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Spanish Fork West Field Irrigation Co. et al v. USA : Brief of Plaintiffs and Respondents and Cross- Appellants

Utah Supreme Court

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In the Supreme Court of the State of Utah

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SPANISH FORK WEST FIELD IRRIGATION COMPANY, a corporation, et al.,

Clerk, Supreme Court, Utah

*Plaintiffs and Respondents
and Cross-Appellants,*

Case No.
8994

vs.

THE UNITED STATES, a Nation, et al.,
Defendants and Appellants.

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

BRIEF OF PLAINTIFFS
AND RESPONDENTS AND CROSS-APPELLANTS

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V

In the Supreme Court of the State of Utah

SPANISH FORK WEST FIELD IRRIGATION COMPANY, a corporation, et al.,

*Plaintiffs and Respondents
and Cross-Appellants,*

vs.

THE UNITED STATES, a Nation, et al.,
Defendants and Appellants.

Case No.
8994

BRIEF OF PLAINTIFFS AND RESPONDENTS AND CROSS-APPELLANTS

ADDITIONAL STATEMENT OF FACTS

This is the second time that this case has been before this Court on appeal. Heretofore the defendants, United States, a Nation, the Secretary of the Interior and Commissioner of Reclamation of the United States, pursuant to Rule 72(b), sought to have this Court direct the dismissal of this action upon the ground that the Court below, where the action was

pending, was without jurisdiction of either the United States or the Secretary of the Interior or the Commissioner of Reclamation of the United States, and that each of them is an indispensable party to this action. This Court denied the relief sought in such appeal. The same parties on this appeal are seeking identically the same relief that they unsuccessfully sought in the former proceeding before this Court. In the main the other facts recited in the Brief filed on behalf of the United States and its Interior Secretary and Commissioner of Reclamation are correct, but the Respondents and Cross-Appellants are not in agreement with the inference which said Appellants seek to draw from such facts, nor with the contention as to the law applicable thereto.

ARGUMENT

The Respondents contend:

POINT I

THAT THE APPELLANTS, UNITED STATES AND ITS SECRETARY OF INTERIOR AND COMMISSIONER OF RECLAMATION ARE BOUND BY THE DECISION OF THIS COURT WHEREIN AND WHEREBY THEY WERE DENIED THE RIGHT TO HAVE THIS ACTION DISMISSED BECAUSE OF LACK OF JURISDICTION.

The doctrine of Res Judicata, The Law of the Case and Estoppel by a judgment alike require that there be an end to litigation; that when a party has had an opportunity to litigate a matter he should not be permitted to litigate it again to the harassment and vexation of his opponent. 30 *Am. Jur.*,

Sec. 165 to 170, both inclusive, pages 911 to 914, and cases cited in the footnotes. It will be seen from the text and the cases cited in the footnotes that:

“the doctrine of the ‘law of the case’ is akin to that of former adjudication, but is more limited in the application. It relates entirely to questions of law and is confined in its operation to subsequent proceedings in the same case.”

See also: *Black's Law Dictionary, Third Edition*, page 1076, and cases there cited. Among such cases is *Grow v. Oregon Short Line R. Co.*, 47 Utah 26, 150 Pac. 670.

It will be noted from the cases there cited that when the “Law of the Case” is applicable to a particular proceeding, it is binding alike on the trial court and the appellate court in any further steps or proceedings in the same litigation. While, as we recall, no written opinion was rendered by this Court when this case was before it in the former proceeding, such fact does not detract from the effect of the decision. *Freeman on Judgments, Fifth Edition*, page 1347; *Nampa Valley Electric Co. v. Railroad Commission*, 251 U.S. 355, 64 L. Ed. 310, 40 Sup. Ct. Reports 74, where there is cited in support of the conclusion reached the cases of *Calaf v. Calaf*, 232 U.S. 371; *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299. It should be noted that the evidence received at the trial of this case does not add anything touching the matter of the jurisdiction of defendant, United States, and its Secretary of Interior and Commissioner of Reclamation, that was not apparent in the record before this Court at the time of the former proceeding.

In the event the Court should conclude that it may again review the question of whether or not the trial court had jurisdiction of the United States and its Secretary of Interior and Commissioner of Reclamation we shall again direct the attention of the Court to the authorities which support the conclusions that the court below had jurisdiction over such defendants.

It will be noted from the index to the Brief filed on behalf of the United States and its Secretary of Interior and Commissioner of Reclamation that more than fifty cases are cited, and in the cases so cited there are probably an equal number of other cases cited. We shall not attempt an analysis of all of such cases. Many of the cited cases support doctrines that are so elementary that no useful purpose will be served by a discussion of the same. Thus such cases as *In Re Bear River Drainage Area*, 2 Utah (2d) 208, 271 Pac. (2d) 846; *United States v. Sherwood*, 312 U. S. 584; *United States v. Shaw*, 309 U.S. 496; *Minnesota v. United States*, 305 U. S. 382; *Belnap v. Schela*, 161 U. S. 10; and other cases cited support the view that the United States may not be sued without its consent. Needless to say, we do not contend to the contrary.

It is also urged that the Federal and State governments are divided into three departments, the legislative, the executive, and the judicial. See Brief of United States and its officers, pages 30 to 35. If the numerous cases there cited are for the purpose of convincing this Court that neither it nor the trial court may properly exercise legislative functions, it would seem obvious that Counsel have needlessly devoted considerable effort in their search for cases which support a doctrine

with which the members of this Court and the court below are, and ever since they were in the grade school, have been familiar. We have read the cases above referred to, but as we read them, they shed little, if any, light on the questions here presented. In our view, as we shall presently point out, the errors committed by the trial court are in the improper construction of the contracts which plaintiff sought to have construed, and not in the trial court infringing upon the functions of the legislative branch of government.

POINT II

THE COURT BELOW HAD AND THIS COURT HAS JURISDICTION OVER THE UNITED STATES.

Respondents and Cross-Appellants do, as assumed by Appellants, rely upon the following Acts of Congress:

'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 or 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 amendable 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."

The foregoing statute should be given a liberal construction so that its purposes will be accomplished. *Bank v. King*, 142 Fed. Supp. 1 at 80; *Miller v. Robertson*, 266 U.S. 243, 248; *Canadian Aviation v. United States*, 324 U.S. 215 at 222; *United States v. Aetna Casualty & Surety Co.*, 338 U.S. 350.

It is the contention of the Respondents and Cross-Appellants that this proceeding is fully authorized by the law above quoted. The United States and its defendant officers concede, as they must, that they are necessary parties to this suit, in that: the United States is the owner of the project, subject, of course, to the rights of those who have purchased a water right.

It is argued that this is not a suit for the adjudication or administration of a water right. The pleadings and the evidence shows that this action is brought for both purposes. It will be seen that the Petition for a Declaratory Judgment alleges in detail the facts upon which plaintiffs seek the relief prayed. It is alleged in paragraph 1 of the Petition that each of the plaintiff corporations is and for more than sixty years has been engaged in operating an irrigation system and delivering water to its stockholders and other water users who have purchased water from defendant, United States (R. 5). Similar allegations are made in paragraph 9 as to the defendant, Spanish Fork Southeast Irrigation Company, the Clinton Irrigation Company, the Salem Canal and Irrigation Company, and the Strawberry High Line Canal Company (R. 6).

In paragraph 11 of the Petition it is alleged that defendants

the Springville Irrigation District and the Mapleton Irrigation District have each purchased a water right from the United States. The amounts of each such purchase and the price to be paid therefor is set out in paragraph 33 and 34 of the Petition (R. 7). The quantity of water right purchased by Spanish Fork City is set out in paragraph 36 of the Petition, and the amount of water purchased by Payson City is set out in paragraph 37 (R. 16). In Paragraph 38 is set out the total quantity of water right purchased from defendant, United State, by the various parties to this proceeding.

In paragraph 23 it is alleged that in 1906 defendant, United tSates, filed with the State Engineer an Application to appropriate a flow of 156 cubic feet per second throughout the year for the generation of electricity, and in paragraph 24 it is alleged that on February 4, 1909, by the Bureau of Reclamation defendant, United States, filed an Application with the State Engineer of Utah to appropriate 300 cubic feet per second of the unappropriated water of Spanish Fork River, and that in 1914 it filed another Application to appropriate an additional flow of 100 cubic feet per second of the water of Spanish Fork River.

