1979

Morley Wilson And Mary Ellen Wilson v. Hubert C. Lambert, Utah State Engineer : Brief of Respondent

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

MORLEY WILSON and
MARY ELLEN WILSON,

Plaintiffs-Appellants,

v.

HUBERT C. LAMBERT,
UTAH STATE ENGINEER,

Defendant-Respondent.

Case No. 16612

BRIEF OF RESPONDENT

ON APPEAL FROM THE JUDGMENT OF THE
FIFTH JUDICIAL DISTRICT COURT
IN AND FOR IRON COUNTY, STATE OF UTAH
HONORABLE J. HARLAN BURNS, PRESIDING

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December 6, 1979

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This action was initiated pursuant to the provisions of Section 73-3-14, Utah Code Annotated 1953, as amended, to review a decision of the State Engineer dated January 10, 1968, rejecting four applications to appropriate water.

DISPOSITION IN THE LOWER COURT

This action was dismissed with prejudice (R. 29) on Respondent's Motion to Dismiss (R. 17) which was filed pursuant to the provisions of Section 73-3-15, Utah Code Annotated 1953, as amended, for failure of Plaintiffs-Appellants to prosecute this action to final judgment in the District Court within two years after it was initiated.

RELIEF SOUGHT ON APPEAL

Respondent seeks to affirm the Order of the District Court dismissing this action with prejudice and to sustain the constitutionality of Section 73-3-15.

STATEMENT OF FACTS

Respondent does not believe there is any substantial disp between the parties concerning the basic facts of this case, t there is disagreement between the parties concerning the legal significance of certain events that have transpired. Since Appellants have elected to rely on their Memorandum in the tri court as their brief in this Court, the traditional statement facts with citations to the record has not been presented to t Court. Consequently, it is believed that a summary of the per ent facts will be helpful in evaluating the legal arguments wh follow.

This action was filed on March 11, 1968, to review a decis of the State Engineer rejecting four applications to appropriat water from the Escalante Valley Groundwater Basin in Iron Count Utah (R. 1). Respondent State Engineer answered the Complaint on April 22, 1968 (R. 2). Very little transpired until the mat was set for Trial on September 17, 1973 (R. 3). That Trial set ting was vacated because of illness of the Plaintiff (the prese Appellants' predecessor in interest) (R. 4). The lower court again set this matter for Trial on May 4, 1977 (R. 5). Followi receipt of this notice, Appellants requested the lower court to vacate the Trial setting. This request was contained in a lett to the lower court dated April 20, 1977, and sets forth Appella reasons for the request (R. 6). The lower court granted that re quest. Then, on May 17, 1977, Appellants filed a motion to sub

stitute Appellants as plaintiffs (R. 13), accompanied by a stipulation from Respondent to this substitution (R. 12). The lower court granted this motion on May 19, 1977 (R. 11).

On January 10, 1978, the trial court, on its own motion, issued an Order to the parties to appear on March 6, 1978, and show cause why this action should not be dismissed for failure to prosecute (R. 8). Following receipt of this Order, Appellants (on February 13, 1978) filed a request for Trial setting (R. 9). On March 6, 1978, the Court provided by Minute Entry that the Order to Show Cause be stricken and the matter again be set for Trial (R. 14).

Appellants filed "Plaintiffs' First Interrogatories to Defendant" on October 3, 1978 (R. 15). On October 16, 1978, Respondent filed a Motion to Dismiss this action pursuant to the provisions of Section 73-3-15, Utah Code Annotated 1953, as amended. Upon motion of Respondent, the lower court granted an extension within which to answer Appellants' Interrogatories, pending disposition of Respondent's Motion to Dismiss (R. 21). Following briefing and oral argument by the parties, the lower court granted Respondent's Motion (R. 29), and Appellants filed this appeal.

ARGUMENT

I. INTRODUCTION

Section 73-3-15, Utah Code Annotated 1953, as amended, mandates the dismissal of any action to review a decision of the State Engineer which is not prosecuted to final judgment in the

the district court within two years after it is filed. More than ten years elapsed between the initiation of this action on March 11, 1968, and the filing of Respondent's Motion to Dismiss on October 16, 1978. The questions before this Court are whether the trial court abused its discretion in dismissing this action with prejudice and, if not, whether Section 73-3-15 is a constitutional statute.

