

1960

## South Kamas Irrigation Co. v. Provo River Water Users' Association : Brief of Respondent

Utah Supreme Court

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Fisher Harris; Joseph Novak; Attorneys for Defendant and Respondent;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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Supreme Court, Utah

SOUTH KAMAS IRRIGATION  
COMPANY,

*Plaintiff and Appellant,*

vs.

PROVO RIVER WATER USERS'  
ASSOCIATION,

*Defendant and Respondent.*

Case No. 9168

BRIEF OF RESPONDENT

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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SOUTH KAMAS IRRIGATION  
COMPANY,

*Plaintiff and Appellant,*

vs.

PROVO RIVER WATER USERS'  
ASSOCIATION,

*Defendant and Respondent.*

Case No. 9168

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BRIEF OF RESPONDENT

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STATEMENT OF CASE

This action was filed by plaintiff below, being the appellant herein, pursuant to and under the provisions of the Declaratory Judgment Act of Utah, Chapter 33 of Title 78, Utah Code Annotated, 1953. (R. 4). Appellant sought to have the Court below adjudicate solely as against respondent (defendant

below) that appellant, as a stockholder in the respondent corporation is entitled to use and employ the Duchesne Tunnel and connected facilities of the Provo River Project (which admittedly are owned by the United States) to convey private non-project water for the sole benefit of appellant's own stockholders. (R. 3, 4, 5). Respondent herein filed its motion to dismiss the complaint on the ground, among others, that the United States of America is an indispensable party in this action and had not been joined as a party. (R. 8, 9). In support of the foregoing motion respondent served and filed, pursuant to Rule 43(e), U.R.C.P., an affidavit (R. 10) with attached Exhibit "A" (R. 10-23 incl.), identified as a true and correct copy of the contract between respondent and the United States of America dated June 27, 1936, and Exhibit "B", (R. 24-31 incl.) identified as a true and correct copy of the Articles of Incorporation of respondent.

The trial Court, after having fully considered the pleadings on file, the proof offered by the parties and the arguments of counsel, found that the United States of America is an indispensable party in this action and that the United States could not be brought before the court without its consent and such consent had not been given. Thereupon the trial Court entered its judgment dismissing the Complaint (R. 33) from which plaintiff filed its

Notice of Appeal. (R. 34). No Answer was filed and no trial was had upon the merits. The sole point of this appeal, therefore, is whether the trial Court erred in ruling that the United States of America is an indispensable party, and in dismissing the action. (R. 40).

### STATEMENT OF FACTS

Respondent can only agree in part with the Statement of Facts set forth in the brief of appellant since a number of the facts recited therein either go beyond the record or are not supported thereby. For this reason we deem it proper to formulate a Statement of Facts which we believe to be supported by the record. In developing the facts respondent is mindful of the rule that for the purpose of this appeal we must assume that the allegations of the material facts set forth in appellant's complaint are true even though respondent may deny the same. Wherever in this brief we assume such facts to be true it is because of such rule and for the purpose of this appeal only. In addition thereto, some of the facts hereinafter recited appear in the records of the Utah State Engineer and we agree with appellant that this Court may take judicial notice of such records.

Respondent is a non-profit corporation organized as a Water Users Association to meet the requirements of U. S. Reclamation Act of June 17,

1902, and acts amendatory thereof and supplemental thereto. (R. 26). On June 27, 1936, respondent entered into a contract in writing with the United States of America for the construction of the Deer Creek Division of the Provo River Project by the United States of America. (R. 10-23 incl.). One of the features of the project is the construction of the Duchesne Tunnel for the purpose of diverting project waters from the North Fork of the Duchesne River and conveying the same to the Provo River for storage in the Deer Creek Reservoir. (R. 10, 13, 14). Title to the project works constructed by the United States, including the Duchesne Tunnel, is in the United States and shall remain in the United States until otherwise provided for by Congress. (R. 21, 22). Title to the project water rights is in the United States of America. (R. 12, 13). Respondent has agreed to repay the entire cost of the project to the United States. (R. 18).

