracts, were executed between the United States and those irrigation companies. (Ex. 40-46 incl. Fdg. 25, 26). Such contracts are referred to herein as "Carrier Contracts" and all contain substantially the same language. (Fdg. 26).

The area served by the Strawberry Valley Pro-

ject is divided into 16 districts each having approximately equal voting power. (Fdg. 41 Ex. 13). The Board of Directors consists of 16 members, each being a landowner in the District which he represents. In addition thereto, each director must own five shares of capitol stock of the Corporation. There are nine directors from the Districts under the High Line Canal since approximately  $\frac{4}{7}$  of the water of the project is used thereunder. (Tr. 348). There is one director from the Springville Irrigation District, one director from the Mapleton Irrigation District, and one director from each of the five districts under the Spanish Fork Division. The five districts under the Spanish Fork Division are so situated that each comprise approximately the same area served under the Spanish Fork West Field Irrigation Company, East Bench Canal Company, Spanish Fork South Irrigation Company, Lake Shore Irrigation Company, and Spanish Fork Southeast Irrigation Company, respectively.

The average period during each year when the natural flow of the Spanish Fork River is in excess of that necessary to satisfy prior rights, occurs during the period from April 1, to May 20, and usually does not last more than two or three weeks. (Fdg. 47). Such water is not as valuable to the users prior to May 1, as water subject to call later in the season. (Fdg. 48). If the water users are charged in full for the high water used by them from the Spanish Fork River against their indi-

vidual project supply, they will use substantially less high water with the result that a portion thereof would be lost to the project and more storage water will be called for and used from the Strawberry Reservoir (Fdg. 49).

During the period when the United States operated the project, different methods were employed to dispose of the high waters of the Spanish Fork River as shown by columns 8 and 9 of Exhibit 73. In 1919, a partial charge was made against the individuals' project supply covered by their existing water right contracts. In 1921, 1924, and 1925, no charge was made, and in 1926, a partial charge was made. After the Association took over the management and operation of the project, a partial charge for such high water was made in the years 1927 and 1928. During the period from 1929 to 1933, inclusive, a flat charge annually of 4880 acre feet was made against the users under the High Line Canal and 120 acre feet was made against the users under the Springville-Mapleton Lateral. (Fdg. 43, Ex. 73). Since 1934 a partial charge for such water has been made each year except for the years 1939, 1943, 1944, and 1946, when no charge was made, because of the abundant supply of water. (Ex. 73). During the period from 1913 to 1931 inclusive, a contract allotment of 100% was made. (Ex. 73). From 1932 to 1938, inclusive, less than 100% contract allotment was made. In 1939, a contract allotment of 100% was made. From 1940 to

1945 inclusive, less than 100% contract allotment was made. From 1946 to 1956, inclusive, a full contract allotment of 100% or more has been made. (Ex. 73).

The irrigation committee of the Strawberry Water Users Association consists of 4 directors and is in charge of the distribution of project water. (Tr. 323, 406). Early in the spring the committee meets, interprets available data with respect to the anticipated water supply for the coming year, and makes its recommendations to the Board of Directors of the Association as to its judgment of the percentage of the total contract allotment which can be met for that year (Tr. 342-344 incl. 407). The Board of Directors acts on the recommendations of the committee and advises the water commissioner and the canal companies as to the percentage allotment for the coming year. (Tr. 344, 411). The respective companies, through whose systems the individual contract holders receive water, then set up a credit for each individual as determined by the total contracts he holds in good standing.

During the period when high water is available from the natural flow of the Spanish Fork River for use on project lands, the project users who can use such water are encouraged to take as much high water as possible with the understanding that less than a full charge for the high water used will be made against their individual total project



supply. (Tr. 325, 326, 408, 411). As soon as such high water drops to a point where the demands for it exceed the water available, the committee formulates its judgment as to the percentage value of such high water and recommends to the Board of Directors the percentage charge which should be made for it. (Tr. 323, 413-415 incl.) The Board of Directors act on such recommendations and thereafter the individual contract holder is advised as to the amount of the charge in acre feet for the high water used by him which will be made against his entire allotment, and he then knows how much water he has left for the remaining year such that he can plan the use of his remaining water for that year. (Tr. 344-347 incl.).

A full charge is made against each user for all stored water used from the Strawberry Reservoir. Likewise a full charge is made against each user for all water used from the Spanish Fork River when water is called for which otherwise would have to be released from the Strawberry Reservoir (Tr. 416, 417).

