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Maybeth Farr Reimann and Paul E. Reimann et al v.
W. B. Richards, Jr., et al : Brief of Respondents
Reimann and Young and Cross-Appellants
Reimann

Utah Supreme Court

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Wilford M. Burton; Paul E. Reimann; Reed H. Richards; McKay and Burton; Attorneys for Respondents;

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IN THE SUPREME COURT
of the
STATE OF UTAH

MAYBETH FARR REIMANN and PAUL
E. REIMANN,

*Plaintiffs, Respondents and
Cross-Appellants,*

—vs.—

W. B. RICHARDS, JR., A. Z. RICHARDS,
A. Z. RICHARDS as “agent for applicants
in Application No. A-1810 on file in the
Office of State Engineer of Utah”; and J.
ROY FREE,

*Defendants, Appellants and
Cross-Respondents*

Civil Nos. 107,485; 107,486 and 112,261

A. Z. RICHARDS, A. Z. RICHARDS as
agent for Applicants in Application No.
A-1810 on file in the office of the State
Engineer of Utah; and W. B. RICHARDS,
JR.,

*Plaintiffs, Appellants and
Cross-Respondents,*

—vs.—

PAUL E. REIMANN, MAYBETH FARR
REIMANN, his wife, GLEN E. YOUNG
and WAYNE D. CRIDDLE, State Engineer
of the State of Utah.

*Defendants, Respondents
and Cross-Appellants.*

Civil No. 112,596

FILED

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Clerk, Supreme Court, Utah

Case No. 9340

**BRIEF OF RESPONDENTS REIMANN AND YOUNG AND
CROSS-APPELLANTS REIMANN**

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Case No. 9340

BRIEF OF RESPONDENTS REIMANN AND YOUNG AND
CROSS-APPELLANTS REIMANN

STATEMENT OF FACTS

The “Statement of Facts” set forth in the Brief of Appellants is incorrect in many particulars. Appellants have not only disregarded their own admissions, but substantially all of the essential facts which show there is unappropriated

water in Mountair Canyon and particularly within the Reimann lands in Section 22, T. 1 S., R. 2 E., SLM.

There are 72 exhibits. They are listed and described in the Appendix hereto, together with a statement as to objections thereto or any controversial aspects. Appellants have listed only 6 of the 8 applications to appropriate water on page 2 of their brief. They have omitted 2 approved spring applications: No. 27,404 on the Bluebird Spring in Aspen Fork, and No. 27,410 on the Parker Spring in the East Fork. (Exhibit 10. The court approved 7 of the 8 applications. The only application which the District Court did not approve was No. 27,987 on the Maybeth Spring area. The area is more than a half mile up on the Reimann land in the South Fork, and at the highest elevation of any water sources in controversy.

Appellants Richards and their alleged predecessors and those in privity with them never filed any application to appropriate water. (R. 793-794). Until 1956 the only water right claimed by them was the "Eckman diligence right" for irrigation of $2\frac{1}{2}$ acres of land in Section 17 at the mouth of Mountair Canyon, with a priority of 1885. By decree of May 2, 1912, No. 5680, paragraph 19, the title of predecessors to appellants was quited against Salt Lake City as a right "to use and divert all of the primary waters of Mountair Canyon" from May 15 to September 15 for "irrigation of two and one-half ($2\frac{1}{2}$) acres of land." (Exhibit 5, R. 235, 260, 328, 576). That land was devoted to the raising of alfalfa prior to 1912. The duty of water for alfalfa did not exceed 4 acre feet per acre nor more than 10 acre feet per year for the entire tract. (R. 393, 540, 802).

Alvaro A. Pratt and Parker B. Pratt homesteaded 335 acres in Section 22 prior to the withdrawal in 1902 of the public lands in the area for the Wasatch National Forest. Alvaro A. Pratt conveyed to Parker B. Pratt in 1929. The latter died in 1934. By decree of distribution of his estate, the lands were distributed to Paul E. and Maybeth Farr Reimann (grantees of the devisees) in 1948, "*together with all water rights.*" (Exhibits 13, 36).

By answers to requests for admissions of fact (R. 26-29, file No. 112,56) appellants admitted the following facts: The Pratts used water from the East Fork and from the South Fork of Mountair Creek prior to 1903. Neither Alvaro A. Pratt nor Parker B. Pratt was a party to Civil No. 5680 which went to decree May 2, 1912, nor was ever served with summons, nor named in the alias summons in 1908. There were no "unknown defendants" mentioned in the published alias summons. Prior to 1953 neither A. Z. nor W. B. Richards, Jr., ever told Paul E. or Maybeth Farr Reimann that they claimed any rights to waters arising in Section 22.

On July 29, 1953, during a field investigation by the State Engineer, W. B. Richards, Jr., stated that the total uses of water by the Pratts amounted to 1/3 or 3/10 of a second foot of water. (R. 575-576). It was admitted during the trial that the Pratts had diligence rights. (R. 245, 590-591). The court found that the use of water by the Pratts ceased upon the death of Parker B. Pratt in 1934; that in 1939 the waters became subject to re-appropriation; and that the Reimanns are the only persons who have filed any applications to appropriate.

On page 3 of the Brief of Appellants it is incorrectly asserted that "All of the sources of Mountair stream" are situated on the Reimann lands. The engineers including A. Z. Richards himself, all testified that Mountair Creek is fed by a number of side streams and springs in Sections 15, 16 and 17. (R. 251, 321, 448-449, 373-374, 940-944). Mountair Creek is a gaining stream. Even during low water season the Mountair Creek flow at the Richards land at the mouth of the canyon is from 2½ to 4 times the measured flow 2.4 miles upstream at the Moffat flume just below the Reimann lands. (Exhibits 66 and 67). Appellants admitted they did not acquire any of the Pratt water rights by adverse use. (R. 166, 599-591).

Cultivation of the 2½ acre tract ceased in 1918. In 1944 A. Z. Richards as "agent" filed change application A-1810 to change the alleged irrigation right for the 2½ acre tract to a domestic use of cabins built up the canyon.

(Exhibit 6). He intended to change the nature, *not the quantity of use*. (R. 792-799). There is no proof of any beneficial use on the 2½ acre tract for 40 years. The State Engineer made studies which indicate, and the court found, that 650 gallons of water per day constitute the need of a family for all domestic purposes. (R. 1055-1059) There were 32 cabins in the canyon in 1953 .By power of attorney filed with the State Engineer in 1956. (Exhibit 8), A. Z. Richards is agent for a number of the cabin owners in this water controversy.

The Mountair Canyon drainage area covers 2.47 square miles. The average annual precipitation is 35 inches. The evaporation loss and consumption by plant transpiration, etc., amount to about 27 inches or 77%. The remaining 8 inches which will reach a stream channel or get down the canyon through underground percolation, will produce an estimated annual water yield of 1054 acre feet. Other studies by another method indicate that the water yield might be 940 acre feet. For the period of April to September the estimated yield is 757 acre feet. (R. 957-965). Reducing the figure 1/3 to conform to the four months' period of use by appellants the estimated yield for that period would be 505 acre feet. The maximum beneficial use of about 10 acre feet shown by appellants and those in privity with them amounts to only 2% of the said water yield.

The court approved all of the Reimann applications except No. 27,987 on the Maybeth Spring area. On their cross-appeal respondents seek approval also of said application. The Reimanns also seek reversal of those portions of the judgment whereby they were denied court costs and also limited to \$10 damages against W. B. Richards, Jr., and denied injunctive relief.

During a period of July 1954 to August 1956, W. B. Richards, Jr., in person and by agents made secret excursions onto the Reimann lands in the East Fork, dammed up the north creek channel, and diverted from 20 to 60 gallons of water per minute out onto the Parker Road built by the Reimanns. Said wrongful diversions of water not merely

interfered periodically with water measurements by Paul E. Reimann, but washed out portions of the road, rendered the road impassable for days, and necessitated repeated road repairs. Mr. Richards repeatedly was seen coming down from the Reimann lands, but he falsely represented to Mr. Reimann that no one in the canyon had committed such acts. He told Mr. Reimann to get in touch with Walter K. Fahr (a special deputy sheriff) and also Grant Morgan, who looked after the Richards interests, and that those men would assist in catching the offenders. The court refused to receive evidence showing that they induced Mr. Reimann to spend 150 hours away from his law practice to investigate fictitious clues which they gave him to divert attention from their continued trespasses. Mr. Reimann finally caught the agents of Mr. Richards on August 27, 1955. The same types of damaging acts were repeated through the summer of 1956, until Mr. Reimann had the road grade raised to prevent any further cutting of a ditch out into the middle of the road. (R. 329-331, 422-423, 486-491, 508-509, 592-593, 626-655).

There are a number of misstatements of fact in the Brief of Appellants which are discussed in the argument of respondents.

STATEMENT OF POINTS ON WHICH RESPONDENTS RELY INCLUDING POINTS ON THEIR CROSS-APPEAL

1. The portions of the judgment not covered by the cross-appeal should be affirmed.

(A) The trial court did not err in refusing to find that all waters in Mountair Canyon were fully appropriated under a decree dated May 2, 1912, Civil No. 5680. Said case was not a general adjudication, the water users in Section 22 were not parties to such decree, and appellants failed to show a beneficial use of more than 2% of the waters arising in said canyon.

(B) There is no legal nor factual basis for the contention that the Pratt diligence rights “reverted” to appellants or to Salt Lake City and “never became available” for re-appropriation by the Reimanns.

(C) The court was justified in fixing the needs of cabin owners at 650 gallons of water per day, and in refusing to fix a rate of flow for the “combined needs” of all cabins during “peak periods of use.”

(D) There is no competent proof that the Reimann water development program will impair any vested rights of appellants or any one else.

2. The Reimanns are entitled to an adjudication that neither appellants nor any one in privity with them, ever acquired any rights to any waters arising in the East Fork basin in Section 22. T. 1 S., R. 2E., SLM.

3. Failure to include the identifying words “East Fork” and “Fork, and in Aspen Fork of”, in paragraph 8 of the judgment tends to create ambiguity and uncertainty. Such words should be incorporated into the decree.

4. The Reimanns are entitled to judgment approving application No. 27,987 to appropriate waters from the Maybeth Spring area from January 1 to December 31, by virtue of either developed water or unappropriated water in the source. The underground water was not subject to appropriation prior to 1935.

5. The award of only \$10 damages against W. B. Richards, Jr., was wholly inadequate to indemnify the Reimanns for damages resulting from his willfull trespasses and other misconduct.

6. The court erred in refusing to allow proof of financial loss to Paul E. Reimann from the deception practiced by W. B. Richards, Jr., and his agents in their attempt to prevent detection of their unlawful destructive water diversions onto the Parker Road.

7. The Reimanns are entitled to recover their costs in the District Court against the appellants.

ARGUMENT
POINT 1.

THE PORTIONS OF THE JUDGMENT NOT COVERED BY THE CROSS-APPEAL SHOULD BE AFFIRMED.

(A)

THE TRIAL COURT DID NOT ERR IN REFUSING TO FIND THAT ALL WATERS IN MOUNTAIR CANYON WERE FULLY APPROPRIATED UNDER A DECREE DATED MAY 2, 1912, CIVIL NO. 5680. SAID CASE WAS NOT A GENERAL ADJUDICATION, THE WATER USERS IN SECTION 22 WERE NOT PARTIES TO SUCH DECREE, AND APPELLANTS FAILED TO SHOW A BENEFICIAL USE OF MORE THAN 2% OF THE WATERS ARISING IN SAID CANYON.

By decree of distribution in the estate of Parker B. Pratt, deceased, dated November 15, 1948, about 310 acres of land in the East Fork, South Fork and Aspen Fork of Mountair Canyon in Section 22, T. 1 S., R. 2 E., SLM, were distributed to Paul E. Reimann and Maybeth Farr Reimann, his wife, "*together with all water rights.*" Said lands had been homesteaded by Parker B. Pratt and Alvaro A. Pratt sometime prior to the creation of the Wasatch National Forest in 1902. (Exhibit 13).

In 1952 appellants asserted that the Pratts lost all of their water rights by nonuse. Starting in February 1953, the Reimanns filed 8 applications to appropriate water involved in this litigation, with points of diversion on the Reimann lands in Section 22. Appellants attempted to prevent approval of all of said applications by asserting claims under a 1912 decree to 50 times more water than appellants and those in privity with them ever could have beneficially used. At the pretrial and at the trial it was admitted that there was no adverse user against the Pratts. (R. 166, 887). Appellants could not have acquired any of the Pratt water rights. In fact, there is no competent evidence that appellants and their predecessors could have beneficially used more than 2% of the total water yield of Mountair

Canyon drainage area during their alleged period of use, nor that all of their rights cannot be completely satisfied from sources arising downstream from the Reimann lands. The evidence required a finding that there is unappropriated water, particularly in Section 22.

