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February 10, 2004

**BY HAND DELIVERY**

Jerry D. Olds  
Utah State Engineer  
Division of Water Rights  
5094 West North Temple, Suite 220  
Salt Lake City, UT 84114

**Re: Distribution Matters - Storage Rights on Beaver River**

Dear Mr. Olds:

I represent the Rocky Ford Irrigation and Minersville Reservoir and Irrigation Companies. These Companies have, up until recently, been represented by Mr. Steve Clyde, but due to time constraints on Mr. Clyde, the Companies have now retained me to represent them in this matter.

Over at least the past year, Mr. Clyde and the Companies have brought several concerns to the attention of your office regarding the problems with the measurement, allocation and distribution of storage in the upper portion of the Beaver River, specifically storage by the Kents Lake Reservoir Company. While exacerbated by the current drought conditions, Rocky Ford and Minersville have been getting very little, if any, water at their respective points of diversion. The Companies believe this is occurring, in great part, due to a lack of adequate measurement, control and accounting of water by the users on the upper portion of the Beaver River, again, specifically regarding the storage rights of Kents Lake Reservoir and Beaver City.

Your office has been helpful in responding to correspondence from Mr. Clyde and the Companies, but their concerns and issues still remain. If water available for storage in the lower portion of the Beaver River is to be seriously curtailed this year, my clients want to make sure that all water stored and used in the upper portion of the river is adequately measured and accounted for.

It is my understanding that the annual Beaver River distribution meeting will be held on February 17<sup>th</sup>. The purpose of this letter is to outline, in some detail, the concerns of Rocky Ford and Minersville so that progress might be made in solving or addressing the

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current distribution problems on the Beaver River. I suggest the February 17<sup>th</sup> distribution meeting is a good place to start.

I have not had an opportunity to conduct a full investigation of all the water rights and issues in the short time I have been involved. Nevertheless, I believe the following discussion may be helpful in identifying those areas of concern to my clients.

I. PRIORITY OF STORAGE RIGHTS

In attempting to clarify the storage rights between the upper and lower portions of the Beaver River, I have examined the original and amended decrees, the various applications to appropriate and change applications of Kents Lake Reservoir Company and its stock holders, the opinion of the Utah Supreme Court in the Rocky Ford case and the 1954 Agreement. I have not had the time to review the current proposed termination for the area and I may have missed some of the relevant water rights. Nevertheless, the discussion below will at least appraise you of the concerns in this area.

A. The 1931 Beaver River Decree:

Award No. 2 is to Kents Lake Reservoir Company for 1660 acre feet of annual storage in the original four Kents Lake Reservoirs on the South Fork of the Beaver River from April 1 to June 30. The right carries a 1890 priority and is used for the supplemental irrigation of 1,920 acres. The decree limits the storage right to times when the total amount of water measured at the mouth of Beaver Canyon exceeds 161.31 c.f.s.

B. Change Application a1413(77-177):

This application was filed in 1938 by Kents Lake to move 830 acre feet of storage from the reservoir complex on the South Fork to the then proposed Three Creeks Reservoir on the mainstem of the Beaver River. This right was protested by Rocky Ford. The State Engineer approved the change and an appeal was filed, with the case eventually being reviewed by the Utah Supreme Court. In Rocky Ford Irrigation Company v. Kents Lake Reservoir Company, 135 P.2d 108 (Utah 1943), the Supreme Court approved the change, but with clear limitations. The Court held that the change from the South Fork to the Three Creeks site could not enlarge the supply to Kents Lake at the new site and storage in the Three Creeks Reservoir could only be made under this application if an equivalent amount of flow was available at the Kents Lake site on the South Fork. The Court stated:

[Kents Lake] admits, as well it must, that storage rights under the transferred rights must be limited to the amount that

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would have been available to Kents Lake for storage at the present South Fork location during the same period. The combined storage at South Fork and at Three Creeks could not exceed the total amount available for storage at that time in the South Fork.

135 P.2d at 111. A copy of the Supreme Court decision is attached for your reference.

The Supreme Court remanded the case back to the trial court with instructions to amend the trial court decree to so limit the storage under this right. The amended decree specifying this limitation was issued by Judge Hoyt on November 8, 1943.

Thus, the Kents Lake Company currently has a right to store 830 acre feet at the South Fork under its original decreed right and an additional 830 acre feet for storage at Three Creeks Reservoir. Both of these storage rights are limited to the period between April 1 and June 30 and storage can occur only when the water measured at the mouth of the canyon exceeds 161.31 c.f.s. Additionally, the amount of water available for storage at the Three Creeks site is specifically limited to the flows available for storage at the South Fork site so as not to enlarge the original right.

Finally, paragraph 4 of the 1943 amended decree provides that while this right generally retains its 1890 priority date, the change of the 830 acre feet to the Three Creeks site "shall be inferior and subject to all water rights existing in and to the waters of the Beaver River as of the time Application No. a1413 was filed in the Office of the State Engineer . . ." Thus, I would argue that the right to store the 830 acre feet at Three Creeks (with a 1938 priority) is subject to the prior rights of Rocky Ford and Minersville which carry at least a 1907 priority date.<sup>1</sup>

C. Application to Appropriate No. A13420(77-37):

This application was filed March 8, 1940 to appropriate an additional 1,193 acre feet in the Three Creeks Reservoir. This application was also the subject of the same lawsuit as Change Application a1413. In addressing the new appropriation, the Utah Supreme Court held that this right was subject to all prior rights on the Beaver River:

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<sup>1</sup> I would also call to your attention the approval letter of this Change Application in File 77-177 dated January 14, 1941 from the State Engineer to Rocky Ford and Kents Lake. On page 3 of that approval letter, State Engineer Humphries states that whatever storage is attributable to Beaver City is deemed to be placed in the South Fork Reservoir and not in Three Creeks.

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This appropriation, if approved, would be junior to all existing rights or prior appropriators . . . as far as Rocky Ford is concerned, the approval of the application could not deprive it of any rights.

135 P.2d at 113. Paragraph 5 of Judge Hoyt's 1943 Amended Decree also makes it clear that the new appropriation under Application A13420 is subject to all prior rights in the Beaver River.

Thus, storage under this right cannot occur unless all prior rights on the river, including those of my clients, are filled. It is my opinion that the Supreme Court's decision in this regard is not subject to the restriction in the 1931 decree regarding the cut-off at the Patterson Dam, because this right was filed after that decree was issued.