II. THIS ACTION WAS PROPERLY DISMISSED WITH PREJUDICE UNDER THE PROVISIONS OF SECTION 73-3-15

A. Introduction

It should be noted that the majority of Appellants' Memorandum before the trial court—which now constitutes their brief before this Court—consists of arguments attacking the constitutionality of Section 73-3-15. However, Appellants also assert that Respondent had, by his actions, waived, and is estopped to assert the provisions of Section 73-3-15 (Points IV and V, Appellants' Memorandum). In Point VI, Appellants attempt to distinguish Dansie v. Lambert, 542 P.2d 742 (Utah 1975) for these reasons. This Court, in the Dansie case, construed the dismissal provisions of Section 73-3-15 as mandatory. In May of this year this Court again affirmed the mandatory nature of this statute in Provo City v. Hansen (No. 15772, May 14, 1979). Appellants' Memorandum does not address this latter case. Apparently Appellants concede that some new ground—such as the unconstitutionality of the statute—is required for them to prevail in this action.

B. Effect of Dansie v. Lambert and Provo City v. Hansen

It seems clear beyond question that the decisions of this Court in Dansie v. Lambert, supra, and Provo City v. Hansen, supra, which construe the meaning of Section 73-3-15, mandate the dismissal of this action and fully support the action taken by the lower court. Section 73-3-15 specifies that the action must be concluded in the trial court within two years and "All suits heretofore or hereafter commenced must be dismissed . . . unless such suits are or were prosecuted to final judgment within the time specified above; . . .". This Court first construed this legislation in Dansie v. Lambert, supra, approximately four years ago. In that action, an appeal was taken from a decision of the State Engineer, but the action was still pending some twenty-six months after the Complaint had been filed. The trial court granted a motion to dismiss the complaint with prejudice as to all defendants, including the State Engineer (even though the State Engineer did not join in the motion to dismiss). On appeal, this Court affirmed the decision of the trial court and held that the language of Section 73-3-15 was mandatory and that the trial court had no option but to dismiss the action. In so doing, this Court stated:

> Some may not approve the legislation, subject of this case, but in substance and effect it is nothing more nor less than a limitations statute, which may be displeasing to one who is its victim, but which like other similar statutes is one of repose, designed to put a time barrier against litigation, in determining the precious water rights in this arid state. We are not they that may question the wisdom of the legislature on any constitutional or prejudiciality basis under the circumstances here.

> Plaintiff does not claim the statute is or is not mandatory. His sole point on appeal is that the trial judge erred in granting the motion as to the Engineer. The fallacy of the contention lies in the fact that the statute has nothing to do with joinder of parties, dismissal as to parties and the like, but simply applies to the life or death of a cause of action. If plaintiff should contend that the statute is not mandatory, then in addition to other authorities unnecessary to cite here, this court, in a very recent case, Herr v. Salt Lake County, 525 P.2d 728 (Utah) 1974, and cases therein mentioned, seem to be quite dispositive as to any interpretation of the words "shall" and "must" used in the statute here (73-3-15), as being anything but mandatory, and not discretionary. (542 P.2d at 744; Emphasis supplied by the Court).

Within the last six months this Court again considered the impact of the dismissal provisions of Section 73-3-15 in Provo City v. Hansen, supra. This action was an appeal from a decisi of the State Engineer conditionally approving a change applicat The action had been pending for approximately three years, and some discovery had taken place when the Intervenors in the suit filed to dismiss it with prejudice. The trial court granted th motion, and this Court affirmed the mandatory nature of the provisions of Section 73-3-15 and reaffirmed the principles announc in the Dansie decision:

> The first sentence of the above-quoted provision gives the court discretion to dismiss an action upon the grounds of Rule 41 generally, including failure to prosecute with diligence. However, if over two years have elapsed since the filing of the action, a plaintiff has failed to prosecute with diligence as a matter of law and the court must dismiss the action. This Court has clearly ruled upon the mandatory nature of this provision. In Dansie v. Lambert the Court made the following observation:
>
> > If plaintiff should contend that the statute is not mandatory, then in addition to other auth-

orities unnecessary to cite here, this court, in a very recent case, Herr v. Salt Lake County, 525 P.2d 728 (Utah), 1974, and cases therein mentioned, seem to be quite dispositive as to any interpretation of the words 'shall' and 'must' used in the statute here (73-3-15), as being anything but mandatory, and not discretionary.