In Civil No. 112,596 as amended, A. Z. Richards individually and as "agent for applicants in application A-1810 on file in the office of State Engineer," and W. B. Richards, Jr., filled suit against Paul E. Reimann, Maybeth Farr Reimann, his wife, Glen E. Young and the State Engineer, in an effort to reverse approval by the State Engineer of applications No. 27,404 on the Bluebird Spring in Aspen Fork; No. 27,410 on the Parker Spring, No. 28,106 on the Discovery Spring, and No. 28,555 on the Yvonne Spring, in the East Fork; and savings application No. 27,770 on the South Fork. The said Richards also sued to quiet title to "all of the water rights and waters known as Mt. Air Creek lying in Mt. Air Canyon" including "tributaries thereto and water supplies contributing" to the stream, based on a decree dated May 2, 1912.

(a) *By the decree of May 2, 1912, Civil No. 5680, the title of appellants' predecessors was quieted against Salt Lake City only, to a right to divert and use the waters of Mountair Creek for the irrigation of 2½ acres at the mouth of Mountair canyon:*

"That the title and right of Willard B. Richards, Nephi J. Hansen and the P. A. Sorenson Company to use and divert all of the primary waters of Mountair Canyon or Smith's Fork of Parley's Canyon from the 15th day of May to the 15th day of September of each year for the *irrigation of two and one-half (2½) acres of land*; and also during the surplus or high water season to divert and use such surplus water from said Smith's Fork to irrigate six (6) acres of land, and each of said rights is hereby quieted and confirmed." (Exhibit 5, decree, Salt Lake City v. Pleasant View Irrigation Co. et al.)

It was admitted and then stipulated that the 6 acre tract mentioned in paragraph 19 of the decree was never irrigated

at any time after 1912. (R. 257, 589-590). Consequently, the 6 acres must be eliminated from consideration. The decree did *not* purport to adjudicate any water rights 3 miles up the canyon in Section 22. The decree did not purport to give the predecessors of appellants all of the waters arising in Mountair Canyon, but water for irrigation of $2\frac{1}{2}$ acres of land in Section 17.

(b) *Since "Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this State," the predecessors of appellants could not have acquired any right to more water than they could use beneficially.*

In paragraph 19 of said 1912 decree above quoted, the duty of water per acre was not spelled out, but in paragraphs 12, 13, 14, 15 and 16 of said decree (Exhibit 5), the duty of water on other irrigated land in the same general area was $1/60$ th of a cubic foot per second per acre continuous flow. The 5 acre tract of the Portland Cement Company mentioned in paragraph 14 of the decree is only a few hundred feet from the $2\frac{1}{2}$ acre tract in the same Section 17.

Prior to 1912 said $2\frac{1}{2}$ acre tract was devoted to raising alfalfa. The duty of water for alfalfa does not exceed 4 acre feet per acre per season, or 10 acre feet for $2\frac{1}{2}$ acres. (R. 393). Under the criterion set forth in the 1912 decree of $1/60$ th of a second foot per acre for the $2\frac{1}{2}$ acre tract there would be $1/24$ th of a second foot or 18.7 gallons per minute or 26,928 gallons per day. For a period of 124 days from May 15 to September 15 the right would aggregate 3,339,072 gallons or 445,209.6 cubic feet of water or 10.22 acre feet.

A. Z. Richards, an engineer, admitted that the duty of water for alfalfa was 4 acre feet per acre if the water was applied on the land uniformly. (R. 802). Appellants asked the court for $1\frac{1}{2}$ second foot of water, but A. Z. Richards admitted that if such an amount were applied on the land 90% of it would sink into the ground. (R. 801-802). In 1953 he testified that "No irrigation water is used constantly. It is all intermittent." (R. 262, 811). He stated

it would not be good irrigation practice to pour water on the same tract constantly. (R. 260). He said the caretaker was instructed not to divert any more water than was necessary. (R. 764). If the 90% which would be wasted by constant flooding were eliminated, the *estimated need* stated by Mr. Richards would be scaled down to 5/100ths of a second foot, or not over 12 acre feet per year.

Exhibit 68, a topographic plat shows that only 1.61 acres of the $2\frac{1}{2}$ acre tract could have been irrigated. Thus, it is unlikely that the actual beneficial use of water could have exceeded 6.6 acre feet per irrigation season.

There has been no cultivation of the $2\frac{1}{2}$ acre tract since 1918. Some trees were planted after 1912. In addition to trees and native growth, in 1953 there were Russian thistles and other weeds. There have been many dead trees there in the past 20 years. (R. 258-260). Exhibits 53 to 60 are photographs which illustrate the physical conditions of that tract of land. Diverting water on that land has been a wastage of water for a number of years. The court so found.

(c) *Appellants ignore the fact that the maximum beneficial use of the Richards predecessors and those in privity with them never exceeded 2% of the average water yield of Mountair canyon.*

The studies conducted by the State Engineer show that the estimated annual water yield from surface and underground sources in Mountair Creek drainage area, April to September is 757 acre feet. (R. 957-961). Reducing that figure $1/3$ to cover only the four months' irrigation season, the estimated yield would be 505 acre feet, or 50 times the maximum amount of water which appellants and their predecessors could have used beneficially. Thus, appellants and those in privity with them, who could not have used beneficially more than 10.22 acre feet or 2% of the estimated water yield, in opposing the Reimann applications have made a fantastic claim to 50 times more water than they or their predecessors could ever have beneficially used.

The State Engineer made further studies. The precipitation in the Mountair watershed is 35 inches annually. Of

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this amount 27 inches or 77% is either lost by evaporation or consumed in plant transpiration. Only 8 inches get down the canyon by stream flow or underground percolation. The 8 inches for the 2.47 square miles of watershed area, produce an average estimated annual yield of 1054 acre feet. (R. 961-965). If the precipitation formula is used, the beneficial use by appellants and their predecessors was even less than 2% of the estimated water yield during their period of use.

(d) *The decree dated May 2, 1912, was not a general adjudication of the rights to the waters of the entire canyon.*

A general adjudication of water rights in any drainage area requires that the State shall be a party to the proceedings. *Morris et al. v. Smith*, 76 Utah 162, 288 P. 1068. The State was *not* a party to Civil No. 5680 in 1907 which resulted in the decree of May 2, 1912. The statutory proceedings for general adjudications were not followed. The action by Salt Lake City against more than 2,000 defendants was not a general adjudication proceeding, but only a "private suit" by the city against specifically named defendants. *Spanish Fork West Field Irr. Co. v. District Court*, 99 Utah 558, 110 P. 2d 344. The alias summons published in 1908 so indicated:

"This action is brought to determine and establish the respective rights and interests of *each of the parties to the suit* in and to the waters of Parley's Canyon Creek in Salt Lake County, Utah."

There were no "unknown defendants." Nothing in the decree (Exhibit 5) purports to adjudicate rights against any one not made a party to the suit.

(e) *Alvaro A. Pratt and Parker B. Pratt as landowners and water users in Section 22 were not parties to the 1912 decree, nor served with process, so that the decree was not binding on them nor on the Reimanns as successors in interest.*

The Pratts were not named parties to the suit nor served with summons nor named in the published alias summons. On page 10 of the Brief of Appellants, in utter disregard of elementary rules of "due process of law," it is contended

that the Pratts did not have to be named parties to the suit because their patents were not recorded prior to commencement of suit. No lis pendens was ever filed which described either the Pratt lands or the waters arising on their lands. Nor were there any "unknown defendants" designated in the published summons. In April 1908, several months *prior* to commencement of publication of summons, the ownership of the Pratts was of record as shown by the abstract of title, Exhibit 13. They could have been named parties and served with summons if any of the parties to the suit had desired to adjudicate the Pratt water rights in Section 22.

In view of the fundamental rules of "due process of law", the decree of May 2, 1912, which quieted title against Salt Lake City to the waters of Mountair Creek for the irrigation of $2\frac{1}{2}$ acres at the mouth of the canyon, could not operate to divest the Pratts of their diligence rights to the use of waters arising in Section 22, because the Pratts were never brought in as parties nor served with process. As aptly stated in *Taylor v. Barker*, *District Judge*, 70 Utah 534, 262 P. 266 at 267:

" . . . The law is well settled that as a general rule a judgment is effective only between the parties to the action, and their privies, and that no rights whatever, either in favor or against strangers to the judgment are acquired, lost, or affected by reason of the judgment. 1 Freeman on Judgments (5th Ed) s 407, p. 887. In a footnote the text is supported by a collection of numerous cases from various jurisdictions."

The United States Court of Appeals, 10th Circuit, pointed out in *Albion-Idaho Land Co. v. Naff, Irr. Co.*, 97 F. 2d 439 at 444:

"It is well settled that with certain exceptions, strangers to a judgment or decree are not bound thereby. An exception is recognized in the case of judgments strictly in rem. The exception, however, does not apply to judgments in proceedings quasi in rem like suits to quiet title or to adjudicate water rights. The defendants were not parties to the Diet-

rich decree and are not bound thereby. The Land Company and interveners were not parties to the Christensen decree and are not bound thereby.”

The decree of May 2, 1912, was not an adjudication of any of the water rights of the Pratts. They were not parties. They continued to use the water many years after the 1912 decree. Such decree could not be binding on the Pratts nor on the Reimanns as successors to the Pratts.

(f) *Mountair Creek is a gaining stream, and there is no evidence that any beneficial use established by appellants or any others cannot be satisfied entirely from sources downstream from the Reimann lands.*

There is no evidence whatsoever that appellants or any third parties ever appropriated any waters arising on the Reimann lands in Section 22. W. B. Richards, Jr., and those in privity with him never had any point of diversion on any of the Reimann lands. (R. 573). The Reimanns contended that a downstream appropriator who is able to satisfy his water right from sources downstream close to his point of diversion cannot claim a right to have the water taken at the head of the canyon. Counsel for the Richards group replied: “Nobody is.” (R. 907). There was no proof whatsoever that all rights of the Richards group or of any person who could possibly have any water rights, cannot be satisfied entirely from sources which are downstream from the Reimann lands.

Mountair Creek is a *gaining stream*. At the pretrial it was admitted that all of the canyon waters do not arise on the Reimann lands. (R. 182). However, on page 3 of the Brief of Appellants there is a statement that “All of the sources of Mountair stream, from the various springs, are situate on the land of plaintiffs” (Reimann). Such assertion is refuted by appellants themselves. In change application A-1810 filed in 1944, A. Z. Richards as “agent” stated (Exhibit 6):

“Mountair Creek consists of a mountain stream made up of small tributary streams from small side canyons and from springs along these streams cov-

ering a distance of 6 or 8 miles . . . This condition makes it necessary to have many points of diversions to intercept the water as it accumulates in the stream and to reach the widely scattered cottages throughout the Mountair Canyon."

A. Z. Richards himself admitted that *half* the water comes into the stream below the Reimann lands and that the creek is fed by a number of side streams and springs in Sections 15, 16 and 17. (R. 251, 314, 321). James R. Barker, an engineer, found that the creek is fed by side streams and springs down below the Reimann lands. (R. 448-449). J. R. Driggs, an engineer who had a cabin in Section 22 near the confluence of the East Fork and South Fork, testified that the flow past his cabin was only 1/3 of what the flow was near the mouth of the canyon. (R. 373-374). Del Foutz, geologist for the State Engineers' office, testified that Castle Crag Canyon and Maple Fork are some of the sources which contribute to the stream below the Reimann lands. He also said there are numerous springs on the sidehills of Mountair Creek northwest of Section 22, in Sections 15 and 16. (R. 940-944).

Even during low-water season the flow in Mountair Creek at the Richards diversion near the mouth of the canyon is always more than twice the flow measured at the Moffatt flume below the Reimann lands. As illustrated by Exhibit 66, during low water season the measured flow at the Richards diversion 2.4 miles downstream from the Moffat flume is from $2\frac{1}{2}$ to 4 times the flow at the Moffat flume. As shown in Exhibits 66 and 67, on August 8, 1959, the flow past the Moffatt flume was only 31.32 gallons per minute (.07 c.f.s.) A quarter of a mile downstream at Warner's, just above Castle Crag Creek, the Mountair Creek flow was 70 gallons per minute. The flow from Castle Crag Creek was an additional 15 gallons per minute. The combined flow of the two creeks was 85 gallons per minute, or 2.7 times the flow at the Moffat flume. At the Richards diversion on the $2\frac{1}{2}$ acre tract near the mouth of the canyon, the measured flow was .205 of a

cubic foot per second or 92 gallons per minute, or 3 times the flow at the Moffat flume. The significant fact is that those measurements were taken when no water was being diverted above the Moffat flume, and during the so-called "peak period" of diversions in connection with the cabins and homes. Notwithstanding all diversions below the Moffat flume, the flow in the creek at the Richards division was still 3 times the flow at the Moffat flume.

