

1959

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

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Spanish Fork West Field Irrigation Co. v. USA*, No. 8994 (Utah Supreme Court, 1959).
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No. 8994

In the Supreme Court of the State of Utah

SPANISH FORK WEST FIELD IRRIGATION COMPANY, A CORPORATION,
ET AL., PLAINTIFFS AND RESPONDENTS

v.

THE UNITED STATES, A NATION, ET AL., DEFENDANTS AND
APPELLANTS

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

BRIEF FOR APPELLANTS, THE UNITED STATES, THE SECRETARY
OF THE INTERIOR, AND THE COMMISSIONER OF RECLAMATION

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**BRIEF FOR APPELLANTS, THE UNITED STATES, THE SECRETARY
OF THE INTERIOR, AND THE COMMISSIONER OF RECLAMATION**

STATEMENT OF FACTS

The Strawberry Valley Irrigation Project is a reclamation project of the United States, built and operated under and in pursuance of the Reclamation Act of 1902 (32 Stat. 388) and acts supplemental thereto. Construction of the project by the United States began in about the year 1907 (Fdg. 22) and irrigation water was first declared to be available under the project by public notice dated October 8, 1915 (Def. Ex. 50). The project serves lands in the southerly part of Utah County, Utah. Its principal features include the Strawberry Valley Reservoir, located in Wasatch County, Utah, and the High Line and Springville-Mapleton Canals.

Most of the project water supply is obtained by trans-mountain diversion from the Colorado River system and the water so obtained is stored in the Strawberry Valley Reservoir (Fdgs. 22, 51). Released from there as need arises during the irrigation season, this water pours through a tunnel in the Wasatch

(1)

Mountains and into the Diamond Fork of the Spanish Fork River. From that river, it is diverted at several points for the ultimate use by irrigators and other water users who have contracted with the United States for the delivery of water. In furtherance of the project plan, the United States filed upon and acquired the right to use the waters so stored in the Strawberry Valley Reservoir (Fdg. 22).

By applications filed in 1909 and 1914, the United States also acquired under the law of Utah appropriative rights to use for irrigation of lands within the project 390 cubic feet per second of the natural flow of Spanish Fork River (Fdgs. 22, 24, 25). Water available under these rights comprises the second component of the project supply.¹

Insofar as this case is concerned, the project includes two types of water users. The plaintiff type are the users under appropriative rights to use natural flow of the Spanish Fork River which were acquired independently of the appropriations made by the United States. Consequently, these users irrigate with "river" water obtained under those rights during the spring months when such water is available, and their only demand upon the project water supply is for stored water after the early river flow has subsided. Their lands are served with both "river" water and stored water through the works of the plaintiff canal and irrigation companies and some of the defendant companies similarly situated which did not join as plaintiffs.²

¹The United States also has a right under an appropriation of 1906 to use 156 cubic feet per second of the flow of Spanish Fork River for power purposes (Fdg. 23). It is deemed unnecessary further to consider that right for the purposes of this appeal.

²The trial court determined that the appropriative rights of all these companies in the natural flow of the Spanish Fork River, aggregating 390 cubic feet per second, are prior in time to the appropriative rights of the United States from the same source (Decree, pars. 5-9). Whether or not that is correct is not a matter of moment in the consideration of this appeal as, in our view, the decree must be set aside for lack of jurisdiction in the Court below to render it. It is sufficient to observe here that no complaint is made in the petition that the appropriative rights of those companies have been injured by anyone, including the United States, and the petition does not seek a declaration of the relative priorities of the companies and the United States. That is not what this case is about, as appears more particularly below.

The defendant-type users receive their entire water requirements from the project supply, the deliveries to them consisting of "river" water within the United States' appropriations so long as it is available, and thereafter of stored water. All of the lands belonging to users of this type are under the High Line and Springville-Mapleton Canals.

"Most" of the water right application contracts between the United States and the defendant-type users provide for delivery of that quantity of project water which shall be beneficially used on the lands referred to in the applications, not to exceed a specified number of acre feet per acre (Fdg. 30). A typical provision of those contracts is quoted in Finding 30 as follows:

The quantitative measure of the water right hereby applied for is that quantity of water which shall be beneficially used for the irrigation of said irrigable land up to, but not exceeding two (2) acre feet per acre per annum, measured at the head of the Strawberry High Line Canal, and in no case exceeding the share proportionate to irrigable acreage, of the water supply actually available as determined by the Project Manager or other proper officer of the United States, or its successor in the control of the project, during the irrigation season for the irrigation of lands under said unit. The applicant assumes all risk of loss in transporting the water from the point of delivery to the said land.

Although in the course of development of the project at least nine different forms of water-right applications were used, including the contracts with the plaintiff-type users, the trial court found that as to every such contract for project water, it was intended that in case the total supply of water available in any year should be insufficient "to fully supply all applicants, then the supply available should be prorated in proportion to the acre feet subscribed for by the holders of applications approved and then in good standing" (Fdg. 45). "The majority" of such contracts "specify a period of delivery of water from May 1st to September 30th, while some specify the irrigation season, and others contain no recital as to the time of delivery" (Fdg. 45).

The defendant Strawberry Water Users' Association was incorporated in 1922 (Fdg. 33) for the purpose of operating the project (Plf. Ex. 13). Pursuant to request by the Association of the Secretary of the Interior, the United States, acting by and through the Secretary, and in pursuance of subsection G of Section 4 of the Act of December 5, 1924 (43 Stat. 702), entered into a contract on September 28, 1926, whereby "the care, operation and maintenance of the entire" project "except the Mapleton and Springville lateral [canal] and the High Line Canal" were transferred to the Association.³ The transfer was made "subject to the terms of all existing contracts" and the contract provided for retention of title to all property in the Government (Plf. Ex. 11, Article 11; Fdg. 33). The Association obligated itself to operate the project "in full compliance with the reclamation law as it now exists (and as it may hereafter be amended), the regulations of the Secretary now and hereafter made thereunder, and the terms of this contract. * * *" These terms still govern management of the project by the Association (Def. Ex. 49, Articles 14, 23; Fdg. 33), although the original contract was amended by later contracts dated November 20, 1928 (Def. Ex. 48) and October 9, 1940 (Def. Ex. 49; Fdg. 33).

For many years it has been the practice of the Association to provide that use by the defendant-type users of early "river" water should be charged only in part against their respective contract entitlements (Fdg. 43). A reason for this practice has been that, because stored water delivered after the early river flow has subsided is more valuable to the irrigators (Fdg. 48), the defendant-type users would not use all the "river" water when it is available if such water were fully charged to their contract entitlements and a portion of the "river" water would as a result be lost to the project (Fdg. 49).

It is this practice in administration of the project water supply which is the sole subject of controversy in this suit. The plaintiff-type users being so situated as not to receive any apparent direct benefits therefrom, this suit was initiated under

³ The care, operation and maintenance of the High Line and Springville-Mapleton Canals had been previously transferred to other organizations (Fdgs. 32, 34, 35; Plf. Exs. 10 and 15).

the Utah Declaratory Judgment Act late in December, 1954. The plaintiffs purport to represent all plaintiff-type users and they sue the defendants as representatives of all defendant-type users. The relief prayed for, so far as it need be considered for the purposes of this appeal, was a determination (1) that all water right applicants under the project should be charged in full with all the water they receive, whether "river" water or stored water, and (2) that all parties should be limited to the quantities of water specified in their respective contracts with the United States, except as they may show some other or additional water right. The injury which plaintiffs assert is that the practice complained of diminishes the supply of stored water beyond the extent to which it would be diminished if the defendant-type water users were charged in full for their use of river water, thereby requiring plaintiff-type users to accept pro rata reductions of their contract entitlements in years when water in storage is insufficient to meet all project needs.

Motions to dismiss and to quash service of process were filed on behalf of the United States, the Secretary of the Interior and the Commissioner of Reclamation. These motions were denied and thereafter a petition for an interlocutory appeal was denied by this Court on October 3, 1955. Defendants, the United States, the Secretary of the Interior and the Commissioner of Reclamation, "without submitting to the jurisdiction" of the Court below, then answered. Trial of the cause was had during January, 1957, and the Court below entered its findings of fact, conclusions of law, and decree on March 12, 1958. Motion for a new trial made by the United States, the Secretary of the Interior and the Commissioner of Reclamation, in which motion certain of the other defendants joined, was denied on November 22, 1958. Notice of appeal to this Court from the judgment of the trial court and from the order denying the motion for new trial were timely filed by the United States, the Secretary of the Interior, and the Commissioner of Reclamation. All other parties have likewise appealed.

In its determination of the case, the trial court went far beyond plaintiffs' request for a determination that all water used should be charged to the respective contract entitlements and that all users should be limited to their respective contract

rights except as they might show some other or additional right. After gratuitously determining, *aliunde* the pleadings, that the rights of the United States in the natural flow of the Spanish Fork River are junior to such rights of Spanish Fork City and the canal and irrigation companies which carry project water to the plaintiff-type users, and enjoining "the United States, its agents and successors in title and interest" from interfering with the latter rights (Decree, par. 11), the decree then quiets "in the United States and its successors in interest and title" title to the appropriate rights of the United States "to the flow of the Spanish Fork River to the extent of 390 cubic feet per second during the period extending from March 1st to November 1st of each year" and to the "rights to the use of the water stored and to be stored in the Strawberry Reservoir" (Decree, par. 12). The Court then, having concluded that the Water Users' Association "in its management and operation of the Strawberry Project, does not have the right to allow diversion of water from the river without charging the user therefor" (Conclusion 14) but that the charge to be made need not and should not be for the full quantity of river water used (Conclusions 15 and 16), assumed to itself the power to determine the proper percentages of charge which should be made on account of such uses. Paragraph 13 of the Decree sets forth the trial court's judgment of the percentages of charge properly to be made under the circumstances therein set forth. By paragraph 14 of the Decree the State Engineer of Utah is designated as the court's agent to estimate each year the project water supply, as a predicate for application of the appropriate percentage charge prescribed by the preceding paragraph. Paragraph 15 purports to authorize the Water Users' Association to sell excess river water in years of high water, but prescribes that "no sale shall be made for use upon lands covered by presently subsisting subscriptions in the Strawberry reclamation project at a cost less than that which will be commensurate with the percentage charges hereinabove set forth for use of project river water." And by paragraph 16 jurisdiction is retained for a period of ten years for the purpose "of making changes in the percentages of charges to be made for the use of project river

water in the event the percentages herein provided for shall be found to be inequitable.”

STATEMENT OF POINTS

I. The Court below had no jurisdiction over the United States and could acquire none. As the United States was an indispensable party, however, the entire action should have been dismissed.