The reasons for the mandatory nature of the dismissal are also articulated in Dansie as follows:

> Some may not approve the legislation, subject of this case, but in substance and effect it is nothing more nor less than a limitations statute, which may be displeasing to one who is its victim, but which like other similar statutes is one of repose, designed to put a time barrier against litigation, in determining the precious water rights in this arid state . . . .

From the pleadings it is clear that plaintiffs have failed to prosecute the suit to final judgment within two years after it was filed, and the dismissal was therefore proper.

The Court also held that the dismissal with prejudice was proper because to do otherwise would allow a plaintiff to circumvent—and would be contrary to—the purpose of the statute:

> Plaintiff's argument that the trial court abused its discretion in dismissing the action with prejudice rather than without prejudice is without merit. To dismiss without prejudice is to give a party an additional one year within which to commence a new action to final judgment. Such a result is contrary to the whole tenor of the statute and hence, the dismissal must be with prejudice. The provision that an action to review the State Engineer's decision shall be dismissed if not filed within 60 days after notice of the decision precludes the filing of a "new action" in water cases of this type.

This Court's rulings in the Dansie and Provo City cases are completely dispositive of this appeal, and the decision of the lower court should be affirmed.

C. No Waiver or Estoppel

Appellants attempt to develop the argument (at Points IV and V of their Memorandum) that Respondent has somehow "wa: or is "estopped" to assert the dismissal provisions of Section 73-3-15. However, this Court noted in the Provo City case tha:

> The mandatory language of the act requires a plaintiff to take advantage of other remedies available to him within the allotted time where the opposing party attempts to purposefully delay the case. In any event, we are not convinced that anyone in the instant case was responsible for the delay other than plaintiff. (See Footnote No. 3).

Further, as will be shown in the following section of this Brief, there is absolutely no basis for asserting that Respond in any way delayed the trial of this matter or provided any bas for Appellants to assert waiver or estoppel. What the record does show is that every delay and postponement that has occurre in this action has been at the request of Appellants. The fact is that this action had been pending for over ten years when Re pondent filed his Motion to Dismiss, and had been set for Trial twice—with both settings continued at the request of Appellant None of the delays in this action have been caused by Responden Appellants have had more than ample opportunity to conclude thi action, but have failed to do so. It is not Respondent's respo sibility to see that Appellants properly pursue their case:

> Respondent further contends that the doctrine of estoppel has application to proceedings of this nature; that if the defendant rests his oars and permits the case to remain untried he should not be heard to complain; and that in any event he must

> show prejudice. But "it is the plaintiff upon whom the duty rests to use diligence at every stage of the proceeding to expedite his case to a final determination." J.C. Penney Co. v. Superior Court, Cal.App., 336 P.2d 545. (Thran v. First Judicial District Court, 380 P.2d 297 (Nev. 1963)).

Respondent was never asked to waive the requirements of Section 73-3-15, and certainly would not have done so had he been approached on this subject. There is absolutely nothing in the record to suggest otherwise. Respondent's lack of resistance to Appellants' efforts to delay trial of this case cannot now be used against Respondent to justify Appellants' inaction. This is clear beyond question. In addition to Provo City v. Hansen, supra, see Johnson v. Harber, 582 P.2d 800 (Nev. 1978); Bank of Nevada v. Friedman, 476 P.2d 172 (Nev. 1970); Featherstone v. Hanson, 338 P.2d 298 (N.M. 1959); Miller & Lux v. Superior Court, 219 Pac. 1006 (Calif. 1923); and Taylor v. Shultz, 144 Cal. Rep. 114 (Calif. 1978). The cases cited by Appellants simply do not support the argument which they assert under the facts of this case.