The maximum beneficial use ever acquired by the predecessors of appellants was 10.22 acre feet per year. On a constant flow basis, it would only require 18.7 gallons per minute, and that amount is only a small fraction of the gain of the creek down below the Reimann lands.

(g) If the predecessors of appellants had some water rights in addition to the irrigation right for 2½ acres, those rights were insignificant.

Until 1956 both A. Z. Richards and W. B. Richards, Jr., stated that the *only right* claimed by them and by those in privity with them was the "Eckman right" with an alleged priority of 1885, covered by the decree of May 2, 1912. (R. 235, 260, 328, 576). At the trial, the Richards also claimed diligence rights for 5 cabins allegedly built prior to 1903. Two of those cabins were built in Section 22 by the Pratts, predecessors to the Reimanns. A. Z. Richards admitted that the Pratts had diligence rights, but he did not claim any interest in those rights. (R. 245-246). Only 3 other cabins could be identified as having been built prior to 1903. One was owned by Willard B. Richards who was a party to the 1912 decree, and no such right is mentioned in the 1912 decree. The other 2 were Dr. Wilcox and a Mr. Sorenson. The actual beneficial use was unknown. Since the State Engineer has determined that 650 gallons per day per home will cover the needs of a family, if appellants could have shown privity, the additional beneficial use would amount to less than 1 gallon per minute.

(h) The Richards could not have acquired any rights to underground waters by a 1912 decree which only related to surface waters, for until 1935 underground percolating wa-

ters not flowing in known or defined channels were deemed the property of the landowner and not subject to appropriation.

The right to divert the waters of Mountair Creek for the irrigation of 2½ acres of land related to *surface waters available* at the point of diversion. The decree did not purport to grant the predecessors of appellants any of the underground percolating waters in Section 22 nor in any other part of the canyon. Such waters then were not subject to appropriation. As stated in *Holman v. Christensen*, 73 Utah, 389, 274 P. 457:

“ . . . It should be observed that we do not here hold that water arising from springs on private land and flowing off such land in a manner other than through a natural channel is subject to appropriation.”

Prior to the 1935 amendment to our water law, Section 100-1-1, R. S. U. 1933, read as follows:

“The water of all streams and other sources in the State whether flowing above or *under the ground in known or defined natural channels*, is hereby declared to be the property of the public, subject to all existing right to the use thereof.”

See *Bullock v. Tracy*, 4 Utah 2d 370, 294 P. 2d 707; *Cook v. Tracy*, 6 Utah 2d 344, 313 P. 2d 803. In the latter case, referring to underground waters prior to the 1935 legislation, this Court said:

“ . . . No one advanced the philosophy that one could lose such rights by nonuser, since it was believed that one might use the underground water as he saw fit, without losing his proprietary right therein, just as he would not lose his land by nonuser during any period of time. . . .”

“ . . . Prior to the decisions and legislation mentioned, the latter philosophy, applied to underground water, had been accepted by bench, bar and people generally; and any lawyer who advised his client otherwise would have been considered incompetent.”

(i) *Appellants not having established any right to waters arising in Section 22 were not entitled to any decree quieting title.*

The basic rule in a suit to quiet title is that a complaining party must prevail on the strength of his own title, not on any defects or weakness in the title of his adversaries. *Home Owners' Loan Corp. v. Dudley*, 105 Utah 205, 208, 141, P. 2d 160, 166. Appellants have not been able to point to any findings of fact made by the court adverse to them, which are not supported by sufficient competent evidence. Appellants were reluctant to measure the amount of water beneficially used because the amounts were such a small fraction of their extravagant claims. Appellants and those in privity with them could not show that they or their predecessors ever put to beneficial use more than 10.22 acre feet, or more than 2% of the total water yield of the canyon during their period of alleged use.

Appellants never had any points of diversion in Section 22 on the Reimann lands. Their own proof shows that Mountair Canyon is a gaining stream below the Reimann lands in spite of all uses by appellants and those in privity with them. There was no proof that all beneficial uses could not be satisfied entirely from sources near their points of diversion downstream from the Reimann lands. Appellants were not entitled to quiet title as to any waters arising on the Reimann lands. As pointed out in *Tanner v. Humphreys*, 87 Utah 164, 48 P. 2d 484, a party who protests an application should point out how and in what manner he will be injured if the application is granted. Appellants could show no actual impairment of any rights. Having neglected to file any applications to appropriate water, and having disclaimed any adverse use, appellants endeavored to prevent approval of the Reimann applications by an unconscionable claim to 50 times more water than appellants and those in privity with them could have ever beneficially used, including the waters appropriated by the predecessors of the Reimanns which were allegedly lost by nonuse.

(B)

THERE IS NO LEGAL NOR FACTUAL BASIS FOR THE CONTENTION THAT THE PRATT DILIGENCE RIGHTS "REVERTED" TO APPELLANTS OR TO SALT LAKE CITY AND "NEVER BECAME AVAILABLE" FOR RE-APPROPRIATION BY THE REIMANNS.

Appellants make the absurd contention that if they did not acquire all rights to all waters of Mountair Canyon under the decree of May 2, 1912, Salt Lake City acquired a right to the balance of the water under that decree. The predecessors in title to Paul E. and Maybeth Farr Reimann admittedly were Alvaro A. Pratt and Parker B. Pratt, who homesteaded 335.98 acres of land in Section 22 prior to creation of the national forest. They were water users in Section 22 more than a decade prior to the 1912 decree. Not being parties to the 1912 decree they could not have been divested of their water right. The recorded notice of intention of Alvaro A. Pratt to make final homestead proof dated January 12, 1905, designated W. B. Richards and others as witnesses to "prove his continuous residence upon and cultivation of said land." (Exhibit 13). There could not be successful cultivation of the land without water.

By answer to request for admission of fact No. 21, appellants admitted that "The Pratts used water from the East Fork of Mountair Creek and also from the South Fork of Mountair Creek prior to 1903." (File No. 112,496, R. 27). A. Z. Richards admitted that the Pratts had diligence rights. (R. 245). On July 29, 1953, in the presence of the State Engineer, in answer to a specific question, W. B. Richards, Jr., said the Pratts used about $1/3$ or $3/10$ of a second foot of water. (R. 575). In view of the dispute, it is quite evident that Mr. Richards was not overstating the Pratt water rights. Since the maximum amount of water which could have been used beneficially by the appellants and those in privity with them did not exceed 10.22 acre feet, the Pratts were using 6 times more water than appellants and those in privity with them.

On page 15 of the Brief of Appellants it is contended that the Pratt water rights in Section 22 were "abandoned". Since abandonment requires an intent, it is difficult to see how the death of Parker B. Pratt in 1934 could show an intent to abandon water rights which were appurtenant to lands devised by his last will and testament. Appellants on pages 15 and 16 falsely contend that "Appellants had long since been using all of the water in Mountair Canyon", when their use could not have exceeded 2%. Appellants then make the absurd claim that the "abandoned" Pratt rights "would have reverted either to Appellants or to Salt Lake City; certainly not to the State of Utah and to Respondents." If the Pratt diligence rights were lost by non-use after the death of Parker B. Pratt, those water rights could not possibly have "reverted" either to appellants or to Salt Lake City who never owned those water rights. There were no junior appropriators at that time. Consequently, loss of those rights would have made the water available for re-appropriation.

Appellants resort to a misleading argument to make it appear that Salt Lake City acquired the Pratt water rights as a "junior appropriator." Appellants offered in evidence application No. 11360 filed by Salt Lake City in 1933 to appropriate 7,000 acre feet of water. It was error for the court to admit such irrelevant application in evidence. The city could not have appropriated any of the allegedly lost Pratt rights by such application for the point of diversion is not in Mountair Canyon, but in Parley's Canyon $1\frac{1}{2}$ miles *above* the confluence of Mountair and Parley's creeks. (Exhibit 49). Appellants did not introduce in evidence application No. 11269 filed June 12, 1932, by Salt Lake City to appropriate waters *from Mountair Creek* for the obvious reason that said application on Mountair Creek was *withdrawn* September 14, 1938. This Court has held that it takes judicial notice of the records of the State Engineer's office. *McGary v. Thompson*, 114 Utah 442, 201 P.2d 288 *Lehi Irr. Co. v. Jones*, 115 Utah 136, 202 P. 2d 892. Since withdrawal of the Salt Lake City application on Mountair

Creek, the Reimann applications are the only applications filed and they are the only means whereby any of the lost Pratt diligence rights could be appropriated.

Salt Lake City has never claimed that it acquired any of the Pratt rights. Appellants have tried to arrogate to themselves the right to assert claims for Salt Lake City which the city has never seen fit to assert although it had an attorney in court nearly every day of the trial. (R. 937-975). Charles W. Wilson, Salt Lake City water superintendent for the past 5 years was familiar with the Reimann applications. There was a conference between A. Z. Richards and the city attorney with respect to them. Salt Lake City, which would readily file a protest if convinced that its rights might be impaired, decided not to file any protest nor to intervene in this litigation. (R. 728). Counsel for the city moved to intervene near the end of the trial, but the motion to intervene for Salt Lake City was withdrawn on the last day of trial. (R. 976-977). Appellants could not show that they and their predecessors ever put more than 2% of the water of Mountair Canyon to beneficial use, and they could not show that they ever acquired the Pratt rights in Section 22, so they tried to have the court give those rights to Salt Lake City to prevent the Reimanns as successors in interest to the Pratts, from re-appropriating the waters of Section 22. Yet, by a motion to amend, appellants asserted adverse use against Salt Lake City and any other downstream water users. (R. 91-94).

At the pretrial and at the trial counsel for the Richards group stated they did not claim the Pratt rights by adverse user. (R. 165-166, 878-879). In *Wellsville East Field Irr. Co. v. Lindsay Land & Livestock Co.*, 104 Utah 448, 137 P. 2d 634, this Court stated that "It is almost universally held that adverse use will not 'run upstream.'" Neither appellants nor Salt Lake City could have adversely used the Pratts who were water users at the upper end of the canyon.

Appellants contend that Salt Lake City has "continually used the *Parley's Creek water* for purposes of exchange in the various irrigation ditches extending throughout Salt Lake

County”. Appellants infer that such water included the Mountair Creek water, although the appellants pretend that they themselves were “using all of the water.” Mr. Wilson admitted that during the past 20 years no water from Mountair Creek had been taken into the city water system, because the water is too contaminated to be used with simple chlorination. He said some water from Parley’s Creek had been used for irrigation in the Decker Ditch and Kennedy Ditch years ago under exchange agreements, but the city bought most of the stock of those companies. Except for irrigation of 150 acres, those ditches were discontinued in 1953 and 1955. Many hundreds of acres of land once irrigated from those ditches have been converted into residential areas and are no longer irrigated. (R. 731-733). There is no proof that Salt Lake City ever used any water from Section 22, nor that the city filed any change application or any application to suspend the use of water involving ditch rights from Parley’s Creek. As an appropriator for irrigation uses, the city would have to comply with the statutes the same as any one else to maintain a water right. See *Mt. Olivet Cemetery Assoc. v. Salt Lake City*, 65 Utah 193, 235 P. 876. *Richfield Cottonwood Irr. Co. v. Richfield*, 84 Utah 107, 117, 34 P. 2d 945.

Appellants have attempted to prevent approval of the Reimann applications and thereby obstruct development of the Reimann lands, by asserting claims which are devoid of any substance.

(C)

THE COURT WAS JUSTIFIED IN FIXING THE NEEDS OF CABIN OWNERS AT 650 GALLONS OF WATER PER DAY, AND IN REFUSING TO FIX ANY RATE OF FLOW FOR THE “COMBINED NEEDS” OF ALL CABINS DURING “PEAK PERIODS OF USE”.

(a) Change application A-1810, even if not fatally defective for failure to designate a new point of diversion,

could not operate to enlarge the quantity of water then being beneficially used.

