

1967

# State Of Utah By And Through Its Road Commission v. F. Ephraim Bates And Mae P. Bates : Appellant's Brief

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# IN THE SUPREME COURT OF THE STATE OF UTAH

STATE OF UTAH by and through  
ROAD COMMISSION,  
*Plaintiff and Respondent,*

vs.

EPHRAIM BATES and  
E. P. BATES,  
*Defendants and Appellants.*

## APPELLANTS' BRIEF

Appeal From a Judgment of the Third District Court  
For Summit County

HONORABLE STEWART M. HANSEN, Judge

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Clerk, Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH by and through  
its ROAD COMMISSION,  
*Plaintiff and Respondent,*

vs.

F. EPHRAIM BATES and  
MAE P. BATES,  
*Defendants and Appellants.*

Case No.

10910

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## APPELLANTS' BRIEF

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### STATEMENT OF NATURE OF THE CASE

This is an action wherein Plaintiff claims a right of eminent domain in the construction of a highway and a stock trail and in the taking, Defendants' access to water on Silver Creek was cut off. Defendants claim that Plaintiff has the obligation to furnish them access to water or pay additional compensation therefore.

## DISPOSITION IN LOWER COURT

The case was tried to the Court, and the Court granted judgment of \$35.00 per acre on 8.71 acres of Defendants' land by reason of the stock trail construction, but found that the agreement between the agent of Plaintiff and the Defendants as to water, watering rights, or compensation therefor was not binding.

## RELIEF SOUGHT ON APPEAL

Defendants and Appelants seek a reversal of the trial court's finding and judgment that the agreement made with Defendants by the agent of Plaintiff was not binding, and that Plaintiff should either provide water or pay compensation to Defendants for not doing so in accordance with the evidence presented. Further, that the trial court should make additional findings and judgment to conform to the evidence and facts proved.

## STATEMENT OF FACTS

In the fall of 1959, Mr. Alden S. Adams, an agent of the State Road Commission of Utah, contacted defendants in Wanship, Utah, concerning the State Highway Project proposed in that area which would affect defendants' land and access to water on Silver Creek.

Over the years defendants had watered their cattle and sheep on the Silver Creek stream in the area where Silver

Creek crosses the corner of section 26, (see exhibit D-10) and about 3,000 acres of defendants' land to the north and west of that watering area were used by these cattle and sheep from that stock watering source (TR 12).

Defendants' property extends north and west up a fairly steep slope from Silver Creek to a ridge involving about 3,000 acres. Then north, beyond the ridge, on the other side of the mountain, defendants' land includes another approximate 4,000 acres, and this side of the mountain is served by another stream for stock water purposes.

When defendants discovered that plaintiff's highway project would cut off their access to Silver Creek and would affect their use of some 3,000 acres of land, they were vitally concerned and "water" became the major issue in their discussion with Plaintiff and its agents.

On several of these discussions with Mr. Alden Adams and a Mr. Stahle, defendants received assurances that the state would provide them with water (TR 15, 16) and it was further discussed the possibility or feasibility of the state's acquisition or exchange of lands with others so that defendants could get access to water (TR 17).

On January 7, 1960, defendants received a letter from Mr. Alden S. Adams, the agent for plaintiff referring to the *Settlement of the water problems and exchange of land* (exhibit D-8 and TR 17). Then on February 2, 1960, defendants received right of way contracts, deeds, and settlement invoices in relation to the taking by plaintiff of defendants' land, and attached to, and as a part of these contracts, was

a letter addressed to defendant, Fay E. Bates, and signed by Alden S. Adams, as agent, wherein defendants were requested to sign the documents, and further that they would be furnished water. It reads as follows :

“Relative to the water situation, we do not have title as yet. The state is endeavoring to make a deal with your neighbors for some landlocked land which includes water, which we plan to develop for the land owners, including yourself. At that time a supplemental contract will have to be executed.” (Exhibit D-7 and TR 18).

Defendants thereupon signed the documents and received \$8,664.00 for the land taken and damages, but nowhere did the documents refer to the cutting off of defendants' water as part of the damages, and at no time did the agents for plaintiff discuss with defendants that the damages they were being paid for included their being cut off from their water. (TR-19)

Thereafter, defendants continually met with agents of the plaintiff, both at their offices and out on the property concerning *How* the water would be furnished defendants, each year since 1960 and sometimes several times during a year (TR-21) until the time of trial in February 1967 (TR-30).

