

At the August 19, 1992 hearing on the Order to Show Cause, the Plaintiffs/Petitioners were represented by A.W. Lauritzen; Defendant Robert L. Morgan, Utah State Engineer, was represented by Michael M. Quealy and John H. Mabey, Jr., Assistant Attorneys General; and the Utah Division of Wildlife Resources--not having been formally served--entered a special appearance through David S. Tibbs, Assistant Attorney General.

Prior to the hearing, Plaintiffs/Petitioners and the Utah State Engineer submitted legal memoranda along with documentary evidence (primarily in the form of water rights documents and a Contract between Porcupine Reservoir Company and the Utah Division of Wildlife Resources).

The Court having reviewed the pleadings and legal memoranda, having studied the relevant underlying documents, and having heard the arguments of counsel, hereby makes the following findings relative to these proceedings:

1. The Court finds that Plaintiffs/Petitioners presently hold no legal title to any water rights in Porcupine Reservoir, but do have a contractual right to operate the Reservoir and to use a portion of the water stored therein. The real controversy in this matter involves the interpretation of a Contract between Porcupine Reservoir Company and the Utah Division of Wildlife Resources, relative to the operation of Porcupine Reservoir.

2. Since this matter is one of contractual interpretation and not the actual adjudication of water rights, the Court finds that the "Petition" filed in the context of the general adjudication of water rights action on the Bear River and its tributaries (Civil No. 550008220) under §73-4-24, Utah Code Ann., is improper and should be dismissed. The Court further finds that the Plaintiffs/Petitioners have failed to follow the general and specific notification requirements set forth in §73-4-24, Utah Code Ann.

3. Based on the pleadings, memoranda, exhibits and oral arguments, the Court is of the opinion that the contractual dispute between the relative parties can and should be decided without delay--as those owning contractual rights to the use of water from Porcupine Reservoir, and the operation thereof, stand to suffer serious damage if the issue is not resolved on the merits immediately. Therefore, rather than dismissing the Petition for the reasons stated above, the Court hereby ORDERS that the Petition filed in the context of the general adjudication of water rights action (Civil No. 550008220) be converted to a separate declaratory judgment action with a new and separate Civil No. to be assigned by the Court Clerk.

4. At the conclusion of the hearing, the Court gave all parties the opportunity to supplement the record or to file

additional legal memoranda, and the Court advised counsel that it was fully advised in the premises having read the relevant contracts, water rights, and other documents, memoranda and pleadings previously submitted. The State Engineer supplemented the record with two documents and none of the parties objected to the Court's proceeding to rule on the merits.

5. The Court, being fully advised in the premises, is of the opinion that as a declaratory judgment action it can rule on the merits of the contractual dispute between the parties as a matter of summary judgment, based on the record now before the Court and in the absence of objection by any of the parties to this proceeding as stated in open Court.

Based on the foregoing, it is hereby ORDERED, ADJUDGED AND DECREED as follows:

1. The Petition for an Adjudication of Rights of Less Than All Parties within the general adjudication of water rights action on the Bear River and its tributaries (Civil No. 550008220) should be and is hereby dismissed; provided, however, that such action is ordered converted to a separate civil declaratory judgment action with a new Civil No. to be assigned by the Court Clerk.

2. In the newly-created action, the "Petition" shall be deemed to be the Complaint, and the response of the State Engineer shall be deemed to be his Answer. The Utah Division of Wildlife

Resources, being a necessary party and having consented to be joined, shall have twenty (20) days in which to file its Answer, nunc pro tunc.

3. As a matter of law, the Contract between Plaintiff Porcupine Reservoir Company and the Utah Division of Wildlife Resources entitles said Division to store and utilize 1,000 acre-feet of dead storage and 500 acre-feet of the active storage capacity in Porcupine Reservoir.

4. As a matter of law, under the aforementioned Contract the Utah Division of Wildlife Resources may use its 1,500 acre-feet in Porcupine Reservoir at its discretion. Specifically with regard to the 500 acre-feet of active storage, the Division may carry such stored water over from year to year for fish culture use in the Reservoir itself (subject to its share of evaporation losses) or may release such water to augment flows below the Reservoir for fish culture. Any water so released will be junior to the Porcupine Reservoir Company in the refilling of the Reservoir the following year.

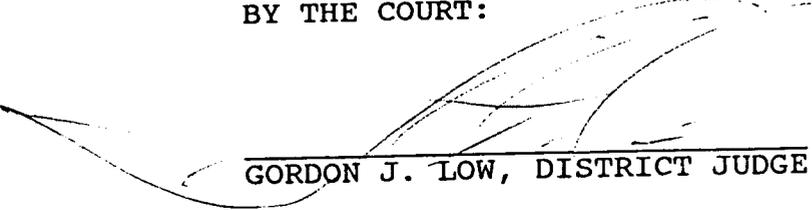
5. The Porcupine Reservoir Company has no right to use the said 1,500 acre-feet of water except with the consent of the Utah Division of Wildlife Resources.

6. Plaintiffs' Complaint (Petition) is therefore dismissed with prejudice, and Plaintiffs' request for injunctive relief as against the Defendant Utah State Engineer is denied.

7. Each of the parties hereto shall bear their own costs.

DATED this 10 day of September, 1992.

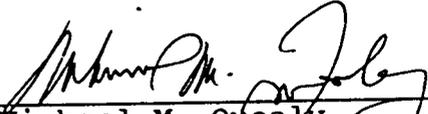
BY THE COURT:



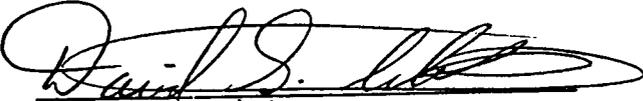
GORDON J. LOW, DISTRICT JUDGE

Approved as to form:

A.W. Lauritzen
Attorney for Plaintiffs



Michael M. Quealy
John H. Mabey, Jr.
Assistant Attorneys General
Attorneys for Defendant Utah State Engineer

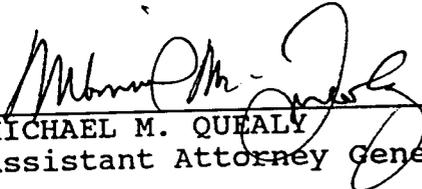


David S. Tibbs
Assistant Attorney General
Attorney for Utah Division of Water Resources

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing proposed ORDER AND JUDGMENT, prior to signature and entry, was served by mailing the same, first class postage prepaid, this 27th day of August, 1992, to:

A.W. Lauritzen
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Attorney for Petitioners
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MICHAEL M. QUEALY
Assistant Attorney General