

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF UTAH,  
IN AND FOR THE COUNTY OF CACHE.

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WELLSVILLE EAST FIELD IRRIGATION, )  
a corporation; NEW WELLSVILLE EAST )  
FIELD IRRIGATION COMPANY, a )  
corporation; HYRUM IRRIGATION COM- )  
PANY, a corporation; and SOUTH )  
CACHE WATER USERS ASSOCIATION, )

Plaintiffs, )

-vs- )

LINDSAY LAND AND LIVESTOCK COMPANY, )  
a corporation; ARTHUR SUMMERS, )  
EDWARD KNOWELS, JAMES KNOWLES, )  
O. H. PULSIFER, WILLIAM PULSIFER, )  
LELAND PULSIFER, OLE OLSEN, JESSE )  
COOKE, GEORGE NUHN, SAMUEL BANKHEAD, )  
WILLIAM RICHMOND, and LESLIE C. )  
NUHN )

Defendants. )

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW.  
ON INTERLOCUTORY DECREE

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This cause having come on regularly for trial upon the plaintiff's complaint, the answer of Bar B. Company, formerly Lindsay Land & Livestock Company; the joint answers of defendants Arthur Summer, William Pulsifer, Jr., and Leslie C. Nuhn; the joint answer of Jesse Cooke, James Knowles and Ole Olsen; and the separate answer of Samuel Bankhead and the separate answer of William Richmond and plaintiff's separate replies to the affirmative answers and claims set up in the answers of the defendants, J. D. Skeen and Ernest Young, appearing for plaintiffs, and Thatcher & Young appearing for the defendants, and the plaintiffs having introduced oral and documentary evidence in support of their claims and the defendants having introduced oral and documentary evidence in support of their respective claims and the defendants Leland Pulsifer and George Nuhn having failed to answer and their defaults having been entered and the Court being sufficiently advised in the premises now makes the following

FINDINGS OF FACT

I.

Bear River is an interstate stream rising in the Uintah Mountains in Northeastern Utah and flowing in a Northerly direction in the states of

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Utah and Wyoming, thence into Idaho, thence in a Northwesterly direction around the North end of Bear Lake, Bear Lake County, Idaho and thence in a Southerly direction into Utah, where it discharges into Great Salt Lake. The Little Bear River is a tributary of said Bear River, which rises in the mountains South and East of Cache Valley, Utah. A suit was instituted by Utah Power & Light Company against the Richmond Irrigation Company, et al., in the above entitled court by the filing of a complaint and the service of summons upon numerous individuals and corporations asserting and claiming the right to divert and beneficially use the waters of Bear River, including its tributaries South of the Utah-Idaho line, and numerous water users, including plaintiffs and defendants, were served with summons and entered their appearances in this court in said cause and on the 21st day of February, 1922, this court made and entered a decree adjudicating the rights of all parties before the court to divert and use for beneficial purposes the waters of said Bear River at all points below the Idaho line and including the said Little Bear River and other tributaries. The decree in the said case of Utah Power and Light Company v. Richmond Irrigation Company, insofar as the same adjudicates the rights to the use of waters of the Little Bear River, was pleaded by the plaintiffs and has been introduced in evidence herein.

## II.

The Lindsay Land & Livestock Company, now known as the Bar B Company, was a party defendant in said suit, was served with process, appeared therein, made claim to the right to divert and use water flowing in the Little Bear River and was decreed the right to the use of one second foot with a priority of May 1, 1890. George H. Nichols, the predecessor in interest of the Lindsay Land and Livestock Company, now Bar B Company, was a party defendant in said suit. He was regularly served with process, made no legal appearance therein and was adjudged and decreed to have no right, title, interest or claim in or to any of the waters of Bear River of its tributaries.