II. The Court below had no jurisdiction over the Secretary of the Interior and could acquire none. As the Secretary was, however, an indispensable party, the entire action should have been dismissed.

III. The decree entered is invalid for the following additional reasons. It should be set aside and the Court below directed to dismiss the action.

(a) The Court below has promulgated a legislative regulation for future guidance. This is foreign to the judicial function and is forbidden by the doctrine of separation of powers, which is binding as well upon the courts of Utah as upon the federal courts.

(b) The decree of the Court below directs the operation of a federal reclamation project. But the power of Congress over the operation of federal reclamation projects derives from the federal Constitution and is exclusive of all State authority. Congress has not authorized the States or the courts of the States to direct in any particular the operation of these projects.

(c) The decree of the Court below substitutes the will of the Court for the will of the Secretary of the Interior, who is charged by law with responsibility for the operation of federal reclamation projects. The doctrine of separation of powers which precludes the court from promulgating a legislative regulation in the first place, also precludes it from assuming direction of the executive function.

(d) The decree of the Court below makes new contracts for the parties. No court has power to do this.

IV. Plaintiffs failed to establish a cause of action against defendants and even though jurisdiction of the United States

and the Secretary of the Interior were assumed the trial court should have entered judgment dismissing the complaint.

ARGUMENT

It is important to note that this case is not a contest between appropriators and it was not brought to determine priorities. It is a contest between rival camps of water users under a reclamation project of the United States respecting administration of the project water supply, the right to the use of which has been appropriated by the United States under Utah law. Such interests as all these water users have in that supply derive solely from contracts with the United States. These contracts are creatures of federal reclamation law, to be determined by that law and not by the law of Utah.

This is an action, purely and simply, for a declaratory judgment. The only relief really sought by the petition is a declaration that all parties be limited "to the amount of water provided in their respective contracts with the United States."⁴ So stated, it is apparent that plaintiffs have misconceived their forum because, as this Court knows, the United States can be sued on its contracts for monetary relief only in the federal courts (28 U.S.C. § 1346, 1491), and in no court for specific relief. *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 703 (1949). It is to be noted the United States is the other party to every contract to which the attention of the Court below was solicited by the petition. But, were it not for the impediments hereinafter discussed to obtaining the relief sought against the United States and the Secretary of the Interior, plaintiffs did not misconceive their appropriate remedy, if they have a cause of action against anyone (which we deny), because declaratory relief is most proper where the construction of written instru-

⁴ Second prayer of the petition. The first prayer of the petition actually only supplements the second. It requests that all water users "be charged with all of the water that they receive"—something quite meaningless unless they are limited to their contractual entitlements. The third and fourth prayers of the petition do not enlarge the contractual basis of this suit and in any event have been stricken by agreement of the parties. The fifth prayer is for "an appropriate decree to insure a compliance with its determination." The sixth prayer is for relief pendente lite and the seventh is for such further order as is just and proper.

ments or contracts, wills, deeds, etc., will resolve the controversy. Unresponsive to the plaintiffs' petition, however, the Court below entered a decree which, it is submitted, will not withstand analysis. The question put to the Court by plaintiffs was: "Can the defendants, under their contracts with the United States, use river water without a full charge being made therefor?" Answering that question in the affirmative, the Court then proceeded to determine: "How much of a charge should be made for the use of such water?" When the Court attempted in its decree to answer that question, it passed by the pales of the judicial function and entered the legislative province of rate making. This it could not constitutionally do.

The second prayer of the petition shows that the suit is not one for the adjudication of rights to the use of water of a river system or other source,⁵ but only one for determination of contractual entitlement of the defendant-type water users to share in the rights of one appropriator—the United States. It is obvious that the questions presented by the petition could not be answered until the Court interpreted the provisions of all contracts executed between the United States and water users of the defendant type. (*Supra*, footnote 4.) Yet the Court below made no real interpretation of the contracts. It found that there were hundreds of them (Fdg. 16); that there were nine different types of them (Fdg. 45); and that the period of delivery of water under some was from May 1st to November 1st of each year and under others was unspecified (Fdg. 45). "Most" of the individual defendants' contracts for delivery of water through the Strawberry High Line Canal failed to specify the period during which water would be delivered, if the contractual provision reproduced in Finding 30 is typical. To note that is to wrestle with the problem of interpretation but not to solve it.

The evidence shows that 138 contracts were executed with individuals of the defendant type (Tr. 42) containing the following common provision:

2. The quantitative measure of the water right hereby applied for is that quantity of water which shall be

⁵ This contention is addressed in Part I of this argument, *infra*.

beneficially used for the irrigation of said irrigable lands up to, but not exceeding, two (2) acre-feet per acre per annum, measured at the head of the High Line Canal; and in no case exceeding the share, proportionate to irrigable acreage, of the water supply actually available *as determined by the Project Manager or other proper officer of the United States, or of its successors in the control of the project*, during the irrigation season for the irrigation of lands under said unit. *The said water shall be delivered at the head of the High Line Canal during the irrigation season from May 1 to October 1 of each year* in a flow as nearly uniform as practicable, unless otherwise mutually agreed, and will be distributed throughout the months of the irrigation season in accordance with the schedule of delivery adopted by the Secretary of the Interior for the High Line Unit. The applicant assumes all risk of loss in transporting the water from the point of delivery to the said lands. [Emphasis supplied.] (Def. Ex. 18.)

The Court below found that the season of "high water" in the Spanish Fork River "usually occurs between about April 1 and May 20, and usually lasts not more than two or three weeks" (Fdg. 47). Suppose that any part of the high-water flow occurs before May 1 or the extreme case where it all occurs before May 1. Isn't it true that, in the case of a water user whose contract contains the provision quoted above, the limit of two acre-feet per acre per annum does not apply with respect to river water delivered before May 1? Isn't this even more persuasive when we consider the following provision from the contract which the United States executed with the Strawberry High Line Canal Company?

The water for the High Line Unit will be delivered at the head of the High Line Canal which is located in the southeast quarter of section 33, Township 8 South, Range 3 East *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. * * *. [Emphasis supplied.] (Plf. Ex. 12.)⁶

And isn't it clear beyond question that under the quoted contract provision the ultimate determination of the quantity of water actually to be delivered is to be made by the authorized officer or agent of the United States operating the project on the basis of his estimate (and not the estimate of the Court or Utah State Engineer) of the water supply actually available "for the irrigation of lands under said unit"?

In any event, plaintiffs' petition necessarily sought a declaration that would fairly interpret every contract held by individual water users of the defendant type. If that was the steep and thorny way to ultimate solution, it might at least have resulted in a decree on its face within the power of the Court to render, subject to the questions hereinafter discussed respecting suability of the United States and the Secretary of the Interior and the capacity of the Courts to control the executive branch of the United States government, rather than in the legislative rule which the Court adopted quite unsolicited by any of the parties.

⁶ And see the public notice published May 21, 1917, by the Secretary of the Interior, paragraph 14 of which reads as follows:

"14. Schedule of water delivery for High Line Unit.—During the irrigation season of 1917 and thereafter, until further notice, water will be delivered to all lands of the High Line Unit, Strawberry Valley Project, Utah, under Public Notice in accordance with 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 supplied.] (Def. Ex. 54.)

Other public notices subsequently issued, as those of March 11, 1919 (Def. Ex. 58), February 20, 1920 (Def. Ex. 59), April 26, 1920 (Def. Ex. 61), February 15, 1921 (Def. Ex. 62), fail to define the period of delivery otherwise.

I. The Court below had no jurisdiction over the United States and could acquire none. As the United States was an indispensable party, however, the entire action should have been dismissed

(a) Section 666, 43 U.S.C., enacted as a rider to the Department of Justice Appropriation Act, 1953, was intended to and does authorize the joinder of the United States as a defendant only in suits which are *sui generis*, relating to the general adjudication of rights to the use of water of a river system or other source

In *In Re Bear River Drainage Area*, 2 Utah 2d. 208, 271 P. 2d 846 (1954), this Court said "It is elemental that the Federal government cannot be sued without its consent and it has been held that there is no distinction between suits against the government directly and suits against its property",⁷ and "The waiver of sovereign immunity is the sole prerogative of Congress." To the same effect see: *United States v. Sherwood*, 312 U.S. 584, 586 (1941); *United States v. Shaw*, 309 U.S. 495, 500 (1940); *Minnesota v. United States*, *supra*, footnote 7; *Arizona v. California*, 298 U.S. 558, 568 (1935).

The first question, then, presented by this appeal is: Did the Court below have jurisdiction over the United States?

The fact that this is a suit for declaratory judgment does not confer jurisdiction upon the Court. The federal Declaratory Judgments Act, 28 U.S.C. §§ 2201, 2202, does not in itself authorize suit against the United States (*a fortiori*, the Utah statute does not), but provides an additional remedy only where the jurisdiction of the federal court has already attached by virtue of some other statute. See *Aetna Casualty and Surety Co. v. Quarles* (C.A. 4, 1937) 92 F. 2d 321, wherein the Court said: "The Declaratory Judgments Act does not add to a Court's jurisdiction, but it is a procedural statute providing for an additional remedy for use in cases of which the Federal courts already had jurisdiction. In a suit for relief under the Declaratory Judgments Act, the question is not whether jurisdiction shall be assumed but whether in exercising jurisdiction *already conferred*, a discretion exists with respect to granting the remedy prayed for." Particularly pertinent is

⁷ "A proceeding against property in which the United States has an interest is a suit against the United States", *Minnesota v. United States*, 305 U.S. 382, 386 (1938).

the following language of the United States Court of Appeals for the Ninth Circuit in *Brownell v. Ketcham Wire and Manufacturing Co.*, 211 F. 2d 121 (1954): "*The Declaratory Judgments Act does not constitute a consent of the United States to be sued but merely grants an additional remedy in cases where jurisdiction already exists in the Court.*"

Plaintiffs will say (in fact will be obliged to say) that jurisdiction is authorized by 43 U.S.C. § 666. But that statute does not grant that consent without which this suit must fail.

Subdivision (a) of § 666, 43 U.S.C., enacted as a rider to the Department of Justice Appropriation Act of 1953, reads as follows:

Consent is hereby given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source, or (2) for the administration of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law, by purchase, by exchange, or otherwise, and the United States is a necessary party to such suit. The United States, when a party to any such suit, shall (1) be deemed to have waived any right to plead that the State laws are inapplicable or that the United States is not amenable thereto by reason of its sovereignty, and (2) shall be subject to the judgments, orders, and decrees of the court having jurisdiction, and may obtain review thereof, in the same manner and to the same extent as a private individual under like circumstances: Provided, That no judgment for costs shall be entered against the United States in any such suit.

