

users on the San Pitch River and its tributaries, including; Six-Mile Creek, and Twelve-Mile Creek. In addition, these protestants are owners of certain direct flow rights. Said rights to use said waters were confirmed by the terms and conditions of the decree entered in 1936, entitled Richlands Irrigation Company, a corporation, Plaintiff, -vs- West View Irrigation Company, et al, Defendant In the Fifth Judicial District Court of the State of Utah in and for the County of Millard, "commonly known as the Cox Decree or the Sevier River Decree".

3. All waters of the San Pitch River are now fully appropriated for specific lands and this fact has been judicially determined by the Supreme Court of the State of Utah.

4. That the above-numbered Change Application attempts to divert water from the San Pitch River, Gunnison Reservoir, Nine-Mile Reservoir, Twelve-Mile Creek and Six-Mile Creek into the Highland Canal Company to irrigate lands in which Gunnison Irrigation's priority rights have not been decreed for such use. That said Change Application will impair the existing rights by diminishing the quantity and degrading the quality of water accruing to these Protestants. Applicants, Gunnison Irrigation Company's, Change Application, is for the sole purpose of giving away to Highland Canal users or otherwise disposing of surplus water to the injury of the Protestants herein. Gunnison Irrigation's application is attempting to increase their demand subsequent to Protestants intervening right, which was granted

before Gunnison Irrigation's original demand increased. See Jensen vs. Birch Creek 289 P 1097, Gunnison Irrigation vs. Gunnison Highland Canal Company 174 P 852, Manning vs. Fife 54 P 111.

5. Protestants herein have a priority date of 1882 and used said priority rights for approximately six (6) years before the dam, storage, or Gunnison Reservoir were constructed. The footnotes of section 73-3-3 Utah Code Annotated (1953) state as follows:

" When a reservoir is constructed, the amount of water that lower users are entitled to is what they had a right to under the old system, and an application by the reservoir operators for a change in the diversion and use of water should be granted when it does not affect the vested rights of other users."

See Eastbench Irrigation vs. Deseret Irrigation 271 P.2d 449.

6. Protestant, Gunnison-Fayette Canal Company, has a right to the waters of Six Mile Creek for irrigation beginning March 1st. This priority is prior to Manti Irrigation (1899) or Highland Canal Company (1896). Applicant, Gunnison Irrigation's, claimed storage priority of 1860 is in error because Gunnison Reservoir was not built until 1888 and they had no place to store water prior thereto. Protestant, Gunnison-Fayette Canal Company, is the only company or appropriator that has the right to use irrigation during the month of March each year, which includes the San Pitch River, Twelve-Mile Creek and Six-Mile Creek.

7. The above-numbered application attempts to increase its irrigated acreage from 8347.5 acres to 13,849.30 acres together with increasing the irrigating season from April 1 through

October 1 to April through November 1. Protestant's irrigating season is from March 1 to October 1. That said Change Application to increase the acreage and irrigating season is for the sole purpose of disposing of Applicant's excessive and surplus water to the Highland Canal users, which demanded increase has come as a result of the mergers of Gunnison Irrigation and Highland Canal Company which increased use is subsequent to Protestants herein intervening rights and priorities. The existing and decreed rights of Protestant will be diminished, impaired, adversely affected and Protestants will suffer irreparable damage.

8. Applicant, Gunnison Irrigation does not have an unlimited right to the use of water. Applicant is subject to a reasonable limitation of its right for the benefit of junior appropriators. Applicant has increased its demand and use of water by acquiring and merging the Highland Canal Company, a junior appropriator to the Protestants herein, for the sole purpose of giving away or otherwise disposing of its surplus water and Applicants increase in demand is subsequent to Protestants intervening rights herein.

9. Protestant herein objects and protests to Applicant's claim to stock watering from April 1 to October 31 for 7500 head of livestock on the grounds Applicants do not have livestock in such numbers and Protestants specifically object to Applicant using any domestic and stock watering rights for irrigating purposes.

10. Protestants herein are entitled to have the stream conditions maintained substantially as they existed at the time rights were appropriated to the Protestant herein in 1882. Protestants herein specifically object to applicants storage methods and measurement of waters and specifically request the State Engineer impose the following conditions, restraints, and enforcements upon Applicant, Gunnison Irrigation company, as follows:

- a. That the lower San Pitch water commissioner measure the water, keep records, and deliver the water pursuant to the vested rights, priorities and conditions imposed by the State Water Engineer. Applicants be restricted from assuming the duties of the water commissioner.
- b. All waters from all tributaries stored in Gunnison Reservoir be measured prior to entering Gunnison Reservoir.
- c. Gunnison Reservoir be drained each year as provided under the Cox Decree and not be allowed to store water year to year.
- d. Applicant, Gunnison Irrigation, be restrained from storing water during the irrigation period.
- e. Applicant, Gunnison Irrigation, be restrained from diverting water by underground pipeline or other means to the Nine-Mile Reservoir, either from Gunnison Reservoir or Six-Mile Canyon. Applicant has no storage rights in Nine-Mile Reservoir.