The plaintiff, Wellsville East Field Irrigation Company and the Hyrum Irrigation Company were parties defendant in said suit and entered their appearances therein, asserted and claimed the right to

divert and use the waters of Little Bear River and the court decreed to said companies water rights as follows:

LITTLE BEAR RIVER

| Date of Priority   | Amount in Second feet | Point of Diversion and Place of Use  |
|--|-----------------------|--|
| Wellsville East Field Irrigation and Canal Company:<br>(a) 1860--April 1 | 30 c.f.s.             | Said water to be diverted from Little Bear River at a point in the North-east quarter of Section 7, Township 10 North, Range 1 East, S.L.M., and used throughout the irrigation season of each year for the irrigation of 3075 acres of land in Section 6, Township 10 North, Range 1 East, Section 31, Township 11 North, Range 1 East Sections 1 and 2, Township 10 North, Range 1 West, Sections 13, 14, 15, 22, 23, 24, 25, 26, 35 and 36, Township 11 North, Range 1 West.                              |
| (b) 1878--April 1  | 15 c.f.s.             | Said water to be diverted from Little Bear River at the point of diversion described in paragraph (a) immediately above, and used for the irrigation of the lands therein described.   |
| (c) 1860--May 1  | 10 c.f.s.             | Said water to be diverted from Little Bear River at the point of diversion described in paragraph (a) immediately above, between the dates of October 1st and October 10th inclusive of each year and used for the irrigation of the lands therein described.  |
| Hyrum Irrigating Company:<br>(a) 1860--April 1                           | 3 c.f.s.              | Said water to be diverted from Little Bear River at a point in the Southeast quarter of Section 17, Township 10 North, Range 1 West, and used for the irrigation of 200 acres of land in Sections 8, 9, 16 and 17, said township and range.  |
| (b) 1860--May 1  | 30 c.f.s.             | Said water to be diverted from Little Bear River at a point in the Southeast quarter of Section 15, Township 9 North, Range 1 East, and from the East Fork of said Little Bear River at a point in the Southeast quarter of Section 10, Township 9 North, Range 1 East, throughout the irrigation season of each year, and used for the irrigation of 2820 acres of land in Sect. 3, 4, 5, 6, 7, 8, 9, 10, Township 10 North, Range 1 East, and Sections 31, 32, 33 and 34, Township 11 North, Range 1 East. |
| (c) 1878--April 1  | 15 C.F.S.             | Said waters to be diverted from Little Bear River at the point described in paragraph (b) immediately above and used throughout the irrigation season of each year for the irrigation of the lands therein described.  |

| Date of Priority | Amount in Second Feet | Point of Diversion and Place of Use.  |
|------------------|-----------------------|---|
| (d) 1890--May 1  | 15 C.F.S.             | Said water to be diverted from Little Bear River at the point of diversion described in paragraph (b) immediately above, between the dates of April 1st and July 1st of each year and used for the irrigation of 1000 acres of land in Sections 9, 16, 21 and 28, Township 10 North, Range 1 East, SLM. |
| (e) 1860--May 1  | 10 C.F.S.             | Said water to be diverted from Little Bear River at the point of diversion described in paragraph (b) immediately above, between the dates of October 1st and October 10th inclusive of each year and used for the irrigation of the lands therein described.   |

A portion of the water so decreed was, by said Wellsville East Field Irrigation Company, transferred to the New Wellsville East Field Irrigation Company.

That ever since approximately the year 1923, the State Engineer of the State of Utah has annually appointed a commissioner whose duties it has been to regulate the waters of Little Bear River.