In the fall of 1966, Mr. Kenneth Hisatake, attorney for Plaintiff, had conversations and discussions with Gaylen S. Young, Jr., counsel for Defendants, concerning a settlement of the issues between the clients, and the real issue of *water* was discussed, and *how* the state was going to furnish it to



Defendants, as had been agreed and promised. The state engineers indicated they could build a water trough and pump the water up through a pipe from Silver Creek, inasmuch as their efforts to obtain water from Mr. Bertagnole's spring and other sources had not worked out (TR-38). Defendants, thereupon met with Mr. Hisatake, one of the state engineers, and Mr. Young out on the property to discuss further the feasibility of a pump situation. Defendants were concerned whether a gasoline driven pump placed on the hillside would be practical and feasible, thus they followed the suggestion made of obtaining an engineer to make a study and obtain a report on how best to secure the water. Mr. Wayne D. Criddle, an engineer and expert in the field of water, and formerly having spent eight years as the state engineer, was hired by Defendants for this purpose.

Mr. Criddle came up with three alternate methods of supplying water to Defendants for their cattle and sheep, as well as the cost of each, and this he testified to at the trial (TR-44-49).

Thus, the fact of the continuous discussions, promises, and actions on the part of Plaintiff and their agents in the furnishing of water to Defendants was shown not only by the testimony of Mr. Fay Bates and the letters of Alden S. Adams, agent but it was corroborated by the testimony of Mae Bates, (TR-32) John Bates, (TR-31, 32) and Gaylen Young, (TR-38, 39). Furthermore, Plaintiffs' witnesses, Mr. Hisatake and Mr. Wheadon, substantially corroborated the fact of the continuous recognition by the Plaintiff and its agents to furnish water to Defendants and their efforts to do so (TR-6, 7, 8, 35).

About two days prior to trial, counsel for Plaintiff notified counsel for Defendants that the state would not furnish water to Defendants, nor would they pay compensation for not doing so (TR-30). Thus, counsel for Defendants asked for a special pre-trial conference to determine the issues at the trial. The court, at that hearing, suggested to Defendants that if they would repay the State Road Commission \$8,664.00 together with interest thereon since February 2, 1960, at 6% per annum, it would consider starting all over on the issue of damages in the original taking and the water issue could be determined with it.

Defendants could not come up with that amount of cash, and it was finally determined that, along with the issue of damages for the land taken from Defendants by Plaintiff in the construction of the stock trail, the issue of whether the state should be required to furnish water to Defendants, or pay compensation for not doing so, would be heard.

Then after hearing the evidence presented on February 20, 1967, the trial court rendered its judgment that the agreement made by Alden S. Adams was not binding on Plaintiff and that Defendants were not entitled to further compensation (R-23).

## ARGUMENT

### POINT ONE

THE COURT ERRED IN FINDING THAT THE  
PURPORTED AGREEMENT MADE BY ALDEN S.

ADAMS WAS NOT BINDING AND THAT THE DEFENDANTS ARE NOT ENTITLED TO ANY FURTHER COMPENSATION.

From the very beginning of contacts made with Defendants by Plaintiff and their agents regarding the highway project proposed and the taking of land, the question of *water* and the furnishing of *water* was the paramount issue and of most concern to Defendants.

Mr. Fay Bates, Defendant, testified that the first contact by the State Highway Department was made in 1959 and his testimony is as follows: (TR-14-15)

A. "Well, the first contact that I had was from a Mr. Alden Adams who was acting as right-of-way purchasing agent for the state of Utah."

Q. "I see."

A. "And we discussed, of course the new project, and what implications there was and that there was in fact to be a non-access fence on both sides of the canyon to control livestock and other things, and, of course, on the initial encounter with Mr. Adams we discussed the various ways, or effects that this would have upon the landowners, and, of course, paramount and immediate and probably basic to all other things was the use or access to water by stock which was to be grazed on this area."