Appellants' effort to shift the blame onto Respondent for their failure to pursue this action basically falls into three broad categories. First, Appellants argue that Respondent is foreclosed from advocating dismissal of this action because Respondent did not raise this matter sooner. In this regard, Appellants are critical of Respondent for such actions as stipulating to the substitution of Appellants as parties; not objecting to the continuances requested by Appellants; and failing to urge the trial court to dismiss this action when that court noticed

up the dismissal of this action on its own motion. Secondly, Appellants assert that Respondent's conduct caused them to purchase land which they would not have otherwise purchased. And third, Appellants claim that for a portion of the time this action was pending Appellants were apparently represented by an unlicensed attorney. None of these arguments have any merit.

1. Respondent's Actions before the Trial Court

As pointed out above, Respondent's responsibility as defendant in this action is to meet Appellants step by step as the action progresses. It is not Respondent's place to tell Appellants how to structure their lawsuit and what the impacts may be if various alternative courses are followed. With respect to Respondent's stipulating that the present Appellants could be substituted as plaintiffs, that is all the Stipulation contained (R. 12). This was a pro forma act by Respondent, and certainly did not require Respondent to completely evaluate his case at that time and advise Appellants what legal strategies he would follow in the future. Appellants never requested a stipulation from Respondent that he do any more than simply agree to a substitution of parties, and that is all that Stipulation did. It did not in any way purport to define Respondent's future conduct in this litigation, and does not foreclose Respondent from asserting the provisions of Section 73-3-15. See Featherstone v. Hanson, supra, Thran v. First Judicial District Court, supra, and Taylor v. Shultz, supra.

Appellants are also critical of Respondent for acquiescing

in continuances of trial dates, but Appellants conveniently overlook the fact that it was they who wanted the trial dates postponed—and not Respondent. For Appellants to now claim that Respondent must accept the responsibility for Appellants having had the trial of the case continued on two different occasions is ludicrous. It is also important to note that Appellants were assigned the prior plaintiff's interest in this action in August of 1976 (Ex. 2 to R. 7), but did not petition the lower court to substitute parties plaintiff until May of 1977 (R. 13).

Appellants also criticize Respondent for not joining with the lower court when that court—on its own motion—was going to dismiss this action for Appellants' failure to prosecute (R. 8). This action was initiated by the lower court on its own motion in order to dispose of this stale litigation. This action by the lower court was, of course, not initiated under the provisions of Section 73-3-15. Respondent had no obligation to join with the court in this court-initiated action. Further, the lower court did not pursue the matter. It simply struck the Order to Show Cause and stated that the matter would be set for Trial (R. 14). This was apparently done on Appellants' representation that the matter was ready for Trial (R. 9). However, the plain fact is that Appellants filed their Request for Trial Setting in February of 1978 (R. 9), but did not initiate discovery in this action until October of that year when they submitted

their first interrogatories to Respondent (R. 15). It is obvious from even a cursory reading of those interrogatories that much of the information being sought demonstrates that Appellants were still only in the initial stages of getting this matter prepared for Trial. And this was over ten years after the action had been filed. What the foregoing comes down to is nothing more than a thinly-disguised effort on the part of Appellants to shift the responsibility to Respondent for actions which Appellants have taken to delay this litigation.

2. Appellants' Purchase of Property

In a further effort to convince this Court that Respondent is somehow responsible for Appellants' situation, Appellants assert that their purchase of certain land was a direct result of Respondent's conduct. This is absolutely untrue, as will be demonstrated by the following discussion. The contract of sale for the property involved is attached to Appellants' Memorandum as Exhibit 2. This document is dated August 6, 1976, but Appellants waited until the following April to have the sale approved by the probate court (R. 7). This contract involved the sale of private property which does not involve Respondent in any way, and Appellants do not allege that it does. Rather, Appellants adopt the curious argument that this contract would not have been executed if Appellants were not somehow going to receive the cooperation of Respondent. For Appellants to

claim that a contract in which Respondent was not involved could in some way operate to dictate the future conduct of Respondent is ridiculous!