Respondent is entitled to the total yield of storage water from the project and is entitled to utilize the project works upon payment by respondent to the United States of the payments provided for in said contract. (R. 15). All of the rights of respondent to utilize the project works, including the Duchesne Tunnel, and to use the water yielded by the project are derived from and are subject to the limitations of the contract with the United States of America. (R. 10-23 incl.).



Appellant is a stockholder in the respondent corporation. (R. 3). There is no issue as to the project water to which appellant is entitled by reason of its stock ownership in respondent association. Appellant is the owner of Application No. 16063 filed with the Utah State Engineer to appropriate 25 second feet of water from Little Deer Creek, a tributary to the North Fork of the Duchesne River. (R. 3). The water which appellant claims the right to use under Application No. 16063 is water which it claims in its own right for use solely by its own stockholders and is not a part of the project waters. This action was commenced by appellant to establish a right solely as against respondent to use the Duchesne Tunnel and connected facilities to convey the water to which it claims it is entitled under said Application No. 16063 from the Duchesne River drainage to the Provo River channel. Appellant readily admits that legal title to the project works, including the Duchesne Tunnel, is in the United States. (Appellant's Brief, pages 2, 16). The sole point on this appeal is whether the trial Court erred in its rulings that the United States of America is an indispensable party and in dismissing the complaint. (R. 40).

Although most of the facts presented in appellant's brief which go beyond the record are immaterial insofar as this appeal is concerned we feel

constrained to point those out since appellant has devoted a substantial portion of its argument to such facts. There is nothing in the record to show that the water which appellant claimed the right to use under Application No. 16063 has been captured and used by respondent as is recited on page 3 of appellant's brief and is argued on pages 16, 17 and 19 thereof. We have examined the file of Application No. 30389 in the office of the State Engineer and find nothing which even remotely suggests that "the Bureau has made repeated efforts to induce the State Engineer to lapse appellant's approved application" as stated on Page 3 of appellant's brief. Nor is there anything in the record to show that "If the Bureau is successful, the use and benefit of the water will go, as it now does, to respondent Association, just as does all Project water" as is recited on Page 3 of appellant's brief and is argued on pages 17 and 19 thereof.

We are at a loss as to where appellant finds the foregoing facts or why appellant believes it proper to recite and argue the same in this appeal. We can only conclude that appellant is attempting to avoid the real issue by injecting unfounded inferences and insinuations in an obvious attempt to discredit respondent and thus to bolster a case otherwise without merit. In answer thereto we merely call this Court's attention to the file of appellant's

Application No. 16063 in the office of the State Engineer of which this Court can take judicial notice under the case of *McGary vs. Thompson*, 114 Utah 442, 201 P. 2nd 288, cited on page 3 of appellant's brief. The foregoing file reveals that appellant gained approval of Application No. 16063 upon its representation to the State Engineer that it would construct its own tunnel and diversion works and submitted reports to show that such tunnel and works were feasible and that it had the financial ability to do so. With the foregoing clearing of the air we direct our attention to our argument of the issues of this appeal.

## STATEMENT OF POINTS

### POINT I

THE UNITED STATES OF AMERICA IS AN INDISPENSABLE PARTY IN THIS ACTION BECAUSE IT OWNS THE DUCHESNE TUNNEL AND CONNECTED FACILITIES IN WHICH APPELLANT SEEKS TO ADJUDICATE A RIGHT OF USE.

### POINT II

THE UNITED STATES OF AMERICA IS AN INDISPENSABLE PARTY IN THIS ACTION BECAUSE ANY RIGHT WHICH APPELLANT MIGHT HAVE AS A STOCKHOLDER OF RESPONDENT TO USE THE DUCHESNE TUNNEL AND CONNECTED FACILITIES MUST BE FOUNDED UPON THE CONTRACT BETWEEN RESPONDENT AND THE UNITED STATES.

### POINT III

SINCE THE UNITED STATES IS AN INDISPENSABLE PARTY IN THIS ACTION AND HAS NOT WAIVED ITS SOVEREIGN IMMUNITY, THE TRIAL COURT DID NOT ERR IN DISMISSING THE COMPLAINT.