## STATEMENT OF POINTS

### POINT I

THE DECREE OF THE TRIAL COURT IS PROPER INsofar AS IT INTERPRETS THE WATER RIGHT CONTRACTS TO PERMIT USE OF THE HIGH WATER OF THE SPANISH FORK RIVER UNDER THE PROJECT WITHOUT MAKING A FULL CHARGE THEREFOR. HOWEVER, THE TRIAL COURT ERRED IN MAKING ITS DECREE FIXING THE PERCENT-

AGE CHARGES TO BE MADE FOR THE USE OF SUCH HIGH WATER UNDER THE PROJECT FOR THE REASON THAT IT SUBSTITUTES THE JUDGMENT OF THE COURT FOR THE JUDGMENT OF THE BOARD OF DIRECTORS OF THE STRAWBERRY WATER USERS ASSOCIATION IN THE INTERNAL MANAGEMENT OF THE AFFAIRS OF THE CORPORATION.

#### POINT II

THE TRIAL COURT ERRED IN ITS CONCLUSIONS AS TO THE PERCENTAGE CHARGES TO BE MADE FOR THE USE OF THE HIGH WATER OF THE SPANISH FORK RIVER, AND ERRED IN MAKING ITS DECREE FIXING THE PERCENTAGE CHARGES FOR THE USE OF SUCH RIVER WATER AGAINST THE INDIVIDUAL CONTRACT ALLOTMENT FOR THE REASON THAT THE PERCENTAGES SO FIXED ARE ARBITRARY AND ARE NOT SUPPORTED BY THE FINDINGS OR EVIDENCE.

#### POINT III

THE TRIAL COURT ERRED IN ITS CONCLUSIONS THAT THE WATER RIGHT CONTRACTS PROVIDE FOR THE DELIVERY OF ANY WATER PRIOR TO MAY 1, OF ANY YEAR, AND ERRED IN MAKING ITS DECREE FIXING ANY CHARGE FOR HIGH WATER OF THE SPANISH FORK RIVER DELIVERED PRIOR TO MAY 1, AGAINST THE INDIVIDUAL CONTRACT ALLOTMENTS.

#### POINT IV

THE TRIAL COURT ERRED IN ADJUDICATING THE RIGHTS OF THE PLAINTIFFS TO THE USE OF THE WATER OF THE SPANISH FORK RIVER FOR THE REASON THAT THERE WAS NO ISSUE AS TO SUCH RIGHTS AND NO COMPETENT EVIDENCE FROM WHICH SUCH RIGHTS COULD BE DETERMINED.

### ARGUMENT

#### POINT I

THE DECREE OF THE TRIAL COURT IS PRO-

PER INsofar AS IT INTERPRETS THE WATER RIGHT CONTRACTS TO PERMIT USE OF THE HIGH WATER OF THE SPANISH FORK RIVER UNDER THE PROJECT WITHOUT MAKING A FULL CHARGE THEREFOR. HOWEVER, THE TRIAL COURT ERRED IN MAKING ITS DECREE FIXING THE PERCENTAGE CHARGES TO BE MADE FOR THE USE OF SUCH HIGH WATER UNDER THE PROJECT FOR THE REASON THAT IT SUBSTITUTES THE JUDGMENT OF THE COURT FOR THE JUDGMENT OF THE BOARD OF DIRECTORS OF THE STRAWBERRY WATER USERS ASSOCIATION IN THE INTERNAL MANAGEMENT OF THE AFFAIRS OF THE CORPORATION.

The whole controversy before this Court is centered around the use of the high water of the natural flow of the Spanish Fork River. The basic issue raised by the pleadings is whether the water right contracts, particularly those executed by the individual users under the High Line Canal, require that all water which is diverted from the high water of the Spanish Fork River and used by the individual users under the High Line Canal must be charged in full against the individual water users project supply. Plaintiffs invoked the jurisdiction of the District Court under the Declaratory Judgments Act (Chapter 33 of Title 78, U.C.A. 1953) seeking to have the Court interpret the water right contracts to require that all high water of the Spanish Fork River which is diverted into the canals of the High Line Division be charged in full against the individual water users contract allotment of project water. Defendants contend that

the water right contracts do not specifically cover the diversion and use of the high water of the Spanish Fork River and that because of the unique character of such high water, the allocation and disposition thereof is a matter of internal management within the discretion of the Board of Directors of the Strawberry Water Users Association, to be distributed in a manner that would be for the best interests of the project as a whole.

Based upon the evidence received, and the findings made, the trial court concluded in substance as follows:

(1) That the high water of the Spanish Fork River constitutes part of the Strawberry Project. (Concl. 12).

(2) That in the management and operation of the project, the Strawberry Water Users Association does not have the right to distribute the high waters of the Spanish Fork River without charging the user thereof. (Concl. 14).

(3) That the charge to be made should be adequate to properly protect the rights of the other users under the project. (Concl. 15).

(4) That if a full charge is made for such high water, a portion thereof will be lost to the project. (Concl. 16).