In paragraph 25 of the Petition it is alleged that the following parties to this proceeding are entitled to a flow of the following quantities of the water of Spanish Fork River, and that the same is superior to the water which defendant, United States, has appropriated of the waters of Spanish Fork River:

East Bench Canal, 95 cubic feet per second;

Salem Canal & Irrigation Company, 55 cubic feet per second;

Spanish Fork South Irrigation Company, 75 cubic feet per second;

Lake Shore Irrigation Company, 60 cubic feet per second, and

Spanish Fork City, Spanish Fork Southeast Irrigation Company, and Spanish Fork West Irrigation Company, 105 cubic feet per second.

Making a total flow of 390 cubic feet per second.

In paragraph 10 of the Petition it is alleged that in about 1926, defendant, Strawberry Water Users Association, was organized as a corporation, and that since its organization has been engaged in the care, operation and maintenance of a Federal Project known as the Strawberry Valley Project and all appurtenances thereunto belonging, except the irrigation systems of defendants Mapleton and Springville Irrigation districts, and the Strawberry High Line Canal, a corporation, but that such care, operation and control of such Strawberry Valley Project is subject to the supervision of defendants, Secretary of the Interior and Commissioner of the Bureau of Reclamation of the United States (R. 7).

In paragraph 39 of the Petition it is alleged that:

"It is provided in the Articles of Incorporation of the Strawberry Water Users Association that the area irrigated by the water from the Strawberry project is divided into 16 districts and that a director is to be elected from each district"

and that as a result of such provision the owners of contracts for water deliverable through the Strawberry High Line Canal

always have a majority of the Board of Directors of said Association, and, therefore, control its policy (R. 17).

In paragraph 40 of the Petition it is alleged that ever since the Strawberry Water Users Association took over the control of the Strawberry Project its Board of Directors have claimed the right to determine from year to year the amount of water that each purchaser of water from the United States is entitled to receive pursuant to his contract of purchase, and particularly does the Board of Directors of the Strawberry Water Users Association claim the right to determine the amount of charges that shall be made against the users of water deliverable through the High Line Canal from the flow of Spanish Fork River water (R. 17).

In paragraph 48 of the Petition it is alleged that petitioners are informed and believed that all of those who are parties to the proceeding have an interest in the subjectmatter of this controversy, and that all parties who have an interest in such subjectmatter, are made parties either by expressly being made so, or by those parties who are expressly named parties for themselves, and all other persons similiarly situated (R. 22).

Plaintiffs in their Petition prayed judgment that those who had purchased water from the United States be charged with all the wtaer that they used, except as they may show some other or additional water right, that the Court make a provision for those who do not use all of the water stored in the reservoir in any given year may use the same the following year with an allowance for evaporation not to exceed 25% thereof. That no part of the 156 second feet of river water appropriated for the generation of power be used for irrigation of lands

under the Strawberry High Line Canal without paying to the Strawberry Valley Project the costs that may be incurred by reason of being deprived of the use of such water for generating electric power; that the Court enter an appropriate decree to insure a compliance with determination as prayed; that the Court make such other and further order and decree as is just and proper, and that petitioners be awarded their costs (R. 23-24).

During the trial of this case defendants were very much opposed to permitting any water user to receive credit in a subsequent year for any water that he might leave in the reservoir during any given year, and plaintiffs stated to the Court that they would abandon such request (R. 434).

It was also made to appear during the trial that there was no controversy concerning the matter of the obligation of those who used water for irrigation that was appropriated for generation of power should pay for the water which was needed for the generation of electricity (A. 503).

The Court below found as facts substantially all of the allegations above stated. In paragraph 60 of its Findings of Fact it found that all of the parties who had any interest in the waters of the Project were parties to the proceeding. No attack was made in the court below upon the propriety of such finding. Nor was any suggestion made as to anyone who was not a party to the proceeding, either in person or by right of representation. That being so, Appellant United States and its Secretary of the Interior and Commissioner of the Bureau of Reclamation may not be heard to raise that question for the first time on appeal.

We have in some detail directed attention to the pleadings filed and the Findings made in the court below because the same show that such Court had jurisdiction of both the subject-matter and the parties to this proceeding.

The parties are agreed that the United States acquired its right to the use of the water here involved by filing with the State Engineer an Application to appropriate the same. Pursuant to the filing of such Application and putting the water applied for to a beneficial use, the United States acquired its right to the use of the water which was stored in the reservoir and of the water of Spanish Fork River. The nature and extent of the right of the purchaser of a water right from the United States is of necessity fixed by the contract of purchase. The only way of securing a determination of the rights of such purchasers is to obtain a construction of the contracts of purchase. That is what is sought by this proceeding.

It is quite true that the Federal Declaratory Act does not of itself authorize suit against the United States. The same may be said of any act, except an Act of Congress. However, when Congress has authorized suit against the United States Government, the Declaratory Judgment Act may properly be used as the remedy to accomplish the purpose of securing an adjudication of water rights as well as for the administration of such rights. That is the effect of the holding of the cases from other jurisdictions cited by Counsel for the United States and its Secretary of the Interior and Commisisoner of the Bureau of Reclamation, among which are *Brownell v. Ketchan Wire & Mfg. Co.*, 211 Fed. (2d) 121; *Aetna Casualty & Surety Co. v. Quarles*, 92 Fed. (2d) 32. That is the express holding of

this Court in the case of *Gray v. Defa*, 103 Utah 339, 135 P. (2d) 251, and its sequel reported in 107 Utah 272, 153 Pac. (2d) 544. It should be kept in mind that under the *Act of Congress*, 43 U.S.C.A., Sec. 666, it is the law of the state where the river system or other source is situated that is controlling, and not the law of some other state.

There is cited in the Brief of the United States and its Secretary of the Interior and Commissioner of the Bureau of Reclamation a number of cases from other jurisdictions to the effect that only parties to the suit are bound thereby, and that all parties to an adjudication of water rights in which the United States is a party must be joined in this action. It is not clear just what bearing such cases have on this case. We certainly are not here contending that anyone not a party of this action is bound thereby. *The Declaratory Judgment Act of Utah*, U.C.A. 1953, 78-33-11, provides that:

“When declaratory relief is sought all persons shall be made parties who have or claim any interest which would be affected by the declaration and no declaration shall prejudice the rights of persons not parties to the proceeding.”

As we have heretofore pointed out, it is alleged in the Petition and found by the Trial Court that all of the parties interested in the subjectmatter of this litigation are parties thereof.

It seems to be the contention of Counsel for the United States and its Secretary of the Interior and Commissioner of Bureau of Reclamation that an action for adjudication of water rights in which the United States may be made a party

must be brought under what is generally referred to as a general adjudication as provided in *U.C.A. 1953, Title 73, Chapter 4*. It may be that a proceeding for the determination of water rights may be maintained against the United States in conformity with the provisions of the Act just mentioned, but there is nothing in that Act which indicates that the only way of securing a general adjudication of water rights is pursuant to the provisions of such Act.

The case of *Gray v. Defa, supra*, is to the contrary, as are also some of the other cases cited in the Brief of the United States and its Officers. Indeed, it is not certain that the general adjudication statute above mentioned may be successfully followed where, as here, it is sought to secure a judgment providing for the administration of water rights. See *Smith v. District Court, etc., et al.*, 69 Utah 493, 502, 256 Pac. 539, 542.

Counsel for the United States and its Secretary of the Interior and Commissioner of the Bureau of Reclamation seem to get some comfort out of such cases as *Lynn v. United States*, 10 Fed. (2d) 586, 588; *New Mexico v. Backer*, 199 Fed. (2d) 426, 428; *Ogden River Water Users Assn. v. Weber Basin Water Conservancy District*, 238 Fed. (2d) 936, and other cases and authorities cited on pages 24 to 27 of their Brief. Those cases in effect hold that the courts may not lawfully take over the control of dams, reservoirs and facilities of a Federal Project. There is nothing in the pleadings, the evidence, the Findings, or the Decree in this case which is calculated to accomplish any such results.