## ARGUMENT

### POINT I

THE UNITED STATES OF AMERICA IS AN INDISPENSABLE PARTY IN THIS ACTION BECAUSE IT OWNS THE DUCHESNE TUNNEL AND CONNECTED FACILITIES IN WHICH APPELLANT SEEKS TO ADJUDICATE A RIGHT OF USE.

The only issue on this appeal is whether the United States of America, as the owner of the Duchesne Tunnel and connected facilities, is an indispensable party in this action. If that issue is answered in the affirmative, which we respectfully submit it must be, the judgment of the trial Court in dismissing this action must be affirmed.

As we view this matter the dispute involved in this appeal revolves around what the appellant seeks to accomplish by its complaint. Appellant argues that the only question it seeks to answer is whether appellant, as a stockholder in respondent association, has the right to use in common with other stockholders of the respondent, whatever right respondent has to use the Duchesne Tunnel and connected facilities without seeking a determination of what those rights are. However, it is obvious

that appellant is seeking to adjudicate a right to convey non-project water through the Duchesne Tunnel and connected facilities which admittedly are owned by the United States of America.

Appellant alleges in its complaint that it has a certain water right (Application No. 16063) for 25 second feet of water from Little Deer Creek which can be most beneficially used if appellant asserts its claimed right to use the Duchesne Tunnel and connected facilities to bring said water through the Duchesne Tunnel and discharge the same into the Provo River Channel for use by its stockholders. (R. 3, 4). Yet the file of Application No. 16063 in the office of the State Engineer reveals that appellant gained approval thereof upon its representation that it would construct its own tunnel and diversion works and submitted reports to show that such tunnel and works were feasible and that it had the financial ability to so do. The prayer of appellant's complaint when stripped of its legal conclusions and unwarranted inferences of fact prays the Court to "adjudicate, declare and determine that plaintiff (appellant) is entitled . . . . to use and employ . . . . the Duchesne Tunnel and connected facilities . . .". The United States of America is admittedly the owner of the Duchesne Tunnel and connected facilities which were constructed by the United States as an essential part of the Deer Creek Division of

the Provo River Project. Legal title to the project works in their entirety is to remain in the United States until otherwise provided for by Congress. (R. 18, 19). This is in accord with Section 6 of the Reclamation Act of June 17, 1902, 43 U.S.C.A. Sec. 498, page 343, and is readily conceded by appellant on Pages 2 and 16 of its brief. Thus, appellant seeks to adjudicate in itself a right to use the Duchesne Tunnel and connected facilities, title to which admittedly is in the United States of America.

It is well settled law that a proceeding against property in which the United States has an interest is a suit against the United States. *Minnesota vs. United States*, 305 U.S. 382, 59 S. Ct. 292, 83 L. Ed. 235; *United States vs. Alabama*, 313 U.S. 274, 61 S. Ct. 1011, 85 L. Ed. 1327; *Maricopa County vs. Valley National Bank*, 318 U.S. 357, 63 S. Ct. 587, 87 L. Ed. 834. This Court recognized and adopted this rule in the case of *Randolf Land and Livestock Company vs. United States*, 2 U. 2nd 208, 271 P. 2nd 846. It was there concerned with the question of whether the proceeding was a suit against the United States. On Page 212 of the Utah Reports it is pointed out that the United States Supreme Court has held that where a judgment sought would expend itself on the public treasury or domain it is a suit against the sovereign. It was then noted that if the objectors therein prevailed in their appeal, the

result would be that the government would lose its water rights and under the definition above was a suit against the government. In the instant case if appellant were to prevail on the merits the judgment would in effect grant appellant an easement over property owned by the United States and certainly would expend itself on the public domain. Mr. Justice Crockett, speaking for the majority of the court on Page 212 of the Utah Reports, then stated:

“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.” (citing cases).

