

1995

# Water Power Company v. Strawberry Water Users Association : Brief of Appellant

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

UTAH  
DOC. NO.  
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DOCKET NO. 950235-CA

IN THE UTAH COURT OF APPEALS

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WATER POWER COMPANY, a	:	
Utah corporation,	:	
	:	
Plaintiff and Appellant,	:	Appellate Court No. 950235-CA
v.	:	(Priority Number 15)
	:	
STRAWBERRY WATER USERS	:	
ASSOCIATION, a Utah	:	
corporation,	:	
	:	
Defendant and Appellee.	:	

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BRIEF OF APPELLANT

An appeal from the decision rendered by Judge Lynn W. Davis,  
Fourth District Court, State of Utah.

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FILED

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COURT OF APPEALS

**IN THE UTAH COURT OF APPEALS**

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WATER POWER COMPANY, a	:	
Utah corporation,	:	
	:	
Plaintiff and Appellant,	:	Appellate Court No. 950235-CA
v.	:	(Priority Number 15)
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## JURISDICTIONAL STATEMENT

The Supreme Court had jurisdiction in this matter pursuant to Section 78-2-2(3)(j), Utah Code Annotated, 1953 as amended and Rule 3(a), Utah Rules of Appellate Procedure. This matter was then poured over to the Court of Appeals by the Supreme Court.

## STATEMENT OF ISSUES

Whether Water Power should be awarded attorney fees on the case below, on the case of Water Power before the Utah State Tax Commission, and in pursuing this appeal. This is an appeal from the granting of Strawberry Water's Motion for Summary Judgment. Upon review of a grant of a motion for summary judgment, the appellate court applies the same standard as that applied by the trial court. Durham v. Margetts, 571 P.2d 1332 (Utah 1977). The appellate court views the facts in a light most favorable to the losing party below. And in determining whether those facts require, as a matter of law, the entry of judgment for the prevailing party below, the appellate court afford no deference to the trial court's legal conclusions, which are reviewed for correctness. First Security Bank of Utah vs. Creech, 858 P.2d 958 (Utah 1993); Tholen v. Sandy City, 849 P.2d 592 (Utah Ct. App. 1993); Allen v. Prudential Property & Casualty Ins. Co., 839 P.2d 798 (Utah 1992); Bonham v. Morgan, 788 P.2d 497 (Utah 1989); Blue Cross & Blue Shield v. State, 779 P.2d 634 (Utah 1989).

### STATEMENT OF THE CASE

This is a case involving a contract agreement entered into on January 24, 1983 between Water Power Company as Seller and Strawberry Water Users Association as Buyer, whereby Water Power would provide Strawberry Water with hydro-electric equipment.

The agreement included a provision which states:

In addition to any price specified herein, Buyer shall pay the gross amount of any present or future sales, use, excise, value-added, or other similar tax applicable to the price, sale or delivery of any product or services furnished hereunder or to their use by Company or Buyer, or Buyer shall furnish Company with evidence of exemption acceptable to the taxing authorities. [Addendum, Exhibit A].

The agreement also contained the following provision regarding attorney fees:

7. ADDITIONAL TERMS: The terms and provisions of "Conditions of Sale", attached hereto as Exhibit "B", are hereby agreed to and incorporated herein. [Addendum, Exhibit A].

Exhibit "B" in turn contained the following provision:

In the event of a breach of this Agreement, the prevailing party shall be entitled to recover reasonable Attorney's fees. [Addendum, Exhibit B].

On or about February 17, 1987, the Utah State Tax Commission sent preliminary notices to Water Power and to Strawberry Water assessing sales and use taxes. Both Water Power and Strawberry Water contested the assessments before the Utah State Tax Commission claiming the transaction was exempt from state sales, excise or use tax. In March of 1990, Strawberry Water lost its



tax appeal, and on or about September 8, 1992, the Utah State Tax Commission denied Water Power's appeal. As of December 30, 1987 the amount of the tax assessed was \$192,018.67. Water Power incurred attorney fees in filing its petition and prosecuting its appeal before the Utah State Tax Commission.