Plaintiffs alleged in paragraph 25 of the Petition that pursuant to contract had with the United States the following

corporations had a prior right to a flow of the waters of Spanish Fork River:

Spanish Fork East Bench Canal Company.....	95 c.f.s.
Salem Canal & Irrigation Company	55 c.f.s.
Spanish Fork South Irrigation Company	75 c.f.s.
Lake Shore Irrigation Company	60 c.f.s.
Spanish Fork West Field Irrigation Company.....	105 c.f.s.
Total.....	390 c.f.s.

and that the water had been distributed in conformity with the foregoing agreement ever since the Federal Government has claimed a right to some of the waters of Spanish Fork River (R. 423).

In the Answer of the United States and its Officers, they at first admitted the allegations paragraph 25 of the Petition (R. 109). See paragraph 15 of their Answer (R. 109). The other defendants in paragraph 16 of their Answer also admit the allegations of paragraph 25 of the Petition (R. 99). It was not until late in the trial that defendants raised any question about the companies above mentioned being entitled to a prior right to a flow of 390 c.f.s. per second (Trs. 426, et seq.) Over objection of Counsel for plaintiffs, the Court permitted the answer of the United States and its Officers to be amended so as to deny that the various companies had the priorities to the flow of the waters in Spanish Fork River above mentioned (Tr. 441). The other defendants asked leave to make the same amendment to their Answer (Tr. 442). After the Court permitted the amendments above mentioned Counsel for numerous of the defendants asked leave to with-

draw as Counsel for some of the defendants, and stated that they were not making a denial on behalf of the defendants for whom they withdrew as Counsel. The basis for the withdrawal was that there would probably be a conflict of interest.

Counsel for the following corporations and their officers were, by leave of Court, permitted to withdraw as their Counsel: Spanish Fork Southeast Irrigation Company; Clinton Irrigation Company; Spanish Fork City, Salem Canal & Irrigation Company, and others (Trs. 445 to 457).

In its Order permitting Counsel to withdraw the Court further stated that if the issues as to the relative rights of the United States and the old rights in Spanish Fork River were determined adversely to the claims of plaintiffs, the other defendants who have heretofore been represented by Counsel, who have now withdrawn as their Counsel, will be given an opportunity to offer evidence in support of their claim (Trs. 456-7). Thereupon Counsel for plaintiffs were granted leave to reopen the case. Evidence was offered which showed that ever since the United States made its filings on the water of Spanish Fork River, all of the parties who claimed rights in the water of such River had recognized and distributed the waters of Spanish Fork River upon the basis that the above mentioned corporations have a prior right to a flow of 390 c.f.s., and that such companies have beneficially used the same whenever it has been available (Trs. 458-476 and Trs. 525-546).

As we have heretofore called the attention of the Court to the fact that the pleadings, the evidence and the Findings of fact made by the court below are all to the effect that all

of the parties interested in the water of Spanish Fork River were before the Court, while Counsel for defendant United States seem to contend to the contrary, they fail to point out any facts in support of such contention. They also assert this is not a class action, but fail to point out any defect in the pleadings in support thereof. Of course, near the close of the action when Counsel for defendants asked to amend their pleadings and Counsel for some of the defendants withdrew as their attorney, some of the defendants were without Counsel. However, the Court ordered that if the case should go against them, they would be given an opportunity to be heard. So far as appears, they are satisfied with the judgment. The pleadings, the evidence and the Findings of the Court show that this is a typical class action.

It is the uniform practice in this state to bring the action against a corporation as the means of binding all of its stockholders. That is made apparent in this action. In the Petition filed herein all of the corporations who, as such, have an interest in the waters of Spanish Fork River have been made parties to this action, as have also a number of stockholders of the corporations who are also owners of contracts for the purchase of a water right from the United States. There will be found in the record numerous interrogatories submitted by defendants in conformity with *Rule 33 of the Utah Rules of Civil Procedure*, from which it is made to appear from the answers given that the personal plaintiffs are owners of contracts to purchase water rights from the United States. It is also made to appear from the pleadings and the Findings of the Court that the stockholders of the Strawberry High Line Canal are the owners of 40,377.26 acre feet of water deliver-

able annually through that canal. Paragraph 38 of the Petition (R. 16).

In paragraph 27 of the Answer of the United States and its Officers the allegation of paragraph 38 are admitted, but allege that there is additional water not included in paragraph 38. The evidence shows that the High Line Canal Company does not have any water other than the sum of the water purchased by the various persons who have their water delivered through that canal (R. 347).

During the course of the trial Counsel for the Government and other defendants took considerable pains to point out that not all of the contracts were the same, in that: some of the contracts did not expressly provide for a maximum of 2 acre feet per year. All of the personal contracts, except one, that were for river water deliverable through the Strawberry High Line Canal make the total of the water deliverable through such Canal 40,377.26 acre feet per annum. Paragraph 38 of the Petition, (R. 16), paragraph 27 of the Answer of the United States and its officers, (R. 110), paragraph 26 of the other defendants, Testimony of Mr. Huber, Secretary of Strawberry Water Users Association, (Tr. 162); Findings of Fact No. 47 (R. 432) are to the same effect. If , as it appears from the Brief filed in behalf of the United States, it is contended that each and all of the holders of a contract for the purchase of a water right from the United States should be made a party to this suit in order to give the court jurisdiction of this cause, then, if that be claimed, such claim is not supported by the law. The purchases of water deliverable through the Strawberry High Line Canal are apparently stockholders

of that corporation; or if not, a number of the parties who received water through that Canal were made parties to this action for themselves and others who received water through that Canal. No useful purpose could be accomplished by a decree showing the quantity of water that each was entitled to receive. So far as appears there was no controversy with respect thereto. When, as here, the pleadings, the evidence, the Findings and the Decree fixed the total amount of water that the owners of water contracts under the High Line were entitled to receive, the requirements of a suit to establish the rights of the parties to this action were fully complied with. *Rule 23 of Utah Rules of Civil Procedure, Haugh v. Porter*, 51 Ore. 318, 98 Pac. 1983.

POINT III

THE COURT BELOW AND THIS COURT HAS JURISDICTION OVER THE SECRETARY OF INTERIOR AND THE COMMISSIONER OF THE BUREAU OF RECLAMATION.

On pages 27 of the Brief filed on behalf of the United States and its officers, it is argued that the Court is without jurisdiction over the Secretary of Interior because of the broad powers granted him by Congress and because he resides in Washington D.C., and must be sued at the place of his residence. If that be the law, the provisions of 43 U.S.C.A., Sec. 666, is a nullity. This is an action in rem or quasi in rem and as such must be brought where the subjectmatter of the action is situated. It would indeed be a novel and, so far as we are able to ascertain, an unheard of procedure to bring an action

in Washington, D.C., to have determined the rights to the use of water in Utah and "for the administration of such rights." U.C.A. 1953, 73-2-1 provides, among other matters:

"He (State Engineer) shall have general administrative supervision of the waters of the state, and of the measurement, appropriation, apportionment and distribution thereof. He shall have power to make and publish such rules and regulations as may be necessary from time to time to carry out the duties of his office, and particularly to secure the equitable and fair apportionment and distribution of the waters according to the respective rights of appropriation."

No claim is made, and there is nothing in the Decree entered in this case, which gives to the State Engineer any authority to regulate the water which is stored in the reservoir. The controversy is with respect to the water of Spanish Fork River, some of which was many years ago appropriated by the stockholders of the corporate parties to this action, and some of which was recently appropriated by the United States Government. When Congress provided for the administration of the rights of the water in which the United States has an interest according to state law, such provision of necessity must be by the State Engineer. But assuming, contrary to our contentions, that the Strawberry Water Users Association acting for the Secretary of the Interior has the right to regulate the apportionment and distribute the water of Spanish Fork River, still it may not perform such functions as suits its whims. It will be observed that the contracts of those who purchased a water right under what is characterized as the Spanish Fork Unit contains a provision fixing the quantity of water that is applied for "and in no case exceeding the share propor-

tionate to the irrigable acreage of the water supply actually available or determined by the Project manager or other proper officer of the United States, or its successor, in control of the project during the irrigation season for the irrigation of lands under said unit" (Exhibit 47). Substantially the same provision is contained in the contracts designated as the High Line Unit. In such contracts it is provided that the amount of water delivered in any given year shall not exceed 2 acre-feet per year (Exhibit 8).