There can be no dispute that this is a proceeding against property in which the United States has an interest. How can it be otherwise when appellant seeks to establish a right to use property admittedly owned by the United States. The fact that appellant seeks to establish only as against respondent a right to use the Duchesne Tunnel and connected facilities to convey non-project water does not alter the rule. Whether an action is one against the sovereign is determined not by the party named as defendant but by the effect of the decree that may be entered. *Michal v. Nalder*, 174 F. Supp. 546; *Ogden River Water Users Association v. Weber Basin Water Conservancy District*, 238 F. 2nd 936; *Larson v.*

*Domestic and Foreign Commerce Corporation*, 337 U.S. 682, 69 S. Ct. 1457, 93 L. Ed. 1628. In the instant case appellant prays the Court to enter judgment "that plaintiff (appellant) is entitled . . . to use and employ . . . the Duchesne Tunnel and connected facilities . . .". The effect of the decree which might be entered if appellant were to prevail on the merits would be to grant appellant a right to use the Duchesne Tunnel and connected facilities to convey its own private non-project water for use by its own stockholders. Yet title to those works is admittedly in the United States. The conclusion is inescapable that this is a proceeding against property in which the United States not only has an interest but owns legal title thereto.

The law is equally well settled that in any suit which affects title to property which is in the United States, the United States is an indispensable party. *Minnesota vs. United States*, 305 U.S. 382, 59 S. Ct. 292, 83 L. Ed. 235; *United States vs. Alabama*, 313 U.S. 274, 61 S. Ct. 1011, 85 L. Ed. 1327; *Skeen vs. Lynch*, 10 Cir., 48 F. 2nd 1044, Cert. denied, 284 U.S. 633, 52 S. Ct. 17, 76 L. Ed. 539; *Trueman Fertilizer Company vs. Larson*, 196 F. 2nd 910; *Michal vs. Nalder*, 174 F. Supp. 546; *Ogden River Water Users Association vs. Weber Basin Water Conservancy District*, 238 F. 2nd 936.

In *Minnesota vs. United States*, *supra*, it was



held that the United States was an indispensable party in an action by a state to condemn a right-of-way over nine parcels of land allotted to Indians, legal title to which is held by the United States as trustee. In *United States vs. Alabama*, supra, it was held that the United States was an indispensable party to proceedings in a state court for the sale of lands under a tax sale which took place after the United States had become the owner thereof. In *Skeen vs. Lynch*, supra, it was held that the United States was an indispensable party to an action to quiet title to oil and gas as against the governments prospecting permittees where plaintiffs patent under a Homestead entry contained the exception "except all coal and other minerals, etc. . ." and where the United States claimed title to the oil and gas. In *Trueman Fertilizer Company vs. Larson*, supra, it was held that the United States was an indispensable party in an action for a declaratory judgment to declare that the lands on which plaintiff held a judgment lien and which had been turned over to the General Services Administration as surplus upon the termination of the use for which the lands had been acquired by the United States by eminent domain had reverted to their former owner and were again subject to the judgment lien. In *Michal vs. Nalder*, supra, decided May 18, 1959, an action was brought against the project manager

of the Columbia Basin Project for the Bureau of Reclamation to grant plaintiff's application for water. It was held that the suit was essentially one to reach water and facilities for its transportation owned by the United States and both the United States and the Secretary of Interior were indispensable parties.

The case of *Ogden River Water Users Association vs. Weber Basin Water Conservancy District*, 238 F. 2nd 936, is very closely in point to the instant case. In that case the Ogden River Water Users Association, a non-profit Corporation very similar to respondent, had entered into a contract in May, 1934, with the United States under the terms of which the United States acquired certain lands and water rights for the construction of the Ogden River Project. The contract, being very similar to the contract of respondent, provided that the initial cost of acquisition and construction of the Ogden River Project (the heart of which is the Pine View Dam and Reservoir) was to be financed by the United States but to be repaid by the Ogden Association through annual installment payments. The Ogden Association acquired a permanent right to the annual yield of the water from the project as constructed and, subject to certain supervisory rights of the United States, was given possessory rights to the lands and appurtenances for operational purposes, the