D. Storage Changes Filed by Stockholders of Kents Lake Reservoir Company:

As you are aware, several other irrigation companies in the Beaver area own stock in Kents Lake. Several of those companies, as Kents Lake stockholders, filed change applications to move portions of their decreed direct flow rights to the Three Creeks Reservoir. See e.g. 77-81 through 77-184. While these changes were filed in 1953, some of the priorities were reduced to 1956 for failure to submit proof when due. All of these changes were approved by the State Engineer subject to prior rights, "including rights junior to the original application or rights which might be impaired by the change". See e.g. State Engineer Endorsement page for Change Application a4038 (77-183). Thus, we believe the storage under these various changes (as opposed to direct flow diversions) is junior to the rights of Rocky Ford and Minersville, except as may be provided for in the 1953 Agreement discussed below.

The question of the storage priority of these direct flow rights is further highlighted by a letter in File No. 77-183 involving Change Application a2754. The letter is dated November 5, 1957 from J. M. Gardner, Senior Application Engineer to the Second Northeast Irrigation Company, regarding the amendment of their change application due to errors of the point(s) of diversion. On page 2 of the letter Mr. Gardner seems to take the position that the various change applications of the Kents Lake shareholders are junior to other rights on the river. He states:

[The] capacity of 2029 acre feet [the total storage under Kents Lake Irrigation Company's change and the new appropriation; 77-177 and 77-37] must first be satisfied under

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Application No. A13420 [77-37] and Change Application a1413 [77-177] before storage could be instigated under your Application No. a2754 [77-183] and the change applications of the other irrigation companies filed simultaneously therewith[.] Since [sic] storage under these rights has first priority, they would necessarily have to be first satisfied and it is doubtful if there would be a time that you could so store under the change.

A copy of that letter is attached for your reference.

Similarly, if these changes on direct flow are junior to the prior storage rights of Kents Lake Irrigation Company, as stated in Mr. Gardner's letter, I would suggest that at least as to the Three Creeks storage, such rights should also be junior and subject to the prior rights of Rocky Ford and Minersville. The purpose of these changes was to store direct flow rights when they are not needed to irrigate the lands of the various stockholders. If a senior user does not have a use for water at a particular time, I would argue that it must first be passed downstream to meet prior rights before it is stored.

If Mr. Gardner's position is correct, I also wonder about how the 161.34 c.f.s. limitation on 77-37 and 77-177 fits in to the storage priority regime.

I realize that the discussion of the rights of Kents Lake above may have been arguably amended by the 1953 Agreement, and I will address that agreement below. However, based purely on the water rights or record, it would appear that the following priorities should prevail as between the parties in the order set forth as follows:

1. Decreed Kents Lake Storage at the South Fork Reservoirs; priority 1890; 830 acre feet, when Beaver River flow exceeds 161.31 c.f.s.; period of storage April 1 to June 30.
2. Minersville and Rocky Ford Rights: Award No. 96 Beaver River Decree and Right 77-1948, with priorities ranging from 1870 to 1907 and any other rights of those companies with priorities senior to Kents Lake Rights Nos. 77-37 and 77-137.
3. Kents Lake Storage in Three Creeks under Change Application a1413 (77-177); priority 1938; 830 acre feet; limited by flows available at South Fork and the 161.31 c.f.s. Beaver River flow; April 1 to June 30.

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4. Kents Lake Storage in Three Creeks under Appropriation A13420 (77-37); priority 1940; 1163.34 acre feet, subject to prior rights.

5. Change applications filed by Kents Lake stockholders to convert direct flow to storage in Three Creeks Reservoir (e.g. 77-181 through 184), priorities ranging from 1956 to 1961.

E. The 1953 Agreement:

In April of 1953, the Rocky Ford and Kents Lake companies entered into a "Memorandum Agreement". You and your staff are undoubtedly familiar with this document. The stated purpose of the agreement was, "to provide for the practical administration of storage under the various water rights [of the parties] and to prevent future controversy concerning the diversion and storage under said water rights". Given my recent involvement, I have not as yet had a chance to fully analyze how this agreement fits in with the various water rights discussed above. However, given the current climate on the Beaver River, it seems that the agreement has not fully served its purpose of settling controversies between storage in the upper and lower portions of the river. Further, it seems to me that some thought/research needs to be done to determine how this agreement fits together with the relevant decrees and State Engineer approvals of storage on the river.

As I read it, the agreement addresses two specific issues:

1. Paragraphs 1-3 address the issue of the then proposed changes of direct flow rights to storage to be filed by various stockholders in the Kents Lake Company, to convert direct flow to storage in Three Creeks Reservoir. At the time the agreement was signed, such change applications had not been filed with the State Engineer.

2. Paragraph 4 addresses the storage under the rights of the respective parties which existed at the time the agreement was executed. As to those rights, the agreement seems to depart from the paper water rights discussed above. However, there is nothing in the Agreement that would supercede or waive any of the requirements or limitations of Judge Hoyt's amended decree.

Further, it should be noted that the agreement only addresses the storage of water in the Kents Lake Three Creeks Reservoir. It does not purport to cover storage by Kents Lake in the reservoir facilities on the South Fork.

Given my brief review of the agreement, and for the purposes of discussion only, I believe some of the following issues should be considered:

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A. Neither Minersville or the Kents Lake stockholders were signatories to the agreement.

B. The agreement does not cover storage by Kents Lake of the 830 acre feet in the South Fork reservoirs. This needs to be factored into any analysis of "who can store what, where and when".

C. I believe your office has taken the position that the 1953 agreement is only between the signatory parties and that the State Engineer is not bound by the agreement. (Please see your letter of July 8, 2003 to Rocky Ford Irrigation Company). While I do not disagree with your position, I'm wondering what your position is regarding the effect (if any) of the agreement vis a vis the original decree, the Supreme Court decision and Amended Decree and the various limitations on the Kents Lake storage right set forth by the courts and decisions of your office. Since the State Engineer administers the Beaver River rights through the River Commissioner, do you take the position that the rights should be administered based on the decree and certificates regardless of the agreement? Or, does the agreement have any applicability as to the allocation and distribution of water among the parties thereto? If so, how is the water to be distributed to other water right holders who are not parties to the agreement? I realize that the existence of the agreement presents some rather complex problems, but I believe it needs to fit into the equation so that the parties and other water users can know the "rules" by which the river is being administered.

Finally, in raising these concerns, I do not want to create the impression that my clients are, at the present time, repudiating or objecting to any provisions of the 1953 agreement. To the contrary, many of the provisions of the agreement may well be to my clients' benefit. However, given the current uncertainties and the fact that certain parts of the agreement may differ from the provisions of many of the water rights, I simply raise these issues for your consideration.