### III

That since the making and entry of the said decree, on the 21st day of February, 1922, the said plaintiffs, excepting only the South Cache Water Users Association, have, each and every year, diverted from the Little Bear River for beneficial use, the full amount of waters decreed to them, as hereinabove set forth, when sufficient water was flowing in the said Little Bear River and its tributaries to supply the decreed rights, with the priorities set forth, and when an insufficient amount of water was flowing in the said Little Bear River, the said plaintiffs have, each and every year, used the full proportion of the water flowing in the said Bear River, distributed to them on the basis of their priorities as fixed by the said decree, except that from time to time the defendants named herein, openly and wrongfully, at points on the said Little Bear River above the intake of the plaintiffs' canal systems, temporarily diverted waters from the natural channels of the said Little Bear River and temporarily from time to time deprived plaintiffs of the use thereof. Plaintiffs have, from year to year, maintained an organization and water masters and ditch riders have kept a reasonable lookout for diversions in violation of the

said decree and when, and as often as diversions, violative of the said decree, have been made after July First of each year, the said plaintiffs have caused the diversions to be discontinued and the use of the said waters in violation of the said decree to be interrupted and terminated, and have never permitted the waters of the said Little Bear River to be diverted and used continuously, adversely, peaceable, under claim of right, and/or notoriously and uninterruptedly for the statutory period in excess of the rights decreed in the said case of Utah Power and Light Company v. Richmond Irrigation Company, except prior to July First of each year, and plaintiffs have not, since the entry of the said decree, abandoned or suffered the waters so decreed to them to be wasted, but on the contrary, have beneficially used the said water except as they have been deprived of it by the wrongful acts of the defendants as hereinabove set forth.

IV

That not since the entry of the said decree has either the said Bar B Company and/or its predecessors in interest, or any of them, diverted and used one second foot of water from Davenport Creek at the upper No. 1 diversion, continuously for sixty consecutive hours out of each fourteen days, during the irrigation season, after July First of each year, and neither have said parties diverted from the lower No. 2 point of diversion one second foot of water for thirty consecutive hours out of each fourteen days after July First of each year. Said defendant, Bar B Company, has not taken one second foot of water through the upper or No. 1 ditch and conveyed the same to land owned by the said defendant Bar B Company, then known as the Lindsay Land and Livestock Company, except in accordance with the decree of this court. If the said defendant took water, except as provided for in the said decree with a priority of May 1, 1890, and as to the high water season, the taking of the said water was wrongful, and unknown to the plaintiffs after July First of each year and when discovered, such wrongful diversion of the water, in excess of the decreed right, was promptly interrupted and terminated, and the use of the water so taken was not open, notorious, hostile, continuous or uninterrupted or under claim of right, after July First of each year, for the statutory period. The said defendant as against the parties to the U.P.& L.V. Richmond Irrigation Co case never openly claimed to have

acquired a water right by the taking of water in excess of the decreed rights, so secretly and occasionally diverted from the Little Bear River, for the irrigation of lands, after July First of each year.

V

The defendant, Bar B Company and its predecessors in interest have, since the entry of the decree herein on February 21, 1922, maintained a ditch referred to as ditch No. 1 or upper ditch, the carrying capacity of which is not disclosed by the evidence, and has maintained a lower or No. 2 ditch, the capacity of which is not disclosed by the evidence. The said ditches, over long periods of time, have been tramped in by livestock pasturing in fields through which the ditches run, and at times the said ditches have been very greatly reduced in carrying capacity. The said ditches have been used for the diversion of water from Davenport Creek. The term "high water period", as used in the findings of fact, conclusions of law and decree means up to July First of each year. By use of said ditches, the said water has been conveyed by the said defendant, from year to year, to and upon meadow lands now owned by it and as against the plaintiffs the said defendant has acquired the right to divert from Davenport Creek one 2d foot of water for thirty hours each 14 days prior to July First of each year and also superior adverse rights as to any rights to the summer waters derived by plaintiffs by reason of filings 10528 and 10529 in the State Engineer's Office.

VI

The court finds that the defendant, Bar B. Company, made application No. 12986 to the State Engineer of the State of Utah to appropriate two second feet of water from Davenport Creek, a tributary of Little Bear River, for irrigation of lands in Section 26, Township 9 North, Range 1 East, Salt Lake Meridian, and said application was approved upon condition however, that the said application and all rights acquired thereunder should be subordinate to the rights of the plaintiffs to divert and beneficially use the water of Little Bear River and particularly Davenport Creek under their decreed rights.