same as respondent has with respect to the Provo River Project. *Legal title to the project works was to remain in the United States until otherwise provided for by Congress.* Subsequently, the United States entered into a contract with the Weber Basin Water Conservancy District for the construction of the Weber Basin Project which included the enlargement of Pine View Reservoir. The Ogden Association filed a complaint in the Federal District Court of Utah under the Federal Declaratory Judgment Act, 28 U.S.C. Sec. 2201, and under 28 U.S.C. Sec. 1331, naming the conservancy district; E. O. Larson personally and as Regional Director of the Bureau of Reclamation; Clinton D. Woods, personally and as Project Manager of the Weber Basin Project and the Utah Construction Company, as parties defendant, asking the Court to adjudge, among other things, that the Ogden Association owned the equitable title to the lands comprising the Ogden River Project and to enjoin the enlargement of Pine View Reservoir unless just compensation be paid. The United States was not joined as a party. Motions to dismiss were filed upon the grounds that the United States and the Secretary of Interior were indispensable parties. The trial Court granted the motions and dismissed the complaint, which was affirmed by the Tenth Circuit Court of Appeals.

On page 941 of the Federal Reporter the Court stated:

“Under the terms of each of these contracts the United States obtains, retains and grants certain property rights and no judicial determination of the extent of the rights granted or retained can be had without the United States being a party to the action. Legal title to all lands and appurtenances involved in this controversy rests in the United States and no determination affecting that title can be made that would bind the United States or validly interpret the government’s contractual rights or obligations. *Skeen v. Lynch*, 10 Cir., 48 F. 2nd 1044, certiorari denied, 284 U.S. 633, 52 S. Ct. 17, 76 L. Ed. 539; *Carr vs. United States*, 98 U.S. 433, 25 L. Ed. 209; *Wood vs. Phillips*, 4 Cir., 50 F. 2nd 714.”

On page 942 of the Federal Reporter it is further stated:

“A decree adjudging that appellant owns the equitable title in and to the lands comprising the Ogden River Project, including Pine View Dam and Reservoir, though not binding upon the United States, would serve under the instant facts, to embarrass the government’s title and throw confusion upon the reclamation project. In the absence of the United States, this portion of the relief sought would be improper.”

Under the admitted facts of this case and the authorities cited above the conclusion is inescapable that this is a proceeding against property in which the United States not only has an interest but owns legal title thereto. Any judicial determination that

appellant or anyone else has a right to use the Duchesne Tunnel and connected facilities cannot be had without the United States being a party to the action.

We have no real quarrel with the general principles of law cited in appellant's brief pertaining to indispensable and necessary parties as far as such principles go except to point out that under Rule 19 (b) U. R. C. P., it is still discretionary with the trial Court whether to proceed to judgment in the absence of even conditionally necessary parties. However, such principles merely set forth general policies to aid as a guide in determining who are indispensable parties which might be helpful but do not solve the problem at hand. Our quarrel seems to be centered around what the appellant is seeking to accomplish by its complaint. Appellant very strenuously argues that it merely seeks to adjudicate that appellant, as a stockholder in respondent association, has the right to use in common with the other stockholders of respondent, whatever rights respondent has to use the Duchesne Tunnel and connected facilities without seeking an adjudication of what those rights are. It then argues that the United States has no interest at all in this action and could not even qualify as a proper party. Respondent contends however, that appellant in truth and in fact is asking the Court to adjudicate that appellant has

a right to use the Duchesne Tunnel and connected facilities to convey its own private non-project water for its own private use irrespective of the legal theory it employs. If not, appellant is merely seeking an advisory opinion to test out some pet legal theory which the Court does not have the power to do. Moore's Federal Practice, Volume 6, Sec. 57.11, page 3051.

We respectfully submit that the United States of America is an indispensable party in this action since it owns the Duchesne Tunnel and connected facilities in which appellant seeks to adjudicate a right of use to convey its own private non-project water for its own private use.

#### POINT II

THE UNITED STATES OF AMERICA IS AN INDISPENSABLE PARTY IN THIS ACTION BECAUSE ANY RIGHT WHICH APPELLANT MIGHT HAVE AS A STOCKHOLDER OF RESPONDENT TO USE THE DUCHESNE TUNNEL AND CONNECTED FACILITIES MUST BE FOUNDED UPON THE CONTRACT BETWEEN RESPONDENT AND THE UNITED STATES.