## II. LACK OF ADEQUATE MEASURING DEVICES AND RIVER COMMISSIONER REGULATION

Another concern of my clients is the lack of adequate measuring devices to fairly regulate and account for storage by Kents Lake and its stockholders. Regardless of the relative storage priorities of the parties, my clients believe that the lack of adequate measuring devices on the upper Beaver River reservoirs may be allowing Kents Lake to store water at inappropriate times and in amounts in excess of its rights. Further, my clients believe that (perhaps due to the lack of measuring devices) the Beaver River Commissioner

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is not adequately regulating or accounting for storage water in the upper river and is not reporting what is indeed stored.

A. Lack of Measuring Devices:

We are particularly concerned over the lack of adequate measuring devices at the South Fork Reservoirs and the Three Creeks Reservoir. Section 73-5-4 Utah Code Ann. clearly provides that all water users shall install and maintain adequate devices for the regulation and measurement of any water diverted. The statute further and specifically requires such devices with regard to reservoir storage. Failure to install such devices may result in the State Engineer forbidding the use of water until adequate devices are installed. It appears that the measuring devices (if they exist at all) are inadequate to protect my clients from excess storage by Kents Lake or to produce specific River Commissioner data to ensure that the storage is being fairly and accurately accounted for.

In a conversation with Lee Sim, it was indicated that it would be difficult and expensive to install measuring devices on two of the three creeks feeding the Three Creeks Reservoir. Nevertheless, we believe the burden is on Kents Lake to install and maintain devices necessary to measure and account for its storage, and we request that they be required to do so prior to the start of the upcoming irrigation season. At the very least, in the short term, storage in Three Creeks should be approximated by using an area capacity curve, a staff gauge and the outlet works. According to the proofs filed in Application Nos. 77-181 through 184, a Mr. Theron Ashcroft made a plane table survey and capacity chart for Three Creeks in 1955 showing a reservoir capacity of 2029 acre feet below the spillway. The proof indicates that the capacity chart and elevation contours for the reservoir are on file with your office. Since I could not find them in the water right files, I suspect they may be in the dam safety files and the dam safety staff may have more recent data as well. The Division of Water Resources may also have similar information.

Regarding the South Fork Reservoirs, it is my understanding that the historical storage in the four reservoirs has now been consolidated into two reservoirs, the upper Kents Lake Reservoir and the enlarged middle Kents Lake Reservoir (see 77-407). Given the rather recent consolidation of South Fork storage, I would suspect that area capacity curves exist on those reservoirs as well.

We believe that the installation of adequate measuring devices for the Kents Lake storage may be just as important as the determination of the relative storage priorities, but is simpler to solve. In my mind this is more of a hydrologic and engineering problem than a legal one.

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B. River Commissioner Administration:

We believe the Beaver River Commissioner needs to play a more active role in measuring, distributing and accounting for the water placed in storage and its subsequent release and re-diversion. As acknowledged in Mr. Sim's letter to Mr. Clyde of December 18, 2003, "the Beaver River Commissioner has never kept data of the storage of these reservoirs [Kents Lake and Three Creeks]". Part of this may be due to the lack of measuring devices, but the River Commissioner should start regulating the storage. Otherwise, Kents Lakes takes whatever it sees fit. Please be assured that I am not being critical of the office or the River Commissioner in this regard. We simply believe that from here on, given the current controversy, the River Commissioner needs to regulate the Kents Lake storage and begin keeping adequate records of the same for inclusion in his annual report. If measuring devices are needed to accomplish this, they should be installed by the Kents Lake Company.

Further, we would respectfully request that the outlet works of the South Fork and Three Creeks Reservoirs be placed under the regulatory control of the Commissioner to ensure that the storage and release of water from these reservoirs does not exceed the amounts, times and conditions of the various rights as already occurs on most of the major river systems throughout the state.<sup>2</sup>

III. OVER USE OF WATER

My clients are also concerned that over use of water by irrigators above the Patterson Dam may be contributing to the diminished flows in the lower river. As you are well aware, such problems may arise when traditional flood irrigation is converted to sprinklers. The problem of over use in the Beaver area may be attributable to the expansion of acreage or the simple application of water in excess of the four acre foot duty in this area.

According to Steve Clyde, Dr. David Hansen of the Hansen Allen and Luce engineering firm was retained to conduct a study regarding any expansion of acreage. Due to my recent involvement, I have not, as yet, been able to determine the results of that study.

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<sup>2</sup> I realize that the relatively high elevation of these reservoirs may create early spring access problems due to snow pack and road conditions in some years. Nevertheless, the storage in these reservoirs should be regulated as conditions permit.

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Even if there has not been a significant expansion of acreage in the area, my clients believe that irrigators in the upper river are diverting in excess of the four acre foot duty. For example, the storage rights of Kents Lake under the decree and rights 77-37 and 77-177 are to be used as a supplemental supply for 1,920 acres. Kents Lake therefore has no right to divert stored water for more than those specific 1,920 acres and no right to use storage water on those acres when the direct flow primary rights yield a full acre foot duty.<sup>3</sup> We also question whether Beaver City is exceeding its rights due to municipal growth and the increased demand for water use on city lots that were not in existence 50 years ago. Such over use of water can also adversely effect the recharge into the groundwater basin near Minersville, which is already over appropriated and over pumped. We would suggest that your office take steps to investigate whether excess use of water is indeed occurring in the Beaver area, and have the River Commissioner ensure that no one is exceeding the 4 acre foot duty.

#### IV. CONCLUSION

I apologize for the length of this letter, but my clients asked me to set forth their concerns in as much detail as possible. Further, if I have misstated or over stated any facts or circumstances, it is not intentional. I have tried to set forth the issues as I see them, given that I have had a very short time frame to pull all of this together.

In a nutshell, my clients believe that they are being shorted water and the current drought is not making things any better. Since these issues have been festering for decades, they believe the current situation must be addressed and hopefully settled at the present time. We request whatever help you, your staff and the River Commissioner can provide. We would certainly prefer to work through your office to resolve these issues without resorting to expensive litigation among the respective parties. However, Rocky Ford and Minersville believe that if they are shorted on water the upper users should account for their storage and use to ensure that the upper users are only storing and using water at the time and in the amounts of their rights, and that the respective rights of the parties are being fairly administered and measured.

I realize that these issues will not be resolved at the February 17 distribution meeting, but hopefully some specific plan (even in the short term) can be formulated to resolve these issues and concerns prior to the beginning of the irrigation season. Certainly, the installation of measuring devices and a more concerted regulation of storage by the River Commissioner would be a good place to start.

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<sup>3</sup> The 1931 decree lists a three acre foot duty. I suspect the duty has now been raised to four acre feet.