Water Power brought suit against Strawberry Water in Fourth District Court of Utah in 1990 alleging theories of breach of contract, anticipatory breach of contract and declaratory relief, seeking payment by, or judgment against, Strawberry Water of the tax deficiency assessed against Water Power for the amount of \$120,135.33, plus penalties, interest and attorney fees, for the equipment and service provided to Strawberry Water for the period of January 1, 1983 through September 30, 1986.

In the case below, Strawberry Water filed a Motion for Summary Judgment seeking a ruling that the contract provision regarding payment of taxes set forth above was an indemnity provision for loss only and that Water Power should be required to pay the tax before being allowed to pursue Strawberry Water for indemnification. Said Motion for Summary Judgment was denied and the lower court ruled that Water Power's claim was ripe and that Water Power did not need to actually pay the taxes in order to pursue the action below.

On or about October 14, 1994, Strawberry Water filed a Motion for Summary Judgment in the case below seeking dismissal of the claims of Water Power Company. This motion was based upon the fact that Strawberry Water finally paid the taxes assessed by the Utah State Tax Commission, and obtained a Satisfaction of Warrant from the Utah State Tax Commission and therefore claimed that as the exposure to Water Power had been extinguished by its payment, the dispute between Water Power and Strawberry Water had been resolved and there was no further basis for litigation.

Water Power opposed said position, pointing out to the court that although the underlying issue of the tax liability had been resolved, the issue of plaintiff's attorney fees incurred--both in the litigation before the trial court, and in the litigation before the Utah Tax Court--was yet remaining to be resolved and requested that portion of Strawberry Water's Motion for Summary Judgment should be denied.

The trial court, by written Decision dated December 16, 1994, granted Strawberry Water's Motion for Summary Judgment in full, stating in part:

2. Based upon the unique facts and circumstances surrounding this matter, the Court is not inclined to award Plaintiff attorney's fees;

Thereafter, an Order was signed on January 9, 1995 granting to Strawberry Water's judgment on all causes of action brought by

Water Power, and further providing that each side was to bear its own costs and attorney fees. [Addendum, Exhibit C]. This appeal was thereafter taken.

#### **SUMMARY OF ARGUMENTS**

**I. IT WAS IMPROPER AND AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO REFUSE TO AWARD WATER POWER ITS ATTORNEY FEES IN THE CASE BELOW.**

**II. THE COURT BELOW SHOULD BE DIRECTED TO GIVE WATER POWER AN AWARD OF ATTORNEY FEES IT INCURRED IN PETITIONING THE UTAH STATE TAX COMMISSION CONTESTING THE ASSESSMENT AGAINST IT OF TAX LIABILITY.**

**III. THE COURT BELOW SHOULD BE DIRECTED TO GIVE WATER POWER AN AWARD OF ATTORNEY FEES IT INCURRED IN PROSECUTING THIS APPEAL.**

## ARGUMENT

### I. IT WAS IMPROPER AND AN ABUSE OF DISCRETION FOR THE TRIAL COURT TO REFUSE TO AWARD WATER POWER ITS ATTORNEY FEES IN THE CASE BELOW.

It was improper and an abuse of discretion for the trial court to grant Strawberry Water's Motion for Summary Judgment in full, dismissing the case, and denying Water Power's remaining claims for an award of attorney fees. Water Power had a legal right to have its attorney's fees awarded, which right was thwarted by the trial court's ruling. In the case of Cabrera v. Cottrell, 694 P.2d 622 (Utah 1985), at page 622 the Supreme Court states:

Furthermore, contrary to appellant's contention that attorneys fees should be awarded on the basis of an equitable standard, attorneys fees, when awarded as allowed by law, are awarded as a matter of legal right.

The purpose of an attorney fee provision is to make the non-defaulting or prevailing party whole in the event that it must seek the aid of the courts to enforce its rights under a contract. Requiring a party to bear its own attorney fees when it has a contractual right to payment of a reasonable attorney fee violates a contractual right and leaves the party less than whole. As stated in the case of Management Service Corp. v. Development Associates, 617 P.2d 406 (Utah 1980), "The purpose of a provision for attorney's fees is to indemnify the creditor or the prevailing party against the necessity of paying an

attorney's fee and to enable him to recover the full amount of the obligation."