Q. "Was anything said by Mr. Adams on this occasion?"

A. "Yes."

Q. "What was said?"

A. "Mr. Adams assured me the state would provide water."

Q. "Even though they took your water access in this area from you?"

A. "They would provide me with water regardless of what else they did, they would provide me with water. That was the basic issue."

Defendant Bates further testified that he had about four or five conversations with Mr. Adams and others prior to February 2, 1960 and on *each* of those occasions it was represented that the state would provide Defendant with water (TR-16).

On January 7, 1960 Defendant, Bates, received some documents attached to a letter from Alden S. Adams, right-of-way agent (Exhibit D-8). The letter states as follows:

"Attached, hereto, please find right-of-way entry agreement, in triplicate, giving the Road Commission permission to enter up your property needed for the construction of the above project.

Messers Arnold Shields and Leo Bertagnole have given the Road Commission a right of entry due to the fact that the closing of the right-of-way contracts cannot be made *until after the water problems and exchange of land has been settled.*

We are wondering if you would execute the right of entry since the information you request regarding your neighbors is not yet decided. If you agree to this kindly execute two copies of the agreement and return to this office."

Effort was made by the state to make an exchange and to acquire certain land as a source of water for Defendants (TR-17).

Then again on February 2, 1960 the following document was received from Alden S. Adams, directed to Defendant, Fay E. Bates (Exhibit D-7) :

"Attached, hereto, please find right-of-way contracts, deeds, and right-of-way settlement invoices covering parcels No. 49:B, 56, 47:A, 51:A, 51-E, and 56:A of the above project.

Will you kindly sign the papers and also have your wife sign the same. Your signatures on the invoices and deeds will have to be notarized.

Please note that we have protected you on the only fence where will be any problem on. All of the other fences are solid NA fence, no access.

*Relative to the water situation, we do not have title as yet. The state is endeavoring to make a deal with your neighbors for some landlocked land which includes water, which we plan to develop for the landowners, including yourself. At that time a supplemental contract will have to be executed."*

Defendants therefore signed the deeds and contracts and received a certain amount of money, but nowhere was there reference to the fact that the money received was also for the taking of their water source, but to the contrary, Defendants continued to expect the state to furnish them another water source, and the Plaintiff and its agents continued to lead Defendants to believe that they were honestly trying to do that.

Defendant, Fay Bates, further testified of these facts as follows: (TR 19-21)

Q. "Since February 2, 1960, what efforts, if any have you made to get this water situation solved?"

A. "I have met with the State Highway Purchasing Right of Way Department down there on several occasions. On one specific occasion I recall my wife and I went down there to discuss this with Mr. Adams:"

Q. "This was after February 2, 1960?"

A. "Yes, and we were informed—we did talk to Mr. Adams briefly but, Mr. Adams informed us that he had other business that he must take care of, but mainly that he, in fact, had been taken off of this project and that there had been another man attached to this particular project in the right-of-way purchasing department, and he referred us to a Mr. Williams who we talked to at that time."

THE COURT—"Clarence Williams?"

THE WITNESS—"I believe that was the name."

Q. "To discuss this water situation?"

A. "Yes. We did discuss it with Mr. Williams, and he, of course, did not have a solution to it. He was apprized of the situation. We told him that we were desirous of getting a settlement, and he again told us that the state was trying to effect a satisfactory settlement and that they would continue to do so.

THE COURT: "To get you water?"

THE WITNESS: "To get us water, and further on several other occasions when we discussed the thing we were told that *we would be supplied with water.*"

Q. "Did they come out to your property on definite occasions for discussions with you concerning this?"

A. "There were various men, various men in the department that we discussed this with besides Mr. Stahle and Mr. Adams."

Q. "Well, did they - -"

A. "We discussed the situation with Mr. Hepworth also, who was the project engineer."

Q. "Did any of them at any time say they were not going to provide you with water?"

A. "No. It wasn't said they weren't, but only - -"

Q. "How?"

A. "How the water was to be supplied, and not a question of whether it would be or could be."

Q. "Did they go to some effort to try and locate another spring of water for you?"

A. "We discussed the possibility of a natural spring that was on other land."

Q. "Was that Mr. Bertagnole's land?"

A. "That was Mr. Bertagnole's land, and we discussed the possibilities and feasibilities of devel-

oping it, and at one other time as to whether this would develop, how it could be done that was satisfactory."