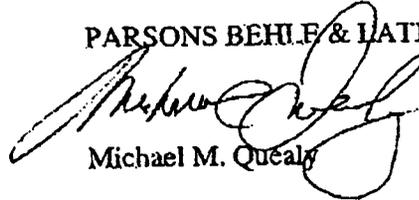
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I look forward to discussing these issues with you at the distribution meeting.

Sincerely,

PARSONS BEHLE & LATIMER



Michael M. Quealy

MMQ/kd  
Enclosures

cc: Lee Sim (via facsimile)  
Kerry Carpenter (via facsimile)  
Mr. Mark Truman (via facsimile and hard copy)

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November 5, 1957

Second North East Bench  
 c/o S. Taylor Farnsworth, Secretary  
 Beaver City, Utah

Gentlemen: RE: UNNUMBERED APPLICATION, APPLICATION NO. 13420,  
 CHANGE APPLICATIONS NOS. a-1413 & a-2754.

In accordance with our verbal agreement pursuant to your recent visit to this office there is enclosed herewith a change application prepared by this office in what would seem to be the best method in changing the point of diversion of your decreed rights designated as 9(a), (b), (c) of the Beaver River Decree to the Mammoth Canal diversion. There is also returned to you herewith your unnumbered change applications, which were filed in this office on September 30, 1957, in triplicate accompanied by the agreement, allowing the use of the Mammoth Canal which was submitted in duplicate, and your check No. 091 in the amount of \$20.00. These are all returned for the reason that the change application did not contain all of the information required by law.

An investigation was made in the matter as to how best to file this change application, and the investigation discloses that you had previously filed in this office Change Application No. a-2754 on January 28, 1953, proposing to change 13 sec.-ft. as evidenced by Right No. 9 (a) of the Beaver River Decree to a storage right of 367.51 ac.-ft. to be stored in Three Creeks Reservoir, or to be diverted directly as heretofore as stated in the decree. This application was approved on November 29, 1954, and carries with it a priority of December 22, 1956, because of a lapsing for failure to submit proof within the time allowed. It is still an application in good standing as it was reinstated. It is also known that proof of appropriation has been submitted through the Kents Lake Irrigation Company through the Utah Water and Power Board, who are the present owners, to cover Application No. 13420 and Change Application No. a-1413 which covers the storage of water in Three Creeks Reservoir. It was found on examination of the proof on these two latter applications that the point of diversion of the Three Creek Reservoir is in error and, therefore, your point of diversion on your Change Application No. a-2754 is in error. Also, as you now propose to change the point of diversion to the Mammoth Canal, the point of rediversion under Change Application No. a-2754 would also be in error. For this reason to proceed to only change the portion of the right (b) and (c) by another change application would call for filing two changes, one to correct a-2754 and one on the (b) and (c) portions of the right and would, therefore, constitute submitting two separate proofs. After due consideration it appeared that possibly the best method to proceed would be to file one change application which would be the one enclosed herewith to correct Right 9 (a) (b) (c) and thereby allowing a-2754 to lapse, or to be withdrawn on approval thereof. In this way only one proof need be submitted.

Also the investigation made indicates that proof of change for the storage water contemplated by a-2754 of this new one may not be possible,

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Second North East Bench  
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particularly as proof has been submitted on a-2754, but the water measurements shown therein do not account for any storage under Application No. a-2754, particularly as the change application was not approved until 1954, and the measurements are relying on measurement records of 1952. Also, the capacity of 2029 ac.-ft. must first be satisfied under Application No. 13420 and Change Application No. a-1413 before storage could be instigated under your Application No. a-2754, and the change applications of the other irrigation companies filed simultaneously there-with since storage under these rights has first priority they would necessarily have to be first satisfied and it is doubtful if there would be a time that you could so store under the change. In any event such storage could only be affected by measurements of the water inflow to Three Creeks, the water outflow below Three Creeks and a measurement taken at the point of diversion or rediversion as the case may be.

For the reasons as stated above it may be that you would wish to strike the element of storage in Three Creeks from the newly prepared change application, as it appears to this office that such a storage is not feasible. In any event this is left to the discretion of your irrigation company.

On resubmitting the change application, it is recommended that the information be given in the blank spaces that are not filled in the application, and return the same properly executed to this office with the \$2.50 filing fee, and it is recommended that it be accompanied by an additional \$22.50 to cover the estimated cost of advertising in the amount of \$20.00 and the \$2.50 approval fee. Also, please accompany the application with a signed copy of the agreement allowing you to use the Mammoth Canal as proposed.

You will note that a statement is made in the Explanatory of the new change application that on approval, Application No. a-2754 will be withdrawn

Yours truly,

J. M. Gardner  
SENIOR APPLICATION ENGINEER.

JMG/ig  
Encs change application,  
Unnumbered change applications  
and check for \$20.00  
and agreement

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the statutes of succession of the State of Utah.

[8] But one question remains. Should defendant be permitted to receive interest on his advancements until date of sale of the property or only until the spring of 1935 when Mercy W. Gibbons tendered to defendant the money he had advanced to that date? Under the construction of the agreement made by the trial court, and which we uphold, defendant's money was not due and payable until the sale of the property after the death of Mercy W. Gibbons, provided defendant properly attempted a sale within 60 days after her death. Until his claim matured, he could not be deprived of interest by a tender. If he did not properly attempt a sale of the property within 60 days after her death as provided in the agreement, and was not prevented from making or attempting such sale by plaintiff or any of the heirs at law, his claim would mature sixty days after the death of Mercy W. Gibbons.

The judgment appealed from is affirmed. Costs to respondent.

MOFFAT and WADE, JJ., concur.

WOLFE, Chief Justice (concurring).

I concur. Plainly the agreement of February 27th, 1933 raised a trust. The uses of the trust were specific. The decree of the lower court must be construed as quieting title in the defendants as against the administrator. This leaves the title in William S. Gibbons for the purposes of executing the uses of the trust. It is deemed he will perform them without further action and so as to save expensive litigation and prevent further interest from running.

McDONOUGH, Justice (concurring).

I concur.

As to appellant's contention that the court quieted title against plaintiff administrator and all those claiming under him, and by so doing denies the heirs the benefit of the agreement of which they are specified as beneficiaries, it need but be pointed out that by virtue of the conveyance to defendant in trust, there was no title which could pass to the heirs on the death of Mercy W. Gibbons, the grantor. The apparent purposes of the conveyances was to avoid probate proceedings and to constitute the outlays made by the trustee for funeral expenses for his

father an investment in the property until the mother passed away. The heirs as such acquired no title upon the death of Mrs. Gibbons for the reason she had conveyed the fee simple title to her son in trust with the absolute power of conveyance without consultation with any of the beneficiaries, such sale to be made in accordance with the terms of the agreement. While the decree fails to mention the obligations of the defendant under his agreement, it, in the light of the issues presented, cannot be construed as a device to impair the rights of the heirs to participate in the proceeds of sale made under the agreement. There is no allegation in the complaint that defendant refuses to perform his obligations thereunder. On sale of the property the defendant is, of course, bound to apply the proceeds in accordance with the terms of the trust.