If the trial court had stopped there, defendants would have no real quarrel with those conclusions with some reservations. However, it did not stop there, but instead, it arbitrarily and gratuitously

fixed the percentage charges to be made for such high water without solicitation from any of the parties. The trial court went much further than it should have done, and in so doing it substituted its judgment for the judgment of the directors of the Strawberry Water Users Association in the internal management of the corporate affairs. Inflexible controls upon the management of the project have been fixed by the trial court, which are detrimental to the operation of the project as a whole as well as to the contractual water rights of the parties, including those plaintiffs who have such rights. We shall endeavor to so demonstrate in the argument which follows:

During the early stages of the project it became apparent that during the period of high water of the Spanish Fork River there was some unappropriated water over and above that necessary to satisfy prior existing rights which could be used on the project lands under the High Line Canal and Springville-Mapleton Lateral to the benefit of the whole project. Accordingly, the United States filed with the State Engineer, Application No. 2259 in 1909, for 300 sec. ft. of water for use under the High Line Canal (Ex. 1), and Application Number 5910 in 1914, for 100 sec. ft. of water for use under the Springville-Mapleton Lateral (Ex. 5). In view of the fact that all of the water that could be beneficially used on the lands under the Spanish Fork Division was being diverted through the existing

canals, which were filled to capacity during the time high water was available, the only lands upon which such water could be used were under the High Line Canal and the Springville-Mapleton Lateral. The water was diverted and beneficially used on the lands under the High Line Canal, and the Springville-Mapleton Lateral, and proof of appropriation was made on such lands. Certificate number 2117 was issued by the State Engineer for the use of such water under the High Line Canal, (Ex. 2) and Certificate number 2118, (reduced to 90 sec. ft.) was issued by the State Engineer for use of such water under the Springville-Mapleton Lateral (Ex. 6).

Under the foregoing Statement of Facts hereinabove recited, defendants have briefly described each separate form of water right contract which has been executed for use of water under the Strawberry Project. Under the High Line Unit there were nine different forms of water right contracts executed totaling approximately 717 in number. (Ex. 16-22 incl., 24-27 incl., 28). The quantitative measure of the water contracted for varies almost with each different form. Under the terms of some of the contracts, the water is to be measured at the head of the High Line Canal, under others at the turnout from the canal, and still others allow seepage and conveyance losses in conveying the water to the lands. None of the foregoing contracts specifically refer to the natural flow waters of the Spanish Fork River.

There are principally two different forms of contracts executed for use of water under the Springville-Mapleton Lateral (Ex. 10, 33). Two of those contracts provide for the construction of the Mapleton Lateral and for the purchase of water by the Mapleton Irrigation District and by the Springville Irrigation District (Ex. 10, 15). Both of the foregoing contracts are very similar in their terms and provide for the management and operation of the lateral jointly between the Mapleton Irrigation District and the Springville Irrigation District. It is provided in paragraph 4 thereof that the water supply provided to be delivered *may* be furnished out of the natural flow of the Spanish Fork River at times when sufficient water is available. This is the only provision in any of the water right contracts which even refers to the high water of the Spanish Fork River. The very purpose of such provision is to give discretionary power to the managing agent of the project to furnish the water from the natural flow of the Spanish Fork River when such is available, rather than to release stored water from the Strawberry Reservoir.

None of the foregoing contracts specifically cover the distribution and use of the high water of the Spanish Fork River. It follows that the users are not obligated under their contracts to take high water from the Spanish Fork River unless they make a demand for project water at a time when such high water is available. In such event water



can be delivered from the high water of the Spanish Fork River to the users who make demand for project water from the river water if it is available rather than release storage water from the Strawberry Reservoir. The latter, however, is not the water about which we are here concerned. We are concerned with the high water of the Spanish Fork River which is available to the project over and above prior existing rights when there is no demand by the users under the project for water. The trial Court found and concluded that such water is of lesser value than storage water which is subject to call later in the season, and that if a full charge is made for such high water a portion of it will not be used, and it will be lost to the project. (Fdg. 48, 49, Concl. 16). The record is filled with evidence to support the foregoing Findings and Conclusions (Tr. 326, 327, 329, 358, 359, 365, 369, 391, 401, Ex. 84).

The difficulties encountered in setting fixed percentages to be charged for such high water are readily apparent when the nature of such water itself is analyzed. The high water of the Spanish Fork River is uncontrolled in the sense that there are no storage facilities which can capture it when it is available and hold the same for use later in the season. Such water comes and goes within a matter of two or three weeks, during the period approximately from April 1 to May 20, when it is of lesser value. It cannot be used by any of the



plaintiff-type users since when such water is available, their canals are filled to capacity. It must be used on the lands under the High Line Canal, and under the Springville-Mapleton Lateral, since the certificates of appropriation so limit the place of use. Either it is used on the lands under those canals, or it isn't used at all. It is a plain and simple case of utilizing such high water at a partial benefit to the project as a whole rather than receiving no benefit at all. Defendants do not deny that the users under the High Line Canal may derive some benefit from receiving such water at a partial charge, but it must be remembered that those users are in a bargaining position. They do not particularly want the water but will take it at a partial charge. The Association must dispose of such high waters at whatever partial charge those who can use it will accept when it is available, otherwise such water will flow into Utah Lake. The Association is in the same position as a salesman who has a product which no one particularly wants and rather than not sell it at all, he sells it for what he can get for it. The only difference is that the salesman trades in terms of money and the Association trades in terms of water.