If, as appears from the argument of Counsel for the defendants, the Court may not alter the contracts for the purchase of a water right from the United States, for stronger reasons the Board of Directors of the Strawberry Water Users Association may not alter such contracts. At least, the trial court had no interest in this controversy, while the majority of the Board of Directors of defendant, Strawberry Water Users Association, are directly interested in securing more water than is called for in the contracts, which provide for delivery of water through the High Line Canal. They have not hesitated to demand, and pursuant to such demand, have received additional water with no charge, or at most only a nominal charge for the same. We agree that the trial court was without authority to amend the contracts, and for stronger reasons the Board of Directors of defendant, Strawberry Water Users Association, is without such authority. We shall have more to say about this phase of the case when we come to discuss the Brief of the other defendants.

POINT IV

THE ACTION SHOULD NOT BE DISMISSED, BUT SHOULD BE AMENDED TO COMPLY WITH THE EVIDENCE.

On page 28 of the Brief of the United States and its Officers, it is argued that the action should be dismissed, especially because of the paragraphs 13 through 16 of the Decree. In light of the fact that most of the provisions of paragraphs 13 through 16 were repeatedly and vigorously urged upon the Court below by the defendants who succeeded in having the Court adopt the same over the objections of plaintiffs, it ill behooves them to now urge that the Court should not have ruled with them on such matters.

It is, of course, elementary law that one may not be heard to complain before an appellate court upon matters which the party complaining succeeded in inducing the lower court to rule with such complaining party. 5 *C.J.S.*, *Sec.* 1501, *page* 857, and cases cited in footnotes.

POINT V

THE APPELLANTS ARE ESTOPPED FROM COMPLAINING BECAUSE THE COURT MADE PROVISION FOR RETAINING JURISDICTION TO THE PURPOSE OF MAKING FUTURE CHANGES IN THE DECREE.

We are agreed with Appellants that the trial court erred in retaining jurisdiction of this cause for a period of ten years, and we commend them for coming to this conclusion, which

is in accord with the contention of the Respondents in the court below.

We shall reserve further discussion of this phase of the case until we consider our Cross-Appeal.

POINT VI.

Beginning on page 46 and continuing to the end of the Brief of the United States and its Officers, it is contended that the Court should not have interfered with the practice that has prevailed since the United States turned the control of the project over to the Strawberry Water Users Association. The evidence shows without conflict that during thirteen of the years since the control of the project has been turned over to the Board of Directors of the Strawberry Water Users Association plaintiffs, who have purchased a water right from the United States, have been deprived of the use of a part of the water which they purchased. On page 7 of the trial Court's Memorandum of Opinion will be found an analysis of the amount of water available for use during various years, and the charges for river water that was made against the water users under the High Line Canal. During the time the Government had control of the project the parties who received the water purchased through the established irrigation systems were supplied with the full amount purchased. Since the Board of Directors of the Strawberry Water Users Association have been in control as little as 35% has been received by such purchasers. The water users who have purchased water deliverable through the High Line Canal have been charged less and less for the river water used by them. During the

period of 1939 to 1955, both years inclusive, the average rate of charge for such water used by those who receive water through the High Line Canal was only 15.5. See Exhibits 69 and 73. It requires no argument to show that if the users of such water are charged for all of the water they use, there will be more water in the reservoir for the use of those who received their water through the established irrigation systems. It is argued that the project as a whole will be benefitted by the method followed by the Board of Directors of the Strawberry Water Users Association even if it results in depriving the users of water under the old established irrigation systems of some of the water they have purchased. That is the same argument that is made by those who would take property from those who have and give it to those who have not. The law has not yet approved such doctrines, and until it does the courts are not empowered to so decree. Nor is the doctrine that one may be a judge in a case where he has a direct financial interest that will be enhanced, met with approval. In this case the evidence shows without conflict that a majority of the Board of Directors of the Strawberry Water Users Association will be and are being benefitted by making a small charge for river water delivered to them through the High Line Canal. So far as we are able to ascertain no appellate court should or has put its stamp of approval upon such a procedure.

POINT VII

CORRECTION OF PRELIMINARY STATEMENT OF DEFENDANTS, STRAWBERRY WATER USERS ASSOCIATION, ET AL., AND STATEMENT OF ADDITIONAL FACTS OF CONTROLLING IMPORTANCE.

The plaintiffs, who are Respondents and Cross-Appellants, have been served with three sets of Briefs, which makes it necessary for them to, in effect, file three Briefs in answer to the various arguments made by the three sets of Appellants. We shall, however, attempt to avoid needless repetition. These arguments made so far are applicable and intended to apply to each of the three sets of Briefs.

In the main the statements of the facts contained in the various Briefs are correct so far as they go, but in at least one important particular the statements are in error.

On page 4 of the brief of Strawberry Water Users Association it is said:

“During the course of the trial the trial court indicated that it was going to adjudicate in this proceeding the relative collective rights between plaintiffs and defendants to the use of the waters of Spanish Fork River (Tr. 425-457, incl.) Up until this point defendants had proceeded on the basis that this action was limited to an interpretation of the water Contracts (Tr. 442-445, 446). When the Court took the view that it was going to adjudicate the relative collective rights to the use of the waters of the Spanish Fork River, (Tr. 447), a conflict of interest between some of the defendants represented by the firm of Christenson, Novak and Paulson arose, and it became necessary to withdraw as Counsel for some of the defendants. (Tr. 450.)”

As to that phase of the case, this is what transpired. In paragraph 25 of the Petition (R. 10), it is alleged that the various canals of the Corporations who have a right to the use of waters of Spanish Fork River:

"were filled to capacity with water from Spanish Fork River and measurements taken of such flow, and thereupon contracts were entered into with each of such companies and Spanish Fork City wherein and whereby it was agreed that plaintiff, East Bench Canal Company, should be entitled to a flow of 95 cubic feet per second, defendant Salem Canal & Irrigation Company to a flow of 55 cubic feet per second, Spanish Fork South Irrigation Company to a flow of 75 cubic feet per second, Lake Shore Irrigation Company to a flow of 60 cubic feet per second, and defendants, Spanish Fork City and Spanish Fork Southeast Irrigation Company, and plaintiff Spanish Fork West Field Irrigation Company to a flow through the Mill Race of 105 cubic feet per second. That such rights consisting of a total flow of 390 cubic feet per second were by such Contracts admitted to be superior to any rights acquired by the defendant United States on account of the certificates issued to it pursuant to the filing made by it as hereinbefore alleged."

By paragraph 15 of the Answer of defendant United States, the Secretary of the Interior and the Commissioner of the Bureau of Reclamation, it is alleged: "Admits paragraph 25 except for the last sentence thereof which is denied" (R. 169).

In paragraph 16 of the Answer of defendants Strawberry Water Users, et al., the allegations of paragraph 25 are admitted except if any Company is unable to beneficially use the amount of water mentioned in paragraph 25, such Company may not transfer the same to another Company (R. 99). No attempt was made to amend the pleadings above mentioned until quite some time after plaintiff had rested, which occurred on January 8, 1957. See Transcript 197. In the Answer of the

State Engineer paragraph 25 of the Petition is admitted. It was not until numerous witnesses were called by the defendants and various Exhibits had been offered and received that the defendants sought, and the Trial Court granted them, leave to amend. See Transcript 425. Upon leave being granted the defendants denied paragraph 25 of plaintiff's Petition. It was then that Counsel for defendants, other than the United States and its officers, withdrew as Counsel for some of the defendants (Tr. 447-457).

It will be seen that 228 pages of testimony of defendants' witnesses were taken after plaintiff rested before the defendants sought leave to amend and leave was granted over objection of plaintiff. After the amendment was made plaintiff asked and was granted leave to amend paragraph 25 of the Petition by striking out the words "certificates issued" and substituting therefore "filings made" (Tr. 435). The plaintiffs were also granted leave to reopen the case. The attention of the Court was called to the following language contained in the various contracts of those who had established water rights in Spanish Fork River:

"the Company (Spanish Fork South Irrigation Company) may divert from the flow of Spanish Fork River such an amount of water as it is entitled to under:

A. a decree of the Fourth Judicial District Court of Utah dated April 20, 1899, rendered by Judge W. M. McCarthy; and

B. decree of the same court dated January 1, 1901, rendered by John E. Booth, and subsequent appropriations through prescriptive rights.