ROCKY FORD IRR. CO. et al. v. KENTS LAKE RESERVOIR CO. et al.  
No. 6473.

Supreme Court of Utah.  
March 24, 1943.

1. Waters and water courses ⇨151

In construing statute providing for forfeiture of an appropriator's right to use water by five years nonuser thereof, the forfeiture will not operate where the failure to use is the result of physical causes beyond the control of the appropriator, where the appropriator is ready and willing to divert the water when it is naturally available. Utah Code 1943, 100-1-4.

2. Waters and water courses ⇨161

Where for period from 1932 to 1940 there were only four years between 1932 and 1937 when unused water was available to senior water appropriator, and in 1937 the appropriator used all its storage rights, the appropriator's storage rights were not forfeited by expiration of the statutory five year period of nonuser. Utah Code 1943, 100-1-4.

3. Waters and water courses ⇨133

The state engineer should approve an application to appropriate water unless it clearly appears that there is no unappropriated water in the proposed source, and, if the question is fairly doubtful and there is reasonable probability that a portion of the waters are not necessary to supply existing rights, the engineer should approve the application. Utah Code 1943, 100-3-1, 100-3-8.<sup>1</sup>

4. Waters and water courses ⇨133

Where there was unappropriated water during high water seasons, which water applicant could put to a beneficial use, the application to appropriate should be approved, unless it appears that approval of the application would injure vested rights of prior appropriators.<sup>1</sup> Utah Code 1943, 100-3-8.

5. Waters and water courses ⇨140

A proposed appropriation of water under application to appropriate, if approved, would be junior to existing rights of prior appropriators, and, if no water in excess of that necessary to supply existing rights were available in any one year, the new appropriator would get none. Utah Code 1943, 100-3-1.<sup>2</sup>

6. Waters and water courses ⇨133

An action for plenary review of state engineer's decision granting application to appropriate water was limited to a determination of whether there was probable reason to believe that there was unappropriated water and whether approval of the application would injure protestants' vested rights and was not an action to determine the relative rights of the parties nor to vest the right to appropriate in applicant.<sup>3</sup>

7. Waters and water courses ⇨133

An application to appropriate water would not be denied on ground that it put applicant in a position as the upstream junior appropriator, where it might, when sufficient water was not available for all, interfere with protestants' rights as downstream senior appropriators, where protestants could seek proper redress by suit for damages or for injunctive relief if applicant unlawfully inter-

fered with their rights. Utah Code 1943, 100-3-1, 100-3-8.

8. Waters and water courses ⇨75, 76

As against upper owners with inferior rights of user, an appropriator of waters of a stream is entitled to have the water at his point of diversion preserved in its natural state of purity, and any use which corrupts the water so as essentially to impair its usefulness for the purposes to which he originally devoted it entitles him to injunctive and legal relief.<sup>3</sup>

9. Waters and water courses ⇨75, 76

Where proposed upstream junior appropriator of water had been forewarned that protestant downstream senior appropriator would not tolerate a deterioration of water quality which would injure protestant's power plant machinery, such fact would be considered in balancing of equities to determine whether protestant would be entitled to damages or injunctive relief, if suit against junior appropriator should be necessary to prevent a flushing down of silt.<sup>3</sup>

10. Waters and water courses ⇨75, 76

If applicant as an upstream junior appropriator of water so deteriorated the quality of water that it materially impaired the use to which protestant downstream senior appropriator was putting water, protestant could seek proper redress in the courts at that time for damages or injunctive relief.

11. Waters and water courses ⇨75

Where type of storage dam which applicant upstream junior appropriator of water proposed to build was not shown, Supreme Court would not supervise or limit the type of construction on ground that downstream senior appropriator would suffer substantial damage to its power plant equipment unless the proposed reservoir would not empty silt into the stream during the low water period.

12. Waters and water courses ⇨145

An application to change place of water storage out of a previously awarded senior storage right to a proposed reservoir site on the main river chan-

<sup>1</sup> Little Cottonwood Water Co. v. Kimball, 78 Utah 248, 229 P. 116.

<sup>2</sup> Eastley v. Terry, 84 Utah 387, 77 P. 2d 362.

<sup>3</sup> Hammond v. Johnson, 84 Utah 20, 68 P.2d 804.

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and was properly approved, where application had not forfeited its decreed storage right; and such transfer could be made without injury to predecant appropriators, if such transfer was so limited that the total amount of water stored did not exceed the total amount available during the same period at the original site. Utah Code 1943, 100-1-4, 100-3-9.

13. Waters and water courses  
Where application to change place of storage out of a previously awarded senior storage right to a proposed reservoir site on the main river channel and application to appropriate allegedly unappropriated water from such channel were approved, plaintiffs who were senior appropriators on the main channel were not foreclosed from future actions for damages or injunctive relief, if applicant interfered with their rights. Utah Code 1943, 100-3-1, 100-3-8.

MOFFAT, J., dissenting in part.

Appeal from District Court, Fifth District, Beaver County, Wm L. Hoyt, Judge.

Action by Rocky Ford Irrigation Company and another against Kents Lake Reservoir Company and another, for a writ of injunction and other relief. Plaintiff's application to change the place of storage of 830 acre feet of water per annum out of a previously awarded storage right from the South Fork of Beaver River to a proposed reservoir site on the main channel of Beaver River and application to appropriate for annual storage from Beaver River 1,660 acre feet of allegedly unappropriated water. From a judgment affirming the engineer's decision, plaintiffs appeal.

Decree affirmed in accordance with opinion.  
Cline, Wilson & Cline, of Millford, and H. R. Waldo, of Salt Lake City, for appellants.  
Elias Hansen, of Salt Lake City, LeRoy H. Cox, of St. George, Grover A. Giles, Alby Gar, and E. J. Steen, of Salt Lake City, for respondents.

WOLFE, Chief Justice.  
In April, 1938, the defendant Kents Lake Reservoir Company filed with the de-

fendant State Engineer an application to change the place of storage of 830 acre feet of water per annum out of a previously awarded storage right of 1,660 acre feet from the South Fork of Beaver River to a proposed reservoir site on the main channel of Beaver River commonly called "Three Creeks." Another application was filed by Kents Lake in March, 1940, with the State Engineer to appropriate for annual storage from Beaver River 1,193 acre feet of water alleged to be unappropriated, the same to be stored in the above mentioned proposed reservoir at Three Creeks.