The mechanics of the trade, in substance, are that early in the spring the Association informs the water user that it has a certain volume of water stored for him in the reservoir, under his contract, which will be delivered at his call. When there is

high water in the Spanish Fork River available, the Association informs the individual that it has such high water available which is admittedly lesser in value to that in storage, and it will trade such high water for a percentage of his water in storage. The percentage of trade can vary from day to day because of the number of variable factors which go into its determination. When such a trade is made, however small the percentage may be, then and to that extent less stored water is drawn from the reservoir later in the season. The net effect is to retain more water in the reservoir to firm up the storage as "drought insurance" for the dry years.

The plaintiffs below complained that the Association ought not be permitted to bargain, and if it was going to trade, it ought to trade straight across the board, acre foot for acre foot, even if it meant that all of the high water would be lost to the project. None of the plaintiffs can use such high water so they took a "dog in the manger" attitude in that they would rather see the water lost to the project than permit the users under the High Line Canal to get some benefit out of the trade. If some of the stockholders are unable to use the waters of the Corporation it is the duty of the Corporation to deliver such water to those stockholders who can use it. In the case of *Smithfield West Bench Irrigation Company vs. Union Central Life Insurance Company*, 142 P. 2d, 866, 105 Utah 468, the Court stated:

“Likewise the company cannot permit the water to be lost by non-use thereof as long as any shareholder desires to and is in a position to use the water. Water undistributed may be used by any stockholder in a position to use it. The shareholders are in effect owners in common of the waters with certain limitations as between one another governing the use thereof. Each may therefore use any water not being used by any other shareholder, as is the case with other owners in common.”

To permit such high water to run into Utah Lake unused under the project for a continuous period of five years would result in the statutory forfeiture of the right, in whole or in part, under the provisions of Section 73-1-4 U.C.A. 1953. We submit that the directors of the Association are charged with the duty to guard against such a forfeiture by delivering the high water to whichever users can beneficially use the same for whatever partial charge they will accept. The Court below recognized that to require a full charge for such water would result in a loss of a portion of it to the project. It found that if a low charge for use of such high water from the Spanish Fork River is made by the Association it will operate to the special advantage of water users under the Strawberry High Line Canal and the Springville-Mapleton Lateral, yet it made no finding that such a low charge would impair any of the rights of any of the other users under the project. The Trial Court then proceeded to hamstring what little bargaining power

the Association had by arbitrarily fixing the basis upon which the trade could be made, and in effect has ordered that the Association trade on the percentage fixed by the Court, or not at all.

Since none of the water right contracts specifically cover the distribution and use of the Spanish Fork River and because of its unique character, we submit that the manner in which such high water is utilized under the project is and can only be a matter of management in the operation of the project. The Strawberry Water Users Association is charged with the responsibility of operating and maintaining the project under its contract with the United States. (Ex. 11, 48, 49). It is a corporation organized and existing under the laws of the State of Utah. (Fdg. 10, Ex. 13). Although the project water users are stockholders of the Association, their rights to the use of the project water are based upon their respective water right contracts with the United States. The board of directors of the Association consist of 16 members, each being a land owner in the District which he represents. In addition thereto, each director must own five shares of capital stock of the Corporation. By statute, the corporate powers of a corporation in this State shall be exercised by the Board of Directors. Section 16-2-21, Utah Code Annotated, 1953. The authority to manage and control the corporation and conduct its business is left exclusively to the board of directors and not to the stockholders as such. *Anderson*

v. *Grantsville North Willow Irrigation Company*, 51 Utah 137, 169 P. 168. In the case of *Summit Range & Livestock Company v. Rees*, 1 Utah 2d 195, 265 P. 2d 381, this Court well stated the rule on page 382 of the Pacific Reporter as follows:

“It is the function and the prerogative of the Board of Directors of the Corporation to manage its affairs in the best interests of the corporation and its stockholders. Its action in so doing will not be interfered with so long as it is within the framework of the purposes and powers included in the corporate charter, and the action is not fraudulent or so discriminatory as to be confiscatory of the rights of the defendant, who is a minority stockholder.” (Citing 13 Fletcher Cyclopaedia Corporations Perm. Ed. Sec. 5813).