In Saunders v. Sharp, 840 P.2d 796 (Ut. Ct. App. 1992), Judge Garff, citing to Cabrera, supra, stated: "While courts may, in some situations, award attorney fees on an equitable basis, 'attorneys fees, when awarded as allowed by law, are awarded as a matter of legal right.'\* \* \*One such instance occurs when the right is contractual. In such cases, "'the court does not possess the same equitable discretion to deny attorney's fees that it has when fashioning equitable remedies, or applying a statute which allows the discretionary award of such fees.'" Cobabe v. Crawford, 780 P.2d 1080, 1085 (Utah App. 1988), cert. denied, 779 P.2d 688 (Utah 1989)(quoting Spinks v. Chevron Oil Co., 507 F.2d 216, 226 (5th Cir. 1975)).

"Thus, 'provisions in written contracts providing for payment of attorney fees should ordinarily be honored by the courts.' Stacey Properties v. Wixen, 766 P.2d 1080, 1085 (Utah App. 1988), cert. denied, 779 P.2d 688 (Utah 1989) (quoting Soffe v. Ridd, 659 P.2d 1082, 1085 (Utah 1983. This includes attorney fees incurred on appeal. Management Services Corp. vs. Development Associates, 617 P.2d 406, 408-09 (Utah 1980; accord Redevelopment Agency v. Daskalas, 785 P.2d 1112, 1126 (Utah App. 1989), cert. granted, 795 P.2d 1138 (Utah 1990))."

In Stacey Properties v. Wixen, 766 P.2d 1080, 1085 (Utah App. 1988), quoted above, Judge Bench of the Utah Court of Appeals remanded the case to the trial court with directions to award a reasonable attorney fees where the trial court had failed to award the same. The court in Stacey ruled as follows: "We conclude that the trial court abused its discretion in failing to give effect to the broad contractual language and partial success of Golwix in enforcing its contractual rights." Indeed, it was an abuse of discretion for the trial court in this case to refuse to allow an award of attorney fees incurred in the case below for Water Power.

**II. THE COURT BELOW SHOULD BE DIRECTED TO GIVE WATER POWER AN AWARD OF ATTORNEY FEES IT INCURRED IN PETITIONING THE UTAH STATE TAX COMMISSION CONTESTING THE ASSESSMENT AGAINST IT OF TAX LIABILITY.**

In addition to an award of attorney fees incurred by Water Power in pursuing its contractual claims against Strawberry Water in the case below, the trial court should also be directed to enter an award of attorney fees incurred by Water Power in its case before the Utah State Tax Commission in contesting the assessment of taxes against it, under the so-called "third-party tort rule."

Under this rule, the appellate courts in Utah have fashioned a remedy whereby an aggrieved party may be awarded attorney fees as a measure of consequential damages stemming from the

negligence of the third party. This rule is set forth in Broadwater v. Old Republic Surety, 854 P.2d 527 (Utah 1993):

Plaintiff's reliance on South Sanpitch [v. Pack], 765 P.2d 1279 (Utah Ct. App. 1988)] is also misplaced. In that case, a title company negligently failed to timely record the plaintiff's deed. As a result, the plaintiff was forced to file a quiet title action against a third party. The plaintiff sued the title company for the attorney fees incurred in maintaining the quiet title action. Under the 'third-party tort rule,' the court of appeals allowed the recovery of those fees as part of the damages stemming from the title company's negligence. 765 P.2d at 1282-83. Simply stated, the third-party tort rule provides that 'when the natural consequence of one's negligence in another's involvement in a dispute with a third party, attorney fees reasonably incurred in resolving the dispute are recoverable from the negligent party as an element of damages. Id. at 1282. The rule only applies to the recovery of fees incurred in resolving third-party disputes caused by a defendant's negligence. It does not apply to fees incurred in recovering damages from a defendant.