The plaintiff, Rocky Ford Irrigation Company and the Telluride Power Company filed protests to the granting of the applications. The State Engineer overruled the protests and approved the applications. Whereupon, the plaintiffs pursuant to Sec. 100-3-14, R.S.U., 1933 as amended by Sec. 1, Chap. 130, Laws of Utah 1937, filed a petition in the district court for a plenary review of the decision of the State Engineer. The district court, after hearing, affirmed the Engineer's decision and this appeal results.

For the most part, the evidence can best be detailed in conjunction with the analysis of the controlling legal principles, but a few preliminary statements are necessary for a clear approach to the points involved. Kents Lake and both plaintiffs are users of water from Beaver River and its tributaries. The rights of all parties were determined and decreed in 1931 by the District Court of Beaver County in the case of Hardy v. Beaver County Irrigation Company. By this decree Kents Lake was awarded the right to divert and store 1,660 acre feet of water from the South Fork of Beaver River any time between April 1st and June 30th of each year, provided however, that no diversions for storage could be made when the flow of water in Beaver River, as measured at the government gauging station at the mouth of Beaver Canyon, was below 164 c.f.s. This storage right has a priority date of 1890. Rocky Ford Irrigation Company was awarded: (1) A right to store 25,447 acre feet in the Rocky Ford Reservoir from October 1st of each year until June 30th of the following year with a priority date of 1907; (2) a right to 120 c.f.s. to be used by a direct diversion from Beaver River from July 1st to Sept. 30th each year with a priority date

of 1909; and (3) a direct flow right to 150 c.f.s. to be used from March 15th to June 30th carrying a priority date of 1907. Since the entry of the general adjudication decree in 1931, Kents Lake has never had storage capacity for more than 950 acre feet. During certain seasons since 1931, there has not been sufficient water above the 164 c.f.s. as measured at the gauging station to allow Kents Lake at the gauging station to allow Kents Lake to store the full 1,660 acre feet as awarded to it by the decree even if it had had the storage capacity. In 1931, 1934, and 1939 it appears that no water whatever was available for storage. At the new proposed Three Creeks site, there is a substantially larger flow of water—a flow sufficient to satisfy the 1,660 acre feet decreed right practically every season.

In opposing the proposed change in place of storage plaintiffs contend: (1) That Kents Lake, since the entry of the decree awarding it 1,660 acre feet, has forfeited by nonuser for over five years all its rights under the decree to water in excess of 950 acre feet, and that if it continues to store 830 acre feet at the South Fork site, it has at most only 120 acre feet available for transfer to the proposed Three Creeks site for storage; and (2) that were there no forfeiture of the court in allowing a transfer in place of storage from South Fork (where usually the flow is insufficient to fill the 1,660 acre feet decreed right) to Three Creeks (where usually there is sufficient water to fill the decreed right) should limit such to all the decreed right should limit such to both South Fork and Three Creeks would not exceed the amount that would have been available to Kents Lake at the South Fork site. Otherwise, it is contended, the proposed change would constitute an enlargement of the Kents Lake rights at the expense of the plaintiffs. If not so limited, Kents Lake could store during most years 830 acre feet at its present reservoir in South Fork, and every year more 830 acre feet at Three Creeks, thus insuring a total of 1,660 acre feet in most years, while at the present location there is seldom 1,660 acre feet available and in some years not even the 950 acre ft.

In support of the proposed change the defendant admits, as well as it must (see Huchings, Selected Problems in Law of Water Rights in the West, 1942, p. 336), that storage under the transferred rights must be limited to the amount that would have been available to Kents Lake for storage at the present South Fork location during the same period. The contention during the same period. The contention that storage at that time in the South Fork. The lower court came to this same conclusion, and so stated in its conclusions of Law, but the decree of the court carries no such provision. This admission by the defendants, which first time on appeal, disposes of one of the main objections raised by the plaintiffs to the approval of the application for a change in place of storage.

We next turn to the question of statutory forfeiture by nonuser for over five years. The statute, Sec. 100-1-4, Utah Code Annotated 1943, under which plaintiffs contend that a forfeiture has occurred provides: "When an appropriator or his successor in interest shall abandon or cease to use water for a period of five years the right shall cease, and thereupon such water shall revert to the public, and may be again appropriated as provided in this title."

[1] This statute was in effect during all times involved in this suit. In construing statutes similar to this, the courts have uniformly held that forfeiture will not operate in those cases where the failure to use is the result of physical causes beyond the control of the appropriator such as floods which destroy his dams and ditches, draughts, etc., where the appropriator is ready and willing to divert the water when it is naturally available. Morris v. Bean, C.C., 146 F. 423, affirmed, 9 Cir., 159 F. 651 and 221 U.S. 485, 31 S.Ct. 703, 55 L.Ed. 821; Ramsey v. Gatsche, 51 Wyo. 516, 69 P.2d 533; Horse Creek Conservation Dist. v. Lincoln Land Co., 54 Wyo. 320, 92 P.2d 572; New Mexico Products Co. v. New Mexico Power Co., 42 N.M. 311, 77 P.2d 634; In re Maine Spring and its Tributaries, 60 Nev. 280, 108 P.2d 311; Huchings, Selected Problems in the Law of Water Rights in the West, p. 396.

The uncontradicted evidence shows that there is sufficient water available at South Fork to allow Kents Lake to store the full 1,660 acre feet. In 1931, 1934, and 1939 no water whatever was available for storage by Kents Lake. During every other year from 1931 to 1940,

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Kents Lake stored 950 acre feet whether it was entitled to store that much or not. There is a conflict in the evidence as to the exact amount of water available each year. Mr. Ullrich and Mr. Lofgren, both civil engineers, were called by the plaintiffs and the defendant respectively. From rather limited and incomplete data concerning amount of snow fall, snow melting records, and data in regards to the area encompassed by the South Fork water shed, they each gave an opinion as to the amount of water available each year. Ullrich concluded that between April 1st and June 30th of each year the following amounts of water were available for storage by Kents Lake:

1931—none	1935—556	1938—700
1932—538	1936—684	1939—none
1933—566	1937—1519	1940—489
1934—none		

The corresponding figures given by Lofgren were:

1931—none	1935—1400	1939—none
1932—1308	1936—1790	1940—1535
1933—566	1937—3050	
1934—none	1938—1650	

It becomes obvious that if the figures given by plaintiff's witness Ullrich are correct, there has been no forfeiture by Kents Lake, for every year except 1937 when any water has been available for storage Kents Lake by storing 950 acre feet stored even more water than its rights entitled it to store. However, if the figures adduced by Lofgren are correct, there has been considerably more water available for storage, except in 1931, 1934, and 1939 than was actually stored by Kents Lake. Therefore, if there were a five year continuous period during which Kents Lake failed to use material amounts of available water, we should hold that a forfeiture of at least part of its right has occurred by virtue of this nonuse.