Q. "Have you been discussing, under the taking and their statement, the possibility of providing you with water ever since 1960 then?"

A. "Yes, we have."

Q. "Some time each year since 1960, without stop?"

A. "Yes, often several times during a year."

Counsel for Defendants, Gaylen S. Young, Jr., testified also at the trial of the further efforts on the part of the state to furnish Defendants with water and the fact of their recognizing an actual obligation to furnish water. Mr. Young's testimony is as follows: (TR-38)

"It is my testimony that a few days following October 20, 1966, after receiving a letter from Mr. Kenneth Hisatake, attorney for the Plaintiff, that I informed him of the question of water being the real issue in this case and the furnishing of Mr. Bates water on his land.

"Mr. Hisatake told me that he would contact the Engineer's office, or those from the State Road Commission who had the information, and let me know later. It was a few days later that I had a call from Mr. Kenneth Hisatake in which he informed me that he had discussed the matter with agents from the State Road Commission and that Mr. Bates was, in fact, entitled to water, that they had agreed to furnish him with water, and that they were making efforts to provide him with that water but so far these efforts had not materialized in obtaining a spring



from Mr. Bertagnole or from other sources, but that the state would be able to build a pump and a watering trough and that it would be necessary for us to go out to the property of Mr. Bates to see exactly what that would be like in order to provide him with water."

The testimony of Mae Bates and John Bates was also the same as Defendant Fay Bates as to these facts, (TR 31-32). Furthermore, Plaintiff did not dispute these things and the evidence presented, but relied merely on the position that the Plaintiff was not bound, under the law, to perform regardless of its promises or agreements to furnish water to Defendants.

For the state to take this position, after leading Defendants on for over six years that they were to receive a supplemental contract on water rights and that they were actually making effort to develop another water source, is simply manifestly unjust, inequitable, and we believe contrary to the law.

Had Defendants realized that the state did not intend to honor its commitments to them, they could have refused to sign the original contracts and deeds and obtained relief through the courts for the loss of about 3,000 acres of land by reason of their loss of water, and which Defendants believe is far in excess of the \$8,664.00 received by them for the land taken originally. However, to compel Defendants to return the money received, after these many years, with interest as was suggested by the trial court at the pre-trial conference, places them at a great disadvantage.

Furthermore, as the letter of Alden S. Adams of February 2, 1960 was attached to and made a part of the documents sent out, the reference to the plan to *develop and furnish water for Defendants and the intent to enter into a supplemental contract*, constitutes a "condition subsequent." and the Plaintiff's failure and refusal to abide by this condition amounts to a breach and failure to pay, which in accordance with 78-34-14 of Utah code annotated 1953 entitles the Defendants to the restoration of possession of their property and an annulment of the entire proceedings.

The Plaintiff *can* furnish a source of water to Defendants, though, if they will just do so, as was outlined in 3 alternate methods by Mr. Criddle, Engineer, at the trial (TR 44-49), and the state should be bound by their promises and agreements to do it.

In 43 Am. Jur. 71, Section 254 it states:

"When power or jurisdiction is delegated to any public officer over a subject matter, and its exercise is confided to his discretion, the acts done in the exercise of the authority are, in general, binding and valid as to the subject matter."

Mr. Alden Adams, right-of-way agent, was given power or jurisdiction to negotiate with Defendants on their land, and we submit that he had discretion to deal on the basis of furnishing water. However, not only did Alden Adams assure Defendants of providing water, but others in the right-of-way department gave these assurances over a six year period (TR 16, 19-21, 38), and if the state claims that Adams did not have authority to deal with Defendants on

water, the further promises and actions of the other officers and agents of Plaintiff certainly constitute a ratification and validation of Alden Adams' actions. See 42 Am. Jur. 319, Section 27:

“Acts of administrative authorities unauthorized at the time may become valid and binding by ratification. . .”