In the instant case, the Court made no finding that the directors of the Association mismanaged the operation of the project, or abused their discretion in determining the percentages charged for the high water of the Spanish Fork River. This is so because the evidence would not support such a finding, and in fact overwhelmingly shows otherwise. There has been no showing that the partial charges made in the past have been other than for the best interests of the project as a whole. The record is devoid of any evidence to show that any rights of the plaintiffs or of any other users under the project have been impaired by the percentage charges which have been made in the past for such high water. As a matter of fact, the evidence shows that since the year 1946, a full allotment of project water

has been received each year by all users entitled to the same. (Ex. 73). During this entire period only partial charges as determined by the directors have been made for such high water. While defendants concede that such management cannot be conducted in such a way that it will impair the rights of any of the users, we submit that there is no evidence to show that the management and operation of the project has in any way impaired the vested rights of any of the users or that the board of directors have not acted in good faith.

It is not the right or privilege of a Court to set up its judgment as to whether or not the directors of a corporation have acted wisely in its management. It is the duty of the Courts to determine whether or not the directors have acted in good faith with their corporation. If so, then it is the duty of the Court to uphold the actions of the directors. *Chapman v. Troy Laundry*, 87 Utah 15, 47 P. 2d, 1054. Courts of equity will not, as a general rule, exercise jurisdiction at the instance of shareholders in a corporation to control or interfere with the management of the corporate or internal affairs of a corporation. To authorize or justify interference, there must be some action or threatened injurious acts, abuse of power or oppression on the part of the corporation or its officers which are clearly subversive to the rights of the minority stockholders. 13 Am. Jur. Corporations, Section 452, pages 498 and 499. To the same effect is 19 C.J.S. Corpora-

tions Secs. 743, 984. If the stockholders of the corporation are dissatisfied with its management their remedy is to elect a new board of directors. 19 C.J.S. Corporations Sec. 743, P. 84.

In spite of the foregoing principles of law the trial court, without solicitation from any of the parties, undertook to substitute its judgment for that of 16 men, long experienced in the practical operation of this project and themselves farmers and water users under this project, and it arbitrarily fixed the percentage charges which must be made for such high water. It must be remembered that the Strawberry Project is the sole source of supply to those users under the High Line Canal. On the other hand, the Strawberry Project is merely a supplemental supply to those users under the Spanish Fork Division. With such a limited sole supply to the users under the High Line Canal, the individual user must be extremely cautious to call for his water at the time when it will do him the most good. The evidence is undisputed that, except on rare occasions, if the user knew that all high water delivered to him would be fully charged against his limited supply, he would not call for it, and the trial court so found. He will take his chances on the spring storms and soil moisture retained in the ground to start his crops growing, and will call for the storage water later in the season to mature his crops. As a result the individual would then call for his entire supply from the stored water



in the Strawberry Reservoir. The net result would be that very little, if any, of the high water would be used, and it would flow to Utah Lake, totally lost to the project. On the other hand, if the individuals under the High Line Canal could be encouraged to use as much high water as possible with some assurance that only a partial charge would be made against their project supply, commensurate with the benefit they receive from such water, the net result would be that proportionately less than their entire supply would come from the Strawberry Reservoir, thereby leaving more water in the reservoir to supply those users, particularly the plaintiff-type users, whose entire supplemental supply, must of necessity come from the stored water in the reservoir.

With the foregoing goal in mind, the directors of the Association worked out a plan which has been in operation for a number of years, and has been very effective, since during the past 10 years a full contract allotment has been received by all water users. The mechanics of the plan are relatively simple. When the high water begins, the users under the High Line Canal are encouraged to take as much high water as possible, with the understanding that only a partial charge will be against their individual project supply. As soon as the high water is over, the irrigation committee, which is composed of four members of the Board of Directors of the Association, determines the relative value of such

high water as compared to the storage water. The committee makes their recommendations to the full board of directors. If the same are approved, the individual is immediately notified of the amount of the charge for such high water in order that he can plan the use of his remaining water. The net result is that less high water is lost to the project and more storage water is made available to fill the allotments contracted for and to conserve water for periods of drought. How can this result be other than for the best interest of the project. The inflexible controls fixed by the trial Court destroy the basis upon which such plan is founded, i.e. the latitude to bargain for the benefit of the project as a whole. This latitude we urge, is and should remain within the discretion of the directors of the Association, each of whom are water users under the project and experienced farmers. The Association was created for the express purpose of managing and operating the project. In the complete absence of any showing of mismanagement of the project, bad faith or abuse of discretion, or impairment of the rights of any of the users, we submit that the trial court erred in substituting its judgment for the judgment of the board of directors of the Association in a matter of purely internal management of the affairs of the corporation.

## POINT II

THE TRIAL COURT ERRED IN ITS CONCLUSIONS AS TO THE PERCENTAGE CHARGES TO BE

MADE FOR THE USE OF THE HIGH WATER OF THE SPANISH FORK RIVER, AND ERRED IN MAKING ITS DECREE FIXING THE PERCENTAGE CHARGES FOR THE USE OF SUCH RIVER WATER AGAINST THE INDIVIDUAL CONTRACT ALLOTMENT FOR THE REASON THAT THE PERCENTAGES SO FIXED ARE ARBITRARY AND ARE NOT SUPPORTED BY THE FINDINGS OR EVIDENCE.