Cultivation of the $2\frac{1}{2}$ acre tract at the mouth of the canyon ceased in 1918. (R. 258). For many years such tract has been covered with trees, native brush, Russian thistles, weeds and other volunteer growth and some grass. (R. 835). Turning water on that land in recent years could not be a "beneficial use of water." In 1941 over 25 years after cultivation ceased on the $2\frac{1}{2}$ acre A.Z. Richards "as agent" filed change application A- 1810 to change the use from irrigation to domestic needs of canyon cottages and cabins. (Exhibit 6). He testified that he filed it for all people in the canyon who were then using the water. None of the people in the canyon had ever filed any application to appropriate water. (R. 791-794). The application recited that the water "has been used intermittently to irrigate the land." No new point of diversion was specified: "*The points at which it is now proposed to divert the water are indeterminate at this time.*" The amount of water which would be beneficially used by each cabin owner was not specified. Mr. Richards said 25 to 30 cabins have been built since 1922. (R. 971).

The court observed: "Richards has the $2\frac{1}{2}$ acre water right, which by equity or estoppel or whatever you want to call it has gone up in those homes." (R. 897-898). Counsel for appellants said they wanted "enough water for the beneficial use of those homes. That's the thing we're particularly concerned about." (R. 878). The court continued the case for one year for further study by the State Engineer for a proposed determination, and to determine "just how much the cabins need." (R. 901).

The State Engineer made extensive studies which determined that the combined needs of a home amount to 650 gallons of water per family per day, to serve the domestic needs of a family, whether located in a city or in the canyon. Such figure includes all household uses such as in a kitchen sink, bathtub, toilet, etc. (R. 1055-1059). The court adopted the figure submitted by the State Engineer of 650 gallons

of water per day for each of the 32 cabins which were in the canyon in 1953 when the first Reimann water applications were filed. There was sufficient competent evidence to support such finding.

There is no substance to the argument that the court should have awarded 1,000 gallons per day for each cabin. A. Z. Richards merely *estimated* that each cabin should have that amount of water available per day. (R. 427). *He has never measured the actual use of water.* He has planned culinary water systems, but he has never set a formula on how much water should be used per family per day. (R. 818-812) He did not know how many cabins have water piped into them, how many cabins merely have water piped to a point outside, nor what uses cabin owners make of water. *A. Z. Richards has no water piped into his own cabin.* (R. 247, 149, 286-287, 791-793, 1002-1003).

The figure of 50 gallons per cabin per day used by James R. Barker after his visit to the canyon would doubtless be right for a number of the cabins which have no water piped inside. (R. 450). Richard E. Reddin, geologist and engineer, testified that normally a cabin would use around 250 to 300 gallons of water per day. (R. 567). In view of the lack of competent evidence of actual use, the court was liberal in allowing 650 gallons per cabin per day.

On page 18 of their brief, appellants contend that they "have not completed the change of water and are still irrigating the land at the bottom of the canyon even though a substantial number of the cabins upstream are now being served." The court correctly found that the watering of the land at the bottom of the canyon is not a beneficial use, but a wastage of water. (R. 102).

In *Garner v. Anderson*, 67 Utah 553, 248 P. 496, this Court held that the District Court has no authority to enter a decree in a water suit relating to rights of persons not parties to the litigation (which shows that the 1912 decree was utterly invalid as to the Pratts). This Court also held that regardless of the amount of the original appropriation, an appropriator is not entitled to more water than he can

beneficially use, and that it is the *duty of the court to determine the actual needs and beneficial use of the water user*. The predecessors of appellants never made a beneficial use of water on more than $2\frac{1}{2}$ acres or in excess of 10.22 acre feet per year. No application to suspend the use of water was ever filed. A change application could not enlarge the quantity, but would be limited to the beneficial use of water made at the time.

(b) *The court did not err in refusing to fix a rate of flow to cover the maximum possible "peak period use" of all of the cabin owners.*

On page 20 of their brief appellants say: "The great bulk of the water, however, is used in a concentrated period each day at the various mealtime hours, with the greatest use at the dinnertime hour. (R. 781)." The court adopted the "peak periods of use" argument as to concentrated use from 6 to 9 a.m., 11:30 a.m. to 1:30 p.m., and 5 to 8 p.m. The court properly found that there is very little actual beneficial use of water during the other 16 hours of the day. (R. 107). Appellants attempt to invoke the riparian doctrine for the 16 hours of the day when they admittedly would not make any beneficial use of water. There is no proof that any cabin owner could not fully satisfy his needs from downstream sources during the 8 hours when he would be using water.

On pages 20 and 21 of their brief appellants make the unfounded claim that "There is uncontradicted testimony that each home requires about four to five gallons per minute during the peak load hours. (R. 777-782,)" Appellants infer that each home owner (including those who have no water piped into their cabins) indiscriminately turns on a tap and keeps it running throughout each of the three periods of "peak use" which aggregate 8 hours. A tap discharging 5 gallons per minute emits 650 gallons in 2 hours and 10 minutes. For 8 hours it would draw 2,400 gallons. No prudent person turns on a tap and keeps it running indefinitely. Yet, appellants complain because the court did not arbitrarily fix a flow at the combined rate of all possible

diversions aggregating 150 gallons per minute for the entire 24 hours of every day.

Water is not diverted at any one point, but there are a number of diversions scattered over a distance of 1.4 miles. Appellants admit that Mountair Creek is a gaining stream. *The gain in the stream is in excess of all of the diversions.* By change application A-1810 it was recognized that "Mountair Creek consists of a mountain stream made up of small tributary streams from side canyons covering a distance of 6 to 8 miles." (Exhibit 6.) It would be unreasonable to "fix the flow" at any point in the stream in view of the sources of water which feed the stream all along the way. In September the discharge at the Moffat flume frequently goes down to less than 22 gallons per minute. It would be ridiculous to specify that the flow at that point should be 150 gallons per minute or 7 times the actual flow.

(c) *There is no merit to the argument that "It was error to fix the point of diversion irrespective to the lack of storage facilities."*

On pages 20 to 23 of the Brief of Appellants there is an unfounded argument about "lack of storage". There is also a false contention that the court "fixed" the points of diversion. The court did nothing of the kind. The court adjudged that all points of diversion of the water users are downstream from the Reiman lands. The proof clearly shows that neither appellants nor those in privity with them have ever had any point of diversion on the Reimann lands. When A. Z. Richards was interrogated as to whether he was unable to designate a new point of diversion in change application A1810 he said: "I could have established many other points of diversion, because there were pipelines in, but I didn't." (R 277). The application failed to specify a new point of diversion as required by Sec. 100-3-3, U.C.A. 1943. The court recognized the points of diversion already established by the cabin owners.

A. Z. Richards said that if there is not a pipeline system, storage would be advisable. He did not know how much storage presently exists on the creek below the Reimann

lands. He admitted that the aggregate storage capacity of the reservoirs along the creek might be 30,000 gallons. (R. 998-1002). There are 14 dams in the creek. Some are 5 to 6 feet high. The complaint about "lack of storage" is plain nonsense.

(D)

THERE IS NO COMPETENT PROOF THAT THE REIMANN WATER DEVELOPMENT PROGRAM WILL IMPAIR ANY VESTED RIGHTS OF APPELLANTS OR ANY ONE ELSE.

The claims of possible injury to appellants and those in privity with them, are based on misstatements of fact or of law. Appellants make a number of false and misleading claims. For example:

(a) "It is further clear that all of the water, surface or subsurface, flows down to and contributes to the Mountair stream." (Page 13). The studies conducted by the State Engineer show that the total average annual precipitation in Mountair Canyon is approximately 35 inches. About 27 inches or 77% of that total figure could not possibly reach the creek channel because it is either lost in evaporation or consumed in plant transpiration. Only 8 inches or 23% either reaches the stream channel or gets out by underground percolation. (R. 961-965).

(b) "Appellants had long since been using all the water in Mountair Canyon. . ." (Page 15). Appellants and their predecessors never made a beneficial use of more than 10.22 acre feet—not over 2% of the estimated average water yield of the canyon during their period of alleged use. That is not 2% of the total annual precipitation, but merely 2% of the 23% of the precipitation which could get down to the stream channel.

(c) "The measures contemplated by Respondents, in draining and bringing to the surface all of the subsurface water, can result in nothing more than increased flooding and wasteful run-off in the springtime and a local drouth

in the summertime. This is not consistent with the program of water conservation which is so important in the State of Utah." (Page 14). Such unfair arguments are not only made in defiance of the evidence, but are contradicted by what A. Z. Richards and W. B. Richards, Jr. said themselves.

The applications (Exhibit 10) show plans to take the water at the spring sources and place in underground storage to avoid contamination and prevent evaporation loss. By taking the water from the developed spring sources above the swamp areas, the swamp condition and high evaporation loss and high transpiration rate can be greatly reduced which definitely means water conservation. In a conversation in 1951 Mr. Reimann told A. Z. Richards that he planned to remedy the swamp conditions by diverting the water into a pipeline above the marsh areas. *A. Z. Richards said that was a good idea and it would tend to conserve water.* (R. 576-578). Mr. Richards knew about the marshy areas in the East Fork and South Fork. (R. 266). Mr. Richards was aware of the Reimann plan to build underground storage and to take the water from spring sources which would not be contaminated. (R. 312-313, 316-317). At the trial Mr. Richards said he may have told Mr. Reimann in 1951 that his idea of tapping the springs at their source to avoid contamination and having connecting pipelines was a good idea. (R. 322).

In 1951 Mr. Richards admittedly advised Mr. Reimann that the 1910 proposed reservoir site of Alvaro A. Pratt shown on Exhibit 7, was not feasible because it was in a snowslide area. (R. 273-274). When Mr. Reimann said he did not intend to use that site, but to have underground storage farther up the South Fork, Mr. Richards said he thought that was a good idea. Mr. Richards also told Mr. Reimann that road construction would be the most difficult problem he would face. (R. 576-578). Mr. Richards admitted that he knew in 1951 that Mr. Reimann filed Restrictive Covenants in 1949 to protect the water sources from contamination, Exhibit 37. Mr. Richards expressed approval of the idea. (R. 280-281). He admitted that Paul E.

Reimann is "very, very enthusiastic" about keeping the area "free from contamination." (R. 253). A. Z. Richards made no pretense in 1951 that the Reimann water development plan would injure any one. In fact, he expressed approval of the Reimann plans.

Mr. Richards said he made no claim that the proposed plans of the Reimanns are not economically feasible, nor that there is anything about the proposed Reimann water systems set out in the applications which is unsanitary or which would render the use of water by others unsanitary. (R. 270, 276). A. Z. Richards said he knew from experience with Mr. Reimann that Mr. Reimann would go into the matter of costs very carefully. He knows from what he has seen of the roads built on the Reimann lands and development there that it looks like Mr. Reimann has planned ahead. In the construction of roads where a road has crossed a stream, reasonable care has been taken to culvert the stream channel. (R. 312-313) He told Mr. Reimann that the upper part of the canyon is a delightful place and the foliage is beautiful. He said it is not much of an engineering problem to tap a spring and cut it into a pipeline. He admitted that Mr. Reimann could do that in Section 22. (R. 322-325).

Not only did A. Z. Richards in 1951 approve and encourage the Reimann plan to take the water into pipeline and underground storage above the swamp areas to remedy the swamp conditions, but W. B. Richards Jr., himself favored that idea too, provided he could get all of the water free of charge which the Reimanns would develop at their own expense.

"Q Do you object to the plaintiffs [Reimanns] draining the swamps and utilizing the water in the swamp areas where mosquitoes now breed?

"A No, we would like to see it done.

"Q But *you* want the water?

"A Turned down the creek where it belongs."
(R. 339).

W. B. Richards, Jr., clearly demonstrated that he is determined to unjustly enrich himself from the expenditures

and efforts of the Reimanns. He has no right whatsoever to the Reimann lands or resources. On December 6, 1958, counsel for the Richards stated that "Mr. Richards would like to develop his other acreage." (R. 878). On deposition in 1956 he testified:

"Q So you are trying to claim water for future development of your own land up there?

"A *That's right.*" (R. 833).

Appellants even tried to stop approval of application No. 27,404 on the Bluebird Spring in Aspen Fork. During low water season the flow there drops to 3.1 gallons per minute. That quantity could not possibly reach any point of diversion of appellants. A junior appropriator upstream would be entitled to use that water. See *Albion-Idaho Land Co. v. Naff Irr. Co.*, 97 F. 2d 439.

There is not a shred of testimony in the record to support the contention that the Reimann development on their own lands would be contrary to conservation policies of this State.