VII

The predecessors in interest of the defendants, Arthur Summers, William Pulsifer, Jr., and Leslie C. Nuhn were parties defendant in said case of Utah Power & Light Company against the Richmond Irrigation Company and were likewise stockholders in the plaintiff, Hyrum Irrigation Company, that since the entry of the said decree, the said defendants have diverted and used water from the Hyrum Irrigation Company's canal as stockholders thereof, being recognized as such by plaintiffs, and on numerous occasions the said defendants have wrongfully and surreptitiously and in violation of the rules and regulations of the said corporation, drawn water from the said plaintiff's canal in excess of their right as stockholders and on numerous occasions the defendant, Arthur Summers has caused the diversion dam of the said Hyrum Irrigation Company to be opened permitting water to flow past the said dam and into a diversion ditch maintained by the said defendants. The Hyrum Irrigation Company has at all times and as often as it learned the said diversion dams were opened, caused the same to be closed and the water from the channel of the Little Bear River to be diverted into its canal system; that the diversion of the said water in excess of their equivalent stockholders' rights by the said defendants has not been continuous and uninterrupted, adverse, or peaceable, for the statutory period, but on the contrary, such excess diversions have been interrupted and clandestine and have not been under claim of right made known to the said plaintiffs or at all. That said defendants are entitled to their respective share of said waters as stockholders only, excepting that Arthur Summers William Pulsifer Jr and Leslie C. Nuhn are entitled to continue using such seepage and drainage waters as may be in the natural channel below the point of diversion of the Hyrum Irrigation Company's canal after July First of each year and to superior rights as to filings 10528 and 10529 as to waters in excess of the decreed rights of plaintiffs to the summer waters.

VIII

From year to year, since the entry of the said decree on February 21, 1922, said defendants, Arthur Summers, William Pulsifer, Jr., and Leslie Nuhn have diverted water from the Little Bear River through a ditch located below the diversion dam of the Hyrum Irrigation Company for

the irrigation of lands aggregating approximately 40 acres, of which 4 acres are owned by the defendant, Leslie Nuhn, 6 acres are owned by William Pulsifer, Jr., and 31.66 acres are owned by defendant Arthur Summers. That said water has been diverted during the high water season and prior to July First and after said date only at such times as the plaintiffs' watermaster has seen fit to turn them water, except as to the seepage and drainage waters referred to in the preceding paragraph.

IX

The defendant, James Knowels is the successor in interest of Edward Knowels, deceased; the said Edward Knowels was a party defendant in the case of Utah Power & Light Company v. the Richmond Irrigation Company and was decreed the right to use water from the Little Bear River; the said Edward Knowels was likewise a stockholder of the Hyrum Irrigation Company owning in his own right fifteen shares of the capital stock of said corporation; the said Edward Knowels caused three and a half shares of the said capital stock to be transferred to another water user and retained eleven and one-half shares of the said stock. Since the entry of the said decree, the said James Knowels and his predecessor in interest, from time to time, took from the Hyrum Canal, water in excess of that represented by the shares of stock now owned and on numerous occasions took water in violation of the rules and regulations of the said corporation. The taking of the said water in excess of his stockholders' rights was wrongful, was not continuous, but was interrupted whenever the wrongful taking was discovered, was not peaceable and was not under claim of right.

The defendant, Ole Olsen, was a party to the said suit of Utah Power & Light Company v. Richmond Irrigation Company and was decreed the right to divert water from the Little Bear River. From time to time, water has been conveyed through a loop ditch from the Hyrum Irrigation Canal and across the canal to and upon small areas of land owned by the defendants Jesse Cooke and Ole Olsen. The use of said water at times has been permitted by the Hyrum Irrigation Company during the high water season and prior to July First of each year and, at such other times, when the water was not required to meet the needs of the stockholders of the

said corporation. The use of the said water has not been continuous and has been interrupted from year to year; it has not been adverse to the said Hyrum Irrigation Company, but has been permissive and the taking of the said water has been directly from the said Hyrum Irrigation Company's canal and only indirectly from the Little Bear River, and has continued from year to year, only as the officers and agents of the said corporation permitted. The use of said water has been without claim of right made known to the Hyrum Irrigation Company or at all.