- f. Six-Mile Creek stream be measured prior to entering any storage facility after March 1, then refilling the reservoir in violation of Protestant, Gunnison-Fayette's, appropriated rights.
- g. Protestant, Gunnison-Fayette Canal Company has a vested right to the waters of Six-Mile Creek with priorities prior to Manti Irrigation Company or Highland Canal Company. Protestant, Gunnison-Fayette Canal Company's, irrigation season starts March 1st of each and every year and Manti Irrigation should not be allowed to refill their reservoir after March 1st.
- h. Applicant, Gunnison Irrigation Company, be restrained from diverting water from Twelve-Mile Creek to fill its numerous irrigation storage ponds before April 1.
- i. Applicant, Gunnison Irrigation Company, be restrained from using domestic and stock watering rights for irrigation purposes.
- j. Applicant, Gunnison Irrigation Company, be restrained from use of the New Field Canal or any other canal without obtaining a change application.
- k. The State Water Engineer pursue Applicants' previous and current violations of section 73-3-3 Utah Code Annotated (1953) (9) in which it states:

"Any person who changes or who attempts to change a point of diversion, place, or purpose of use, either permanently or temporarily, without first applying to the state engineer in the manner provided in this

section:

- (a) obtains no right: and
- (b) is guilty of a misdemeanor, each day of the unlawful change constituting a separate offense, separately punishable."

11. In 1968 Applicant, Gunnison Irrigation Company, and Protestant, Gunnison-Fayette Canal Company, received judgment from the District Court of Sanpete County, which was affirmed by the Utah Supreme Court and is attached hereto and by this reference incorporated herein, in which the court specifically ordered that:

"(1) The Plaintiff (Protestant) is entitled to divert and use 25 c.f.s. of the aforesaid 40 c.f.s. of water from the San Pitch River prior to delivery to Defendant (Applicant) of any of the waters of the San Pitch River and its tributaries, Six-Mile Creek and Twelve-Mile Creek, awarded to Highland Canal Company, Inc. (now merged into the Defendant (Applicant) corporation), in paragraphs (a) through (d) at pages 166-167 of the printed edition of the Cox Decree.

(2) That after those rights awarded to the Defendant (Applicant) and its predecessors by the Cox Decree are filled, the Plaintiff (Protestant) shall be entitled to divert the remaining 15 c.f.s. of its decreed 40 c.f.s. before the Defendant (Applicant) (and its constituent corporations) are to divert any additional waters."

12. The Applicant, Gunnison Irrigation Company, by its application herein is attempting to circumvent the decrees of the District and Supreme Court to supply water to the merged Highland Canal Company users. Said application of Gunnison Irrigation Company impairs Protestant's intervening-decreed rights which are prior to the merged Highland Canal Company rights and prior to Applicant, Gunnison Irrigation Company's, demand for increased use. See Jensen vs. Birch Creek 289 P 1087 (1930).

13. In Manning vs. Fife 238 P 111 (1898) the Utah Supreme

Court held,

"for he cannot waste, give away, or otherwise dispose of surplus water to the injury of the latter"

14. In Jensen vs. Birch Creek Ranch 289 P 1097 the Utah Supreme Court held,

"prior appropriator of water...may not so increase use of water as to deprive subsequent appropriators rights acquired before such increased use."

15. In Gunnison Irrigation Company vs. Gunnison Highland Canal Company 174 P 852 (1918) the Supreme Court ruled,

"The rights of a prior appropriator are measured and limited by the extent of his appropriation to beneficial use, and if he diverts more water than he is entitled to for seasonal use he must return such surplus to the stream for the use of subsequent appropriators."

16. If change application is granted, the existing and decreed rights of protestants will be diminished, impaired and adversely affected and the protestants will suffer irreparable damage.

WHEREFORE, Protestant, Gunnison-Fayette Canal Company, and its shareholders respectfully request the above-numbered Change Application be denied and rejected. Protestant hereby requests hearing on the above-numbered Change Application at which Applicant, Gunnison Irrigation Company, and Protestant, Gunnison-Fayette Canal Company, present evidence in support of their respective positions, and that following said hearing, said Change Application be denied.

The officers who sign this Affidavit hereby certify that this affidavit was duly authorized under a resolution duly adopted by the board of directors of Gunnison-Fayette Canal Company at a lawful meeting duly held and attended by a quorum.

In witness whereof, Gunnison-Fayette Canal Company, has caused its corporate name and seal to be hereunto affixed by its duly authorized officers this 18th day of January, A.D. 1992.

BOARD OF DIRECTORS, GUNNISON-FAYETTE CANAL COMPANY

Cecil Bown
CECIL BOWN

Dwight Malmgren
DWIGHT MALMGREN

Clyde L. Dorius
CLYDE L. DORIUS

(Corporate Seal)

On the 18th day of January, A.D. 1992, personally appeared before me CECIL BOWN, DWIGHT MALMGREN, and CLYDE L. DORIUS, who being by me duly sworn did say, each for himself, that he, the said, CECIL BOWN, DWIGHT MALMGREN, AND CLYDE L. DORIUS are the Board of Directors of GUNNISON-FAYETTE CANAL COMPANY, and that the within and foregoing instrument was signed in behalf of said company by authority of a resolution of its board of directors and said CECIL BOWN, DWIGHT MALMGREN and CLYDE L. DORIUS each duly acknowledged to me that said company executed the same and that the seal affixed is the seal of said corporation.

My Commission Expires

2/5/96

Dale M Dorius
NOTARY PUBLIC

Residing at: Box Elder