But there is an even more fundamental flaw in Appellants' logic—and perhaps in their business judgment as well—if they predicated their purchase of this land upon these applications. The four applications involved in this lawsuit were rejected by the State Engineer. Neither Appellants nor their predecessor had any right whatsoever to use any water under these filings unless the decision of the State Engineer was reversed. Thus, at the time this contract was executed, there was absolutely no water right in existence under the subject applications. This is not a situation of the State Engineer changing his position and telling a water user that he no longer has a water right which the State Engineer had previously granted. Rather, it is a situation where the State Engineer has taken the position that there is no unappropriated water in the area, and he has pursued a consistent course of action to sustain that determination. See McGarry v. Thompson, 114 Utah 442, 201 P.2d 288 (1948) and Whitmore v. Welch, 114 Utah 578, 201 P.2d 954 (1949).

Another large gap in Appellants' argument is that the four applications involved in this appeal are not even filed for the land covered by this contract. This agreement covers the purchase by Appellants of 960 acres located in the East 1/2 of Section 7 and Section 9, T32S, R13W, SLB&M (¶1, Ex. 2 of Appellants' Memorandum). None of these applications were filed on

this acreage. Applications Nos. 24625 and 24626 were filed for irrigation of land in Section 17, T31S, R13W, SLB&M. Application No. 24624 sought to appropriate water for use in part of Section 20, T31S, R13W, SLB&M, and Application No. 24627 covers a portion of Section 23, T31S, R13W, SLB&M.

In sum, Appellants have offered absolutely no basis for arguing to this Court that Respondent was in any way responsib for Appellants' purchase of property, and are being less than candid with this Court to suggest otherwise.

3. Appellants' Change of Attorneys

It is difficult to see the relevance of the argume made by Appellants concerning the prior plaintiff's attorney. The fact that that attorney had his license suspended for non-payment of license fees is totally immaterial. No one was awa of this fact until Appellants' present counsel raised the matt But Appellants do not argue—nor could they—that this somehow denied the prior plaintiff access to the court. It did not. Prior counsel had full and complete participation in the actio to the extent he desired to do so. Further, it is interesting to note that that attorney was an active member of the Utah Ba for over a three-year period after this action was filed—which is one year beyond the time frame provided in Section 73-3-15 for conclusion of this action in the trial court. Carelessness or neglect of counsel will not serve to toll the statute (Mart v. Cook, 137 Cal.Rptr. 434 (Calif. 1977) and Brown v. Lufkin

Foundry & Machine Co., 487 P.2d 1104 (N.M. 1971)).

In affirming the dismissal of an action for failure to prosecute under the New Mexico statute dealing with the dismissal of actions where the argument was made—among others—that the changing of counsel was grounds for preserving the action beyond the statutory period, the New Mexico Supreme Court ruled that:

> With respect to the third assertion, claiming either a waiver or estoppel, it is agreed by the parties that there was never any agreement or apparently even discussion between any of the attorneys with respect to a stipulation of waiver of the two-year limitation. Actually, the only claim of consequence upon which plaintiff relies is the fact that after the two-year statute had run from the date of the filing of the original complaint, plaintiff's original attorneys were discharged, new attorneys employed, settlement negotiations entered into, depositions of the parties taken, and substantial sums paid by the plaintiff to his new attorneys for fees and costs. It should be mentioned that, according to the correspondence between plaintiff and his new attorneys, one of the main purposes of the taking of the depositions was in order that the new attorneys could competently advise the plaintiff as to the possible outcome of the litigation.
>
> We fail to see anything in any of the actions on behalf of the defendant which would create an estoppel. There is nothing before us to even intimate any promise, duty or holding out on the part of the defendant upon which the plaintiff relied which could in this case bring the doctrine of estoppel to bear. Plaintiff's situation was not worsened by reason of any of the acts of the defendant. See State ex rel. Fitzhugh v. City Council of Hot Springs, 1952, 56 N.M. 118, 241 P.2d 100; Continental Pacific Lines v. Superior Court, 1956, 142 Cal.App.2d 744, 299 P.2d 417; and Ruby v. Wellington, Cal.App.1958, 327 P.2d 586. Certainly, the defendant cannot be held responsible for plaintiff's difficulty, whatever it was, with his own highly reputable attorneys.