But this is not a suit for the adjudication or administration of rights to the use of water of a river system or other source. It is a suit for a declaratory judgment. The petition, which is so styled, recites that the action "is brought pursuant to the Declaratory Judgment Act of Utah, the same being Chapter 33 of Title 78, U.C.A., 1953." Compare the general determination law of Utah, Chapter 4 of Title 73, U.C.A., 1953. The follow-

ing considerations show that the federal statute was enacted to permit joinder of the United States only in suits for the general adjudication of water rights, not at all in suits such as this under the declaratory judgment acts.

Suits for the general adjudication of water rights are, as this Court knows, actions *sui generis*, Weil, *Water Rights in the Western States*, 3d ed., vol. 2, page 1125; *Holbrook Irrigation District v. Fort Lyon Canal Co.*, 84 Colo. 174, 195, 269 Pac. 574, 582; *Hough v. Porter*, 51 Or. 318, 439, 98 Pac. 1083, 1109, common in the law of the Western States in one form or another, Weil, *supra*, pages 1120, 1125. There is a universal requirement in such suits that all known claimants to the water supply be joined and that their individual rights be determined by the final decree. The reason for this is pointed out by the court's opinion in *Washington State Sugar Co. v. Sheppard* (C.C., D. Idaho, N.D. 1911) 186 Fed. 233, 235:

* * * it is highly important that all claimants to the right to divert the water of a natural stream for beneficial purposes should be brought into the same court in a single action, and therein be required to wage their claims, in order that such claims, necessarily more or less interdependent and conditioned one upon the other, may be settled and defined by a single decree. The cogency of the reasons for such course is so thoroughly appreciated that almost invariably the state courts in the arid region, where the doctrine of appropriation prevails, have shown solicitude and have exercised great care in requiring that all claimants be made parties in suits of this character.

The nature of such suits is put this way in this Court's opinion in *Bear River*, *supra*, p. 12:

The purpose of the statutory procedure for the determination of water rights is to prevent piecemeal litigation or a multiplicity of suits and to provide a means of determining all rights in one action. * * * A general determination * * * differs from the ordinary private suit in that it is a statutory procedure which may be commenced by the state engineer for the purpose of

bringing into the suit every water claimant or user on a single source or system and require them to litigate and settle their relative rights in one proceeding.

And in this way by the Supreme Court of the United States, construing the Oregon statute which is the counterpart of the Utah general determination law:

* * *, the proceeding in question is a *quasi* public proceeding, set in motion by a public agency of the State. All claimants are required to appear and prove their claims; no one can refuse without forfeiting his claim, and all have the same relation to the proceeding. It is intended to be universal and to result in a complete ascertainment of all existing rights, to the end; First, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights without needless waste or controversy; Second, that the rights of all may be evidenced by appropriate certificates and public records, always readily accessible, and may not be dependent upon the testimony of witnesses with its recognized infirmities and uncertainties, and, Third, that the amount of surplus or unclaimed water, if any, may be ascertained and rendered available to intending appropriators.

* * * * *

* * * In such a proceeding the rights of the several claimants are so closely related that the presence of all is essential to the accomplishment of its purpose, and it hardly needs statement that these cannot be attained by mere private suits in which only a few of the claimants are present, for only their rights as between themselves could be determined * * *. *Pacific Live Stock Co. v. Oregon Water Board*, 241 U.S. 440, 447 (1916) *et seq.*

That the universal requirement of joinder of all known claimants is not limited to statutory adjudication suits appears further from a recent decision of the Court of Appeals for the Ninth Circuit. There the Court said:

The only proper method of adjudicating the rights on a stream, whether riparian or appropriative or mixed, is to have all owners of land on the watershed and all appropriators who use water from the stream involved in another watershed in court at the same time.

The trial court violated this principle by issuing a declaratory judgment as to the right of the United States as against one claimant whose rights were junior, which had the effect of preventing a trial of the other water rights involved without giving a hearing as to the individual owners.⁸

Thus it is apparent that a suit to which something less than the whole number of known claimants of rights to use the waters of the river system or other source sought to be adjudicated are joined is not an adjudication suit within the generally accepted meaning of that term, and that this is not such a suit.

It is further apparent that this is not a suit of the type consented to by 43 U.S.C. § 666. The legislative history of that statute shows that the Congress intended nothing different from what the language of the statute clearly expresses and that consent to the joinder of the United States in general adjudication suits only is granted. The then Chairman of the Senate Committee on the Judiciary stated that the act

is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value.⁹

But in demonstrating the inapplicability here of Section 666 we are not restricted to the language of the statute and to the

⁸ *State of California et al., v. The United States of America* (C. A. 9, 1956), 235 F. 2d 647, 663.

⁹ Report No. 755, 82d Cong., 1st Sess., page 9. See Appendix hereto. In the appendix there are set forth additional excerpts from the Report which show that only general adjudication suits were contemplated by the language of the statute in question.

legislative history as disclosed by Senate Report No. 755. *Miller v. Jennings* (C.A. 5, 1957), 243 F. 2d 157, was a suit for declaratory and injunctive relief quite similar to this. It was brought by several water users and the water district of which they were constituents, purporting to represent all other users similarly situated, for a declaration of their asserted rights under a contract with the United States providing for the delivery of project water surplus to the needs of the Rio Grande Federal Reclamation Project. There, as here, the named defendants were the United States, officers of the Department of the Interior, and certain project landowners who were allegedly sued as representatives of all other landowners similarly situated. The Fifth Circuit Court of Appeals, in affirming dismissal of the case, denied plaintiffs' claim of the applicability of Section 666 in the following language:

The United States has not given its consent to be joined as a defendant in every suit involving water rights. It may be made a party only in suits 'for the adjudication of rights to the use of water of a river system or other source.' There can be an adjudication of rights with respect to the upper Rio Grande only in a proceeding where all persons who have rights are before the tribunal. The Ninth Circuit Court of Appeals has most succinctly stated the doctrine in this manner:

"The only proper method of adjudicating the rights on a stream, whether riparian or appropriative or mixed, is to have all owners of lands on the watershed and all appropriators who use water from the streams involved in another watershed in court at the same time." *People of the State of California v. United States*, 9 Cir., 1956, 235 F. 2d 647, 633. See *Pacific Live Stock Co. v. Lewis*, 241 U.S. 440, 36 S. Ct. 637, 60 L. Ed. 1084.

With respect to plaintiffs' contention that the suit was maintainable as a class action, the Court said:

It is urged by the plaintiffs that all persons having any interest in the subject matter of the suit are parties to the suit or are members of a class represented by

parties to the suit. The same contention was ably argued, carefully considered, and rejected in *Martinez v. Maverick County Water Control & Improvement District No. 1*, 5 Cir., 1955, 219 F. 2d 666. There, as here, a suit was brought for a declaratory judgment as to water rights. There the plaintiffs asked for a decree reserving the right to plaintiffs to apply for injunctive relief. Here the plaintiffs pray for a declaration of their rights and for an injunction. This difference does not create a distinction. There it was said:

“The declaratory judgment would be binding only on those parties actually before the court; each new party asserting his rights in the waters of the river, in the same or any other court, would have the right to relitigate the questions already adjudged as between those before the court.” *Martinez v. Maverick County Water Control and Improvement Dist. No. 1*, 5 Cir., 1955, 219 F. 2d 666, 672.

On October 14, 1957, the Supreme Court denied certiorari in that case. 355 U.S. 827, 885.

A suit for adjudication of water rights within the generally accepted meaning thereof and within the meaning of Section 666 is just what Senator McCarran described in his letter to Senator Magnuson, included in Senate Report No. 755, and it is what the Fifth Circuit Court of Appeals described in *Miller v. Jennings*—a proceeding to determine the relative rights of all users “on a given stream” or other source.

But plaintiffs sought only a determination that the United States and its agents may not deliver to the defendant-type water users of the Strawberry Valley Reclamation Project more project water than the quantities specified in their respective contracts with the United States. They did not ask a determination of the relative rights of the various water users on a river system or other source. They did not ask an adjudication of water rights.

The United States is an appropriator of the waters of the Spanish Fork River. So are the plaintiff canal companies. But adjudication of those rights and the rights of other appropriators on the river is not the purpose of this suit, even if

such were possible, contrary to the authorities above reviewed, in the absence of all such appropriators. The individual water users, plaintiff and defendant, and all other users whom they are supposed to represent by this purported class action, are not appropriators.¹⁰ The project water supply, in which they have contractual interests only and the use of which by defendant-type users is the sole subject of controversy, is, as correctly noted by the Court below in paragraphs 2, 3, and 4 of the Decree, the property of the United States.

The Congressional consent to suits for adjudication cannot be extended by implication to suits such as this. For "It is not * * * [the court's] right to extend the waiver of sovereign immunity more broadly than has been directed by the Congress."¹¹ Any contention that the statute should be liberally construed to permit this suit is clearly refuted by the following language of the Supreme Court in its opinion in *Larson v. Domestic & Foreign Corp.*, 337 U.S. 682, 703 (1949):

It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits [for damages] to be maintained against the sovereign and we should give hospitable scope to that trend. *But the reasoning is not applicable to suits for specific relief.* For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Govern-

¹⁰ This is subject to the caveat that in this declaratory judgment action there is no showing that they are appropriators. In a suit for general adjudication the truth of that matter could be determined. As all water claimants must be joined under the statute before the United States can be, *supra*, the error is here presented of joinder of the United States in a type of action where, if the action is maintainable at all, joinder of other appropriators is irrelevant.

¹¹ *United States v. Shaw*, 309 U.S. 495, 502 (1939). See also *Belknap v. Schild*, 161 U.S. 10, 16 (1895); *Minnesota v. United States*, 305 U.S. 382 (1939).

ment from acting, or to compel it to act. There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign. The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract rights. [Emphasis supplied.]

Enough has been said to demonstrate that this is not a suit for the adjudication of rights to the use of water of a river system or other source. Neither is it a suit for the administration of water rights within the meaning of 43 U.S.C. § 666. In such suits courts can logically administer only between conflicting water rights *inter sese*. But such a suit certainly is not maintainable for the internal management of one water right [as the Government's, here] which is not alleged to be adversely affecting others. Yet that constitutes the judgment of the Court below as will appear more particularly in Part III of this argument. No matter how the United States distributed its water, no injury could have been incurred therefrom by the other appropriators party to this suit (the canal companies) as long as the United States did not trespass upon their shares of the flow. There is no single allegation in the petition that they were injured or apprehended injury—and no evidence.¹²

The statute can't be construed to authorize administration of single rights only, while at the same time providing for nothing less than system-wide adjudications. The contiguity of the words of the statute prohibit. As the statutory consent is to "the adjudication of rights to the use of water of a river system or other source" and to "the administration of such rights," it can't be that suits for administration are narrower in purview than suits for adjudication. The statutory consent is not to suits for the administration of "any rights," or of a single

¹² Why plaintiff canal companies are even in the case is not clear to us. They do not claim that their rights have been infringed and they are strangers to the contracts between the United States and the individual water users served by their systems. Their contracts with the United States relate only to the transportation of project water to the project lands served by their respective systems (Fds. 25 and 26).

right—it is to “suits for the administration of [rights to the use of water of a river system or other source].”