Defendants are of the view that because of the unique character of the high water of the Spanish Fork River, the disposition thereof, at whatever partial charge it will bring, is a matter of internal management within the discretion of the board of directors of the Strawberry Water Users Association, to be disposed of in a manner that would be for the best interests of the project as a whole. Since it is a matter of internal management, the Court ought not substitute its judgment for the judgment of the board of directors of the Association unless the directors have clearly abused their discretion and have acted in bad faith in the percentage charges made. Without any showing of abuse of discretion, or bad faith, the trial court took it upon itself, without solicitation from any of the parties to arbitrarily fix the percentage charges which must be made.

The record is silent as to how the trial court arrived at the percentages it fixed. A review of the findings showed that the trial court arithmetically computed the average diversions of the high water of the Spanish Fork River for the months of March, April, May and June, during the period from 1919

to 1956 (Fdg. 47). It then computed the average net yield to storage in the Strawberry Reservoir from 1913 to 1955 inclusive (Fdg. 51). Next it computed the average yearly percentage charge which had been made for such high waters during the period from 1919 to 1938 inclusive, and during the period from 1939 to 1955 inclusive. (Fdg. 54). The trial court then concluded what the percentage charges should be for the future (Concl. 17), and fixed those amounts in its Decree. (Decree, Par. 13). The trial court apparently had in mind that one could water next years crops with the average water available during the past years. It completely disregarded the fact that the percentage value of such high water varies from year to year and from season to season, as well as from day to day. The percentage that may have worked for last year will not necessarily work for next year. We are mindful that the trial court has retained its jurisdiction for a period of ten years for the sole purpose of making changes in the percentages in the event those fixed shall be found to be inequitable. However, any adjustments made this year will not necessarily work next year. The fact that the percentages fixed may work in whole or in part for the ten years of retained jurisdiction does not necessarily mean that they will work for the next twenty years, yet they will become permanent.

The mere fact that the trial court has fixed the percentages which must be charged, whatever

the figures may be, has so bound the hands of the directors of the Association, that what little bargaining power they have to dispose of the high water is completely gone. It is conceivable that through some stroke of fate the arbitrary percentages to be charged as fixed by the Court may work some of the time, but to the extent that those percentages do not work, water will be lost to the project, and all of the users, including those plaintiffs entitled to water, will be deprived of the benefits which otherwise might be gained.

A cursory examination of the averages arithmetically computed by the Trial Court shows that there is absolutely no correlation between those averages and the percentages fixed by the Decree. The percentages which the trial court concluded must be made were of necessity picked out of the air since the findings of fact will not support those conclusions. The rule is well established that the conclusions of law must be predicated upon and find their support in the findings, and the judgment must follow the conclusions of law. *Parrott Bros. Co. v. Ogden City*, 50 Utah 512, 167 P. 807. *Friedli v. Friedli*, 65 Utah 605, 238 P. 647, *Needham v. First National Bank of Salt Lake City*, 96 Utah 432, 85 P. 2d, 785. If the conclusions are at variance with the findings, the Supreme Court will order the lower Court to set aside its erroneous conclusions and substitute correct ones therefor. *Parrott Brothers Company vs. Ogden City*, 50 Utah 512, 167 P. 807.

*Mason v. Mason*, 108 Utah 428, 160 P. 2d 730. Conclusions of law must be based upon facts and must be considered with the facts, and in like fashion the Court's Decree must rest upon legal conclusions and be consistent with them. *Brittain v. Gorman*, 42 Utah 586, 133 P. 370. Since there is no evidence to support a finding as to the percentage charge which should be made, it would be an idle jesture to order the trial court to make new findings and conclusions which could be supported by the evidence.

We respectfully submit that the conclusions of the trial court as to the percentage charges which must be made for the high water of the Spanish Fork River, must be set aside and those provisions of the Decree which rest on such conclusions must be reversed.

### POINT III

THE TRIAL COURT ERRED IN ITS CONCLUSIONS THAT THE WATER RIGHT CONTRACTS PROVIDE FOR THE DELIVERY OF ANY WATER PRIOR TO MAY 1, OF ANY YEAR, AND ERRED IN MAKING ITS DECREE FIXING ANY CHARGE FOR HIGH WATER OF THE SPANISH FORK RIVER DELIVERED PRIOR TO MAY 1, AGAINST THE INDIVIDUAL CONTRACT ALLOTMENTS.