(d) "By their action, Respondents are seeking to force the senior appropriators of this stream to construct a new system for the protection of their existing water rights." (Page 24). Appellants persist in their endeavors to put the fact in reverse. The record shows that some of the cabin owners who are in privity with the Richards have polluted Mountair Creek by discharging into the stream sewage from septic tanks. In order to get water fit to drink for those who do not have springs back of their homes it is necessary for the cabin owners to install a sanitary pipeline system which will capture the water before it gets into the badly contaminated creek channel from which most of the cabin owners now divert water. A. Z. Richards not only admitted that Mountair Creek down below the Reimann land is very seriously contaminated from a number of septic tanks (R. 253-255); but that the creek contamination became such a health and sanitation problem that it was a subject of grand jury investigation in 1959. (R. 1009).

A. Z. Richards said that no one should use water for a toilet and then "turn it back into the stream as sewage. *But some of my friends are doing that now.*" (R. 992-993). The Restrictive Covenants dated July 1, 1955, (Exhibit 72), prohibit such practice; but a number of cabin owners who signed such document have septic tanks. They include some of the persons named on Exhibit 8 who gave A. Z. Richards a power of attorney to represent them in this water litigation. (R. 1005-1007). Inasmuch as he is attorney-in-fact for some of the cabin owners who pollute the stream by septic tank discharge, it is no wonder that he is not trying to compel the cabin owners to comply with the provisions of change application A-1810. Said change application expressly states that the water changed from irrigation to domestic uses "*will not be used in such a manner as to contaminate the stream and render the water of the stream unfit for culinary use. No septic tank will be used in connection with the uses of the water.*" Said change application also proposed "to revoke the use to all parties who do not immediately abandon the use of the septic tank in Mountair Canyon." (Exhibit 6. R. 1004). In 16 years A. Z. Richards has done nothing to get rid of any of the septic tanks or to take any action to stop the construction of new ones. He said he "got after" one man who built a septic tank, but the man just laughed at him.

"Q You did nothing about it?

"A *No, I just laughed back.*" (R. 1006-1007).

By motion to amend filed September 1958, the Richards asked the court to allow 1,000 gallons of water per day per cabin, plus an indefinite amount of "carrier water" to deliver water on a "potable condition." (R. 92-94). The water did not have to be fit to drink for the one-time irrigation use. A. Z. Richards knew an appropriation cannot be enlarged by a change application. He testified that the purpose of the change application was to change the nature, *not the quantity of use.* (R. 789-799.) There was no carrier channel" in connection with the irrigation of the 21½ acre

tract, for the water was diverted directly from the creek onto the place of use.

The change application recited that the water would be diverted from the creek to the cottages by *pipelines*. Thus, no "carrier water" was contemplated by the change application. "Carrier water" is the excess water diverted to enable the appropriator to get sufficient water to his place of use, due to imperfect laterals or porous carrying channels. *Big Cottonwood Tanner Ditch Co. v. Shirtliff*, 49 Utah 569, 164 P. 856, 56 Utah 196, 189 P. 587. There could not be any "carrier water" loss from pipelines in a good state of repair.

The claim for "carrier water" is a subterfuge. It is an attempt to acquire a right to additional waters without filing any application to appropriate, and for a purpose which is not a lawful use. The alleged "need" for "carrier water" is based on willful or negligent contamination of the creek with septic tank discharge by some cabin owners including persons in privity with appellants. The pretended "need" would not exist if appellants met the requirements of their own change application A-1810 and eradicated the septic tanks and prevented the unlawful stream contamination. Appellants in effect argue the old riparian theory that the Reimanns must not be permitted to reduce stream flow in any amount whatsoever, for it would mean less water to dilute the stream contamination caused by persons in privity with appellants. Appellants make the unconscionable claim that if the Reimanns reduce stream flow in any amount whatsoever the court should require them to install free of charge a sanitary water system to rescue some of the cabin owners from the results of their own misuse of water and contamination of the stream. Appellants want to unjustly enrich themselves at the expense of the respondents.

The pipelines through which cabin owners divert water from the creek are very short in most instances because the cabins are close to the stream. Any excessive diversions of water through pipelines result in a very substantial percent-

age of return flow to the creek. Nevertheless, appellants do *not* have any vested right in excessive diversions (nor in antiquated or obsolete diversion devices if their arguments imply the existence of such devices). In *Hardy v. Beaver County Irr. Co.*, 65 Utah 28, 41, 234 P. 524, 529, this Court said it is the duty of appropriators "to provide themselves with reasonably efficient means for diverting and applying the water." In *Richfield Cottonwood Irr. Co. v. Richfield*, 84 Utah 107, 117, 34 P. 2d 945, this Honorable Court stated that the rule of beneficial use has been the law of this jurisdiction since the Territory of Utah was organized:

"... The mere fact that the city of Richfield has for many years diverted water from Cottonwood Creek does not give it the right to the use of such water nor establish a right thereto. It must be made to appear that the water diverted has been put to a beneficial use. As bearing upon that question the area irrigated and the duty of water on land irrigated are of controlling importance."

All of the arguments about the large quantities of water diverted are simply confessions of wastage and misuse of water in the light of insignificant beneficial use. Appellants cite cases which do not have the slightest application. Appellants admit that Mountair Creek has a grade of about 10%. The proposed diversions by the Reimanns are $\frac{1}{3}$ to $\frac{3}{4}$ of a mile farther up the canyon. Even if any of the cabin owners get any water at all from the Reimann lands, the Reimann diversions would not deprive the cabin owners of "pressure" or gravity flow essential to get the water to their dams and pipelines $\frac{1}{2}$ to 2 miles downstream where they divert water. Yet, appellants cite cases dealing with loss of hydrostatic pressure in artesian wells, which have no possible relevancy. In *Hanson v. Salt Lake City*, 115 Utah 404, 205 P. 2d 255 at 266, this court denied recovery for alleged losses from interference with the use of an inefficient "ram." In *Tudor v. Jaca*, 178 Or. 126, 164 P. 2d 680, 165 P. 2d 770, the Oregon court held that wasteful

methods by early settlers did not establish a vested right to their continuance, and that "No person should be allowed more water than is necessary when applied by a proper system."

There is no prescriptive right to maintain a public nuisance by befouling the waters of a stream. There can be no vested right to have the stream flow remain undiminished in order to dilute the stream pollution caused by downstream landowners. In *Town of Antioch v. Williams Irr. Dist.*, 188 Cal. 451, 205 P. 688, a prior appropriator objected to an appropriation farther upstream because such upstream appropriation would lessen the flow of the river and such reduced flow would be insufficient to keep the sea water below the point where the prior appropriator had installed its pumps. The Supreme Court of California rejected such objections:

" * * * By moving its pump a few miles up the river it could obtain water free from saline solution. * * * It is evident, from all these considerations, that to allow an appropriator of fresh water near the outlet of these two rivers to stop diversions above so as to maintain sufficient volume in the stream to hold the tide water below his place of diversion and secure him fresh water from the stream at that point, under the circumstances existing in this State, would be extremely unreasonable and unjust to the inhabitants of the valleys above, and highly detrimental to the public interests besides.

"Our conclusion is that an appropriator of fresh water from one of these streams, at a point near its outlet to the sea, does not by such appropriation, acquire the right to insist that subsequent appropriators above shall leave enough water flowing in the stream to hold the salt water of the incoming tides below his point of diversions."

Appellants have not shown that their beneficial uses together with all persons in privity with them have ever aggregated more than 10.22 acre feet per year or more than 2% of the yield of Mountair Canyon during their period of al-

leged use. The appellants are unable to show wherein anything which the Reimanns would do under their applications to appropriate, could possibly injure appellants in any vested rights. The pretensions of injury are predicated on claims to water which appellants have never lawfully appropriated, and upon efforts to get additional water for future development without filing any application to appropriate.

POINT 2

THE REIMANNS ARE ENTITLED TO AN ADJUDICATION THAT NEITHER APPELLANTS NOR ANY ONE IN PRIVITY THEM, EVER ACQUIRED ANY RIGHTS TO ANY WATERS ARISING IN THE EAST FORK BASIN IN SECTION 22, T. 1. S., R. 2 E., SLM.

For at least 45 years prior to October 1956, there was a large dike known as the "Lotus Lake Dike" across the mouth of the East Fork basin in Section 22. Said dike was built for the Pratts by A. Z. Richards. It was dry in there when he built it. (R. 293). From 1911 to October 1956, as shown by the testimony of eye-witnesses who were familiar with that dike and the surrounding area, no water came over that dike after the first part of July. Water ponded on the easterly side. The "Lotus Lake" area was a bog. It was very swampy, and a "mosquito nest." On the westerly side of that dike there was a strip of land 40 or 50 feet wide where the old road went, where it was dry in the summer. The channel on the westerly side of the dike was generally dry after the first part of July. After July 4th no water reached the flume under the road at a point designated on Exhibit 1 as the "Y", unless there was a storm. In August 1955 Mr. Reimann had a traxcavator dig up the old flume at the "Y", and then had an excavation made to a depth of about 41½ feet down to bedrock. Below the dry channel where the excavation was made the ground was damp but not wet. No water seeped into the excavation from the East Fork. (R. 340-341, 346-347, 355-367, 503-507, 595-596, 621-624).

In October 1956 as part of a reclamation program, Mr. Reimann succeeded in getting a channel cut through the "Lotus Lake Dike," and started to drain the Lotus Lake swamp area on the easterly side. Since 1957 he has had a flow of water out of that area at the "Y" throughout the summer. Part of the swamp area so drained has been filled in, and the place is now known as "Garden Valley Park." The water measurements given in answers to interrogatories are in evidence. (R. 589-590, case file 112,596).

There was no evidence that any water flowed out of the East Fork after the first part of July until the year 1957. There was no proof that any one made any beneficial use of water in the East Fork except the Pratts. W. B. Richards, Jr., testified that prior to 1903 the Pratts used all of the stream coming down from the north (one of the East Fork channels) through a 6 or 8 inch pipe. He was familiar with irrigation ditches 350 to 400 feet in length. The Pratts had a restaurant and some "tent-houses". Mr. Richards said he operated the stage up there for several years. (R. 340--345).

Counsel for appellants on December 6, 1958, attempted to have the court limit the Reimanns to the use of the waters of the East Fork only:

" . . . I don't even suppose we care about that, Judge, about him getting the water that's up there. It's in the East Fork, if I correctly understand the geology of it, and during the spring there's plenty of high water out of the South Fork to take care of all the needs of the people we represent, *if he shut the East Fork off dry. During low water the East Fork doesn't contribute anyway . . .*" (R. 877, 879).

There was no evidence that appellants and those in privity with them ever appropriated any water out of the South Fork or out of the East Fork. After stating that the Richards were not claiming that they acquired the rights of the Pratts in Section 22 by adverse use, counsel for appellants said:

“MR. CLYDE: No, we have never opposed and don’t now oppose you getting, on any theory the court wants to give it to you, the Pratt water out of the East Fork. *It’s no benefit to us.* Whether you lost it or reappropriated it, whether you never lost it, whether it’s 3/10th of a foot or 3 feet for 1 house we don’t care, if the source is limited to the East Fork.” (R. 879. Emphasis added).

The water of the East Fork was never any benefit to appellants for the reason that they never could have appropriated it, and that fact was clearly recognized at the trial. On July 29, 1953, W. B. Richards, Jr., in answer to a question as to the use by the Pratts stated they used 1/3 or 3/10 of a second foot of water. (R. 575). There is not nearly that much water in the East Fork. The Pratts also owned the South Fork and Aspen Fork in Section 22. The Richards admitted that prior to 1903 the Pratts used water out of the South Fork as well as the East Fork. (R. 27, file 112,596). The decree of distribution in the estate of Parker B. Pratt, deceased, dated November 15, 1948, distributed the Pratt lands in Section 22 to the Reimanns “together with all water rights.” (Exhibits 13, 36).

During the period of 45 years prior to October 1956 the waters of the East Fork basin were captive waters after the first part of July. They did not flow out of that basin nor off the lands of the landowners either on the surface or in any known or defined underground channel. It is likely that those waters were private waters of the Pratts and of the Reimanns as their successors. The Pratts could not lose any rights to captive waters by nonuse.

There are approximately 10 acres of “wet areas” and swamps in the East Fork basin. (R. 382). W. B. Richards, Jr., testified that there were swamps all the way down from the Parker B. Pratt home. He identified one area in the East Fork as “Bear Wallow”. It was quite marshy and soggy. (R. 341). The evidence clearly indicates that there has always been a substantial amount of diffused water in the East Fork basin.