We submit that 43 U.S.C. § 666 authorizes only suits for administration which are ancillary to suits for adjudication. Such is clearly indicated by the following language from the legislative history. That language is also proof that joinder of all appropriators is no less necessary in suits for administration than in suits for adjudication.

It is most clear that where water rights have been adjudicated by a court and its final decree entered, or where such rights are in the course of adjudication by a court, the court adjudicating or having adjudicated such rights is the court possessing the jurisdiction to enter its orders and decrees with respect thereto *and thereafter to enforce the same by appropriate proceedings.* In the *administration of* and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. *Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings.* [Emphasis supplied.] Senate Report No. 755, *supra*, footnote 9.

As *Miller v. Jennings, supra*, p. 17, is authority for the proposition that this is not a suit for adjudication of water rights within the meaning of § 666, so also is it authority for the proposition that this is not a suit for administration of such rights. For if the suit there involved was not a suit for administration, neither is this. And while the Fifth Circuit Court of Appeals did not expressly discuss in its opinion the language of part (2) of the first sentence of the statute, the question was before it and what it did say was applicable to that part as well as to part (1). It was urged by appellants both to the Court of Appeals and in their Petition to the Supreme Court for certiorari that the suit was one under the statute for the administration of water rights if not for adjudication.

There is a common thread running through suits for the adjudication and administration of water rights. This is that

they are entertained by the courts to settle conflicts *between* owners of rights to the use of water. This suit is not brought for that purpose. The only appropriative rights really involved here are those of the United States. The gravamen of plaintiffs' suit is not that the United States or any of the defendants are interfering with or impairing any of the plaintiff canal companies' appropriative rights but that the individual defendants are getting more of the reservoir supply of water than they are entitled to. The waters impounded in the reservoir belong to the United States. No use made of them can interfere with the appropriative rights of the plaintiff canal companies who have no contracts with the United States relative to reservoir water except that they will deliver it to their members. The individual plaintiffs and the individual defendants have no right to reservoir water except by contract with the United States.

The whole subject matter of this case, and the only relief specifically prayed, is an interpretation of contracts made under and in pursuance of the laws of the United States. The State courts can hear suits brought under the statutory water laws for adjudication or administration to resolve conflicts between appropriative rights and in some such suits it may be that the United States can be joined. The State courts can hear suits arising in contract between private citizens. But those courts cannot, as a matter of jurisdiction, entertain suits of this nature against the United States based purely and simply upon contracts with the United States.

Neither Section 666, 43 U.S.C., nor any other statute, waives the United States' immunity from suits such as this. As, further, there is no question but that this action is "a proceeding against property in which the United States has an interest," *Minnesota v. United States*, *supra*, footnote 11, as inescapably proved by the decree, it should have been dismissed by the Court below.

(b) Section 666, 43 U.S.C., does not consent that the will of the Utah District Court be substituted for that of the Secretary of the Interior, and his authorized agents, who are charged by law with the administration of the Strawberry Valley Reclamation Project. Were the statute to be so construed, there would be serious doubt as to its constitutionality

As noted *supra*, p. 6, the decree entered herein purports to enjoin the United States from interfering with the rights of the

plaintiff canal companies to the natural flow of Spanish Fork River. The granting of such relief by the trial court was purely gratuitous since it was not sought by the petition or justified on the basis of the issues which were tried. But aside from that specific grant of injunctive relief, it is not questionable that the purpose of the suit, even if limited to the relief specifically prayed by the petition, is to restrain and regulate administration of the project water supply by the Secretary of the Interior and his authorized agents. The decree which has been entered even more plainly attempts to accomplish such purpose. The suit therefore should be considered as one for specific relief in the effort to determine whether consent is given by Section 666.

To test the accuracy of this analysis, it is necessary only to consider the utter futility of a naked declaration upon the specific questions referred to in the prayer if the Court were not to undertake also to compel by its orders conformity to the declarations it has made. And the fact that the test for determining the Court's jurisdiction in a suit for declaratory relief is whether the controversy might be entertained in that Court if the relief sought were injunctive (*Colegrove et al. v. Green*, 328 U.S. 549, 552 (1946)) indicates the judicial view that injunction is a concomitant of declaratory relief.

Apart from the express language of the statute and its legislative history, discussed *supra*, pp. 12 to 22, there are the strongest reasons why § 666 is not to be construed as authorizing the relief prayed for against the United States or that granted by the decree which the Court entered. Those reasons find expression in the authorities reviewed in part III of this argument respecting the constitutional incapacity of the judiciary to exercise legislative power and to control the executive officers of the United States in the exercise of discretionary powers validly conferred by statute.¹³

¹³ It should be noted that we are not contending that the Secretary of the Interior, or his agent, the Strawberry Valley Water Users' Association, may with impunity administer the project water supply in disregard of the contracts which have been made with the project landowners. If, contrary to our contentions in part IV of this argument, the practice of which plaintiffs complain does result in compensable injury to the plaintiff-type users, then, as observed by the Supreme Court

Thus, in *Hudspeth County Conservation & Reclamation District No. 1 et al. v. Robbins* (C.A. 5, 1954), 213 F. 2d 425, 432, cert. denied 348 U.S. 833, the Court said:

* * * Whatever may be the merits of the plaintiffs' contentions, the court would have no jurisdiction by declaratory judgment, see *Lynn v. United States*, 5 Cir., 110 F. 2d 586, 588, or by injunction against Government officers to substitute itself in any part of the management and operation of the dams, reservoirs and facilities for the agency designated by Congress. * * *

In *New Mexico v. Backer*, 199 F. 2d 426, 428 (1952), the Tenth Circuit Court of Appeals stated the problem in this language:

The Rio Grande Reclamation Project was constructed and operated in the exercise of a proper governmental function and in accordance with valid statutes of the United States. The facilities were owned by the United States and the waters were stored in the reservoir to be withdrawn by the United States for authorized governmental purposes. The management, control, and operation of such facilities are given the Secretary of the Interior in broad terms, 43 U.S.C.A. § 373. The United States could not hold or operate this vast project except through its officials and agents. Backer was performing these functions for the Secretary of the Interior and under his instructions. Whatever he did, he did for the Secretary under authority of the reclamation laws of the United States. The operation of the project and facilities depended upon the flow of water from the reservoir. If this flow could be enjoined or affected by court decree or order directed to Backer, he would be under the direction of the court and not his supe-

of the United States in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, 297 (1958) "the courts are open for redress" in a suit for compensation. What we are contending is that Congress has vested the Secretary of the Interior, and his authorized agents, with authority to administer this reclamation project, including its water supply, and that Congress has not consented to the assumption of such administration by the courts of Utah or, for that matter, the courts of the United States.

riors as representatives of the United States. It would be a complete ouster of the United States over the control and management of its own property and facilities.

And we repeat here the language of the Supreme Court in the *Larson* case, hereinabove quoted at page 19:

* * * For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. *There are the strongest reasons of public policy for the rule that such relief cannot be had against the sovereign.* The Government, as representative of the community as a whole, cannot be stopped in its tracks by any plaintiff who presents a disputed question of property or contract rights. [Emphasis supplied.]

Although in *Belknap v. Schild*, *supra*, p. 19, the Supreme Court said "unless expressly permitted by act of Congress, no injunction can be granted against the United States," it is of the utmost significance that neither in that case nor in any other decision of an appellate court has it been found that the Congress has extended such permission.

In the face of these precedents, it is inconceivable that there can be found by implication ¹⁴ in a statute "not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream," ¹⁵ the consent by Congress that the Government *can* be stopped in its tracks by *any* plaintiff who presents *any* disputed question of property or contract rights relating to the use of water.

¹⁴ "It [permission to sue the United States] will not be implied * * *." *North Dakota-Montana Wheat Grower's Assn. v. United States* (C.A. 8, 1933), 66 F. 2d 573, 577; *cert. denied* 291 U.S. 672 (1934).

¹⁵ The language immediately preceding that quoted from Senator McCarran's letter to Senator Magnuson is also especially significant: "S. 18 is not intended to be used for the purpose of obstructing the project of which you speak or any similar project * * *." See Appendix hereto.

The statute in express terms permits joinder of the United States as a defendant only in suits for the adjudication of rights to the use of water of a river system or other source, or for the administration of such rights. There is no reference to actions such as this for injunctive or declaratory relief. That is in keeping with the view expressed by the Supreme Court in the *Larson* case that "*There are the strongest reasons of public policy for the rule that such [injunctive] relief cannot be had against the sovereign.*" [Emphasis supplied.] Since neither injunctive nor declaratory relief is expressly provided for, it necessarily follows that the Congress has not waived the immunity of the United States from suits of this character, for, as discussed above: "[The United States] cannot be subjected to legal proceedings, at law or in equity, without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress." ¹⁶

Were Section 666 to be construed otherwise, serious constitutional questions would be presented. Among them would be the question whether Congress can constitutionally delegate to the courts, either of the States or of the United States, supervision of the performance by the executive branch of its functions in the operation of a federal project. Since relief is sought against the United States as well as against specified officers, it must be assumed that judgment for the plaintiff would of necessity, to be effective at all, be binding upon all executive officers, including the President, and perhaps also upon the Congress. The problem would be similar to those dealt with by the Supreme Court in *Mississippi v. Johnson*, 71 U.S. 475 (1866), and by Judge Pope in his concurring opinion in *United States v. United States District Court*, *infra*, pp. 31-32. Cf. *Marbury v. Madison*, *infra*, p. 41; *Decatur v. Paulding*, *infra*, p. 41; *Martin v. Motl*, 25 U.S. 19, 31 (1827); *Riverside Oil Co. v. Hitchcock*, *infra*, p. 41; *United States v. Ide*, *infra*, p. 42; 11 Am. Jur., Const. Law, p. 889, § 190, footnote 1, p. 887, § 188. Congress may not waive the sovereign immunity where the result would be to transfer to the judiciary powers which under the Constitution repose in

¹⁶ *Belknap v. Schild*, *supra*, p. 19.

the executive branch of the Government. The doctrine of separation of powers which precludes the legislative branch from assuming to itself executive powers also forbids the transfer of such powers to the judiciary. (See *infra*, p. 42.)

We submit that neither the express language of the statute, its legislative history, nor general policy considerations permit an interpretation of § 666, 43 U.S.C., as authorizing this suit against the United States.