All of the high water of the Spanish Fork River is used on the lands under the High Line Canal and under the Springville-Mapleton Lateral (Fdg. 50, Ex. 2, 5). Most of such water is used on land under the High Line Canal, and a small portion is used on lands under the Springville-Mapleton Lateral, (Tr. 324, 325). The Springville Irrigation District

does not use such high water and only a small area in the extreme south end of the Mapleton Irrigation District has at different times used a little of the high water from the Spanish Fork River. (Tr. 404-405). In view of the foregoing, we shall direct our attention under this point to those water right contracts of the users under the High Line Canal.

Under the High Line Canal Unit, there were nine different forms of water right contracts executed, totaling 717 in number and aggregating 40,377.26 acre feet of water per annum. (Ex. 16-22 incl., 24-27 incl. 28, Tr. 41, 42, 46, 47, 51, Fdg. 39). Five of the different forms specify the irrigation season as being from May to September inclusive, or May 1 to October 1 (Ex. 18, 21, 22, 24-27 incl., 28). Three forms refer only to the "Irrigation Season" (Ex. 16, 17, 20) and one form is silent in this respect (Ex. 19). The only forms which may be ambiguous with respect to the period of delivery are the three which specify "the irrigation season" and the one which is silent in this respect. The interpretation of those necessarily hinges upon the "Irrigation Season". The logical interpretation would be the one which would make all nine forms consistent with each other. Any interpretation which would extend beyond the period from May 1 to October 1 inclusive, would be directly contrary to the express provisions of the first of the five forms. It follows therefor that the most logical and consistent interpretation of such period is either May



1 to September 30, inclusive, or May 1 to October 1, inclusive, and in no event would the period begin prior to May 1. There can be but little question that the foregoing is the only interpretation when viewed in light of the contract between the United States and the Strawberry High Line Canal Company for delivery through the High Line Canal of the water contracted for by the water users covered by all of the nine different forms of water right contracts. (Ex. 12). Section 6 thereof provides as follows:

“The water for the High Line Unit will be delivered at the head of the High Line Canal . . . during the irrigation season of *May 1 to October 1 of each year* in accordance with the terms of the existing contracts and public notices and future contracts and public notices. No water will be carried in the High Line Canal System during the period from November 1 to March 31 inclusive without the written permission of the chief engineer of the United States Reclamation Service first obtained.” (Emphasis ours).

Copies of the public notices referred to in the foregoing contract are in evidence. (Ex. 50-66 incl.). The public notice of May 21, 1917 (Ex. 59) provides under paragraph 14 thereof that water will be delivered to all lands under the High Line Unit under the following schedule:

“. . . in May 18% of the total amount called for by the water right application in as near a uniform flow as practicable. The remainder of the season's supply to be delivered as demanded, but not to exceed 27½%

of the total amount in any one month, in as near a uniform flow as practicable during the remainder of the irrigation season, *which is from May 1 to September 30*". (Emphasis ours).

Most of the remaining public notices make specific reference to the above public notice of May 21, 1917, and incorporates the provision defining the irrigation season as being from May 1 to September 30, for the use of the water under the High Line Unit.

It is clear from reading the water right contracts of the users under the High Line Canal that none of such contracts specifically refer to the high water of the Spanish Fork River, nor do they specifically provide for any use thereof. Those contracts specified above, which provide for a period of delivery from May 1 to September 30, inclusive, specifically do not cover the use of any water prior to May 1. Since the water covered by such contracts can be delivered through the High Line Canal only during the period from May 1 to October 1, inclusive, there is little room for doubt that the "irrigation season" referred to in the three forms specified above does not extend beyond the period from May 1 to October 1, inclusive, and the same is true for those contracts of the form which is silent in this respect. This is further made clear by the public notices described above which define the "irrigation season" under the High Line Unit as being from May 1 to September 30, inclusive. The con-

clusion is inescapable that the water right contracts do not cover or provide for the delivery and use of the high water of the Spanish Fork River prior to May 1 of any year.

We must recognize, however, that prior to May 1, there is usually some high water of the Spanish Fork River available which can be used on the lands under the High Line Canal. As far as the water right contracts are concerned, such water is clearly not a part of the project supply contracted for by the water users. In its interpretation of the water right contracts, the trial court concluded that those contracts covered such water prior to May 1. It follows that the trial court erred in its decree making a fixed percentage charge for such water delivered prior to May 1 against the individual users thereof.

As a practical matter, such water is available for use on the lands under the High Line Canal, which use will benefit the project as a whole. Common sense dictates that the water should be used when it is available for whatever benefit the project as a whole can derive and not permit it to run into Utah Lake to be lost to the project, simply because the contracts do not cover the use of such water prior to May 1. The fact that the Association has taken it upon itself to bargain for the use of water which is not covered by the water right contracts for the benefit of the project as a whole, is no reason for the trial court to go beyond the provisions of the contracts which it was asked to interpret and

by its decree fix an arbitrary percentage charge for such water. It is not as valuable as the storage water subject to call later in the season and must be disposed of at whatever percentage charge it will bring whenever possible. The percentage charge which such water will bring fluctuates from day to day as well as from year to year. Since that is the nature of the water, the Association must be given a free bargaining arm in disposing of it. We respectfully submit that the trial court erred in hamstringing the bargaining arm of the Association by concluding that the water right contracts provide for the delivery of any water prior to May 1 of any year, and erred in making its decree fixing any charge for the high water of the Spanish Fork River delivered prior to May 1 against the individual contract allotment.