Prior to 1935 underground percolating water was deemed to be part of the soil if not flowing in known or defined underground channels. If any of the diffused and any other underground waters of the East Fork basin became subject to appropriation, they could have been subject to appropriation only since 1935, and Paul E. Reimann is the only person who has filed any application to appropriate those waters which arise on the lands owned by him and his wife. The court was inexorably right in approving all of the Reimann applications in the East Fork basin.

No. 27,410 is the application on the Parker Spring area, filed September 1955. For many years there was a large wet area on the northerly slope, with the lower end of the wet area 30 to 40 feet above the stream channel. The area was wet even in the fall when the channel of the East Fork below was dry. Ferns and other water-loving vegetation flourished. From this half-acre wet area there was no measurable flow of water. On September 1, 1955, a bulldozer went off course and got stuck. After pulling the equipment out, water was oozing from one of the depressions made by the cleat-tracks. Mr. Reimann dug a trench and got a flow of 1 gallon per minute. By successive digging he got a flow of 3.6 gallons per minute. Two years previously, on July 29, 1953, Mr. Reimann pointed out to the Richards that such place was one where his engineers thought water could be developed. (R 412-416, 493-496, 600-602).

No. 28,106 is the application on the Discovery Spring area, east of the Parker Spring, developed from a large wet sidehill in September 1955. The wet area extended about 150 feet northerly from the East Fork channel, although the channel itself was dry at the surface. A hole was dug by the side of the new road, and the water was channeled into the East Fork channel from the developed spring. (R. 607-610).

No. 28,555 is the application on the Yvonne Spring area, on the southerly side of the East Fork channel. During 1956 which was a dry year, Mr. and Mrs. Reimann checked periodically to see if the marshy spongy area would dry up. In September the area seemed as wet as during the

summer. September 15, 1956, they probed with a shovel in the wet spongy area where reed grass or cane grass is very profuse. They cut through 6 or 8 inches of mantle of vegetation, and obtained a flow of water at 4 points. (R. 610-615).

Richard E. Reddin, geologist and professional engineer, testified as to the geology of Section 22. He testified that by reason of the sandstones crossing the creek-beds, and other obstructions, the flow of the water is retarded. He said there are waters of the Parker Spring area, Discovery Spring are and Yvonne Spring area, which do not reach Mountair Creek:

“Well, there’s water in those areas which if allowed to exist under the conditions of today would yield considerable water to evaporation and plant transpiration. As I understand from Mr. Reimann, his plan of recovering water from the area is to intercept and drain those areas collected in infiltration pipes and put it into reservoirs. Now, if that plan were followed, he would save and collect water which otherwise would evaporate and be transpired from the plants, and also the water which during this slow course would penetrate the sedimentary beds. The water varies in quantity at different times of the year due to the temperature, and *it is not and has not been contributing to the stream flow.* (R. 531. Emphasis added).

Mr. Reddin made a careful and detailed study of the basin. Prior to 1957 when Mr. Reimann completed the cutting of a channel through the old “Lotus Lake” dike, there was no measurable flow of water on the westerly side of that dike in the East Fork channel after the first part of July. Since 1957 he has had a flow of water through there and he has reclaimed part of the Lotus Lake swamp area. As shown by the water measurements for some years the measurement was zero, but there is now water flowing at the “Y”. Prior to 1957 the waters of the East Fork did not flow off the Reimann lands in the summer time after July 1st. No one except the Pratts and the Reimanns could have ever put those waters

to beneficial use. At the trial appellants recognized that they had no rights to any waters of the East Fork.

POINT 3

FAILURE TO INCLUDE THE IDENTIFYING WORDS "EAST FORK" AND "FORK, AND IN ASPEN FORK OF", IN PARAGRAPH 8 OF THE JUDGMENT TENDS TO CREATE AMBIGUITY AND UNCERTAINTY. SUCH WORDS SHOULD BE INCORPORATED INTO THE DEGREE.

The trial judge struck out the above mentioned words from paragraph 8 of the judgment. (R. 118). Unless the phrase as modified, "That there is unappropriated water in the — in the South — Mountair Canyon drainage area in Section 22", refers to all three forks in Section 22, there is an ambiguity. The deleted words should be inserted for clarity.

POINT 4

THE REIMANNNS ARE ENTITLED TO JUDGMENT APPROVING APPLICATION NO. 27,987 TO APPROPRIATE WATERS FROM THE MAYBETH SPRING AREA FROM JANUARY 1 TO DECEMBER 31, BY VIRTUE OF EITHER DEVELOPED WATER OR UNAPPROPRIATED WATER IN THE SOURCE. THE UNDERGROUND WATER WAS NOT SUBJECT TO APPROPRIATION PRIOR TO 1935.

Application No. 27,987 on the Maybeth Spring area is the only application to appropriate water which the court denied. The proposed point of diversion is more than a half-mile up on the Reimann land at the highest elevation of any of the Reimann applications involved in this litigation. The court found that there is unappropriated water in the South Fork of Mountair Canyon *except* at the Maybeth Spring. The exception is clearly erroneous. It was error to hold

in effect that the water was appropriated at the upper part of the Reimann land when there is unappropriated water near the lower part of their land, although there are no intervening landowners and no one has any point of diversion on the Reimann lands. In view of the evidence and the law, denial of approval of application No. 27,987 should be reversed and said application should be allowed along with all of the other applications:

(a) Appellants admitted under oath that "The Pratts used water from the East Fork of Mountair Creek and also *from the South Fork* of Mountair Creek prior to 1903." (R. 27, Requests for admissions, No. 21, and answers, file No. 112,496). In answer to a specific question on July 29, 1953, as to how much water the Pratts used, W. B. Richards, Jr., said the Pratts used about $1/3$ or $3/10$ of a second foot of water. (R. 575). The Pratts homesteaded and received patents to 335.98 acres of land in Section 22 (Exhibit 13). They also had a resort and restaurant and "tent-houses". (R. 340-345). It is quite evident that W. B. Richards, Jr., was not overstating the Pratt water rights.

(b) By its conclusions of law the court reduced the figure to $1/4$ of a second foot as the Pratt diligence right. (R. 110). It would have been impossible for the Pratts to have used even half that amount of water in the East Fork basin, particularly in August, in the light of water measurements in file 112,596, received in evidence by stipulation. (R. 590-591). At least half of the waters used by the Pratts would have had to be diverted from the South Fork. The late season water measurements at the Bluebird in Aspen Fork show only 3.1 gallons per minute, so that there could not have been any substantial amount available from Aspen Fork.

(c) The court correctly found that there was no adverse use against the Pratts. Adverse use does not run upstream. At the trial counsel for the Richards stated: "We claim nothing as adverse against Pratt. . . . We make no adverse claim. He had an appropriation, and the extent and so on has been fairly well developed." (R. 590-591). It has

been admitted repeatedly that there was no adverse user against the Pratts who owned the land farthest up the canyon. Whether those Pratt rights amount to 3/10 or only 1/4 of a second foot, if those rights lapsed by nonuse after the death of Parker B. Pratt in 1934, the right reverted to the State because there were no junior appropriators. The court properly found that the Reimanns are the "first in time" to file applications to appropriate waters in Section 22. Application No. 27,987 should be approved.

(d) The court recognized the fact that there is unappropriated water in the middle portion of the South Fork near the lower end of the Reimann land by approving application No. 24, 531 filed by Maybeth Farr Reimann to appropriate waters in the marshy areas of Pine Canyon or "Lover's Lane" area. The court was right in allowing such application. However, the Reimanns own the land in the South Fork nearly $\frac{3}{4}$ of a mile farther up the canyon. It was error to treat the water of the swampy Maybeth Spring area as "appropriated" when it is a half-mile farther up the South Fork than the unappropriated Pine Canyon area. Appropriated by whom? Certainly not by appellants, who own no land up the South Fork and who never had any point of diversion up in that area. There is no proof whatsoever that anyone other than the Pratts appropriated surface or underground water in that area.

(e) The South Fork channel is dry at the surface after July 4 of each year above the Maybeth Spring area. That spring area consists chiefly of a large long wet bank on the westerly side of the channel with a 45° slope, covered with wild currants and other water-loving vegetation. Mr. Reimann first observed that gully in 1950 when he found some sheep there. It was muddy each year, and no water was flowing in the channel after the spring run-off. In October 1955 there was no measurable flow of water in the channel. The gully was muddy. After probing into the wet bank with a shovel, he first got a flow of 1 gallon of water per minute. Later he got 5 gallons per minute, and after further digging 10 gallons per minute. A measuring pipe

(later Parshall flume) was installed about 175 feet below where formerly it was impossible to get any water measurement. The highest diversion point for any of the cabins is about $\frac{3}{4}$ of a mile *down the canyon from the Maybeth Spring*. There is no proof that any one ever appropriated the waters of South Fork except Parker B. Pratt. However, even *if* some one else had appropriated the water, since Paul E. Reimann obtained an additional quantity of 10 gallons per minute, under the rule in *Bullock v. Tracy*, 4 Utah 2d 370, 294 P. 2d. 707, he would be entitled at least to that flow which he obtained as a result of his 1955 development from a muddy and wet area.

(f) During the trial counsel for the Reimanns contended that "A down stream appropriator who can have his water rights satisfied from sources down stream close to his point of diversion can't claim rights to have the water taken at the head of the canyon." Counsel for appellants conceded the point by replying, "Nobody is." (R. 907). There is no proof that the sources which arise downstream from the Reimann lands, from side-canyons and springs, are insufficient to satisfy all needs of appellants and those in privity with them.

(g) On pages 11 and 12 of the Brief of Appellants it is argued, "The rule is well settled in this jurisdiction, that whoever claims he has developed water in close proximity to the sources of a stream *previously appropriated by others*, must assume the burden of proving his development does not interfere with the waters already appropriated." The cases cited on pages 11 to 13 and 22 to 23 are not in point. The diversion points of appellants and any other water users are $\frac{3}{4}$ to 2 miles farther down the canyon. Their aggregate appropriations never exceeded 10.22 acre feet per year nor more than 2% of the estimated water yield of the entire canyon during their periods of use. The gain in the creek is considerably in excess of all of their net diversions, as demonstrated by the water measurements.

(h) Mountair Canyon drainage area covers 2.47 square miles. The average annual precipitation amounts to

35 inches. About 27 inches or 77% cannot reach a stream channel because of being lost by evaporation or consumed by plant transpiration in the watershed. No one has any right to say to a landowner that he cannot utilize the 77% of the water which does not get off his land. The balance of 8 inches or 23% which can reach the stream channels or get out of the watershed by underground percolation, produces a "water yield" of 1054 acre feet by one method of computation and 940 acre feet computed by the other method. For April to September the estimated yield 757 acre feet. If reduced $\frac{1}{3}$ to cover the 4 months of May 15 to September 15 the figure would be 505 acre feet. (R. 957-965). An examination of the blow-up of the Government Survey plat, Exhibit 4, indicates that the Reimann lands in the South Fork (exclusive of U.S. Forest lands) aggregate about 160 acres or $\frac{1}{4}$ of a square mile or 10% of the total watershed area. Disregarding the natural "water retarders" which create some of the swamp conditions, and assuming that the full 23% of the annual precipitation could flow out at the surface or by underground percolation, the South Fork yield from the Reimann land would be 50.5 acre feet. Assuming (contrary to the facts) that the existing downstream sources were not available to appellants and other cabin owners and that the full amount of 10.22 acre feet which they could use beneficially came entirely from the Reimann (not the U.S. Forest) portion of the South Fork, it would amount to little over 20% of the estimated 50.5 acre feet "water yield" from the Reimann land, and about 80% would still be unappropriated. There was no legal reason for refusal to approve the Maybeth Spring filing. The court undoubtedly was misled by the unfounded arguments of appellants. Since the water of the South Fork could not possibly have been "fully appropriated", the court could not lawfully (and surely did not intend to) restrict the Reimanns to appropriation of waters near the lower end of their lands and restrain them from appropriating waters at the higher elevation.