X

The defendant, Samuel Bankhead, was employed by the Hyrum Irrigation Company to assist in the operation of its canal system and at times rented the right to divert water from the Hyrum Irrigation Canal for the irrigation of his land and at times the said Hyrum Irrigation Company permitted him to draw water from its canal in excess of water so rented. The withdrawal and use of water has, at all times, been as a lessee or as a permittee and the use of water by him has not been adverse or uninterrupted, but has been permissive and interrupted. The officers of the said Hyrum Irrigation Company stopped the said permissive use of water whenever the water was needed by its stockholders.

XI

The predecessor in interest of the defendant, William Richmond, was permitted by the Hyrum Irrigation Company to discharge water from the Paradise Canal into the Hyrum Irrigation Company's canal and at a lower point to divert the said water from the Hyrum Irrigation Company's canal for the irrigation of one and one-half acres of land and at times unknown to the officers and agents of the Hyrum Irrigation Company, the said William Richmond diverted water from the Hyrum Irrigation Company's canal without having caused water to be discharged into the canal in equal or in any amount; that the diversions of water from the said canal by the said William Richmond was not open, notorious, or uninterrupted, and was not under claim of right, but was surreptitious and wrongful and as and when discovered by the officers of the said Hyrum Irrigation Company the diversion of said water was stopped. The said defendant has the

right to continue discharging water from the Paradise Canal into the Hyrum Irrigating ditch and drawing the same therefrom under plaintiffs' water-master.

XII

All claimants of rights to divert and beneficially use water from the Little Bear River were not made parties in the case of Utah Power and Light Company v. Richmond Irrigation Company, et al., and that there are now persons and corporations asserting and claiming rights in and to waters of Little Bear River and as to them, the said suit was not a general adjudication of the waters of the said stream system, and said proceeding was not a general adjudication as to all parties in interest in the subject matter thereof.

XIII

On the 20th day of November 1939 the United States of America, Bureau of Reclamation, made application to the State Engineer of the State of Utah, No. 10528 for a permit to divert and store water not exceeding fifteen thousand five hundred acre feet and not exceeding ninety five second feet from Little Bear River to be used for irrigation of lands subject to irrigation from said stream; that said application was duly approved and recorded in Book 1-31 of Applications to Appropriate Water, pages 430 to 432 of the records of the State Engineer of the State of Utah and said application has at all times been and now is in good standing as an approved application to appropriate said water, and on the 20th day of November, 1928, the United States of America Bureau of Reclamation made application to the State Engineer No. 10529 to appropriate for beneficial use, twenty thousand acre feet of water to be stored in the Hyrum Reservoir and one hundred eighty five second feet of direct flow of the Little Bear River, Blacksmith Fork River and Logan River; that said application was duly approved, filed and recorded in the office of the State Engineer in Book 1-31 of Applications to Appropriate Water, pages 434 to 436 and said application is now in good standing as an approved application; that for a valuable consideration said applications No. 10528 and 10529 were duly assigned and transferred to the South Cache Water Users Association and by said applications and assignments said South

Cache Water Users Association became the owner of the right to divert and use the waters therein specified for irrigation purposes with priorities as of November 20, 1928, but subject to defendants' claims. That thereafter the United States constructed a reservoir on the said Little Bear River commonly known as the Hyrum Reservoir, and that ever since the construction of the said reservoir, to-wit on or about the year 1936, this plaintiff has placed certain of the waters allotted to it by said appropriations to beneficial use and has continuously used the same, beneficially, upon the lands owned by its stockholders. That said rights are subordinate to those claimed by defendants so far as the spring and summer waters are concerned.