The question arises then, whether Alden Adams, as a public officer, was in fact acting within the scope of his authority in dealing with Defendants on the issue of water, so that the principles of agency should apply. We submit that he was acting within the scope of his authority even though not specifically directed or requested to do so by his superior. See 43 Am. Jur. 85, Section 273, wherein it states:

“In order that acts may be done within the scope of official authority, it is not necessary that they be prescribed by statute, or even that they be specifically directed or requested by a superior officer, but it is sufficient if they are done by an officer in relation to matters committed by law to his control or supervision, or *that they have more or less connection with such matters . . .*”

Now at the trial of these issues, Plaintiff made no showing whatsoever of any lack of authority on the part of Plaintiff's agents to deal with Defendants on the furnishing of water except that after both sides had rested their case, and 3 days later at the time set for argument, and over the objections made by counsel for Defendants, testimony was heard from Mr. Anthony Rudelich touching on the authority of Alden S. Adams, only. We submit to this court that it was

error for the trial court to allow in the record the testimony of Mr. Rudelich, after both sides had rested their case. Upon stipulation of the parties, counsel for Plaintiff had agreed to try and get Mr. Alden S. Adams into court at the time of argument to be examined by counsel for Defendants, for the state had agreed to have him present previously at the trial on February 20, 1967, but he had suddenly gone out of town on state business and was still not available. So rather than obtaining Mr. Adams, Plaintiff brought in Mr. Rudelich, and thus the objection to his testimony was voiced.

Should this court, however, consider his testimony, we call the court's attention to the fact that it goes only to the authority of a "negotiator" and not to others in the department who also acted on this matter of providing water for Defendants, including Mr. Hisatake and those with whom he dealt, such as Robert Wheadon, project engineer. Furthermore, Mr. Rudelich admitted that upon proper clearance, matters outside the right-of-way contract could be authorized, such as providing a gate, rip-rap on eroded areas, and the building of culvert at the state's expense (TR 69, 70). As a matter of fact these conditions and items were brought to the attention of Plaintiff as a part of the agreement with them, and as Mr. Hisatake admitted (TR-71), they are binding upon the state. And as Plaintiff has not performed on this part of their agreement and promise, we submit that the trial court should make these items and conditions a part of the finding and judgment in the case, which was not done.

Therefore, just as the gate, rip-rap, and culvert items were outside of the contemplated contract with Defendants, and yet authorized, so also should *the providing of water to*

*Defendants be approved and authorized, which was in fact made a part of the contract by reason of the documents all being attached to the writing of February 2, 1960, and for over six years never denied or objected to as being an obligation of the state.*

It is further the contention of Defendants that the *furnishing of water* to them by Plaintiff was in fact approved and authorized by reason of the writing and actions of the state and its agents over these several years, and even though the Federal Government may not participate in the cost for some technical reason, Plaintiff nevertheless, by all that is equitable and proper, should be bound, just as any private person or corporation would be under the circumstances.

We, therefore, respectfully submit that Plaintiff should be bound by its promises and agreements to furnish Defendants with water or be required to pay just compensation for not doing so.

## POINT TWO

PLAINTIFF SHOULD BE ESTOPPED TO DENY ITS AGREEMENT AND OBLIGATION TO FURNISH DEFENDANTS WITH WATER OR A WATERING SOURCE FOR LIVESTOCK.

We have set out, what is believed to be undisputed facts and evidence of the Plaintiff's promises, agreements, actions, and efforts to provide water for Defendants over the

past six and one-half years, in our STATEMENT OF FACTS and in our POINT ONE, and so we refer the court to those facts and evidence therein presented as a part of our argument here.

There should be no question that the state has power to contract and may be bound thereby. In 49 Am. Jur. 285, Section 74 the law seems clear :

“The rights and responsibilities of a state under an ordinary business contract are, with few exceptions, the same as those of individuals. Although it cannot be sued without its consent, the state when making a contract with an individual is liable for a breach of its agreement in like manner as an individual contractor.”

See also *Campbell Bldg. Co. vs. State Road Commission*, 95 Utah 242, 70 p 2nd 857.

In the instant case, we submit, that had the state not been involved as a contracting party, there would be no question of the obligation to construe the promises, writing, and actions involved herein as a contractual responsibility. Can the Plaintiff, then, after leading Defendants to believe it was actually going to furnish the source of water promised, and causing Defendants to spend considerable money and a great deal of time on these matters over the six year period suddenly renig on its agreements and promises and hide behind the state's immunity and claim lack of authority to so contract? We think not, and Plaintiff should be estopped from denying its obligation.