#### POINT IV

THE TRIAL COURT ERRED IN ADJUDICATING THE RIGHTS OF THE PLAINTIFFS TO THE USE OF THE WATER OF THE SPANISH FORK RIVER FOR THE REASON THAT THERE WAS NO ISSUE AS TO SUCH RIGHTS AND NO COMPETENT EVIDENCE FROM WHICH SUCH RIGHTS COULD BE DETERMINED.

We adopt the view set forth under Points III and IV of the brief of the United States, Secretary, and Commissioner, and of those set forth in Point I of the brief of the State Engineer. In addition thereto, we would make the following further observations.

The defendants at least, if not all of the parties proceeded with the trial of this cause on the basis of the relief sought in the petition for declaratory judgment, i.e., for an interpretation of the project water right contracts. Defendants urged from the very beginning that based upon the pleadings filed the corporate plaintiffs, Spanish Fork West Field Irrigation Company, East Bench Canal Company, and Spanish Fork South Irrigation Company were not proper parties to this suit since such corporations, as separate entities, owned no water right contracts. Accordingly, motions to dismiss as against such plaintiffs and motions to strike were filed (R. 277, 278), and made in open court (Tr. 197, 198), and a motion for summary judgment against such plaintiffs was filed. (R. 279). Such corporate plaintiffs contended that they had an interest in the subject matter of this action by reason of their "carrier contracts", (Ex. 40-46 incl.). Such motions were denied by the trial court (R. 283, Tr. 199).

During the trial and after most of the defendants had rested their case in chief (Tr. 418), the Court indicated that it was going to adjudicate the relative collective rights between plaintiffs and defendants to the use of the natural flow water of the Spanish Fork River (Tr. 425-457). Thereupon a conflict of interest arose between some of the defendants represented by Christenson, Novak & Paulson, and the trial court permitted such attorneys to

withdraw as counsel for some of the defendants (R. 290, Fdg. 65). This left some of the defendants without counsel.

The only evidence offered as to such rights consisted of the "carrier contracts" (Ex. 40-46 incl.), and the oral testimony of witnesses who were officers of some of the plaintiff irrigation companies as to what they claimed to be their rights (Tr. 532, 534). In addition thereto some evidence was offered by plaintiffs to show that some recognition has been given to a collective use of a maximum of 390 sec. ft. of water from the natural flow of the Spanish Fork River before water therefrom was diverted and used under the project. (Tr. 460, 464, 469). The earliest recollection of any such recognition was that of Mr. Huber, whose personal knowledge dated back only to 1928 (Tr. 464). It was assumed by the defendants that the primary users of the Spanish Fork River collectively had a prior right to 243 sec. ft. under the provisions of the McCarty Decree dated April 20, 1899 and the Booth Decree dated January 21, 1901, although such decrees were not offered in evidence. No applications had been filed with the State Engineer by any of the plaintiff-type companies to appropriate collectively the additional water between 243 sec. ft. and 390 sec. ft. There is no other evidence from which the Court could find and determine such water rights. Motions to dismiss were made in open court by defendants on such grounds (Tr. 547, 551).

The claimed rights to the use of the natural flow of the Spanish Fork River between 243 sec. ft. and 390 sec. ft. could not be established through adverse use since adverse use clearly did not run against the United States, being the owner of the high water rights. The fact that the project canals divert water from the Spanish Fork River upstream from any of the diversions of the plaintiff-type companies would further preclude an adverse use, since adverse use does not run upstream. *Wellsville East Field Irrigation Company vs. Lindsay Land and Livestock Company*, 104 Utah 448, 137 P. 2d, 634. The plaintiff-type irrigation companies were permitted to remain in this action on the basis of their interest in the "carrier contracts". Under this guise they were awarded a decree quieting title as against all other parties to their rights to the use of the natural flow waters of the Spanish Fork River. In so doing, the trial Court went far afield of what it was asked to do. In spite of the fact that such water rights were not in issue, and in spite of the complete failure in proof of the plaintiffs to establish such rights, the trial court found that individually those companies owned prior rights to the use of the Spanish Fork River aggregating 390 sec. ft. (Fdg. 26, 27), and concluded that each of the companies owns such rights (Concl. 5-10 incl.), aggregating 390 sec. ft., which are prior in time to the rights owned by the United States (Concl. 11), and incorporated the same in its decree (Decree-par. 5-12 incl.).