The total amount of said water diverted at one time

not to exceed 75 second feet, and the company so far as its rights and interest are concerned will permit the United States to take all other waters of Spanish Fork River without interference." (Tr. 438)

Similar provisions were contained in other contracts except that the amount of water is that heretofore specified, namely: 105 second feet in the Mill race, 95 second feet in the canal of the East Bench; 55 second feet in the Salem Canal and 60 second feet in the Lake Shore Canal. The Court having permitted plaintiffs to reopen they called Wayne Francis, the Water Commissioner, who testified that he had been Water Commissioner on Spanish Fork River since 1941 (Tr. 408); that at all times since he had been such Commissioner no one purporting to represent the United States had questioned the right of the old water users of Spanish Fork River to a prior right of 390 second feet (Tr. 459, 461). That was also the testimony of Robert E. Huber, the Secretary of defendant Water Users Association (Tr. 463-467), and of Arthur W. Finley, a director of defendant Water Users Association (Tr. 468-472). There is no evidence to the contrary. Mr. Leo M. Banks was called as a witness by plaintiff and testified that he is an officer of plaintiff West Field Irrigation Company (Tr. 526); that the various companies who are the owners of water rights in Spanish Fork River have beneficially used the 390 cubic feet per second whenever the same is available (Tr. 530). The testimony of Lawrence E. Johnson (Tr. 532), is to the same effect, so also is the testimony of Joseph Hanson (Tr. 538).

In the statement of the case on behalf of defendant Strawberry Water Users Association, et al., mention is made of the

fact that there are sixteen members of the Board of Directors of defendant Strawberry Water Users, but attention is not called to the fact that a majority of such directors are subscribers for water deliverable through the defendant Strawberry High Line Canal Company. It is, however, so alleged in paragraph 39 of the Petition (R. 17). In paragraph 27 of the Answer of defendants Strawberry Water Users Association, et al., it is admitted that a majority of the board of directors of said defendant Association are subscribers for water deliverable through the Strawberry High Line Canal (R. 101). While in the Answer of the United States, et al., they deny the allegations of paragraph 39 of the Petition for lack of information, the trial court found the allegations of paragraph 39 to be true in its finding No. 41 (R. 429). No attack is made upon that Finding.

Moreover, at the commencement of the trial, Counsel for defendants Strawberry Water Users Association, et al., expressly admitted the allegations of paragraph 39 of the Petition, and Counsel for the United States stated that he won't make an issue of the allegations of paragraph 39 (Tr. 14).

The decree entered in this cause, paragraph 13, (R. 446), provides:

"That in light of the fact that the quantity of water in Spanish Fork River to which the United States and its successors in interest have the right to the use thereof varies during different years and during different seasons of the same year, 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 decision as follows:

That all water users shall be charged in full for all stored water and for all project river water used during periods when reservoir water is being released.

That in any calendar year when the project supply will probably not be sufficient to furnish the holders of approved applications 100 per cent of the amount of water applied for and approved under their applications, then all users of project water shall be charged in full for such water used after May 1st and 30 per cent for water used prior to May 1st.

That in any calendar year when the project supply will probably be sufficient to furnish 100 per cent or more of project water covered by their approved applications, then users of project river water shall be charged as follows:

(a) For water received prior to May 1st when water is not being released from the reservoir 20 per cent;

(b) For water received between May 1st and May 31st when water is not being released from the reservoir 50 per cent;

(c) For water received after May 31st 100 per cent.
The term "project river water" as herein used refers to water from Spanish Fork River available under the appropriations made by the United States on the flow of Spanish Fork River."

By paragraph 14 of the Decree it is provided that the State Engineer of Utah is directed to make an announcement on or before April 1st of each year an estimate as to whether or not the supply of water from the project will be sufficient for the ensuing irrigation season to furnish all holders of

approved applications 100 per cent of water applied for and approved under the approved applications, such estimate shall be made by said State Engineer from such information as he shall deem to be reliable and adequate. The estimate made by the State Engineer shall not affect the right of the Directors of the Strawberry Water Users Association to make their own independent determination as to the available water supply for the purpose of administering the project, but shall be binding upon the Board as to the percentage charges to be made for the use of project river water as hereinbefore directed unless and until the same is upon good cause shown to be improper and ordered changed by the Court.

POINT VIII

THE DECREE OF THE TRIAL COURT IMPROPERLY INTERPRETED THE WATER RIGHT APPLICATIONS AND ERRED IN FAILING TO SO CONSTRUE THE SAME SO THAT EACH APPLICANT FOR THE PURCHASE OF WATER SHOULD BE CHARGED WITH THE FULL AMOUNT OF WATER USED.

In discussing Point I of the points raised by defendants Strawberry Water Users Association, et al., it is pointed out that the trial court in substance concluded:

- “(1) That the high water of Spanish Fork River constituted part of the Strawberry Project. Conclusion 12).
- (2) That in the management and operation of the project the Strawberry Water Users Association does not have the right to distribute the high

waters of Spanish Fork River without charging the users thereof. (Conclusion 14).

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

If the trial court had stopped there, defendants would have no real quarrel with those conclusions with some reservations."

The Court was clearly right in its above mentioned Conclusion No. 1. See Exhibit 1.

Finding No. 34 of the Trial Court shows that on February 4, 1909, defendant United States by its Bureau of Reclamation filed an application with the State Engineer of Utah to appropriate 390 cubic feet of the unappropriated water of Spanish Fork River to be used to irrigate 19,907.83 acres of land. The lands particularly described in the application are located in the southerly end of Utah County, Utah. That a Certification of Appropriation has been issued for the water applied for. These lands are irrigated through the Strawberry High Line Canal.

As to the above mentioned Conclusion No. 2 (Conclusion 14), (R. 446), plaintiffs are in accord with the same and claim that the charge should be for the full amount of water used.

As to the above mentioned Conclusion No. 3 (Conclusion 15), (R. 447), plaintiffs claim that a full charge for water used is necessary to protect the rights of the other water users under the project, and that each water user has only such rights as are granted to him by his Contract.

As to the above mentioned Conclusion No. 4 (Conclusion 16), (R. 447), plaintiffs claim that this action was brought and prosecuted for the purpose of construing Contracts, and it is immaterial whether or not water is lost to the project. If it is lost to the project, it may be beneficially used by other applicants. Indeed, this Court judicially knows that other claims are being made to the waters lost to the project. *Salt Lake City, et al. v. Anderson, et al.*, 106 Utah 350, 148 Pac. (2d) 346.

On page 26 of the Brief of Strawberry Water Users Association mention is made of there being approximately a total of 717 contracts under the Strawberry High Line Canal, and that such Contracts are of nine different forms. The fact that there are nine different forms of contracts for the purchase of water deliverable through the High Line Canal cannot be said to be material in this case. Neither under the pleadings nor the evidence in this case is there any controversy between the various owners of water right contracts represented by shares of stock in defendant High Line Canal Company.

In paragraph 38, (R. 16), of the Petition for a Declaratory Judgment it is alleged that the number of acre feet of water purchased from the United States, which are annually deliverable through the Strawberry High Line Canal, are 40,377.25 acre feet. It is so found in Finding No. 39 of the Court's Findings (R. 428). It was so testified to by Robert E. Huber, the Secretary of defendant Strawberry Water Users Association, with this qualification, that if an individual who had an application for water under the High Line Unit had not paid his assessment, the number of acre feet for which he had filed

an application would not be included in the figure showing the acre feet of water deliverable through the High Line Canal (Tr. 179).

This controversy is not as to the amount of water purchased by each owner of stock in the High Line Canal, but as to the total amount of water that such stockholders are entitled to receive through that canal. A finding as to the acre feet of water that each stockholder owned in the High Line Canal would not aid in resolving this controversy, but would make needless voluminous Findings, Conclusions and Decree.

On page 28 of the Brief of Appellant Strawberry Water Users Association the attention of the Court is called to certain Findings, Conclusions and evidence to the effect that the flow of water in Spanish Fork River is less valuable than storage water. It is true that those who bought storage water were required to pay therefor at the rate of \$45.00 per acre foot, while those who purchased part storage water and part river water were required to pay only \$80.00 per acre of irrigable land which entitled them to two acre feet per annum, and in addition to that, those whose lands were irrigated through the High Line Canal had such canal constructed with money chargeable against the entire project, including those who were required to pay \$45.00 per acre foot. Those who were required to pay \$45.00 per acre foot were required to furnish their own means of conveying water from Spanish Fork River to their lands. See Finding No. 31 (R. 425). River water is generally available in the early season in larger quantities. That later the value of water for irrigation entirely depends on the need of the crops growing on the land to be irrigated.