II. The Court below had no jurisdiction over the Secretary of the Interior and could acquire none. As the Secretary was, however, an indispensable party, the entire action should have been dismissed

Not much need be said in support of this point. The Secretary of the Interior has been given by Congress very broad authority for the operation, management and control of federal reclamation projects, 43 U.S.C. § 373. By the decree of the Court below, it is his hands which are tied, his congressionally delegated authority which is shackled. He is, therefore, an indispensable party. But he cannot be made a party. This is because his official residence is the District of Columbia and for that reason he is without the territorial jurisdiction of any courts, State or Federal, except the courts of the District. See *Blackmar v. Guerre*, 342 U.S. 512 (1951). Certainly the Utah District Court was not capable of bringing him within its jurisdiction by service of its process on him in Washington, D.C.

Moreover, the trial court's judgment against him, even were the United States not specifically named, would expend itself on the United States and the United States' immunity from suit is as much a bar to the suit against the Secretary as it is to the suit against the United States. See *Larson v. Domestic & Foreign Corp.*, *supra*, p. 19; *New Mexico v. Backer*, *supra*, p. 26; *Hudspeth County Conservation & Reclamation District No. 1 et al v. Robbins*, *supra*, p. 24; *Ogden River Water Users' Assn. v. Weber Basin Water Conservancy District* (C.A. 10, 1956), 238 F. 2d 936.

None of the contracts out of which this action stems seem to have been made with the Commissioner of Reclamation.

Moreover, his powers and authority are derived as a subordinate of the Secretary. If, because of these reasons, he is not an indispensable party, nonetheless the District of Columbia is his official residence and the service of process upon him was also outside the jurisdiction of the lower court. Motion made in the Court below to quash service of process upon him should have been granted.

III. The decree entered is invalid for the following additional reasons. It should be set aside and the Court below directed to dismiss the action

The third question presented by this appeal is: Did the Court below have jurisdiction to render this particular decree? We submit that it did not as a matter of constitutional law, both Federal and, be it noted, of the State of Utah.

This portion of the argument would be no less valid even if the Court below had secured jurisdiction of the United States and of the Secretary of the Interior, which, of course, we absolutely deny.

We appeal from the whole of the decree, because the Court had no jurisdiction to enter it as previously pointed out, and also because no single paragraph thereof is responsive to the pleadings and because judgment of dismissal is the only judgment on the merits which the record would support.

But especially we appeal from paragraphs 13 through 16 of the decree, not only because they are even more strikingly unresponsive to the pleadings than is the rest of the decree—of which the cross appeal of plaintiffs is eloquent proof—but because they are out-and-out regulation of a federal reclamation project, and for that reason alone cannot stand.

There is nothing in 43 U.S.C. § 666 which remotely suggests that Congress has authorized operation, management or regulation of a federal project by a State court.

That the Court below has attempted nothing less is apparent from a consideration of paragraphs 13 through 16 of the decree.

In paragraph 13, "the Court has deemed it proper and necessary to make and does make *the following provisions of the manner in which the waters of the project shall be regulated and distributed* during the next ten years after the entry of

this decree.” [Emphasis supplied.] Following this in the same paragraph are the detailed provisions providing, by regulating the charge to be applied, how much of the United States’ water the project landowners may receive.

In paragraph 14 the State Engineer of Utah is designated as “Referee,” and his independent estimate of the amount of water available to the project in any given year is binding upon the Water Users’ Association, the United States’ managing agent, as to what part of the Court’s formula to apply.

Paragraph 15 provides that when the volume of river water warrants, sales of excess project water may be made by the Water Users’ Association at such rates as will not circumvent or nullify the schedule of charges set forth in paragraph 13.

By paragraph 16, the Court retains jurisdiction of the cause for ten years “for the sole purpose of making changes in the percentages of charges to be made for the use of project river water.”

The argument below will show that in entering this decree the trial court committed grave error.

(a) The Court below has promulgated a legislative regulation for future guidance. This is foreign to the judicial function and is forbidden by the doctrine of separation of powers, which is binding as well upon the courts of Utah as upon the Federal courts

In its most vulnerable aspect, the decree is legislative rule-making quite outside the judicial function. Plaintiffs’ pleading is entitled “Petition for Declaratory Judgment,” and the jurisdiction of the court is expressly invoked “pursuant to the Declaratory Judgment Act of Utah, the same being Chapter 33 of Title 78, U.C.A., 1953.” This is substantially the Uniform Declaratory Judgment Act and provides that the district courts of Utah “shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed.” It would seem hardly assailable that the setting of an arbitrary charge *in futuro* for the use of water is not the declaration of rights, status, or other legal relations. True enough, in Utah as in other States other relief, including coercive relief, can be afforded in an action for a declaratory judgment, *Gray v. Defa*, 103 Utah 339, 135 P. 2d 251 (1943). But

it must, we think, be relief of a type otherwise sanctioned in law or equity, as damages, injunction, specific performance, cancellation, rescission, reformation, etc. A rule setting an arbitrary charge for future use of water is none of these. It partakes of the legislative function which is, generally, "to govern future conduct," *Mulcahey v. Public Service Commission*, 101 Utah 245, 255, 117 P. 2d 298, 302 (1941). The following cases demonstrate that such a rule is outside the judicial function.

In *Atchinson, Topeka & Santa Fe R.R. v. Denver & New Orleans R.R.*, 110 U.S. 667 (1883) Denver Railroad sought a court order requiring Santa Fe to transact the business of through traffic with it, the Santa Fe having previously refused to do so. Denver contended that upon such refusal of Santa Fe to agree "upon the terms of their intercourse a court of equity [could] in the absence of statutory regulations, determine what the terms should be." The Supreme Court said:

Such appears to have been the opinion of the Circuit Court, and accordingly in its decree a compulsory business connection was established between the two companies, and rules were laid down for the government of their conduct towards each other in this new relation. In other words, the court has made an arrangement for the business intercourse of these companies such as, in its opinion, they ought in law to have made for themselves."

In holding invalid the Circuit Court's order, the Supreme Court said: "A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law, or usage, but it cannot create the obligation."

In *Bistor v. Board of Assessors of Cook County*, 346 Ill. 362, 179 N.E. 120, 78 A.L.R. 686 (1931), plaintiff taxpayers complained that local taxing officials were not proceeding according to law in assessing the value of real property and sought a decree from the court directing the manner in which the officials

were to make the assessments.¹⁷ The lower court refused to provide any such direction and the Supreme Court of Illinois affirmed the dismissal of the bill. The following language of the Court points up the division between the judicial and the legislative function:

It is long-established and well-recognized practice in this state that a court of equity will exercise jurisdiction to enjoin the collection of a tax where the tax is not authorized by law, where it is assessed upon property not subject to taxation, and where the property has been fraudulently assessed at too high a rate. (Citations.) This is not a case of that kind. The bill in this case attacks the assessment because it is alleged the assessing officers have failed to follow the course imposed upon them by law in making the assessment, and it is not a bill which seeks to correct the wrong done to the complainants alone, but it seeks to have a court of equity assume general supervision of the assessment and direct in advance the officers charged with the duty of making it, as to the manner in which they shall proceed.

The Court concluded that

The supervision of the officers appointed by law for the assessment of property for taxation by directing them in advance how they shall proceed is foreign to the jurisdiction of equity.

In *United States v. United States District Court*, (C.A. 9, 1953) 206 F. 2d 303, the United States sought a writ of prohibition against an order, issued pendente lite by the District Court, commanding the release of certain waters from Friant Dam for the benefit of downstream water users who had free access to such waters prior to the construction of the dam. The order attacked by the Government was characterized by Judge Pope in the following language in a concurring opinion:

¹⁷ The case cited differs from this in that there plaintiffs sought the legislative relief which the lower court granted. In this case legislative relief was not even sought by the plaintiffs.

Here, the Court [i.e., the District Court], through its agent, is about to tell the Bureau of Reclamation what work is to be done on or near the pumps of the water users. The Bureau may reduce the quantity of water discharged downstream only if the Court's agent agrees that the reduction will allow sufficient operation of the pumps, and reduction below 400 second-feet may be made only with the approval of the Court. The Bureau must do the work on the water users' pumps as the Court's agent may, in his opinion, think required.

In substance, the Court has undertaken to manage and control the flow from Friant Dam, *pendente lite*, through the Court's agent. (*Ibid.*, 310.)

This order said Judge Pope, "amounted to putting the District Court in the water distributing business" (*Ibid.*, 311). And, "However well adapted this order may have been to accomplish a common sense result, I do not see how power to issue it could exist." And, "I think that the court is without power to participate in such an enterprise" [i.e., the administration of water distribution even with the consent of all parties to the action]. The judicial, as opposed to the legislative, function is illustrated by Judge Pope's following remarks criticizing the District Court's order:

Such a court may enjoin action where necessary to preserve the status quo, but it may not create rights, nor administratively execute them. Thus, while a district court may enjoin the collection of a tax based on an arbitrary overvaluation of property, it may not determine what tax would be valid, *Rowley v. Chicago & N.W. Ry.*, 293 U.S. 102, 112, 55 S. Ct. 55, 79 L. Ed. 222, it may cancel a franchise to take water for breach thereof, but not annul it under a power reserved in the grant, *Public Service Commission of Puerto Rico v. Have-meyer*, 296 U.S. 506, 518, 56 S. Ct. 360, 80 L. Ed. 357, it may set aside a confiscatory public utility rate but not prescribe a valid one, *Central Kentucky Natural Gas Co. v. Railroad Comm.*, 290 U.S. 264, 272, 54 S. Ct. 154, 78 L. Ed. 307.

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* * * But it seems to me that a district court may not assume the administration here undertaken, any more than such a court, while trying a suit to enjoin an adjoining landowner from excavating so as to cause subsidence of plaintiff's land and building, could appoint an agent to locate the place and to supervise the work of making the excavation.

In addition to the United States Supreme Court cases cited by Judge Pope, see the following: *Honolulu Rapid Transit Co. v. Hawaii*, 211 U.S. 282 (1908), (courts have no business regulating the time schedule of street railway cars); *Newton v. Consolidated Gas Co.*, 285 U.S. 165 (1922), ("Rate making is no function of the courts and should not be attempted either directly or indirectly"); *West Ohio Gas Co. v. Comm'n (No. 1)*, 294 U.S. 63, 74 (1935), ("A court passing upon a challenge to the validity of statutory rates does not determine the rates to be adopted as a substitute").