On this conflicting evidence the trial court found that: "Since the decree above mentioned was entered in Nov. 13, 1931, except during the years 1934 and 1939, some water has been available for storage by the defendant Kents Lake Reservoir Company in excess of 950 acre feet."

It further found that since there was no measuring device at South Fork to test the amount of water available, it could

not from the evidence adduced determine the exact quantity of water available. It did find, however, that there had been no five year continuous period during which Kents Lake failed to use available water.

If this were all the evidence and all the findings we would, as the plaintiffs contend, be forced to the conclusion that the trial court held that the intervention of the drought years of 1934 and 1939 prevented a forfeiture by interrupting the five year period of nonuse of available water. This subject has been treated at some length in the briefs of counsel. Appellants, the plaintiffs, take the position that the dry years should not be counted at all. That is, in the nine years from 1932 to 1940 there were only two years when no water was available for storage. During the other seven years water was available in excess of 950 acre feet, yet only 950 acre feet were stored. Plaintiffs contend that since there are seven years, not counting the dry years when Kents Lake did not store available water in excess of 950 acre feet, Kents Lake should not be saved from the consequences of its own neglect by the intervention of a dry year. However, in lieu of the other evidence and findings we do not deem it necessary to determine this question.

The evidence shows that in 1937, an abnormally wet year, the Kents Lake stockholders used over 1,660 acre feet by storing 950 acre feet and diverting over 710 acre feet directly from Beaver River. The trial court found that this direct flow diversion "probably", together with the 950 acre feet stored, equalled 1,660 acre feet and that all the water was beneficially used. This finding of the court must have been based primarily on the testimony of Mr. Boyler, who was called at various times by both parties. He was water commissioner in charge of the distribution of water under the Beaver River System. In 1937 at the direction of the State Engineer and in order to prevent flood conditions he diverted to the stockholders of Kents Lake from the Beaver River water in excess of their direct flow rights. In his opinion the excess water so used, together with the 950 acre feet stored, would total 1,660 acre feet. This evidence is not contradicted, every one on the entire system used excess water that year.

[2] We therefore have this situation. In 1932, 1933, 1935, and 1936 Kents Lake neglected to use all the available water either by storage or by direct flow diversions. In 1937 it stored 950 acre feet and used 710 acre feet by direct diversions from the River. Since 1937 there has not been sufficient time up to the filing of this suit for another five year period of nonuse to run. Since no water was available in 1934, it must be disregarded. Hence, there were only four years between 1932 and 1937 when water was available and not used. In 1937 all the 1,660 acre feet was used, thus cutting short at 4 years the period of nonuse. The plaintiffs concede that the beneficial use by the appropriator during at least one out of every five years is sufficient to protect his right against the operation of the forfeiture statute. This leads us to the inevitable conclusion that there has been no forfeiture of any rights by Kents Lake.

The remaining questions raised by the plaintiffs will be discussed in connection with the objections to the approval of the application to appropriate 1,193 acre feet of water from Beaver River. The facts relating to this application follow:

There is some conflict in the evidence as to whether there is, during normal years, any unappropriated water in the Beaver River, but during abnormally wet years it is admitted that there is some unappropriated water during high water seasons. The trial court so found. The cost of building an impounding dam at Three Creeks would be considerably less per acre foot of storage space than would the enlargement of the storage facilities on the South Fork. The plaintiff power company has hydro-electric power plants below the proposed Three Creeks site. There is evidence that the proposed reservoir will collect silt and debris during high water season, and unless facilities are constructed to retain the silt and debris, it will be later sluiced out into the stream, thus causing heavier wear and other damage to the plaintiff's equipment.

The plaintiffs contend (1) that since there normally is no unappropriated water in Beaver River, the State Engineer should not have approved the application for it puts a junior appropriator at the head of the stream where he might unlawfully interfere with senior vested rights to the water; and (2) that if either the pro-

posed transfer or the application for appropriation is approved, the decree should contain a provision requiring Kents Lake to so construct the reservoir that additional debris will not be emptied into the stream to the damage of the plaintiff power company.

[3, 4] We stated in Little Cottonwood Water Co. v. Kimball, 76 Utah 243, 289 P. 116, 118, that the State Engineer should approve an application to appropriate water unless "it clearly appears that there is no unappropriated water in the proposed source. \* \* \* If the question is fairly doubtful and there is reasonable probability that a portion of the waters are not necessary to supply existing rights the engineer should have the power to approve the application and afford the applicant the opportunity for an orderly recourse to the courts, who have the facilities and powers to dispose of the matter definitely and satisfactorily." It would appear that under this rule the Engineer correctly granted the application to appropriate the 1,193 acre feet from Beaver River. In a trial de novo in the district court, the court found on the conflicting evidence that there was unappropriated water during certain high water seasons and that the applicant could put the water to a beneficial use. Therefore, unless it appears that the approval of the application will injure vested rights of prior appropriators, the application to appropriate should be approved. See 100-3-8, Utah Code Annotated 1943; Little Cottonwood Water Co. v. Kimball, supra.

[5-7] This appropriation, if approved, would be junior to all existing rights or prior appropriators. Sec. 100-3-1, Utah Code Annotated 1943; Eardley v. Terry, 94 Utah 367, 77 P.2d 362. If no water in excess of that necessary to supply existing rights is available in any one year, the new appropriator would get none. As far as plaintiff Rocky Ford is concerned, the approval of the application could not deprive it of any rights. At most, it places Kents Lake in a position where it can unlawfully interfere with the plaintiff's rights unless plaintiff exercises diligence to prevent the same. This is not an action to determine the relative rights of the parties nor to vest the right to appropriate in the applicant. It is limited to a determination of whether there is probable reason to believe that there is unappropriated water.

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and whether the approval of the application will injure the vested rights of the protestants, the plaintiffs. Little Cottonwood Water Co. v. Kimball, supra; Eardley v. Terry, supra. Since the plaintiffs' rights in regard to this application are prior to the rights of Kents Lake, they could seek proper redress by a suit for damages or, in a proper case, for injunctive relief if Kents Lake unlawfully interfered with their rights. In the light of our policy of encouraging the development of water rights and the putting of water to a beneficial use, we should not deny this application merely because it puts Kents Lake in a position, as the upstream junior appropriator, where it might, when sufficient water was not available for all concerned, interfere with the plaintiffs' rights.