The situation is well explained by Elmer Jacob, an engineer of many years of experience in the use of water for irrigation (Trs. 510, 511 and 521, et seq.) Be that as it may, it would be a novel and so far as we are able to ascertain an unwarranted basis for a determination of the extent of a water right purchased by a written contract to engage in a speculation as to the relative value of early and late water. Water put to a beneficial use is the basis of the right without regard to whether it is for early or late irrigation.

There is another somewhat novel argument made on page 29 of the Brief of Strawberry Water Users Association, namely: that the defendant "Association must dispose of such high water at whatever partial charge those who can use it will accept when it is available, otherwise such water will flow into Utah Lake," etc.

We have no quarrel with the doctrine announced in the case of *Smithfield West Bench Irrigation Co. v. Union Central Life Ins. Co.*, 142 Pac. (2d) 866, 105 Utah 468, where it is held that if one stockholder of a company has no use for water, some other stockholder may use the same. Indeed, if no stockholder of a corporation or other owner has use for water, a stranger may doubtless use the same. However, that is not this case. The clear effect of the manner in which the Board of Directors of defendant Strawberry Water Users Association has been regulating the waters of the project, especially during recent years, is to take water from those who have purchased stored water and give it to those who have purchased both stored and river water. If the water users under the High Line Canal are charged with all of the river water used by them,

it necessarily follows that they will be entitled to less of the stored water. To illustrate. Assume a water user under the High Line Canal is the owner of one hundred acres of land for which he is entitled to two hundred acre feet of water under his contract for the purchase of a water right from the United States. Assume further that he uses 100 acre feet of river water and he is only charged with 50 acre feet. He would then be entitled to 150 acre feet of stored water, whereas, if he were charged with the full amount of the river water used, he would be entitled to only 100 acre feet of stored water. Under the assumed facts the stored water would be depleted 50 acre feet, and all of the owners of a right to the stored water would stand the loss. It does require a mathematical genius to figure out such results. But it is said that if the purchasers of water available through the High Line Canal are charged in full for the water used by them, they will use less river water and more stored water. Assuming that to be so, does that fact justify only a partial charge for the river water used by those who have a water right deliverable through the High Line Canal? There is no language in any of the contracts of those whose water is deliverable through the High Line Canal that they may have the use of any river water without being charged for all that is used. Most of the contracts for water deliverable through the High Line Canal provide that:

“The quantitative measure of 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 anum, measured at the head of 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 the lands under said unit."

It is so alleged in the Petition, paragraph 29, (R. 12), admitted in the Answer of defendant Strawberry Water Users Association (R. 99), and in the Answer of the United States (R. 109). It is also shown by Exhibit—Plfs. Ex. 8, and found by the trial court, Finding 30, (R. 425). As heretofore stated the pleadings, the evidence and the decree also show that the total number of acre feet required to fully supply those who had contracts for water deliverable through the High Line Canal is 40,377.26 acre feet per annum. Some of those contracts provided for 3 acre feet per annum, and some were silent as to the quantity of water covered by the Contracts, but as above stated the pleadings, the evidence, and the Findings all show the total number of acre feet deliverable annually to those owning water under the High Line Canal. That being so no useful purpose would be served by making a list of the 717 purchasers of a water right under that Canal.

In the Brief of defendants Strawberry Water Users Association, et al., attention is called to the fact that in the Contracts dealing with the sale of water to the purchasers of a water right deliverable through the old established irrigation systems referred to as the Spanish Fork Unit, it is provided that:

"The said water shall be delivered in Spanish Fork River at the head of the during the months of May to September, inclusive, at such a rate of delivery as the water right applicant may desire, insofar

as such rate may be feasible, as determined by the United States, but in no event at a rate of flow per month greater than 40 per cent of the total annual supply in a flow as nearly uniform as practicable unless otherwise mutually agreed."

No such provision is contained in the Contracts for the purchase of water deliverable through the High Line Canal, but such Contracts do provide that not to exceed 2 acre feet shall be delivered annually during the irrigation season. It is clear that the reason for this difference in the language is that it was contemplated that the purchasers of water whose land was under the old established irrigation systems would receive stored water which was to be conveyed through a tunnel which was limited in carrying capacity, and that those who already had a water right in Spanish Fork River were supplied with early water or could arrange to exchange water with those who had a water right in Spanish Fork River. It will further be noted that the Contracts with those whose water was to be delivered through the established systems were to have the water delivered into Spanish Fork River. On the other hand, the river water purchased from the United States could not be said to be delivered into Spanish Fork River by the United States because it was already there. To say that the early water delivered into the High Line Canal for use in the irrigation of the lands under that Canal was not delivered during the irrigation season fails to make sense. An irrigation season must mean the time people irrigated. The United States made its filing on the waters of Spanish Fork River to be used for the irrigation of the lands described in the application from March 1st to November 1st. See Plfs. Ex. 1, and Plfs. Ex. 2. That is the land under the High Line Canal.

It is said on page 29 of the Brief of the Strawberry Water Users Association, et al., that the users of water under the High Line Canal are in a "bargaining position. They do not particularly want the water but will take it at a partial charge." We digress to observe that the practice of coaxing farmers to use more water is certainly an innovation in the use of water in this and other western states. The aim is and has been to secure a reduction in the use of water, not to induce farmers to use more water. If the Contracts which plaintiffs seek to have construed mean anything, they mean that the period of bargaining was at the time the Contracts were signed. Those who desired to purchase more than 2 acre feet were permitted to do so. See Tr. 180. Some of those who did not purchase all the water they desired were permitted to purchase additional water even after the operation of the project was taken over by the Strawberry Water Users Association (Tr. 158).

During the trial and in the Brief of defendants the claim is stressed that by the practice of allowing those who receive water through the High Line Canal to be charged only for a part, if any, of the water used, will result in preserving some of the stored water and result in a benefit to the entire project. It will be seen that those who have water rights deliverable through the High Line Canal are entitled to 40,377.26 acre feet per annum, and that the total number of acre feet purchased in the project is 70,780.32 acre feet per annum. Thus the quantity of water deliverable through the High Line Canal is substantially $\frac{4}{7}$ of the total amount of water purchased in the project. Thus, if any of the river water is allowed to run into Utah Lake, the water users under the High Line Canal

will stand to lose at least 4/7ths of the water so permitted to run into Utah Lake, that is to say, if instead of using river water they use stored water, the amount of their stored water will be reduced to the extent that they could have beneficially used river water. It is doubtful if any such results will follow by a practice of charging all purchasers of a water right with the full amount of the water actually used, whether it be river water or stored water. In any event there is no language in any of the Contracts which may be said to give the Board of Directors of the defendant Association authority to make only a partial charge for water use. The provision of the Contracts for the purchase of water is to the contrary. It is provided in the Contracts of both the High Line Unit and the Spanish Fork Unit that the water delivered to any purchasers of water shall:

“in no case exceed the share proportionate to the 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 practice followed by the Board of Directors of defendant Association, which its Counsel seek to have the Court approve, is at war with such provision.

It is further argued by Counsel for the defendant Association that its Board of Directors have a right to do as it pleases with the water entrusted to its control. That neither the stockholders of the Association nor the courts may interfere with the manner in which the Board of Directors of defendant control the waters of the project. On page 33 of defendant

Association's, et al., Brief cases are cited which it is claimed support such view. Such claim is without support in law for two reasons, they being: 1st. A substantial number of purchasers of water rights under the project who are not stockholders in the defendant Association; 2nd. The Board of Directors of the defendant Association must recognize and protect the rights of each stockholder as fixed by his Contract of Purchase. The evidence shows without conflict that only about 82% of the purchasers of water under the project are members of defendant Association (Tr. 65). To prevent the defendant Association from permitting the stockholders of the High Line Canal to use more water than their Contracts call for will result in depriving other purchasers of water who are not stockholders of the defendant Association, is not an interference with the internal affairs of the Association, but a determination by the Court that the Association must so control and distribute the water under its control so that each owner of water right shall receive the amount of water to which he is entitled, which in this case means the water that he has purchased as provided for in his Contract of Purchase. As to the duty of a corporation engaged in the control of the water evidenced by certificates issued to its stockholders the law is well settled in this and other jurisdictions, that the Company must distribute the amount of water to each stockholder to which he is entitled. If the Company fails to do so the Court will direct that the same be done. See *Yardley v. Long Canal*, 177 Pac. (2d) 530; *Burtenshaw v. Bountiful Irrigation Co.*, 90 Utah 196, 61 Pac. (2d) 312; *Baird v. Upper Canal Irr. Co.*, 70 Utah 57, 257 Pac. 1060; *Genola Town v. Santaquin City*, 96 Utah 88, 80 Pac. (2d) 930.