In 1 ALR 2nd 346, Section 6 it refers to the question of estoppel :

"Assuming, however, the presence of all the prerequisites for the application of the doctrine of estoppel as between individuals, under some circumstances the public or the United States or the *state* may be held estopped if an individual would have been estopped, as when acting in a proprietary or contractual capacity."

The fact that Plaintiff was dealing with Defendants on the disposition of lands is evidence of this transaction being in a proprietary or contractual capacity. (See on this point —*Strand vs. State*, 16 Wash. 2nd 107, 132 p 2nd 1011).

Again in 28 Am. Jur. 2nd 784, Section 123, it states:

"Thus as a general rule, the doctrine of estoppel will not be applied against the state in its governmental, public, or sovereign capacity, *unless its application is necessary to prevent fraud or manifest injustice. . .*"

"A state may be held estopped when acting in a proprietary or contractual capacity."

From the notes on page 347 of I ALR 2nd the case of *State Ex. rel. Upper Scioto Drainage and Conservancy Dist. vs. Tracy*, 125 Ohio St. 399, 181 NE 811 was cited wherein the court held:

"That the state, by participating in a proceeding through one of its departments acting within the scope of its departmental powers concerning lands toward which the state was exercising a proprietary function, was estopped to claim that the law under which the proceeding was brought was unconstitutional or violative of a compact between the United

States and the state of Ohio. The court said *that the state can no more eat its pie and have it than can an ordinary corporation or an individual.*"

In *State ex rel, Caldwell v. Lincoln Street R. Co.*, 80 Neb. 333, 114 NW 422, 118 NW 326, it was held:

"The state, like an individual, may be estopped by its acts or laches, and should not be allowed to oust a corporation of its rights and franchises, *where for a long series of years it had stood silent and seen the corporation expend large sums in the acquisition of property and improvements made thereon under a claimed right so to do under its charter.*"

Also, in *State ex rel Washington Paving Co. v. Clausen*, 90 Wash. 450, 156 p. 554, the court stated:

"Even where the government may not be barred by mere laches, it may be estopped in pais by such actions with individuals as make it a question of *honest dealing.*"

We therefore submit that in order to prevent manifest injustice, honest and fair dealing over a long series of years, wherein Defendants have had their land tied up and rendered useless from lack of a water source for their livestock, and fully expecting the water to be forthcoming through the acts and promises of the state, said Plaintiff should be estopped from denying its agreements and obligations to Defendants.



## POINT THREE

THE TRIAL COURT SHOULD HAVE MADE A FINDING AND JUDGMENT ON PLAINTIFF'S FURNISHING A GATE, RIP-RAP AND A CULVERT ON DEFENDANTS' LAND.

By reason of the highway project going through Defendants' land, Defendants suffered other problems, in addition to the taking of land and loss of access to their water. The Plaintiff, through its agents and counsel promised, and it was stipulated to in the trial court (TR-71), to provide Defendants with a 16 foot access gate across a 20 foot lane, with rip-rap to prevent erosion from spring run offs, and with a culvert to prevent erosion in a ditch.

No finding or judgment was made as to these items by the court, and we respectfully submit that the trial court should be directed to make such a finding and judgment.

## CONCLUSION

In view of the written promise of Alden S. Adams and the many other assurances and promises, and efforts to actually carry out those promises, on the part of Plaintiff, its agents and employees over a six year period of time to provide a watering source for Defendants, and the expending of considerable time and money in reliance thereon, and the further loss of use of some 3,000 acres of land for grazing of livestock over six years, we respectfully submit to this court that it would be a manifest injustice, unfair dealings,

and most inequitable to allow the Plaintiff, State Road Commission, to renig on its agreement and obligation to perform.

We therefore respectfully petition this court to reverse the findings and judgment of the trial court, and make binding upon Plaintiff the obligation to provide water or a watering source for Defendants for their livestock, or in the alternative, either to pay adequate compensation for not doing so, or to return Defendants' land to them from the original taking with an annulment of the entire proceedings.

In addition Defendants submit that they are entitled to additional findings and judgment in regard to Plaintiff's furnishing a gate, rip-rap, and a culvert on Defendants' land.

Respectfully submitted,  
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