We are not unmindful, of course, that the federal courts are constitutional courts and, because of the separation of powers, without legislative power, *Keller v. Potomac Electric Co.*, 261 U.S. 428 (1923). Even so, it does not seem to have been that doctrine which decided the cases above set forth. The *ratio decidendi* of these cases seems rather, that rule-making is "foreign to the jurisdiction of equity", *Bistor* case, *supra*, p. 36. This limit on the judicial function, transgressed here, is expressed by Justice Holmes in *Prentis v. Atlantic Coast Line Company*, 211 U.S. 210, 226 (1908): "A judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. The establishment of a rate is the making of a rule for the future, and therefore is an act legislative and not judicial in kind * * *"

From this difference in the kind of function, as between legislative and judicial, has come the constitutional principle of the separation of powers. Entirely aside from constitutional law, the cases above cited are authority for the proposi-

tion that the Court below had no power as a court of equity (and of course none at all as a court of law) to provide as it did in its decree.

However, the decree of the Court below in this case also violates the doctrine of separation of powers. That apparently was the basis upon which the Supreme Court of Appeals of Virginia set aside the decree of the trial court in *Harrisonburg v. Roller*, 97 Va. 582, 34 S.E. 523 (1882) in the following language:

The [trial] court, by its decree, not merely perpetually enjoined the town from performing the work in the manner it proposed, but went even further and fixed *permanently*¹⁸ what the grade of the sidewalk in front of the residence of the appellee should be, and minutely prescribed the manner in which the town should do the work. This was plainly beyond the jurisdiction and power of the court. The result of such interference by a court of equity would be to control absolutely the council of a city or town in the exercise of the legislative functions plainly conferred upon it by the charter of the city or town, and to be exercised by the council according to its discretion; to usurp powers expressly conferred upon the council; and to substitute the discretion of the court in the place of that of the council.

The Constitution of Utah itself adopts the principle of the separation of powers.¹⁹ In *Young v. Salt Lake City*, 24 Utah 321, 67 Pac. 1066 (1902), this Court said that under that constitution "powers belonging to one department of the government cannot be exercised by others. Courts cannot legislate or make laws. This power is vested in the legislature and any

¹⁸ Emphasis in original.

¹⁹ Article V of the Utah Constitution reads:

"The power of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted."

law which confers such power upon a court or executive officer is unconstitutional and void.”²⁰

(b) The decree of the Court below directs the operation of a federal reclamation project. But the power of Congress over the operation of federal reclamation projects derives from the Federal constitution and is exclusive of all State authority. Congress has not authorized the States or the courts of the States to direct in any particular the operation of these projects

In a case decided as recently as June 23, 1958,²¹ the Supreme Court of the United States reaffirmed²² the plenary power of the Federal Government with respect to federal reclamation projects. The Court said:

In developing these projects the United States is expending federal funds and acquiring federal property for a valid public and national purpose, the promotion of agriculture. This power flows not only from the General Welfare Clause of Art. I, § 8, of the Constitution, but also from Art. IV, § 3, relating to the management and disposal of federal property. * * *

* * * beyond challenge is the power of the Federal Government to impose reasonable conditions on the use of federal funds, federal property and federal privileges. (Cits.). The lesson of these cases is that the Federal Government may establish and impose reasonable conditions relevant to federal interest in the

²⁰ This is the only Utah case discovered by us which is in point. In that case a statute was attacked as unconstitutional because it conferred legislative powers upon the district courts of the state. The statute provided that, upon petition filed by a majority of real property owners of land lying within a city's limits praying that the land be disconnected from the city, a district court could, if it found the allegations of the petition to be true and if justice and equity required, issue a decree excluding the land from the city limits. Denying the contention that the district court in issuing such a decree was performing a legislative act, the Supreme Court said, "It is a judicial act to determine what the facts in a given case are, and whether such facts, when found, entitle the party to the relief sought." The Court admitted, however, that "it is not without doubt and difficulty that we have arrived at the conclusion" and cited decisions of other state courts *contra*.

²¹ *Ivanhoe Irrigation District v. McCracken*, *supra*, p. 24.

²² See the earlier case of *United States v. Gerlach Live Stock Co.*, 339 U.S. (1950) 738.

project and to the overall objectives thereof. *Conversely, a State cannot compel use of federal property on terms other than those prescribed or authorized by Congress.*" (357 U.S. at 294, 295). [Emphasis supplied.]

No federal statute authorizes the relief which plaintiffs sought or the decree herein entered. On the contrary, the controlling laws of the United States have vested in the Secretary of the Interior all discretion to be exercised in the administration of the Strawberry Valley Irrigation Project.

If the Court below, indeed, had power to enter the decree which it made, then the management of every federal reclamation project could be taken over by a State court upon the filing of a single petition by any water user holding a contract with the United States for the delivery of project water.²³ It is submitted that 43 U.S.C. § 666 could never have been intended to bring about such a result. *Supra*, pp. 22 to 27.

Nor does Section 8²⁴ of the Reclamation Act authorize the decree that was entered or the relief which was sought. That law does not empower a State or the courts of a State to regulate in any way the operation of a federal reclamation project. This is clear from the following language of the recent *Ivanhoe* decision, *supra*, p. 24:

As we read § 8 it merely requires the United States to comply with state law when in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests

²³ This statement is in no sense hyperbole for the petition below did not seek an adjudication of water rights, but only a declaratory judgment based upon rights stemming from contract.

²⁴ The Section in its codified form reads as follows :

"Vested rights and State laws unaffected by chapter. Nothing in this chapter shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this chapter, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof" 43 U.S.C. § 383

therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in *Nebraska v. Wyoming* [325 U.S. 589] * * * at 615: "We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent State system." * * * We read nothing in § 8 that compels the United States to deliver water on conditions imposed by the State. (357 U.S. at 291, 292.)

The validity of this portion of the argument is even more apparent if it be supposed that the lower court had acted or been requested to act in pursuance of a Utah constitutional or statutory provision presuming expressly to authorize intervention by the Utah courts in the administration by the United States and its authorized agents of federal reclamation projects. The complete ineffectuality of such an attempt by a State to regulate performance by the United States of its constitutional functions is demonstrated by a long line of decisions of the Supreme Court of the United States ranging from *McCulloch v. Maryland*, 4 Wheat. 316 (1819) through *Arizona v. California*, 283 U.S. 423 (1931), *Federal Power Commission v. Oregon*, 349 U.S. 435 (1955), and *Public Utilities Commission of California v. United States*, 355 U.S. 534 (1958), to the *Ivanhoe* case, *supra*. And see *infra*, pp. 41 to 43. If the people of a state by constitutional or legislative fiat cannot so limit or regulate the operations of the United States, *a fortiori* the courts of a State cannot.

(c) The decree of the Court below substitutes the will of the Court for the will of the Secretary of the Interior, who is charged by law with responsibility for the operation of federal reclamation projects. The doctrine of separation of powers which precludes the court from promulgating a legislative regulation in the first place, also precludes it from assuming direction of the executive function

The management, control and operation of federal reclamation projects are the responsibility of the Secretary of the Interior, 43 U.S.C. § 373. In the case of the Strawberry Valley Irrigation Project, the Strawberry Water Users' Association is his managing agent. The provisions of the contract executed by the United States and the Association in 1940

(Def. Ex. 49) not only show how close is his supervision of the affairs of the Association but, more importantly, the great extent to which control of the project is committed to his own discretion.

As noted, *supra*, page 4, the 1940 contract requires the Association to operate the project, as well pursuant to the reclamation law and the regulations of the Secretary made thereunder, as to its own terms (Article 14(b)). Many of these terms, now to be noted, appeared in substantially the same form in the 1926 contract.

Article 14(c) provides that no substantial change in any part of the project works shall be made by the Association without written consent first obtained from the Secretary. The Association must promptly make any and all repairs to project works deemed necessary "in the opinion of the Secretary." Further, "If at any time, in the opinion of the Secretary" any part of the project works shall be unfit for service, he may order the water shut off until, "in his opinion", such works are put in serviceable condition. In case of neglect or failure of the Association to make such repairs, the United States may, "at the option of the Secretary", take back the care, operation and maintenance of the project works, or cause the repairs to be made and charge the cost thereof to the Association, "which the latter agrees to pay."

Article 14(d), most important of all to the purposes of this argument, deserves to be set out verbatim. It provides that "The Association shall make proper distribution and delivery of water to all parties entitled thereto in full accordance with the provisions of their contracts now and hereafter made and the reclamation law and the public notices and rules and regulations issued by the Secretary thereunder."²⁵

Article 14(f) provides that "The Association shall perform and carry out in accordance with their true intent and meaning

²⁵ It is to be emphasized and reemphasized that by express provision of many, if not all, of the water right application contracts, determination of the land owners' proportionate shares of "the water supply actually available * * * during the irrigation season for the irrigation of lands under" the various project units is to be made "by the Project Manager or other proper officer of the United States, or its successor in the control of the Project." *Supra*, pp. 3, 10.

and to the satisfaction of the Secretary, all obligations imposed upon the United States in all project contracts . . . and shall not attempt in any manner to change any of the terms of any of said contracts without the consent of the Secretary.” No contract for the delivery of water made by the Association “shall be valid until approved by the Secretary, and a draft of each such contract shall be submitted to the Secretary for approval as to form before execution.”

Article 14(g) provides that the Association shall: maintain “a modern set of books of account, to be acceptable to the Secretary”; “furnish such financial reports and statements as may be required from time to time by the Secretary”; furnish to the Secretary each year “a reasonably accurate record of all crops raised and agricultural or livestock products produced on the project”; “keep for each year a careful and accurate record of the project water supply and the disposition of the same and furnish such detailed reports concerning the same as may be required by the Secretary”; and “keep and report such other records as the Secretary may require in the manner and form prescribed by him.”

Article 14(h) provides that “The Secretary shall cause to be made from time to time a reasonable inspection of the project to ascertain whether the terms of this contract are being faithfully executed by the Association.” Such inspection extends to anything connected with the project and the costs of it are to be borne by the Association even, be it noted, of inspection of documents relative to the project contained in the files of the Bureau of Reclamation.

Article 17 requires the Association to employ a project manager, an irrigation engineer, a power superintendent (the project generates hydroelectric power), and an accountant. The article provides that “The selection of each of said persons shall be subject to the approval of the Secretary, and upon notice from the Secretary that any of said employees is or has become unsatisfactory, the Association shall promptly, and as often as such notice is given, terminate the employment of such unsatisfactory employee and promptly employ one acceptable to the Secretary.”

Article 18 provides that the Association may contract for the sale, lease or rental of project water for the purpose of meeting its repayment obligations to the United States "subject to approval by the Secretary."

Article 19(e) requires the Association to pay, *inter alia*, "direct costs for special work or services performed for the benefit of the project by the United States at the direction of the Secretary, and which in the opinion of the Secretary are for the use and benefit of the project."