The evidence in this case conclusively shows that the manner in which the Board of Directors of defendant Association has been distributing and seek to control the water of the Federal Project here involved is contrary to the law announced in the foregoing cases.

A number of exhibits were received in evidence showing the amount of project river and stored water delivered to the various corporations which are parties to this action during the period that the project has been in operation. Referring to Defendants' Exhibit 73, which contains the same information as Plaintiffs' Exhibit 69, these facts are made to appear. During the period extending from the time water of the project was first used up to and including 1931 there was sufficient water to fully supply the amount of water applied for in the various Contracts of Purchase. For a period of five years, 1929, 1930, 1931, 1932 and 1933, an arrangement was had between those who received their project water through the old established irrigation systems and the newly constructed High Line Canal whereby the High Line Canal should be charged with 5000 acre feet per annum for the river water used by its stockholders without regard to the amount of river water so used. This arrangement was abandoned in 1934 because much less than 5000 acre feet of river water was available. See Finding numbered 43. See also Minutes of the Strawberry Water Users Association meeting held on February 18, 1929, marked as page 5 of the meeting of that date, which is a part of Defendants' Exhibit 83. After the arrangement dealing with the charge to be made the High Line Canal for river water was abandoned other attempts were made to come to an agreement with respect to the charges to be made for

the use of river water. See Defendants' Exhibit 8. But no further arrangement was had. Since 1933 the Board of Directors of defendant Association has from time to time fixed the charges that have been made for river water used by the stockholders of the High Line Canal. Exhibits 69 and 73 above mentioned show that in 1932 the High Line Canal used 13,425 acre feet of river water for which they were charged the agreed amount of 5000 acre feet; that in 1933 the High Line Canal used 13,129 acre feet of river water for which the agreed charge of 5000 acre feet was made. It will be seen that in 1932 there was sufficient water to supply only 35% of the water provided in the Contracts for the purchase of project water, and in 1933 only 76% of the water provided in the Contract for the purchase of water. After the arrangement for making a definite charge of 5000 acre feet for river water used by the stockholders of the High Line Canal, the amount of water used, the amount charged and the percentage of water available for the subscribers of water was as follows:

<i>Year</i>	<i>Amount Used By High Line Canal</i>	<i>Amount Charged High Line Canal</i>	<i>Amount of Water Available</i>
1934	13,996	5,146	70
1934	3,996	89	35
1935	11,176	5,146	70
1936	17,326	4,146	80
1937	16,132	5,512	85
1938	11,462	4,880	90
1939	1,123	0	100
1940	9,235	1,524	80
1941	10,708	4,543	80
1942	9,539	348	80
1943	4,107	352	85
1944	11,235	0	80
1945	7,671	859	90

During the next ten years the High Line Canal used substantially more water than was charged against it, but sufficient water was made available to supply the full amount of water that was contracted for. It will be observed that during some years the report shows that water was wasted. A statement of the years in which the water was wasted will be found at the bottom of Defendants' Exhibit 73.

Mr. Elmer Jacob, a graduate of the University of Wisconsin, (Tr. 66), and with more than 30 years experience in connection with the operation of irrigation projects, (Tr. 67), testified that if all the project water that was delivered into the various canal systems had been charged to the water users under such canals from *and* after 1935, there would have been sufficient project water to fully supply all of the water purchased (Tr. 78-79).

The Trial Court made this Finding, the accuracy of which is not questioned:

"52. That in thirteen years between 1932 and 1952 the supply of water under the project was insufficient to supply water users with the full amount of water applied for by them. That the average percentage received by all water users under the project in said thirteen years was 78.15 per cent of the amount applied for.

"53. That during said thirteen years the amount of water diverted from Spanish Fork River for use as project water averaged 10,609 acre feet annually and the average charge made therefor was 26.76 per cent of the amount received.

"54. That during the period from 1919 to 1938, both inclusive, it appears that an average of 9310 acre

feet of water was diverted annually from Spanish Fork River for use as project water, and that the rate of charge therefor during said period was 46.4 per cent of the volume used. That during the period from 1939 to 1955, both inclusive, the average diversion of water from the river for use as project water was 6,940 acre feet, and the average rate of charge therefor was 15.5 per cent of the volume used. (See Defendants' Exhibits 69 and 73).

It will be seen from the Exhibits, and also from the Findings of the Court, that as water in the project became less the percentage of charge made for river water delivered to the users of water under the High Line Canal became less.

The right to the use of water is a vested right which is recognized and confirmed by *Article XVII, Section 1, of the Constitution of Utah*, and the authorities generally. *Skinner v. Jordan Valley Irr. Dist.*, 300 Pac. 336, 27 Idaho 643. It is also the established law that a member of a Board of Directors may not vote in matters where he has a personal interest. 19 C.J.S., page 94, Sec. 749c, and cases cited in foot notes. *Article XI of the Articles of Incorporation of the defendant Strawberry Water Users Association* provides that a majority of the members of the Board of Directors shall constitute a quorum and as such authorized to exercise the corporate powers of the Corporation. See plaintiffs' Exhibit 13. If the nine members who are owners of and represent water rights under the High Line Canal may determine the charges that shall be made for river water deliverable through the High Line Canal, they are not only ignoring the express provisions of the Contracts for the purchase of water rights, but are depriving those who

own water deliverable through the old irrigation systems of a part of the water right purchased by them.

POINT IX

THE TRIAL COURT DID ERR IN FIXING THE PERCENTAGE THAT SHOULD BE CHARGED FOR RIVER WATER AND THAT SUCH ERROR WAS PREJUDICIAL TO THE RIGHTS OF THE RESPONDENTS.

What we have said as to Point I of the Brief of the Strawberry Water Users Association, et al., is applicable to Point II thereof. We shall not repeat what we have heretofore said in answer to Point I. It is said that the best interest of the project as a whole will be furthered by permitting the Board of Directors of the Strawberry Water Users Association to dispose of the water of the project as they see fit. There are those who believe that it would be to the best interest of the people of a county as a whole to let some one determine and fix the amount of property or income that each person should receive. We have not yet adopted such a doctrine. We are still governed by the law that the water rights of the individual are entitled to protection. So also are contracts, which provide for the amount of water that a purchaser shall receive, valid and enforceable. The majority of the Board of Directors of Strawberry Water Users Association are powerless to impair such contracts. That may not be done even by the Legislative Branch of Government. *Sec. 10, Article I of the Constitution of the United States, Sec. 18, Article I of the Constitution of Utah.*

It may be argued that if those who receive their water through the old irrigation systems are given the amount of water that they have purchased, they have no just cause to complain. During a period of 13 years they did not receive the water purchased. According to the testimony of Mr. Jacob this shortage was brought about because more water was given to the users of water under the High Line Canal than was called for by the Contracts for water deliverable through that Canal. That much of said shortage was caused by such practice is not open to doubt, especially during dry seasons. If there are some water users who have failed to purchase sufficient water, and if, as defendants claim, there is still water available for sale, it would seem that the only way that such water can legally be disposed of is by the sale thereof. By that means the cost of paying for the project will be borne by those who receive the water and in proportion to the benefits derived from the project. For those who have purchased 3 acre feet of water to pay the full purchase price thereof and to supply others with water for only a part of what they use, is not only wrong but is in direct conflict with the Contracts which Respondents seek to have construed.

POINT X

THE COURT DID NOT ERR IN CONCLUDING THAT THE CONTRACTS PROVIDE THAT CHARGE SHALL BE MADE FOR WATER DELIVERED PRIOR TO MAY 1st.