> In view of our prior pronouncements with respect to the statute, we are unable to find in this case anything which would amount to a waiver on the part of the defendant to file his motion. There was no conduct on the part of the defendant causing any actual delay. The fact that the defendant did not file his motion immediately upon the expiration of the two years is certainly not a waiver. There is no duty on the part of the defendant to bring the case to trial, this responsibility being entirely upon the plaintiff, and the plaintiff failed to do so. See Emmco Ins. Co. v. Walker, 1953, 57 N.M. 525, 260 P.2d 712; and Pettine v. Rogers, supra. (Featherstone v. Hanson, supra at 300 (1959)).

Also, it must be remembered that it was these Appellants who requested that the most recent trial setting be vacated in May of 1977 (R. 6), which was approximately nine months after the Appellants purchased the rejected applications involved in this litigation (Ex. 2 to R. 7). Thus, these Appellants had asserted an interest in this litigation for over two years before Respondent filed his Motion to Dismiss. Further, after all the delays that had occurred, it was not until October of 1978 that Appellants initiated discovery in this case (R. 15).

But the relevant point here is that the provisions of Section 73-3-15 apply to the cause of action, and not to who the parties are at any particular time or what counsel represents them. This is absolutely clear from the terms of the statute, and to suggest otherwise would totally defeat the purpose and goal of this legislation. As pointed out in the Dansie case, "The fallacy of the contention lies in the fact that the statute has nothing to do with joinder of parties, dismissal as to par-

ties and the like, but simply applies to the life or death of a cause of action" (542 P.2d at 744). It comes down to this—this Court, in Dansie and Provo City, left no room for equivocation or exception, and, try as they might, Appellants cannot distinguish or escape the clear and unmistakable language of those opinions. The fact is that this case, which had been pending for more than ten years, was properly dismissed by the lower court. The burden is upon Appellants to show that the trial court abused its discretion in dismissing this action, and Appellants have failed to sustain this burden (Thompson Ditch Co. v. Jackson, 29 Ut.2d 259, 508 P.2d 529 (1973) and Westinghouse v. Larsen, 544 P.2d 876 (Ut. 1975)).

III. SECTION 73-3-15 IS A VALID EXERCISE OF LEGISLATIVE POWER AND IS CONSTITUTIONAL

A. Preface

In an effort to escape the clear and unequivocal decisions of this Court, Appellants have sought to have Section 73-3-15 declared unconstitutional. At Points I, II and III of their Memorandum, Appellants raise and discuss three separate arguments in a vain attempt to demonstrate the unconstitutionality of this legislation. Each of these arguments is answered below, but it must also be remembered that there is a strong presumption of the constitutionality of any statute, and if there is any doubt as to the validity of any act, the court has an obligation to resolve it in favor of its constitutionality. Further, a court will not

judge an act invalid unless in its judgment there is a clear, complete and unmistakable constitutional violation, and the whole burden of proving the unconstitutionality lies upon the party asserting that position. Plaintiffs have totally failed in that regard in each of the constitutional objections they have raised in this action (Gubler v. Utah State Teachers' Retirement Board, 113 Utah 188, 192 P.2d 580 (1948); Patterick v. Carbon Water Conservancy District, 106 Utah 55, 145 P.2d 503 (1944); Thomas v. Daughters of Utah Pioneers, 114 Utah 108, 197 P.2d 477 (1948); State Water Pollution Control Board v. Salt Lake City, 6 Ut.2d 247, 311 P.2d 370 (1957)).