In this case, Water Power was forced to file a Petition before the Utah State Tax Commission contesting the assessment against it of tax liability, which was assessed due to the negligent, or intentional, non-payment of the same by Strawberry Water Users Association. Such facts fit neatly under the third-party tort rule set forth above. The trial court should therefore be directed to enter an award of attorney fees to Water Power in addition to the attorney fees incurred in the case below, for the attorney fees it incurred in its actions before

the Utah State Tax Commission.<sup>1</sup> Accord, South Sanpitch Co. v. Pack, 765 P.2d 1279 (Utah Ct. App. 1988). In the area of awarding attorney fees as consequential damages for the breach of a duty of good faith imposed upon insurers, see also Canyon Country Store v. Bracey, 112 Ut.Adv.Rep. 19, 781 P.2d 414 (Ut.S.Ct. 1989), where the Supreme Court of Utah stated:

In this case, there was no contractual provision requiring attorney fees, nor is Canyon Country entitled to recover fees by statute. Canyon Country's claim for recovery of fees was predicated on the theory that attorney fees were an item of consequential damages flowing from the insurer's breach of contract. This is a legitimate theory of damages, as the trial court recognized. However, attorney fees recovered as damages in a breach of contract suit must be based on the prevailing party's actual losses, i.e., its out-of-pocket expenses for legal counsel. The insurers may only be held liable to the extent Canyon Country was actually damaged, that is, in the same amount it was legally obligation to pay counsel. See Beck v. Farmers Ins. Exch., 701 P.2d 795, 801-02 (Utah 1985); Zions First Nat'l Bank v. National American Title Ins., 749 P.2d 651, 657 (Utah 1988). [Emphasis added].

**III. THE COURT BELOW SHOULD BE DIRECTED TO GIVE WATER POWER AN AWARD OF ATTORNEY FEES IT INCURRED IN PROSECUTING THIS APPEAL.**

Water Power should also be awarded attorney fees for pursuing this appeal. "A party who was awarded attorney fees and costs at trial is also entitled to attorney fees and costs if that party prevails on appeal." Wade v. Stangl, 232 Ut.Adv.Rep.

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<sup>1</sup>The award of attorney fees as consequential damages in insurance cases is a different theory than the "third-party tort rule." The attorney fees award there is based upon the breach of a duty of good faith. However, appellant sees no compelling reason to limit this theory to insurance cases only.



19, (Ut. Ct. App. 1994). See also Brown v. Richards, 840 P.2d 143, 156 (Utah Ct. App. 1992), cert. denied 853 P.2d 897 (Utah 1993).

#### CONCLUSION

This court should remand this case to Fourth District Court with directions to award appellant a reasonable attorney's fees to be established, regarding attorney fees incurred by Water Power in the dispute between Water Power and Strawberry Water in the case below, regarding attorney fees incurred by Water Power before the Utah State Tax Commission, and regarding attorney fees incurred by appellant in prosecuting this appeal.

DATED this \_\_\_\_\_ day of July, 1995.

BROWN & BROWN, P.C.

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Jeffrey B. Brown, Esq.  
Attorney for Appellant

**ADDENDUM TO BRIEF**

**EXHIBIT A**

## AGREEMENT

THIS AGREEMENT, made and executed as of the 24th day of January, 1983 by and between STRAWBERRY WATER USERS ASSOCIATION, a Utah Corporation, hereinafter referred to as "Buyer" and WATER POWER COMPANY, a Utah Corporation, hereinafter referred to as "Company".

### WITNESSETH:

WHEREAS, the Buyer desires to build a new 3500 kw hydropower facility near the existing Upper Spanish Fork Hydro Plant, (herein after referred to as "Project"), and

WHEREAS, the Buyer desires to engage the services of the Company on the Project and the Company desires to perform such services, pursuant to the terms and conditions of this Agreement as herein set forth.

NOW, THEREFORE, for and in consideration of the mutual covenants herein contained and the monetary consideration herein recited, it is mutually agreed by and between the parties as follows:

1. WORK TO BE PERFORMED BY THE COMPANY. The Buyer hereby engages the Company, and the Company does hereby agree to perform the following:

A. General: The Company will design, fabricate, install and start up penstock and turbine generator units to the following specifications:

Two Turbines: (each)

Power - 2450 hp  
Speed - 600 rpm  
Head Effective - 125 ft  
Flow - 200 cfs

Generator: Power - 1750 kw

Speed - 600 rpm  
Voltage - 2300 volts  
Temp. Rating - 60°C continuous

Penstock: Size - 2-60 inch diameter  
Length - 340 feet each

Existing Wasteway: Repair the overflow crest of existing wasteway

B. Specific: The Company shall proceed diligently to perform the following in a good and workmanlike manner for the fee as provided for herein:

**TURBINE:**

Design and manufacture two Francis turbines to the specifications of Paragraph 1A. The turbine runner, wicket gates and gate shafts will be stainless steel as per HydroWest Group standard specs. Spiral case and all other related parts will be cast or fabricated steel.