Under Point III, pages 41 to 46 of the Brief of defendants Strawberry Water Users Association, et al., it is argued that because the Contract with the High Line Canal provides that

water will be delivered during the irrigation season of May 1st to October 1st of each year in accordance with the terms of existing Contracts, such language does not say that no charge at all should be made for water prior to May 1st. Counsel fails to inform the Court as to what is to be done with the language of the contracts, with the individual purchasers which provides that not to exceed 2 acre feet per annum shall be used by the purchaser. Nor is any attempt made to explain away the undisputed fact that there are 40,377.26 acre feet deliverable through the High Line Canal per annum. Nor does he explain away the fact that everyone connected with the project have, ever since the project was in operation, understood that at least some charge should be made for water delivered to the water users under the High Line Canal prior to May 1st.

The language above mentioned does not say that the irrigation season is limited to the period of May 1st to October 1st of each year. It merely says that "during the irrigation season of May 1 to October 1 of each year." The only water that may be said to *be delivered* is the stored water. The river water is not under the control of anyone except the River Commissioner. There is no occasion to limit the quantity of water that may be called for to 18% in May and not to exceed 27½% in any one month as to the river water. It is obvious that these provisions of the Contract apply only to the stored water. The tunnel that carries the water through the mountain from the reservoir to the headwaters of Spanish Fork River has a limited carrying capacity, hence the necessity of requiring a uniform flow and limiting the amount that is called for in any one month. It was apparently believed, and in the main correctly believed, that the flow of Spanish Fork River would

supply the needs of all of the purchasers of water prior to May 1st. To say that the irrigation season did not begin until May 1st would fly in the face of the very foundation of the right of the United States and its purchasers of a water right, namely: the application to file upon the water of Spanish Fork River for the irrigation of lands under the High Line Canal from March 1st to November 1st. (See Plfs. Ex. 1, and Certificate of Appropriation, Plfs. Ex. 2).

POINT XI

THE TRIAL COURT DID NOT ERR IN FIXING THE EXTENT OF THE OLD ESTABLISHED RIGHTS IN SPANISH FORK RIVER.

The *Declaratory Judgments Act*, U.C.A. 1953, 78-33-11, provides that "all persons shall be made parties who have or claim any interest which would be affected by the declaration." The established water rights on Spanish Fork River were of necessity affected by the declaration of rights to the waters of Spanish Fork River. Without a determination of the established rights of the old Companies as to the nature and extent of such right, it could not be determined the nature and extent, if any, of the rights acquired by the United States under its filings. Moreover, the old irrigation systems were obligated to deliver water purchased from the United States to various purchasers whose land was under the established irrigation systems.

As will be seen from what has heretofore been said, it was only near the close of the trial that the defendants sought

to claim that the various old established rights did not amount to 390 second feet. There is no evidence that such rights are limited to 243 second feet, or any amount less than 390 cubic feet. Mention is made of adverse use. The claims of the old Companies to the water of Spanish Fork River are not based upon adverse use. The claims are made as prior appropriation and the admission of the United States that such claims are prior to the applications made by the United States.

ANSWER TO BRIEF OF THE STATE ENGINEER

The Brief of the State Engineer states One Point and Five subdivisions thereof upon which he relies for a reversal of the Judgment. Much of what has been said in answer to the points relied upon by the United States, et al., and the Strawberry Water Users Association, et al., is applicable to the points relied upon by the State Engineer.

POINT XII

IT IS TRUE THAT THERE WAS NO ISSUE AS TO THE RIGHTS OF THE ESTABLISHED IRRIGATION COMPANIES.

In paragraph 25 of the Petition it is alleged that the various canals of the established irrigation companies were filled with water from Spanish Fork River, and it was agreed that plaintiff East Bench should have 95, Salem Canal & Irrigation Company 55 cubic feet, Spanish Fork South Irrigation Company 75 cubic feet, Lake Shore Irrigation Company 60 cubic feet, Spanish Fork City, Spanish Fork Southeast Irriga-

tion Company and Spanish Fork West Field Irrigation Company 105 cubic feet per second, a total of 390 cubic feet per second (R. 11).

In paragraph 1 of the Answer of the State Engineer paragraphs 1 to 29 are admitted.

There was thus no issue as to the amount of prior water right owned by various established water rights on Spanish Fork River because it was alleged by the plaintiffs and admitted by the State Engineer.

POINT XIII

ALL OF THE PARTIES NECESSARY TO AN ADJUDICATION OF THIS CONTROVERSY WERE BEFORE THE COURT.

This action was brought to secure a construction of the Contracts for the purchase of water from the United States. The only persons who were interested in that controversy were those who had Contracts with the United States touching the water filed upon by the United States. It would have been idle to have brought in all of the parties involved in the case of *Salt Lake City v. Anderson, et al.* That case has been pending in the District Court of Salt Lake County for more than 20 years, and apparently no nearer settlement than it was 20 years ago. Under such circumstances the doctrine announced in such cases as *Matchell v. Spanish Fork West Field Irrigation Co.*, 1 Utah (2d) 313, 265 Pac. (2d) 1016, is especially applicable here. The people interested in this controversy should have the same settled during their lifetime and thus avoid the

loss that will be sustained by them throughout their lifetime. Moreover, the State Engineer did not timely raise the question of another action pending in his Answer. We have discussed the other questions raised by defendant, State Engineer. In an Answer to the Brief of the United States, et al., and the Brief of the Strawberry Water Users Association, et al., and shall not enlarge upon what is there said.

THE PLAINTIFFS HAVE FILED A NOTICE OF CROSS-APPEAL AND THEY RELY UPON THE FOLLOWING POINTS IN SUPPORT THEREOF.

POINT I

THE TRIAL COURT ERRED IN FAILING TO RENDER A DECREE WHEREIN AND WHEREBY THE CONTRACTS FOR WATER DELIVERABLE THROUGH THE HIGH LINE CANAL ARE CHARGEABLE WITH ALL THE WATER THEY USE.

POINT II

THE TRIAL COURT ERRED IN RETAINING JURISDICTION OF THIS CAUSE FOR A PERIOD OF TEN YEARS.

ARGUMENT

THE TRIAL COURT ERRED IN FAILING TO RENDER A DECREE WHEREIN AND WHEREBY THE CONTRACTS FOR WATER DELIVERABLE THOUGH THE

HIGH LINE CANAL ARE CHARGEABLE WITH ALL THE WATER THEY USE.

It will be seen that there are a great number of Exhibits which were received in evidence. During the trial we were at a loss to understand upon which possible theory many of the Exhibits were competent. The issues raised by the pleadings were confined to the construction that should be placed on the various Contracts for the sale of water under the Federal Strawberry Project, and such other Contracts as were entered into by the United States Government and the Corporations that were to distribute the water right applied for to the persons entitled thereto. It would seem to need no argument to convince this Court that contracts are made to be carried out according to the intention of the parties thereto as shown by the language used. It is when, and only when, the language used in a contract is ambiguous or uncertain that resort may be had to construction. If the language of a contract is certain and definite, there is nothing to construe. 12 *Am. Jur.* 228, and cases cited in footnotes. We have heretofore discussed the meaning of the Contracts here involved and shall not enlarge upon what is there said.

THE TRIAL COURT ERRED IN RETAINING JURISDICTION OF THIS CAUSE FOR A PERIOD OF TEN YEARS.

The project here involved had been in operation for a period of 44 years prior to the time of the trial. Water was first delivered in 1913. See Defendants' Exhibit 73. Complete records were kept of the water available to supply those who

had purchased water from the United States during all of that period. If that is not a sufficient time to ascertain all relevant facts, an additional ten years cannot accomplish that purpose. Moreover, the meaning of the various Contracts here involved will not change in an additional ten years, notwithstanding the Supreme Court of the United States is accused of changing the meaning of the Constitution of the United States. In the course of an additional ten years it is more than likely that a number of us who have taken part in this litigation will have passed to the Great Beyond, and any evidence that may be now available will be gone. Further, as to that. The cost of this litigation, which is incurred by the Strawberry Water Users Association Users Association, many of whom are the owners of only stored water, and as such are interested in having the users of river water charged with all the water they use from that source.

CONCLUSION

The plaintiffs herein claim that all those who use project water, whether it be river water or stored water, should be charged with all of the water used. That such is the clear meaning of the Contracts here involved, and that a Final Decree should be entered herein at this time to avoid needless further delay, and to put an end to further litigation.

Respectfully submitted,

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