(i) The testimony of Richard E. Reddin, geologist and engineer, was not controverted. He testified that the swamp

areas in the South Fork including the Maybeth Spring area, are still wet in the fall and are not drained by late season flow of the stream. (R. 558). The Nugget sandstone is up at Mountair. The formations dip to the west. There is a basin upstream. The elevation of the rocks affects water sources at the head of the canyon. Flow is retarded in these areas where resistant sandstones cross the creek-beds. There is a deep soil mantle upstream, and a dense growth of vegetation because considerable water is being held in the soil mantle and alluvium. The Maybeth Spring area is one of the boggy areas, with dense vegetation. It is possible to develop water in these boggy areas because of water which does not reach the stream channel. There is maximum evaporation and transpiration, because of the dense vegetation in the marsh and ponded areas. Some contribution is made to ground water in the stream, but considerable water is consumed by plant transpiration. Water can be recovered by draining the areas and by preventing the loss from evaporation and transpiration and seepage into the sedimentary beds. The Reimann program for water development is economically feasible. More water can be developed at the Maybeth and other spring areas at points crossing the exposed ledges where water stands behind the "dikes" or resistant semi-pervious beds of sandstone. The costs would not be excessive. (R. 526-529, 535-538, 554-558). Movement of underground water is a matter of feet per year in case of deep percolation, but in case of steep canyons it might take only weeks. (R. 563).

(j) There are 10 acres of swamp and marsh areas in the South Fork extending a half-mile from Pine Canyon up to the Maybeth Spring area. (R. 382). In 1951 A. Z. Richards told Mr. Reimann that his idea of remedying the swamp conditions by diverting water into a pipeline above the marsh areas, was a good one and would tend to conserve water. (R. 576-678). Mr. Richards also told Mr. Reimann then that his idea of having underground storage farther up the South Fork was good, and that road construction would be the most difficult problem he would face (R. 576-578). Between 1949 and 1952, both A. Z. Richards and

W. B. Richards, Jr., inquired about the Reimann plans for developing land and water, and they each gave advice with respect thereto. Prior to 1953 neither one of them pretended he had any rights to any waters arising in Section 22. They did not prove they acquired any rights thereto.

(k) Application No. 27,987 proposes taking water from the marshy area by tapping the source which causes the swamp condition, and thereby remedying the swamp condition as well as making water available for canyon homes in that area. That is the same plan which A. Z. Richards commended in 1951. To deny the Reimanns any rights to the water in that area, is to deprive them of their constitutional rights as landowners to develop their own property, or to deprive them of the fruits of their labors, if they remedy the swamp conditions. They are entitled to use the unappropriated waters in Pine Canyon farther down on their land. The Reimanns would have the right to pump water from the unappropriated Pine Fork area a half- mile up the the canyon to the Maybeth Spring area to develop that area. It is neither good sense nor good law to say that even though they own the property for 3/4 of a mile, if they want to reclaim the Maybeth Spring area and make it suitable for use, they must pipe the water down the canyon, and then pump through a pipeline other water from the Pine Canyon area back up the canyon a half-mile to the Maybeth Spring area. A land owner has the right to have his diversions and water development any place on his land he desires, as long as he does not injure any one else, and there is no proof that the Reimanns could possibly injure any one by diverting at the Maybeth Spring area. For 3/4 of a mile down the canyon, no one diverts any water, and there is no evidence that all rights downstream cannot be fully satisfied from downstream sources.

(1) No one has ever made a beneficial use of water at any place down the canyon except for the period of May 15 to September 15. It could not be correctly contended under any circumstance that the water of the South Fork is "fully appropriated at the upper end." The filing on the Maybeth

Spring area is for all-year use. The court even denied the filing for the 8 months of the year when no one ever pretended to make any beneficial use of water.

(m) Prior to 1935 underground percolating waters not flowing in known or defined channels were deemed part of the soil. As part of the land of the Pratts those underground percolating waters could not be appropriated by others. If those waters became subject to appropriation by the 1935 amendment to Sec. 100-1-1, R.S.U. 1933, such an appropriation could only be accomplished by filing an application to appropriate. Neither appellants nor any one else except the Reimanns ever filed any application to appropriate those waters. By suddenly proclaiming in 1953 that they "owned" 100% instead of 2% of the water arising in the canyon, appellants could not lawfully reach 3/4 of a mile up onto the Reimann lands and "appropriate" the waters of the Maybeth Spring area or any other water source arising on the Reimann lands to which they never before asserted any claim. Paul E. Reimann as a landowner filed a valid application on the Maybeth Spring area. It was error for the court to refuse to approve said application since there are both unappropriated ground water and underground water in the source.

POINT 5.

THE AWARD OF ONLY \$10 DAMAGES AGAINST W. B. RICHARDS, JR., WAS WHOLLY INADEQUATE TO IDEMNIFY THE REIMANNS FOR DAMAGES RESULTING FROM HIS WILLFUL TRESPASSES AND OTHER MISCONDUCT.

The court correctly found that "Between July 1954 and August 1956, W. B. Richards, Jr., personally and by agents, without the consent of Paul E. Reimann or Maybeth Farr Reimann, secretly made excursions upon the Reimann lands in Section 22, cut openings in the East Fork north channel near Birch Fork, placed dams in said channel, and caused the water in quantities varying from 20 to 60

gallons per minute to be diverted from the natural channel out onto the Parker Road which had been constructed at the expense of the Reimanns. Such diversions rendered the road impassable and necessitated road repairs. Such unauthorized diversions of water resulted in complete wastage of water . . ." (R. 108). See Exhibit 1. W. B. Richards, Jr., and those in privity with him never had any point of diversion on the Reimann lands in Section 22. (R. 753).

Mr. Reimann found a dam in the channel and water diverted out onto the Parker Road on 24 separate occasions. (R. 329-331, 422-423, 486-491, 592-593, 626-655). Mr. Affleck found the same condition 5 or 6 times in 1955 and also in 1956. (R. 508-509). Mr. Reimann apprehended Walter K. Fahr and Grant Morgan, agents of W. B. Richards, Jr., on August 27, 1955, at which time they confessed. Prior to that time brush was invariably piled on the dam and over the cut in the channel to obscure the wrongful diversion. The conduct of Mr. Richards was malicious. In an endeavor to prejudice action on the Reimann water applications then pending, Mr. Richards called the State Engineer in August 1955 and accused Mr. Reimann of committing the very acts which had been perpetrated by Mr. Richards himself. (R. 334). Mr. Richards also told other people in the canyon. Furthermore he told the State Engineer that he "owned" all of the water in the canyon and that the Reimann applications should be denied. (R. 336). Mr. Richards also falsely represented to the State Engineer that Mr. Reimann had "dug" the North Channel (R. 658), when it existed as far back as 1914, from which the Pratts obtained the water for their north irrigation ditches. (R. 507-509, 658, 664). See also Exhibits 24, 25, 26 and 28. When Sumner G. Margetts & Company in August 1956 brought in equipment to permanently repair the road, Mr. Richards made false accusations and threatened "trouble" for the contractor. (R. 422-426). The diversions behind the backs of the Reimanns interfered with water measurements. As shown by the water measurements, each time the dam was put in, the flow at the Larson flume (below the

point where the north and south channels join again) declined drastically. (R. 850, Exhibit 64).

On an average it took about 1½ hours to remove the dam and close the ditch cut out into the road and to make the temporary road repairs, or a total of 36 hours. Mr. Reimann said the reasonable value of his time was \$5 per hour. It was error for the court to restrict judgment to only \$10, or 28 cents per hour for removing those obstructions, etc. Mr. Reimann had to mitigate the damages. He was the only person available to do the work. If he had gone to the city to hire someone, the damage would have greatly increased and so would the cost of repairs. (R. 640-647). The court erred in rejecting the evidence of \$180 as cost of temporary road repairs. The court also erred in rejecting the proffer of proof of \$405 for permanent repairs by raising the grade of the road and the cost of \$120 to get the equipment up the canyon, made necessary because W. B. Richards, Jr., persisted in diverting the water out on the road to create a continuing nuisance. (R. 645-647, 850-853). See *Herzog v. Grosso*, (Cal.) 259 P. 2d 429. Also 78 C. J. S., pp. 1064-1066, 1070.

POINT 6.

THE COURT ERRED IN REFUSING TO ALLOW PROOF OF FINANCIAL LOSS TO PAUL E. REIMANN FROM THE DECEPTION PRACTICED BY W. B. RICHARDS, JR., AND HIS AGENTS IN THEIR ATTEMPT TO PREVENT DETECTION OF THEIR UNLAWFUL DESTRUCTIVE WATER DIVERSIONS ONTO THE PARKER ROAD.

If the court was of the opinion that the cause of action for deceit was not a compulsory counterclaim in Civil No. 112,596, the court could have dismissed it without prejudice. The court refused to admit proof and thereby denied recovery without a hearing, contrary to Article I, Section 11, Constitution of Utah. W. B. Richards, Jr., not only used a man wearing a deputy sheriff's badge as a tool to assist in committing physical injury to the Reimann land, but also to

deliberately mislead Mr. Reimann and induce him to spend 150 hours away from his law practice investigating fictitious clues and innocent people. That was part of the cover-up scheme to prevent apprehension and to facilitate continuation of the aggravated acts of trespass.

Mr. Reimann had repeatedly seen Mr. Richards come down from the Reimann land, following which Mr. Reimann discovered the wrongful water diversions. On August 8, 1954, Mr. Reimann confronted W. B. Richards, Jr. The latter denied that any one in the canyon was doing it. Mr. Richards knew he was guilty himself, and so were his agents Walter K. Fahr and Grant Morgan. Mr. Richards told Mr. Reimann to get in touch with Grant Morgan and Water K. Fahr (special deputy sheriff) who were looking after Mr. Richards' interests, and that they would assist Mr. Reimann to "catch the offenders." (R. 329-330, 486-491, 592-593, 626-655). Mr. Fahr was admittedly the agent of W. B. Richards, Jr. (R. 626). Since Mr. Fahr was a deputy sheriff, Mr. Reimann was entitled to rely on the representations made by him as well as by Mr. Richards. Such deceitful conduct and the loss deliberately inflicted upon Mr. Reimann are actionable. *Daily v. Superior Court*, (Cal. App.) 40 P. 2d 936, *People v. Mace*, (Cal.), 234, P. 841, and *Macdonald v. DeFremercy*, 168 Cal. 189, 203, 142 P. 73.

POINT 7.

THE REIMANNNS ARE ENTITLED TO RECOVER THEIR COSTS IN THE DISRICT COURT AGAINST APPELLANTS.

The Reimanns were the prevailing parties. They were entitled to costs, although the court awarded only \$10 on their damage claims. See *American Mutual Bldg. & Loan Co. v. Jones*, 102 Utah 318, 117 P. 2d 293. Under Rule 54 (d) Utah Rules of Civil Procedure, the prevailing party is entitled to costs, unless the court otherwise directs. The note to such rule suggests that judicial discretion will not be exercised unjustly. It is unjust to permit the appellants

to escape payment of costs after subjecting the Reimanns to years of litigation

CONCLUSION

The appellants Richards want water for at least 150 homes. (R. 314). If the one-time irrigation right for 2½ acres had been timely changed to domestic use, that water right would have been sufficient for only 41.4 families at 650 gallons per day. The appellants seek water for at least 108 homes for which they have never had any water right. Instead of filing an application to appropriate water, in 1953 appellants Richards made the startling claim that they “own” all the water in Mountair Canyon — 50 times more water than they and all water users (other than the Pratts) could ever have put to any beneficial use.

Some property owners obviously have declined to sign Exhibit 8 or to endorse the claims asserted by appellants. A number of cabin owners refused to consider their own uses to be in subordination to any claim of appellants, and they refused to join in opposition to the Reimann applications, such as the David A. Affleck family, and Lynn S. Richards and his father. The latter two developed their own water system in Castle Crag Canyon. (R. 272, 287-288).

The portions of the judgment not covered by the cross-appeal should be affirmed. On the cross-appeal, denial of approval of application No. 27,987 on the Maybeth Spring should be reversed and said application should be approved. Appellants should be adjudged to have no rights to any waters of the East Fork. The Reimanns should be granted a further hearing on their damage claims against W. B. Richards, Jr., as indicated under Points 5 and 6 of this brief, and they should be allowed their costs in the District Court.