**GENERATOR:**

The generator will be designed and manufactured to HydroWest Group specifications as per the nameplate data listed in Paragraph 1A. The insulation system will be Class FFFX and the stator will have a minimum of 6 RTD's to indicate winding

**MEASURING DEVICE:**

Mapco Sonic Measuring Device to be installed in 60" penstock to measure instantaneous and totalized flow to each turbine

**POWERHOUSE:**

Insulated metal building 30' x 30' with thermostatically controlled louvers

Two motorized butterfly valves 60" diameter ahead of turbine

Two motorized slide (sluice) gates 4' x 4' for Salem Canal

Reinforced concrete box culvert between powerhouse and Salem Canal

C. Technical Director: The Company shall furnish a technical representative qualified to install and erect the equipment to be furnished hereunder, together with all other onsite or offsite labor required for the performance of this agreement.

2. **PAYMENT BY OWNER TO THE COMPANY:** The Buyer hereby agrees to pay to the Company for the work to be performed, a sum of \$2,788,000 payable in monthly installments as specified in the attached Exhibit "A", "Construction Control and Payment Schedule". He's agreed that failure to meet the payment schedule will delay extend the completion date.

temperature. The generator field will have adequate  $WR^2$  (built in inertia) to permit stable operation for remote and manual synchronization. The entire rotation assembly will have total runaway speed capability.

#### EXCITER:

The exciter will be static or brushless and will have solid state voltage regulation.

#### SWITCHGEAR:

The switchgear and relay protection will be standard utility grade designed for HydroWest Group for local manual and remote operation, including the lower 400 kw Spanish Fork Hydro Plant.

#### SUPERVISORY CONTROL:

The supervisory control will be designed by HydroWest Group and manufactured by Digitek Corporation to remotely control the two main turbines plus the recently uprated lower 400 kw Spanish Fork Hydro Plant turbine.

#### STEP-UP TRANSFORMER:

A step-up transformer, low voltage connection box, high voltage disconnect with fuses and lightning arrestors will be furnished with the following capabilities:

1. 5900 KVA minimum with provision for 25% additional capacity from F.O.A.
2. Voltage - 2.3 KV step up to 46 KV with 5 no load taps of 5% each

#### ASSEMBLY & INSTALLATION:

Will be by contractor working for Water Power Company under the direction of HydroWest Group, Inc.

#### PENSTOCK:

60" x 5/16" steel with coal tar enamel inner coating and coal tar outer coating with poly-ken protective wrap. Sacrificial anode electrolysis protection

#### INTAKE:

Two with screens and motorized 6' x 6' vertical slide gates at entrance to each penstock

3. INFORMATION TO BE PROVIDED BY THE BUYER: The Buyer agrees to provide the Company with complete information concerning the project and to provide access for the Company to enter the premises as required to perform the work. The Buyer shall designate one individual to act as the Buyer's representative with respect to the work to be performed by the Company under this Agreement. The person designated as the Buyer's representative shall have complete authority to transmit instructions, receive information, interpret and define the Buyer's policy and decisions and approve payments under the "Construction Contract and Payment Schedule" with respect to work covered by this Agreement.

INSURANCE AND INDEMNIFICATION: The Company shall secure and maintain such insurance as will protect the Company from claims under Workmen's Compensation acts and from all other claims for bodily injury, death or property damage which may arise out of the performance of or failure to perform services by the Company under this Agreement and the Company does hereby indemnify and hold harmless the Buyer from any and all such liability, claims or obligations. The Company will provide a one-year warranty from the date of completion for all equipment, and a performance and payment bond for the project.

5. CHANGES AND MODIFICATIONS: This Agreement shall be modified only by a written agreement setting forth the terms and



conditions of such changes and modifications and the same being executed by each of the parties hereto.