It is alleged that respondent is a mutual water corporation and it is, if at all, in a strictly limited sense i.e., that it furnishes water only to its stockholders and not for profit or hire. Kinney, Law of Irrigation and Water Rights, Volume 3, Sec. 1480, page 2659. However, respondent is fundamentally different from the so-called mutual water corporation in that neither its water rights nor its distribution or storage facilities are derived from its

stockholders but instead title to those are in the United States and respondent merely has a contractual right to their use. The respondent water users association is unique in its character and was organized for a special purpose. Kinney, in his treatise on the Law of Irrigation and Water Rights, Volume 3, Sec. 1281, gives a clear explanation of the objects of the Water Users Association. On Page 2319 he states:

"Therefore, under the authority of the Act, as above set forth, corporations known as 'Water Users Associations' are organized by the actual or contemplated water users of the water furnished from each of these reclamation projects. The objects of the organization of these corporations are twofold: First, to have some responsible organization, acceptable to the Secretary of the Interior, to which the management and operation of such irrigation works may, as contemplated by the Act, be eventually turned; and, second, owing to the fact that in practically all of these Government projects, there are several hundreds or even thousands of land owners, who are, or are contemplated water users, and who claim their rights by private ownership, or from applications under the provisions of the Act itself, it was found essential at an early stage of the operations under the Act to create one organization, so that the Government instead of dealing with hundreds of individuals separately could transact the business with one organization or with a small committee of men representing all of the water users under any particular project."



Thus it can be seen that respondent has many attributes quite different in object and purpose from the so-called mutual water corporation.

Appellant is one of the stockholders of respondent. It is also the owner of Application No. 16063 in which neither the respondent nor the United States has any interest. Appellant obtained the approval of Application No. 16063 upon its representation to the State Engineer that it would construct its own tunnel and diversion works to convey such waters and submitted reports to show that such tunnel and works were feasible and that it had the financial ability to construct the same.

In spite of the foregoing appellant asserts that as a stockholder in respondent association, it is entitled to use and employ in common with the other stockholders of respondent the Duchesne Tunnel and connected facilities, admittedly owned by the United States, to convey private non-project water for the sole use of appellant's stockholders. This, it asserts under an assumed abstract principle of law, for which it cites no authority and repeatedly takes for granted that such is the law. With this respondent strongly disagrees. In the first place if respondent is a so-called mutual water corporation, it is only in a strictly limited sense, i.e., it furnishes water only to its stockholders. Respondent merely has a contractual right of use of the Duchesne Tunnel and



connected facilities and title thereto is in the United States. In the second place there is no mutuality connected with the water claimed by appellant under Application No. 16063. It is water foreign to the project in which neither respondent nor its other stockholders nor the United States has any interest. It is claimed by appellant in its own right for the private use of its own stockholders. With respect to such water appellant stands in the same position as any outsider who is not a stockholder in the respondent association and who could not successfully assert such right. In addition thereto, neither respondent nor any other stockholder of respondent has the right asserted by appellant to use the Duchesne Tunnel and connected facilities to convey non-project water. Respondent could not voluntarily grant appellant the right it seeks. How then can appellant or the Court exact from respondent by compulsion that which respondent cannot voluntarily grant! Finally, all of the rights of respondent and its stockholders to utilize the Duchesne Tunnel and connected facilities are founded upon the contract between the United States and respondent. The existence or non-existence of the right which appellant asserts does not stem from any abstract principle of law as appellant repeatedly assumes. The right asserted by appellant as a stockholder of respondent to utilize the Duchesne Tunnel and connected facilities to convey non-project water, if such right does exist,

can only have its origin from the contract between the respondent and the United States. The only rights which respondent has to utilize such facilities are derived from that contract and it necessarily follows that any right which appellant might have as a stockholder of respondent to utilize such facilities is founded upon the same contract.