Article 21 provides that "all contracts for the sale or lease of power or power privileges shall be upon terms and conditions and at rates approved by the Secretary" and that "no additional capital investment in said power system shall be made by the Association unless and until approved by the Secretary."

By Article 24 no transfer of water rights by the Association shall be effective until the contract effecting it is "approved in advance by the Secretary. The procedure to be followed in making any such transfer, and the terms and conditions of such transfer, shall be satisfactory to the Secretary."

Article 33 prohibits assignment of any part or interest in the contract "until approved by the Secretary."

Article 34 provides that if the Association defaults in its obligations "or is found by the Secretary to be operating the project or any part thereof in violation of the provisions of this contract, the United States may, at the election of the Secretary take back" the operation of "all or any part of" the project. "Notwithstanding any such resumption of operation and maintenance by the United States, all or any part of the property or works taken back by the United States may, at the election of the Secretary, be re-transferred to the Association * * *" During any time that the project works are being operated by the United States pursuant to this article, the Association shall pay in advance operation and maintenance costs "on the basis of estimates made by the Secretary and at such times as the Secretary shall direct."

Finally, Article 35 provides that, in the event of disputes between the United States and the Association as to questions of fact arising out of the contract, the decision of the Secretary shall be conclusive and binding on the parties.

The many powers reserved to the Secretary by the contract and limited only by his discretion are specific instances of the wide authority conferred on the Secretary by Congress. It has been settled since the celebrated case of *Marbury v. Madison*, 5 U.S. 137, was decided in 1803, that courts will not attempt to restrain the executive officers of the Government in the exercise of discretionary powers authorized by statute.²⁶ In that case Chief Justice Marshall said:

The province of the courts is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion.

And see *Decatur v. Paulding*, 39 U.S. 497 (1840). And where an officer of the Land Department has authority to perform a discretionary act "the courts have no power whatever under those circumstances to review his determination by mandamus or injunction," *Riverside Oil Co. v. Hitchcock*, 190 U.S. 316, 325 (1902).

Under the applicable statutes and the contracts which have been made, the matter of setting an equitable charge for the use of project river water is a discretionary matter for the Secretary. Further, even if it were not such *per se*—which seems hardly tenable—any decision made in the matter inescapably affects the Secretary's discretion in managing the project water supply. If the setting of such charge were purely a ministerial matter, the decree below could have assumed the simple form of a direct command or mandatory injunction. The fact that it does not but instead promulgates arbitrary rates to be applied *in futuro*, and subject to change if experience proves them inequitable, is proof enough that the Court below regarded this setting of a charge as a discretionary matter. It is therefore only properly for the Secretary's consideration.

In a case involving other management problems of a federal reclamation project the Eighth Circuit Court of Appeals re-

²⁶ "It is a general rule that the courts are without power to interfere in the performance of executive duties, particularly where the executive must exercise discretion in the performance of constitutional or statutory powers." 11 Am. Jur. 889, Const. Law, § 190, footnote 1; *Ibid.*, p. 887, § 188.

fused to attempt control of the Secretary's actions in the following language:

The necessity for drainage and the methods of conducting work are, in our opinion, in the sound discretion of the Secretary of the Interior, *and such discretion cannot be reviewed by the courts.* (*United States v. Ide*, 227 Fed. 337, 382, affirmed 263 U.S. 497.) [Emphasis supplied.]

Without exception the other Federal appellate courts west of the Mississippi have refused judicial control of the executive in the administration of federal reclamation projects. See *Hudspeth County Conservation & Reclamation District No. 1 v. Robbins*, *supra*, p. 24; *New Mexico v. Backer*, *supra*, p. 24; *Ogden River Water Users Association v. Weber Basin Water Conservancy District*, *supra*, p. 27; *United States v. United States District Court*, *supra*, pages 31, 32.

It is no less the job of the Federal executive departments to execute the Federal law than it is the job of Congress to write it. The functions differ but the authority to perform each is exclusive. The doctrine of separation of powers, which precludes the legislative branch from assuming to itself executive powers, *Springer v. Philippine Islands*, 277 U.S. 189 (1927), also forbids the transfer of such powers to the judiciary. In *Martin v. Hunter's Lessee*, 1 Wheat [14 U.S.] 304 (1816) Story says, "The second article declares that 'the executive power shall be vested in a president of the United States of America'", and asks, "Could Congress vest it in any other person? * * * Such a construction," he says, "would be utterly inadmissible." Op. cit., 329, 330. As Marshall had said earlier in *Marbury v. Madison*, *supra*, page 41:

The province of the court is, solely, to decide on the rights of individuals, not to inquire how the executive, or executive officers, perform duties in which they have a discretion. Questions * * * which are, by the constitution and laws, submitted to the executive, can never be made in this court.

* * * * *

Where [as here] the head of a department acts in a case, in which executive discretion is to be exercised; in which he is the mere organ of executive will; it is again repeated, that any application to a court to control, in any respect, his conduct would be rejected without hesitation.

No one would doubt that, if paragraph 13 of the decree below had been drafted by Congress, it would have been an exercise of legislative power or, if by the Secretary of the Interior, an exercise of executive power. But it is not, because drafted by a court, the exercise of judicial power. Executive power is executive power inherently and not because of the source which attempts its exercise. It can be exercised neither by the legislature nor the judiciary. An exercise of executive power (as distinguished from the power itself) may be indistinguishable from an exercise of legislative power, as a regulation from a law. This is because both lay down rules of conduct for the future. But in this respect both differ from an exercise of judicial power which, as Marshall put it, is "solely, to decide on the rights of individuals."

Granted that Congress has directed the Secretary of the Interior "to comply with State law when, in the construction and operation of a reclamation project, it becomes necessary" to acquire water rights or vested interests therein (43 U.S.C. § 383, *Ivanhoe Irrigation District v. McCracken*, *supra*, p. 24; *United States v. Gerlach Livestock Co.*, *supra*, p. 35); and has permitted rights so acquired to be determined along with all other rights to the use of water in a river system or other source (43 U.S.C. § 666, *supra*, part I). But Congress has not provided that federal reclamation projects, or any part or aspect thereof, shall be regulated in any degree by the States or the courts of the States. As the Supreme Court of the United States said in the *Ivanhoe* case, *supra*, p. 24, "the acquisition of water rights must not be confused with the operation of federal projects."

**(d) The decree of the Court below makes new contracts for the parties.
No court has power to do this**

In the preceding sections of this part of the argument, we have demonstrated that the decree of the Court below transgresses established rules of public law. But it offends not less an established principle of private law in this, that it undertakes to make new contracts between the United States and its water users. To do this is the prerogative of the United States and its agents and the water users (*infra*, p. 49). It is not a judicial function.

We emphasize again the words of the Supreme Court of the United States, quoted *supra* at page 30:

A court of chancery is not, any more than is a court of law, clothed with legislative power. It may enforce, in its own appropriate way the specific performance of an existing legal obligation arising out of contracts, law, or usage, but it cannot create the obligation. (*Atchison, Topeka and Santa Fe R.R. v. Denver & New Orleans R.R.*, 110 U.S. 667 (1883)).

All of the parties to this action have contracts with the United States with which the Court below could not interfere and to which it could not add. This is no more than the general rule. "Interpretation of an agreement does not include its modifications or the creation of a new or different one. A court is not at liberty to revise an agreement while professing to construe it. Nor does it have the right to make a contract for the parties—that is, a contract different from that actually entered into by them. Neither abstract justice nor the rule of liberal construction justifies the creation of a contract for the parties which they did not make themselves or the imposition upon one party to a contract of an obligation not assumed." (12 Am. Jur., Contracts, Sec. 228, page 749).

If new rules are to govern the operation in any particular of the Strawberry Valley Irrigation Project, they must come from "some source of legislative power" and not from a court making contracts for the parties. That is indeed indicated in the following language of the Supreme Court of

the United States, in *The Express Cases*, 117 U.S. 1, 28, 29 (1896), so relevant here that it is unnecessary to set forth the facts of the cases it addressed:

The difficulty in the cases is apparent from the form of the decrees. As express companies had always been carried by railroad companies under special contracts, which established the duty of the railroad company upon the one side, and fixed the liability of the express company on the other, the court, in decreeing the carriage, was substantially compelled to make for the parties such a contract for the business as in its opinion they ought to have made for themselves. Having found that the railroad company should furnish the express company with facilities for business, it had to define what those facilities must be, and it did so by declaring that they should be furnished to the same extent and upon the same trains that the company accorded to itself or to any other company engaged in conducting an express business on its line. It then prescribed the time and manner of making the payment for the facilities and how the payment should be secured, as well as how it should be measured. Thus, by the decrees, these railroad companies are compelled to carry these express companies at these rates, and on these terms, so long as they ask to be carried, no matter what other express companies pay for the same facilities or what such facilities may, for the time being, be reasonably worth, unless the court sees fit, under the power reserved for that purpose, on the application of either of the parties, to change the measure of compensation. In this way as it seems to us, "the court has made an arrangement for the business intercourse of these companies, such as, in its opinion, they ought to have made for themselves," and that, we said in *Atchison, Topeka and Santa Fe Railroad Co. v. Denver & New Orleans Railroad Co.*, 115 U.S. 587, could not be done. The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and

to what extent it may come from the States, are questions we do not now undertake to decide; but that it must come, when it comes, from some source of legislative power, we do not doubt.

IV. Plaintiffs failed to establish a cause of action against defendants and even though jurisdiction of the United States and the Secretary of the Interior were assumed, the trial court should have entered judgment dismissing the complaint

We have shown why the Court below was without jurisdiction to enter *any* decree in this case against the United States and the Secretary of the Interior, both indispensable parties. Alternatively, we have shown that even if jurisdiction of the United States and the Secretary be assumed, the decree entered is in excess of the power of the trial court. Finally, it is to be noted that even had the trial court limited its decree to granting the relief which the plaintiffs sought, such decree also would be erroneous.²⁷

What plaintiffs sought was a determination that by reason of the several contracts between the Secretary of the Interior and the water users of the Strawberry Valley Reclamation Project the Secretary of the Interior, and his agent, the Strawberry Valley Water Users' Association, are precluded from delivering to the defendant-type water users more water from the total project supply, including the United States' rights to the use of the waters of the Spanish Fork River, than their respective water-right application contracts expressly specify. The injury on which plaintiffs predicate their claim for such relief is a claimed diminution of the project supply of stored water as a result of the practice complained of to an extent greater than would occur if the defendant-type users were held to the

²⁷ In subdivisions (b) and (c) of Part III of the argument, we have noted that granting of the relief which plaintiffs sought is as much precluded, by the doctrine of separation of powers and the incapacity of the courts of a State to regulate the performance by the United States of its constitutional functions, as is the legislative rule contained in the decree entered. And see also subdivision (b) of Part I of the argument. Part IV of the argument is addressed to additional considerations in support of the proposition that the relief which plaintiffs expressly sought cannot be granted.

quantities expressly stated in their contracts and their uses of the project's supply of Spanish Fork River water were charged in full against those quantities.