6. COMPLETION: All work shall be completed on or before September 30, 1983 as shown on the attached "Construction Control and Payment Schedule", identified as Exhibit "A".

7. ADDITIONAL TERMS: The terms and provisions of "Conditions of Sale", attached hereto as Exhibit "B", are hereby agreed to and incorporated herein.

IN WITNESS WHEREOF, the parties hereto have set their hands the day and year first set forth above.

BUYER

COMPANY

BY: *Lee Nelson*

BY: *Asst. Driglan*

TITLE: *President*

TITLE: *Chairman of Board*

WITNESS: *Matthew*

WITNESS: *Matthew*

**EXHIBIT B**

**1. WARRANTIES:** Company warrants to Buyer that products and any services furnished hereunder will be free from defects in material, workmanship and title and will be of the kind and quality specified in Company's quotation. The foregoing shall apply only to failures to meet said warranties (excluding any defects in title) which appear within one year from the date of shipment hereunder; provided, however, that if Buyer, in the course of its regular and usual business, transfers title to or leases such products (including equipment incorporating such products) to a third party, such period shall run until one year from such transfer or lease or, eighteen months from shipment by Company, whichever occurs first.

The conditions of any tests shall be mutually agreed upon and Company shall be notified of, and may be represented at, all tests that may be made. The warranties and remedies set forth herein are conditioned upon (a) proper storage, installation, use and maintenance, and conformance with any applicable recommendations of Company and (b) Buyer promptly notifying Company of any defects and, if required, promptly making the product available for correction.

If any product or service fails to meet the foregoing warranties (except title), Company shall thereupon correct any such failure either, at its option (i) by repairing any defective or damaged part or parts of the products, or (ii) by making available, F.O.B. Company's plant or other point of shipment, any necessary repaired or replacement parts. Where a failure cannot be corrected by Company's reasonable efforts, the parties will negotiate an equitable adjustment in price.

The preceding paragraph sets forth the exclusive remedies for claims (except as to title) based on defect in or failure of products or services, whether claim is in contract or tort (including negligence) and however instituted. Upon the expiration of the warranty period, all such liability shall terminate. Except as set forth in Article 2, "Patents", the foregoing warranties are exclusive and in lieu of all other warranties, whether written, oral, implied or statutory. NO IMPLIED STATUTORY WARRANTY OF MERCHANTABILITY OR FITNESS FOR PARTICULAR PURPOSE SHALL APPLY. Company does not warrant any products or services of others which Buyer has designated.

**2. PATENTS:** (a) Company warrants that products furnished hereunder, and any part thereof, shall be delivered free of any rightful claim of any third party for infringement of any United States patent. If notified promptly in writing and given authority, information and assistance, Company shall defend, or may settle, at its expense, any suit or proceeding against Buyer so far as based on a claimed infringement which would result in a breach of this warranty and Company shall pay all damages and costs awarded therein against Buyer due to such breach. In case any product or part thereof is in such suit held to constitute such an infringement and the use for the purpose intended of said product or part is enjoined, Company shall, at its expense and option, either procure for Buyer the right to continue using said product or part, or replace same with a non-infringing product or part, or modify same so it becomes non-infringing, or remove the product and refund the purchase price (less reasonable depreciation for any period of use) and any transportation costs separately paid by Buyer. The foregoing states the entire liability of Company for patent infringement by said products or any part thereof.

(b) The preceding paragraph shall not apply to any product or part specified by Buyer or manufactured to Buyer's design, or to the use of any product furnished hereunder in conjunction with any other product in a combination not furnished by Company as a part of this transaction. As to any such product, part, or use in such combination, Company assumes no liability whatsoever for patent infringement and Buyer will hold Company harmless against any infringement claims arising therefrom.

**3. DELIVERY, TITLE AND RISK OF LOSS:** Delivery dates are approximate and are based upon prompt receipt of all necessary information from Buyer. Unless otherwise specified by Company, delivery will be made and title will pass F.O.B. point of shipment to Buyer. Risks of loss or damage pass to Buyer on delivery.