Respectfully submitted,

WILFORD M. BURTON

PAUL E. REIMANN

REED H. RICHARDS

McKAY and BURTON

*Attorneys for Respondents Reimann and
Young and Cross-Appellants Reimann*

APPENDIX

LIST OF EXHIBITS, BY NUMBER, TOGETHER WITH DESCRIPTION OR IDENTIFYING INFORMATION, AND ANY OBJECTIONS:

No. 1: Sketch plat of East Fork and parts of Aspen Fork and South Fork. This sketch illustrates the location of the Bluebird Spring area in Aspen Fork together with the nearby "wet area"; also the following items in the East Fork: The flume at the "Y" under the Parker Road; the old Lotus Lake Dike and swamp area; the Larson Flume; the old irrigation ditch starting near a point close to the North Channel of the East Fork of Mountair Creek; the division of the creek into two channels at Birch Fork, the North Channel running through the East Flume under the Parker Road and the South Channel running through the West Flume; the point in the North Channel on the southerly side of the East Flume where a dam had been placed on successive occasions from 1954 to 1956, and water diverted from said channel by a ditch cut out into the Parker Road; the course down the Parker Road where the water was found running on 24 different occasions; the marshy areas from Birch Fork easterly; the Parker Spring area; the Discovery Spring area; and the Yvonne Spring area. The principal marshy areas are shown in blue. The general courses of stream beds are shown in green. Only a portion of the South Fork is shown, including the Alvaro A. Pratt proposed 1910 reservoir site.

No. 2: Large air photo, U. S. Department of Agriculture, August 16, 1946, covering the Mountair Canyon drainage area.

No. 3: Enlargement of portion of Exhibit 2, showing the major portion of homesteads patented to Alvaro A. Pratt and Parker B. Pratt, with an outline of roads constructed by the Reimanns superimposed in red and blue.

No. 4: Enlargement of portion of United States Land Office plat of Government Resurvey of Sections 22 and 23,

T. 1 S., R. 2 E., SLM, showing location of roads and proposed points of diversion of water filings in litigation. Stream channels are shown in green.

No. 5: Decrease in Civil No. 5680, District Court of Salt Lake County, Utah, dated May 2, 1912, Salt Lake City, Plaintiff, vs. Pleasant View Irrigation Co., et al., Defendants.

No. 6: Certified copy of change application A-1810 filed by A. Z. Richards as agent on April 5, 1944. The application falsely recites that 9.5 acres were then being irrigated, whereas in 1912 only the 2.5 acre tract was irrigated, and cultivation ceased in 1918. No new point of diversion was designated as required by statute. Paragraph 16 states: "The points at which it is now proposed to divert the water are indeterminate at this time but they will be situated (See Note) See Paragraph 29 between the following points on the creek: Upper Point 570' South and 220' East of NE cor. of Sec. 22 T S R 2 E SLB&M and Lower Point 310' South and 330' West of NE cor. of Sec. 17 T 1 S R 2 E, SLB&M." Exhibit 4 shows that the "Upper Point" is about 325 feet from the East Fork channel, which is dry most of the time in summer. (The Reimanns challenged the validity of said change application because an applicant cannot reserve to some indefinite future date the designation of a new point of diversion).

No. 7: Blueprint of plat of Merrywood Survey of 1910, prepared for Alvaro A. Pratt, showing old Lotus Lake, stage landing, and also proposed reservoir site on South Fork below Lot 34.

No. 8: Undated power of attorney filed August 2, 1956, in State Engineer's Office, executed by Walter K. Fahr, Edna S. Fahr, Martha G. Stewart, M. Douglas Wood, Evelyn N. Wood, Phyllis Duncan, LaMar Duncan, Maurice A. Homes, Cleora B. Jones, Grant Morgan, Eva Morgan, R. W. Van Duren, Dorris Van Duren, Mr. and Mrs. E. V. Staker, Lee H. Roberts, Ruth H. Roberts, William Sorensen,

Ronald L. Kingsbury, Ilene H. Kingsbury, H. Lee Rawlings, Gwen T. Rawlings, Mr. and Mrs. Bob Nielson, Matthew F. Noall, Clarie W. Noall, Claude B. Richards, Asenath Smith Conklin, Mary Joy Richards, J. Roy Free, Irvin S. Noall, Ethel N. Jarman, V. E. Jarman, Barbara R. Rolapp, and Barbara H. Richards, appointing A. Z. RICHARDS their agent to represent them in all matters pertaining to the prosecution and establishment of any rights that may have in and to any of the waters in Mountair Canyon, and more particularly to represent them in any and all water application hearings or legal actions concerning the adjudication or termination of rights in and to any of the water in Mountair Canyon, and ratifying all actions theretofore taken by A. Z. Richards including the filing of Change Application No. A-1810.

No. 9: Evaporation chart, based on 1000 acre free water surface, 1955 and 1956, data from U. S. Weather Bureau "Climatological Data, Utah".

No. 10: Applications to appropriate water, 24,531, 24,532, 27,404, 27,410, 27,770, 27,978, 28,106, 28,555.

No. 11: Water measurements in East Fork, 1956.

No. 12: Water measurements in East Fork, 1957.

No. 13: Abstract of title covering lands in Section 22 (Reimann lands).

No. 14: Colored photo, part of upper Aspen Road, Aspen Fork.

No. 15: Colored photo, looking southeast on Parker Road, where East Flume runs under Parker Road.

No. 16: Colored photo, looking west on Aspen Road about 125 feet southwesterly from Bluebird Spring.

No. 17: Colored photo, looking downw canyon from Maybeth Road across Garden Valley Park, formerly Lotus Lake swamp area.

No. 18: Colored photo, looking south to Maybeth Road around "Rock Curtain". Filing No. 24,531 is to extreme right, half-way between top and bottom of picture.

No. 19: Colored photo, looking northeast across Garden Valley Park formerly old Lotus area, toward Yvonne Spring area at right and Parker Spring area to left.

No. 20: Colored photo, looking down Mountair Canyon from Maybeth Road showing deforested slopes at right and part of Panorama Road.

No. 21: Colored photo, upper Aspen Road, southwest of Bluebird Spring, looking west.

No. 22: Colored air photo, looking up Aspen Fork at right, with Nugget sandstone dike in foreground at lower right, and looking up the South Fork to the left.

No. 23: Colored air photo, showing roads built on Reimann lands, looking northwesterly toward Nugget sandstone ridge.

No. 24: Colored photo looking upstream on North channel, 20 feet southeast of East Flume, facing Birch Tree (Birch Fork) where stream divides into two channels. The South channel is to the right.

No. 25: Colored photo taken after grade of Parker Road was raised 16 inches. Shovel points to place where North channel was dammed off in front of East Flume in 1954, 1955 and 1956, and where bank was cut and a ditch was cut from stream channel out onto Parker Road.

No. 26: Colored photo, looking upstream southeasterly from Parker Road at East Flume, in North channel, showing winding North channel and dense growth on both sides.

No. 27: Air photo looking up Mountair Canyon, toward Mill Creek Divide, with Nugget sandstone ribs across the canyon in foreground.

No. 28: Colored photo looking downstream in North channel after rubbish was cleaned out of channel. Measuring pipe is in foreground.

No. 29: Photo of Parker Spring, measuring pipe.

No. 30: Photo of Maybeth Spring area, measuring pipe, 175 feet below development.

No. 31: Photo of dense vegetation on marshy side-hill, Maybeth Spring (closeup).

No. 32: Photo of wet bank of Maybeth Spring area, looking northwesterly from east side of gully.

No. 33: Photo of Yvonne Spring area, near middle, showing tall cane grass.

No. 34: Photo of Yvonne Spring area, west measuring pipe.

No. 35: Photo from upper road in South Fork.

No. 36: Certified copy of decree of distribution, Probate No. 1301, in Estate of Parker B. Pratt, deceased, dated November 15, 1958, recorded in Book 646, page 448 in the office of Salt Lake County Recorder, distributing the lands and water rights to Paul E. and Maybeth Farr Reimann, as grantees of devises.

No. 37: Restrictive Covenants, dated July 23, 1949, executed by Lynn S. Richards and Lucille C. Richards, Paul E. Reimann and Maybeth Farr Reimann, pertaining to lands in Sections 15 and 22, providing for water systems and reservoirs, and requiring sewage disposal to be in accordance with Board of Health regulations applicable to watershed property.

No. 38: Air view of Section 22, showing location of springs or plastic cover.

No. 39: Air view of roads constructed by the Reimanns, showing location of springs on plastic cover.

No. 40: Air view looking southeast, showing Nugget sandstone ridge in foreground.

No. 41: Air view looking down canyon to Parley's Canyon, showing Nugget sandstone ridges outlined on plastic cover by Richard E. Reddin.

No. 42: Air view looking northwest over mountains into Salt Lake City.

No. 43: Sketch showing schematic layout of proposed Reimann water system.

No. 44: Measurements at Parker Spring 1955 to 1957.

No. 45: Copy of application on Discovery Spring. (Duplicate of part of Exhibit 10).

No. 46: Copy of letter from State Engineer dated April 24, 1957, covering applications 27,404, 27,410, 27,770, 27,987, and 28,106.

No. 47: Photostat of page from Dr. Orson Israelson's text showing that "Where the water table is near the ground surface, evaporation from the soil is almost equal to the evaporation from a free water surface."

No. 48: [Excerpts from findings of fact and conclusions of law, Civil No. 5680 May 2, 1912. (Rejected, and not included in exhibits, but it was later stipulated that either party could refer to findings as if all of the findings were in evidence).

No. 49: Copy of application No. 11360 by Salt Lake City in 1933 to appropriate water with point of diversion in Parley's Canyon at Mountain Dell Reservoir site, 135 feet West and 1058 feet South from the East quarter corner of Section 9, T. 1 S., R. 2 E., SLM. (Objection was made to this exhibit because the city could not appropriate any waters in Mountair Canyon at a diversion point above the confluence of Parley's and Mountair creeks. The application filed by Salt Lake City on Mountair Creek dated June 12, 1932, No. 11269 was withdrawn September 14, 1938. Said aplpication was not offered as an exhibit).

No. 50: This is a plat prepared by A. Z. Richards for the purpose of evidence in this case, which is self-serving.

Of the 1,600 acres in the Mountair Canyon drainage area, he has excluded 700 acres as not contributing to Mountair Creek because there are not live streams at the surface. He has disregarded the springs in Sections 15 and 16. He is not a geologist. He has contradicted the United States surveys in attempting to put "Upper Pt. of Diversion, Change App." at a point on the creek. See Exhibit 4, and also Exhibit 61, the field notes from the United States Survey Office which show that the so-called "Upper Point" is about 325 feet from the creek and is situated on a ridge.

No. 51: An elevation graph prepared by A. Z. Richards.

No. 52: Discharge of streams in second feet, Salt Lake City Water Department for 1952 to 1957. (Said records are objectionable as they do not show that Salt Lake City had any water rights in Section 22).

No. 53: View of of "2½ acre tract" at mouth of Mountair Canyon from new U. S. Highway 40.

No. 54: Photo of Mountair Creek at new highway boundary.

No. 55: Photo of 2½ acre tract from Mountair Road looking north.

No. 56: Photo of same tract from another point on Mountair Road.

No. 57: Photo taken of interior of 2½ acre tract.

No. 58: Photo easterly end of 2½ acre tract.

No. 59: Photo of lower end of said tract, from Mountair Road.

No. 60: Photo of place where water has been diverted onto the Richards tract.

No. 61: Certified Copy of field notes of survey of east line of Section 22. These notes show that the East Fork (Smith's Fork) is 12.70 chains from the northeast corner of the section. There is no indication of a flowing

strem. (This exhibit together with Exhibit 4 show that Exhibit 50 is off by several hundred feet).

No. 62: Photo from Mountair Road showing the same kind of trees on the sidehills to the south as on the 2½ acre tract.

No. 63: Plat of water survey of 1952 conducted by Sumner G. Margetts & Co., for Paul E. Reimann and wife.

No. 64: Sheet showing quantities of water diverted out onto the Parker Road 1954 to 1956.

No. 64-A: Abstract of title to portions of Section 17, T. 1 S., R. 2 E., SLM.

No. 65: Warranty deed from U. S. Acceptance Corporation, and deeds from others to Willard B. Richards, Jr., 1951.

No. 66: Table showing comparison of flow at Moffat Flume and flow at Richards diversion near mouth of canyon, 1955 to 1959.

No. 67: Water measurements in 1959 at Moffat Flume, at Warner's and at Castle Crag Canyon.

No. 68: Topographic plat of tract at mouth of canyon, showing 1.61 acres as total area which could be irrigated prior to taking of .68 of an acre for inclusion in State highway.

No. 69: State Engineer's plat of canyon homes and ownership of properties, in Mountair Canyon.

No. 70: State Engineer's plat of ownership of property in upper end of canyon.

No. 71: Plat prepared by A. Z. Richards showing his location of 34 cabins and homes in the canyon. (See Exhibit 50. It has some of the same errors as Exhibit 50).

No. 72: Certified copy of Restrictive Covenants dated July 1, 1955. (These restrictive covenants are substantially the same as Exhibit 37, but signed by entirely different property owners).