We submit that the evidence does not establish and the Court below did not find that the practice complained of results in a diminution of the supply of stored water available for satisfaction of the contract entitlements of the plaintiff-type users. Certainly the statement in Finding 43 that "the purchasers of water under the irrigation systems of the plaintiffs herein *may have been* deprived of their right to the use of water to which they are entitled" is not a determination that plaintiffs have suffered or will suffer injury by that practice. Neither is the statement in Finding 44 "That if [the defendant-type users] are not charged *with at least some of the water* which they receive from the natural flow of Spanish Fork River * * * such procedure will [in some years] result in depriving the purchasers of water deliverable through the established irrigation systems of a part of the water right which they have purchased." We submit that, on the contrary, the trial court's determination that continuation of that practice under the court's supervision is necessary in the interest of conservation of the project supply refutes conclusively injury to the plaintiffs as asserted by them. By its Finding 49 the trial court specifically determined: "That, if water users are charged for the full volume of water used from the river during said season of high water they will probably use substantially less of it, except in dry seasons, than if a smaller charge is made for its use. That this would result in heavier demands for stored water later in the season. A further result would probably be that a portion of such high water would flow into Utah Lake and be lost as project water." It was to provide against such loss that the Court assumed to itself the responsibility of establishing a schedule of percentage charges for use of the early water.²⁸

²⁸ Why the trial court assumed that it can with greater wisdom than the Secretary of the Interior and his authorized agent, or that it should attempt to, administer, conserve and distribute the waters the rights to the use of which belong to the United States for the use of this Federal project, we are unable to understand. The purpose sought to be accomplished by the decree is precisely the same as the purpose sought to be accomplished

The factual question here is whether the plaintiffs have been injured by the practice of which they complain. Does that practice result in less stored water for the plaintiff-type users? By its determination that the practice complained of should be continued, but under the court's supervision, the trial court decided that that practice is less to the disadvantage of the plaintiff-type users, and to the entire project, than would be a practice of charging the defendant-type users against their contract entitlements with their full uses of the early river water.

Moreover, we submit, the execution of water-right application contracts such as those involved in the Strawberry Project do not enable the landowners of the project to police the Secretary of the Interior in his exercise of the discretion with which he has been invested by Congress in making contracts with other project users or in administering the project water supply to the best advantage of the entire project. The practice about which plaintiffs complain would not constitute an invasion of any right of the plaintiffs even if the evidence established that to some extent the total water supply available for delivery to plaintiffs is diminished thereby. Should we be wrong in this assertion, however, the basic proposition that the Secretary of the Interior and his agents cannot be ousted from their administration of the project by grant of the relief which plaintiffs seek is not altered. *Supra*, Parts III(b) and III(c) of the argument. There can be no question of due process for, as noted in footnote 13, *supra*, if plaintiffs have suffered or should suffer any compensable injury, the courts are open for redress in a suit for compensation.

by the practice of which complaint was made. We believe it is apparent on the face of the matter that the Secretary of the Interior and the Water Users' Association, authorized so to do by the laws of the United States, are better qualified than *any* court to make those determinations which necessarily must be made in administering a reclamation project water supply to the greatest benefit obtainable for the entire project. We believe further that the qualifications of the trial court to perform this function as compared to those of the Secretary of the Interior are not strengthened by the Court's designation as its agent for forecasting project supply the State Engineer of Utah instead of the Secretary's agent. That the Court is without power so to substitute its judgment in those matters for that of the Secretary we have already demonstrated.

It is further to be noted that there is nothing in any of the contracts which plaintiffs sought to have construed which precludes the practice complained of. Certainly not in the contracts with the plaintiff-type users. And certainly not in the contracts with the defendant-type users. Granted that the Court below did find "That none of the applications contained any provision for any user to receive water from the project without being charged in full for the amount received" (Fdg. 45). But from this omission, it did not conclude that the contract provisions precluded the practice of making less than a full charge to the defendant-type users for the early river water used by them. On the contrary, it concluded "that the charge to be made should be adequate to properly protect the rights of other users under the project" (Conclusion 15). And by adoption for purposes of its own administration of the project of the practice of making only a partial charge, it would seem clear that the trial court did determine that there is nothing in the provisions of any of the contracts with the water users inconsistent with or which prohibit that practice.

But notwithstanding the terms of the water-right application contracts between the United States and the water users, we know of no rule of law, statutory or otherwise, which prevents the Secretary of the Interior, by himself or through his agent the Water Users' Association, from contracting separately from year to year with such of the project landowners as may be willing to use the early river water for the use of a portion of that water in addition to their right to receive stored water later in the season. On the contrary, the physical situation existing with respect to the two components of the Strawberry Project water supply, as recognized by the trial court, dictates that such be done in the interest of the fullest and most beneficial use on the project of that supply. In effect, the practice of which plaintiffs complain amounts to the making of such annual contracts.³²

³² Of course, the problem which confronts the authorized agents of the United States in their administration of the project water supply with respect to the defendant-type users does not exist with respect to the plaintiff-type users. They have no use for any part of the project supply of early river water. They get all of such water as they want under the rights thereto of the canal companies which serve them. Were they to utilize a

Thus, without regard to the suability of the United States and the Secretary of the Interior, the judgment of the trial court should be reversed and the plaintiffs' complaint should be dismissed for the additional reasons that (1) no right of the plaintiffs and the water users whom they purport to represent which could be invaded by the practice complained of in administration of the project water supply has been established, and (2) it has not been established that that practice in any way injures the plaintiffs or prejudices the availability of the project water available for satisfaction of their water-right application contracts. On the contrary, the trial court has determined that such practice tends to conserve, rather than diminish, that supply.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that the decree of the Court below should be set aside and the cause remanded to that Court with instructions to dismiss the action.

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Assistant Attorney General,
A. PRATT KESLER,
United States Attorney,
DAVID R. WARNER,
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Attorneys, Department of Justice.

part of the project supply of river water, there is nothing to suggest that the charge to them on account of such use would be any different from that agreed to from year to year with the defendant-type users.

APPENDIX

At footnote 9 and elsewhere in the foregoing brief, references are made to the legislative history of Section 666, 43 U.S.C. Additional excerpts from Senate Report No. 755, 82d Congress, 1st Session, which are particularly pertinent to the considerations presented, are as follows:

Pages 4 and 5:

It is most clear that where water rights have been adjudicated by a court and its final decree entered, or where such rights are in the course of adjudication by a court, the court adjudicating or having adjudicated such rights is the court possessing the jurisdiction to enter its orders and decrees with respect thereto and thereafter to enforce the same by appropriate proceedings. In the administration of and the adjudication of water rights under State laws the State courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts. Unless Congress has removed such immunity by statutory enactment, the bar of immunity from suit still remains and any judgment or decree of the State court is ineffective as to the water right held by the United States. Congress has not removed the bar of immunity even in its own courts in

suits wherein water rights acquired under State law are drawn in question. The bill (S. 18) was introduced for the very purpose of correcting this situation and the evils growing out of such immunity.

Page 6:

The committee is of the opinion that there is no valid reason why the United States should not be required to join in a proceeding when it is a necessary party and to be required to abide by the decisions of the Court in the same manner as if it were a private individual.

Senator Magnuson raised the question as to whether S. 18 could be used for the purpose of delaying or blocking a multiple-purpose development such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin or other similar projects, stating that there was a possibility of an individual or group having water rights on that stream bringing suits to adjudicate their respective rights and therefore preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending. The committee, for the legislative history of this bill, definitely desires to repudiate any such intent which may be deduced from S. 18 and states that this is not the purpose and the intent of this legislation. Where reclamation projects have been authorized for the benefit of the water users and the public generally, they should proceed under the law as it exists at the present time and should the Government have reason to need the water of any particular user on a stream, that water should be obtained by condemnation proceedings as is already provided for by law. The committee can think of no particular reason why the mere development of a project should be delayed or stopped by the passage of S. 18 and it is not so intended. An exchange of letters by Senator Magnuson and Senator McCarran dealing with this feature of the bill is hereto attached and made a part of this report.

Pages 9 and 10:

AUGUST 24, 1951.

Re S. 18.

HON. PAT McCARRAN,
Chair, Committee on the Judiciary,
United States Senate.

DEAR SENATOR: I am in agreement with the general purposes of S. 18. However, there is one possible implication in the bill that has caused me some apprehension and I take this means of achieving clarification before final action by our committee occurs.

It appears to me that section 1 of the bill—although I am sure that is not the intent—might make it possible to block or delay a multiple-purpose development, such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin.

I visualize the possibility of an individual or group, having water rights on that stream, bringing suit to adjudicate their respective rights—thereby preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending. Such action on the part of appropriators might be taken on their own initiative or might be stimulated by third parties who have been opposing this development.

A similar set of circumstances might prevail with respect to other streams in the Basin. I will appreciate the benefit of your best judgment as to whether S. 18 could be used in the manner I have described. I think clarification on this point will be extremely useful if made a part of the legislative history of this bill.

* * * * *

Sincerely,

WARREN G. MAGNUSON, U.S.S.

Hon. WARREN G. MAGNUSON,
United States Senate, Washington, D.C.

MY DEAR SENATOR MAGNUSON: I was very pleased to receive your letter of August 24, 1951, relative to S. 18, which provides for the joining of the United States in suits involving water rights where the United States has acquired or is in the process of acquiring water rights on a stream and is a necessary party to the suit.

I note that you raise the question that it might be possible to block or delay a multiple-purpose development, such as proposed for the Hells Canyon project on the Snake River in the Columbia Basin. You indicate that you visualize the possibility of an individual or group, having water rights on that stream, bringing suit to adjudicate their respective rights thereby preventing the Bureau of Reclamation from going ahead with the Hells Canyon project while litigation is in process or pending.

S. 18 is not intended to be used for the purpose of obstructing the project of which you speak or any similar project and it is not intended to be used for any other purpose than to allow the United States to be joined in a suit wherein it is necessary to adjudicate all of the rights of various owners on a given stream. This is so because unless all of the parties owning or in the process of acquiring water rights on a particular stream can be joined as parties defendant, any subsequent decree would be of little value. I agree with you that for purposes of legislative history, the report should show that S. 18 is not intended to be used for the purpose of obstructing or delaying Bureau of Reclamation projects for the good of the public and water users by the method of which you speak and in that connection I propose that such a statement be incorporated in the report and that this exchange of letters be attached thereto.

* * * * *

Sincerely,

PAT McCARRAN, *Chairman.*