**4. EXCUSABLE DELAYS:** Company shall not be liable for delays in delivery or performance, or for failure to manufacture, deliver or perform, due to (i) a cause beyond its reasonable control, or (ii) an act of God, act of Buyer, act of civil or military authority, Governmental priority, strike or other labor disturbance, flood, epidemic, war, riot, delay in transportation or car shortage, or (iii) inability on account of a cause beyond the reasonable control of Company to obtain necessary materials, components, services or facilities. Company will notify Buyer promptly of any material delay excused by this article and will specify the revised delivery date as soon as practicable. In the event of any such delay, there will be no termination and the date of delivery or of performance shall be extended for a period equal to the time lost by reason of the delay.

**5. PAYMENTS AND FINANCIAL CONDITION:** Except to the extent otherwise specified by Company in its quotation, pro rata payments shall become due without setoff as shipments are made. If Company consents to delay shipments after completion of any product, payment shall become due on the date when Company is prepared to make shipment. In the event of any such delay, title shall pass and products shall be held at Buyer's risk and expense.

Any order for products by Buyer shall constitute a representation that Buyer is solvent. In addition, upon Company's request, Buyer will furnish a written representation concerning its solvency at any time prior to shipment.

If Buyer's financial condition at any time does not justify continuance of the work to be performed by Company hereunder on the agreed terms of payment, Company may require full or partial payment in advance. In the event of Buyer's bankruptcy or insolvency or in the event any proceeding is brought against Buyer, voluntarily or involuntarily, under the bankruptcy or any insolvency laws, Company shall be entitled to cancel any order then outstanding at any time during the period allowed for filing claims against the estate and shall receive reimbursement for its proper cancellation charges. Company's rights under this article are in addition to all rights available to it at law or in equity.

**6. DISCLOSURE OF INFORMATION:** Any information, suggestions or ideas transmitted by Buyer to Company in connection with performance hereunder are not to be regarded as secret or submitted in confidence except as may be otherwise provided in a writing signed by a duly authorized representative of Company.

**7. TAXES:** In addition to any price specified herein, Buyer shall pay the gross amount of any present or future sales, use, excise, value-added, or other similar tax applicable to the price, sale or delivery of any products or services furnished hereunder or to their use by Company or Buyer, or Buyer shall furnish Company with evidence of exemption acceptable to the taxing authorities.

**8. LIMITATIONS OF LIABILITY AND INDEMNITIES:** (a) Unless otherwise agreed in writing by a duly authorized representative of Company, products sold hereunder are not intended for use in connection with any nuclear facility or activity. If so used, Company disclaims all liability for any nuclear damage, injury or contamination, and Buyer shall indemnify Company against any such liability, whether as a result of breach of contract, warranty, tort (including negligence) or otherwise.

(b) In no event, whether as a result of breach of contract, warranty, tort (including negligence) or otherwise, shall Company or its suppliers be liable for any special, consequential, incidental or penal damages including, but not limited to, loss of profit or revenues, loss of use of the products or any associated equipment, damage to associated equipment, cost of capital, cost of substitute products, facilities, services or replacement power, down time costs, or claims of Buyer's customers for such damages. If Buyer transfers title to or leases the products sold hereunder to any third party, Buyer shall obtain from such third party a provision affording Company and its suppliers the protection of the preceding sentence.

(c) Except as provided in Article 2, "Patents", in no event, whether as a result of breach of contract, warranty, tort (including negligence) or otherwise, shall Company's liability to Buyer for any loss or damage arising out of, or resulting from this agreement, or from its performance or breach, or from the products or services furnished hereunder, exceed the price of the specific product or service which gives rise to the claim. Except as to title, any such liability shall terminate upon the expiration of the warranty period specified in Article 1, "Warranties".

(d) If Company furnishes Buyer with advice or other assistance which concerns any product supplied hereunder or any system or equipment in which any such product may be installed and which is not required pursuant to this agreement, the furnishing of such advice or assistance will not subject Company to any liability, whether in contract, warranty, tort (including negligence) or otherwise.

(e) The invalidity, in whole or part, of any of the foregoing paragraphs will not affect the remainder of such paragraph or any other paragraph in this article.