From the foregoing Findings of Fact, the court draws the following

CONCLUSIONS OF LAW

I

That the decree of this court, in the case of Utah Power & Light Company v. Richmond Irrigation Company, dated and filed herein on the 21st day of February, 1922, as to all of the parties to this proceeding, is a valid, continuing and enforceable decree and the rights to the use of the water of Little Bear River and its tributaries as therein decreed to the plaintiffs herein, are unimpaired by the acts of the defendants herein as alleged or otherwise, and plaintiffs are entitled to have distributed to them the waters therein decreed, strictly in accordance with the said decree, except as to the high water claims of the defendants prior to July first of each year.

II

That the defendant, Bar B Company, its officers, servants, and agents and its successors in interest, should, by the decree of this court, be forever enjoined and restrained from diverting or using any of the waters of Little Bear River in excess of the waters decreed to it, excepting, however, said corporation may divert one second foot of water for thirty hours each fourteen days prior to July First of each year.

III

That the defendants, Arthur Summers, William Pulsifer, Jr., and Leslie C. Nuhn and their successors in interest and agents and servants, should be enjoined and restrained by a decree of this court from directly diverting or using from the Little Bear River and its tributaries any of the waters thereof for any purpose whatsoever, except, prior to July First, provided, that excepted as stated above, the said water should never be withdrawn from the said Little Bear River by the said defendants, excepting further, that this conclusion should not bar said defendants from diverting any summer waste and seepage waters from the main channel below the Hyrum Irrigation Co. dam.

IV

The plaintiffs are entitled to a decree of this court enjoining and restraining the defendants and each of them from taking waters from the canal system of either of the plaintiffs at any time or for the irrigation of any land whatsoever, except by virtue of stock in the said plaintiff corporations owned by the defendant and evidenced by certificates of stock of said corporations, whether now in existence or not, and at all times subject to the reasonable rules and regulations of the said corporations as fixed and established by their boards of directors. Defendants and each of them should be enjoined and restrained from asserting or claiming any rights whatsoever in the said canals or the canal systems of the plaintiffs or either of them adversely to the said corporations or either of them.

V

That the court should make and enter an order herein making the State of Utah a party to this proceeding and should make this proceeding a general determination of the rights of all of the users of water from the said Little Bear River system, pursuant to Title 100 of Revised Statutes of Utah, 1933, as amended, and further notice of this proceeding should be given by the clerk of this court to the State Engineer and the State Engineer should be directed as expeditiously as possible to prepare and file with the court a statement, giving the names and addresses of the claimants to the use of the water from the Little Bear River system involved in this proceeding and that this proceeding should be continued

and thereupon be conducted in accordance with Title 100 of Revised Statutes of Utah, 1933 as amended.

VI

That the defendants or their predecessors, were and/or, are either stockholders of the Hyrum Irrigation or parties to the Utah Power & Light Company v. Richmond Irrigation Company action and by reason of that fact, entitled to certain waters from Little Bear River at certain times each year, but by reason of said relationship between the parties, have failed to affirmatively establish adverse claims or uses to said waters in excess of their decreed or stockholders rights excepting only as to the high waters which flow down Little Bear River or its tributaries prior to July First of each year. But as said defendants are not associated with or parties to any decree heretofore entered as to State Engineer's filings No. 10528 and 10529, their use of certain summer waters is hereby determined to be adverse and superior to such filings aforesaid.

VII

That the plaintiffs, (except during the high water period) as between the parties hereto, have not abandoned or surrendered up any waters allotted to them by the Utah Power and Light Company v. Richmond decree.

Dated this 11th day of April, 1941

LEWIS JONES  
D I S T R I C T J U D G E

Filed April 11, 1941,  
N. J. Crookston, Clerk,  
By Elizabeth Scrowther, Deputy Clerk.