[8, 9] The power company is in somewhat the same position. It contends that it will suffer substantial damage to its equipment unless the proposed reservoir is so constructed that it will not empty silt and debris into the stream at times when the stream would otherwise be free from such foreign matter, i. e., during low water period. It does not appear what type of dam Kents Lake proposes to build. It may contemplate a type of construction which will filter the water or otherwise retain the debris. As pointed out by the California Supreme Court in Wright v. Best, 19 Cal.2d 368, 121 P.2d 702, 709, "an appropriator of waters of a stream, as against upper owners with inferior rights of user, is entitled to have the water at his point of diversion preserved in its natural state of purity, and any use which corrupts the water so as to essentially impair its usefulness for the purposes to which he originally devoted it, is an invasion of his rights. Any material deterioration of the quality of the stream by subsequent appropriators or others without superior rights entitles him to both injunctive and legal relief." The court in addition to several other California cases, cited Wiel, Water Rights, Jrd. Ed., Vol. 1, pp. 561-565. See also Hammond v. Johnson, 94 Utah 20, 66 P.2d 894. However, it would seem that the doctrine that the senior appropriator is entitled to water of the same quality should be limited, as the California court has limited it, to apply only to deteriorations of quality which would materially impair the use to which he was putting the water. Since Kents Lake has

been forewarned that the plaintiff will not tolerate a deterioration of quality which will injure plaintiff's machinery, this fact will no doubt be taken into account in constructing a dam; and also if suit should be necessary to prevent a flushing down of silt, in the "balancing of the equities" to determine whether the court should allow damages or injunctive relief, this fact would be considered. Smith v. Staso Milling Co., 2 Cir., 18 F.2d 736.

[10, 11] We need not determine what the power company's rights would be in any given case if the reservoir as constructed does sluice debris and silt into the stream to the injury of said power company. Suffice it to say that if as a junior appropriator, it does deteriorate the quality of water so that it materially impairs the use to which the power company is putting it, the power company could seek proper redress in the courts at that time for damages or injunctive relief. But without more of a showing of threatened injury or a showing of the type of dam Kents Lake proposes to construct, etc., we will not at this time attempt to supervise or limit the type of construction.

[12, 13] We therefore conclude that Kents Lake has not forfeited any of its 1,660 acre feet decreed right to store water at the South Fork site; that a transfer of 830 acre feet of this right can be made without injury to the plaintiffs if such transfer is so limited that the total amount stored at both places does not exceed the total amount available during the same period at the South Fork Location; that the application to appropriate 1,193 acre feet of water was properly approved; that the court correctly refused to supervise or limit the type of dam to be built at Three Creeks; and that the plaintiffs are not foreclosed from future actions for damages or injunctive relief if Kents Lake does interfere with their rights. The decree of the lower court should be amended to conform with this opinion as to limitations on the total amount of water which could be stored at the two sites. It also should correct finding No. 4 to the effect that Beaver River rises in the Wasatch Range of Mountains and flows in an Easterly direction to conform with the fact agreed upon by all parties that it arises in the Tushar mountains and flows in a westerly direction.

Appellant, Rocky Ford Irrigation Company, to recover one third of its costs.

LARSON, McDONOUGH, and WADE,  
JJ., concur.

MOFFAT, Justice (concurring in part, dissenting in part).

I cannot concur in the conclusion reached that Kents Lake Reservoir Company had not forfeited any of the 1,660 acre feet decreed to it to be stored in the South Fork of Beaver River under the 1931 decree. That decree had stood for eleven years, with a priority date of 1850. The limiting dates of storage are between April 1st and June 30th of each year, with the further limitation that no storage could be made when the flow of water of Beaver River at the government gauging station at the mouth of Beaver Canyon was below 164 second feet.

The Rocky Ford Irrigation Company had a right to store 25,447 acre feet between October 1st of each year and June 30th of the following year, and direct diversion rights of 120 second feet and 150 second feet during the periods, respectively, from July 1st to September 30th, with a priority date of 1909, and from March 15th to June 30th, with a priority date of 1907.

At no time since the date of the decree in 1931 had Kents Lake provided a storage capacity for or stored more than 950 acre feet. There were three years of the period when there was no water available for storage. Under Ullrich's testimony there was only one year, 1937, when there was water enough to equal the storage capacity of 950 acre feet. Under Lofgren's testimony there were six years of the period when the estimated run-off would have exceeded the 950 acre feet. With the lapse of eleven years, the fluctuating quantities of water available, and at the end of the period to make an application for a change of point of diversion and storage from the designated place, evidences an abandonment or forfeiture of any right above the capacity provided. It may have been uncertainty of available storage, or expense in excess of economical cost, or impracticability of increasing the storage capacity at the place designated; but whatever the persuading factors, the fact remains no steps were taken to protect the right above 950 acre feet.

Except as herein indicated, I concur in the conclusions reached by Mr. Chief Justice Wolfe.

NABROTZKY v. SALT LAKE & UTAH  
R. CO.  
No. 6460.

Supreme Court of Utah  
March 24, 1945.

1. Railroads  $\Leftrightarrow$  314

Where motorist, struck by electric freight train, alleged that the railroad was negligent in permitting large arc light to blind and injure view of person approaching track in automobile, the railroad could not be held negligent in permitting the arc light to be situated at public intersection under evidence conclusively proving that the city alone controlled location and operation of the light.

2. Railroads  $\Leftrightarrow$  330(2)

Even if motorist approaching railroad tracks had right to assume that wig-wag automatic flasher signals activated by trains on first railroad tracks belonging to another railroad were connected with defendant railroad's near-by tracks, the motorist could not drive ahead in sole reliance on such assumption without taking further precaution for his own safety.<sup>1</sup>

3. Railroads  $\Leftrightarrow$  330(2)

Where motorist approaching railroad tracks assumed that wig-wag automatic flasher signals operated in connection with first track were controlled by movement of trains over defendant's tracks which were located 37 feet from the first track and proceeded onto defendant railroad's track looking straight ahead and where motorist testified that as he approached tracks, light from arc light maintained by city at intersection struck windshield of automobile at such an angle as to blind motorist temporarily and motorist saw approaching train for first time when he was on tracks, the motorist was guilty of contributory negligence as a matter of law.

4. Railroads  $\Leftrightarrow$  324(1), 327(1)

Motorist approaching railroad tracks has duty of keeping a proper lookout for his safety and of avoiding contact with train.

5. Railroads  $\Leftrightarrow$  346(6)

Traveler attempting to cross railroad tracks is chargeable with seeing what he could have seen if he had looked, and with

<sup>1</sup> Pippy v. Oregon Short Line R. Co., 79 Utah 439, 11 P.2d 505.

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