**9. GENERAL:** Any products delivered by Company hereunder will be produced in compliance with the Fair Labor Standards Act of 1938, as amended and applicable. Company will comply with applicable Federal, state and local laws and regulation as of the date of any quotation which relate to (i) non-segregated facilities and equal employment opportunity (including the seven paragraphs appearing in §202 of Executive Order 11246, as amended), (ii) workmen's compensation, and (iii) the production in Company's manufacturing facilities of products furnished hereunder. Price and, if necessary, delivery will be equitably adjusted to compensate Company for the cost of compliance with any other laws or regulation.

The delegation or assignment by Buyer of any or all of its duties or rights hereunder without Company's prior written consent shall be void.

Any representation, warranty, course of dealing or trade usage not contained or referenced herein will not be binding on Company. No modification, amendment, rescission, waiver or other change shall be binding on Company unless assented to in writing by Company's authorized representative.

The validity, performance and all matters relating to the interpretation and effect of this agreement and any amendment hereto shall be governed by the law of the State of Utah.

The provisions of this agreement are for the benefit of the parties hereto and not for any other person except as specifically provided herein with respect to Company's suppliers.

Time is of the essence of this Agreement.

In the event of a breach of this Agreement, the prevailing party shall be entitled to recover reasonable Attorney's fees.

**EXHIBIT C**

REED L. MARTINEAU (A2106)  
RYAN E. TIBBITTS (A4423)  
SNOW, CHRISTENSEN & MARTINEAU  
Attorneys for Defendant  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145  
Telephone: (801) 521-9000

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IN THE FOURTH JUDICIAL DISTRICT COURT  
COUNTY OF UTAH, STATE OF UTAH

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WATER POWER COMPANY, a Utah  
corporation,

Plaintiff,

vs.

STRAWBERRY WATER USERS  
ASSOCIATION, a Utah corporation,

Defendant.

ORDER ON SUMMARY JUDGMENT

Case No. 900400932CV  
Judge Lynn Davis

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This matter having come before the Court on Defendant's Motion for Summary Judgment, both parties having submitted memoranda in support of their respective positions, and the matter having now been submitted for decision, the Court, after carefully considering the memoranda submitted by counsel, hereby ORDERS, ADJUDGES AND DECREES:

1. The facts as set forth in Defendant's initial memoranda were not disputed by Plaintiff and, therefore, the Court adopts those facts and accepts them as true;

2. Based upon the unique facts and circumstances surrounding this matter, the Court is not inclined to award Plaintiff attorney's fees;

3. Defendant's Motion for Summary Judgment is hereby granted and judgment is awarded in favor of Defendant, no cause of action, on all claims asserted by Plaintiff. Each party to bear their own costs and fees.

DATED \_\_\_\_\_.

B Y T H E C O U R T :

By \_\_\_\_\_  
LYNN DAVIS  
District Court Judge

AFFIDAVIT OF SERVICE

STATE OF UTAH                     )  
  : ss.  
COUNTY OF SALT LAKE         )

Cynthia Northstrom, being duly sworn, says that she is employed by the law offices of Snow, Christensen & Martineau, attorneys for Defendant herein; that she served the attached **Order on Summary Judgment** (Case Number 900400932CV, Fourth Judicial District Court, Utah County, State of Utah) upon the parties listed below by placing a true and correct copy thereof in an envelope addressed to:

Charles C. Brown, Esq.  
Budge W. Call, Esq.  
Brown & Brown  
505 East 200 South, #400  
Salt Lake City, Utah 84111

and causing the same to be mailed first class, postage prepaid, on the 21st day of December, 1994.

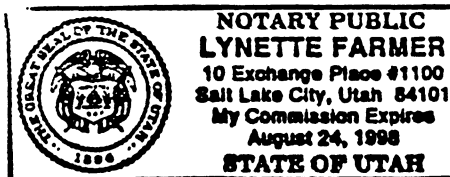
  
Cynthia Northstrom

SUBSCRIBED AND SWORN to before me this 21st day of December, 1994.

  
NOTARY PUBLIC  
Residing in the State of Utah

My Commission Expires:

8-24-98



**CERTIFICATE OF SERVICE**

I hereby certify that on the \_\_\_\_\_ day of July, 1995, I caused to be mailed, first class postage prepaid, four true and correct copies of the foregoing to:

Reed L. Martineau, Esq.  
Ryan E. Tibbitts, Esq.  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145

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