Appellant repeatedly argues that it does not seek to interpret the contract between the respondent and the United States in this action and that this action is merely the first step in its time-table of conquest. It outlines step two as a stockholders derivative suit against the United States to establish the rights of respondent under the contract. Yet it cites no waiver of immunity to bring that type of suit and we submit that there is none. However, neither does respondent seek to interpret the contract except insofar as it has already been interpreted by appellant, i.e., that the United States of America owns the Duchesne Tunnel and connected facilities. Respondent does contend that the determination of the existence or non-existence of the right asserted by appellant is dependent upon whether the United States has, under the contract granted or retained such right. It necessarily follows that no judicial determination of the existence or of the extent of the rights granted or retained by the United States under that contract can be had

without the United States being a party in this action. *Ogden River Water Users Association v. Weber Basin Water Conservancy District*, 238 F. 2nd 936.

We respectfully submit that the fundamental theory upon which appellant prosecutes its complaint is erroneous. It repeatedly assumes as an abstract principle of law, without citing any authority in support thereof, that appellant as a stockholder in the respondent association has the right to use and employ the Duchesne Tunnel and connected facilities to convey private non-project water for its own private use. Respondent of course denies that such is the law or that the existence or non-existence of the asserted right can be determined as an abstract principle of law. If the asserted right exists at all it is derived from the contract between the United States and respondent. The United States is an indispensable party to any judicial determination of the existence or non-existence of the right.

### POINT III

SINCE THE UNITED STATES IS AN INDISPENSABLE PARTY IN THIS ACTION AND HAS NOT WAIVED ITS SOVEREIGN IMMUNITY, THE TRIAL COURT DID NOT ERR IN DISMISSING THE COMPLAINT.

Apparently appellant does not dispute the action of the trial Court in dismissing the Complaint if it is determined that the United States is an indispensable party in this action. The law is clear

that if the United States is an indispensable party, and has not consented to be sued, the action must be dismissed. Moore's Federal Practice, Volume 3, Sec. 19.15, page 2185. The United States has not waived its sovereign immunity from suits for declaratory relief. *Hudspeth County Conservation and Reclamation District vs. Robbins, et. al.*, 213 F. 2nd 425; *Love vs. United States*, 108 F. 2nd 43, Cert. denied, 309 U.S. 673; *Trueman Fertilizer Co. vs. Larson*, 196 F. 2nd 910.

Since the trial Court properly determined that the United States is an indispensable party in this action and such party has not consented to be sued, we respectfully submit that the judgment of the trial Court dismissing appellant's complaint must be affirmed.

## CONCLUSION

Appellant seeks a judicial determination solely as against respondent that appellant, as a stockholder of respondent corporation, is entitled to use the Duchesne Tunnel and connected facilities to convey private non-project water which it claims for use solely by its own stockholders. The United States is admittedly the owner of the Duchesne Tunnel and connected facilities. This action is a proceeding against property in which the United States has an interest and affects title to property which is in the United States. Under the adjudicated cases the

United States is clearly an indispensable party in this action.

If respondent is a mutual irrigation corporation at all, it is so only in a strictly limited sense, i.e., it furnishes water only to its stockholders. In all other respects it is different. The fundamental theory upon which appellant prosecutes its complaint is erroneous. Neither respondent nor any of its stockholders have the right to utilize the project facilities owned by the United States to convey non-project water. Respondent cannot voluntarily grant appellant the right it seeks and such right cannot be exacted from respondent through compulsion.

All of the rights of respondent to utilize the project works and water yielded by the project are founded upon contract with the United States. Any rights of the stockholders of respondent to utilize any of the project works are likewise derived from the contract between respondent and the United States. The United States is an indispensable party to any judicial proceeding to determine the existence and extent of any rights granted or retained under the contract.

Respondent agrees that the most fundamental concept of Anglo-American jurisprudence is that every person should be entitled to his day in Court as stated by appellant on page 15 of its brief. However, it is equally fundamental that when it is de-

terminated by the Court that such person does not have a cause of action, he has had his day in Court.

We respectfully submit that the trial Court did not err in determining that the United States of America is an indispensable party in this action and since it has not waived its sovereign immunity, the judgment of the trial Court in dismissing appellant's complaint must be affirmed.

Respectfully submitted,

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