B. No Violation of Separation of Powers

Appellants first argue that the dismissal provision of Section 73-3-15 is unconstitutional because it violates the separation of powers principle provided for in Section 1, Article V of the Utah Constitution. The essence of Appellants' argument is that the mandatory effect of this statute is an unconstitutional intrusion into the judiciary because it is telling the courts how and when to decide matters. The basic fallacy of Appellants' argument—and the one in which they seem to persist—is that the mandate of §73-3-15 is totally and squarely with the Appellants, and not with the Court. The impact of this statute is simply that when a water user appeals a decision of the State Engineer, he does so with the express knowledge and condition that he must conclude the litigation in the trial court within

a two-year period or must suffer the consequences of the statute. This is not unreasonable, and does provide to any litigant who is interested in actively pursuing such an appeal sufficient time to conclude it in the trial court. Appellants certainly are in no position to complain about a two-year time period when this action has been pending for over ten years, and has been set for Trial twice—only to be vacated at Appellants' request.

Section 73-3-15 is not the type of legislation referred to in the cases cited in Appellants' Memorandum as constituting an interference with a judicial function. Rather, it embodies a valid exercise of legislative power dealing with the limitation of an action, and is clearly constitutional. That a state may constitutionally place reasonable limitations on actions is not open to question:

> A state may constitutionally shorten the periods of limitation fixed by previously existing statutes and make the amended statute applicable to existing causes of action, provided it affords a reasonable time within which suits for such existing causes of action may be commenced. What is a reasonable time is for the determination of the legislature and the court will not interfere with the legislative discretion, unless the time allowed is so manifestly insufficient that it amounts to a denial of justice. (Wolfe v. Phillips, 172 F.2d 481 (10th Cir. 1949); Emphasis added).

In Tucker v. McCrory, 266 P.2d 433 (Okla. 1954), the Oklahoma Supreme Court upheld a limitations statute against a claim that it was a legislative usurping of judicial power:

> Defendants argue that sub-section (6) above quoted, violates Article IV, sec. 1 of the Oklahoma Constitution as a legislative usurpation of judicial power ...

> ....(A) state may constitutionally shorten the periods of limitation fixed by previously existing statutes and make the amended statute applicable to existing causes of action, provided it affords a reasonable time within which suits for such causes .... may be commenced. (226 P.2d 434, 435).

See also United States v. Morena, 245 U.S. 392 (1918); Sparlin v. Refunding Board, 71 S.W.2d 182 (Ark. 1934). Clearly the time allowed under Section 73-3-15 is reasonable when measured against the overall public purpose of effective control over the administration and utilization of the limited water resources of this State.

Appellants' reliance on Atchison, T.& S.F. Ry. Co. v. Long 251 Pac. 486 (Okla. 1926) and Lindauer v. Allen, 456 P.2d 851 (Nev. 1969) is misplaced. In Atchison, the legislation provided that the district courts were to try certain classes of cases within ten days. Such is not the case here—the burden is on the Appellants, and not the Court. Further, the time frame involved in Atchison was only ten days (within which the trial court had to try the matter after the defendant answered) and was unrealistic and unreasonable. However, the two years allow for Appellants in this litigation to get their case tried is fa and reasonable. Appellants have had two opportunities over a t year period within which to conclude this action, but are no closer now than when the action was filed. The Lindauer case, supra, involved an express conflict between the time frame for dismissal for failure to prosecute as specified in the Nevada

Supreme Court's rules and a statute. The Nevada Supreme Court affirmed the dismissal of the action, concluding that the time specified in the court's rules prevailed and voided the statute. No such conflict exists here. But in any event, as discussed above, there is no basic constitutional problem with the Legislature having placed such limitations on actions. Also see Schultz v. Schultz, 70 Cal.A.2d 293, 161 P.2d 36 (Calif. 1945); Denver Local Union v. Perry Truck Lines, 106 Colo. 83, 101 P.2d 436 (Colo. 1940); and Town of Chino Valley v. State Land Dept., 580 P.2d 704 (Ariz. 1978).

C. No Violation of Equal Protection or Due Process

Appellants' second constitutional argument is that Section 73-3-15 violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and Section 7, Article I of the Utah Constitution because persons involved in appeals of State Engineer's decisions before the enactment of Section 73-3-15 are not treated exactly the same as those after enactment of this statute. Laws must have a beginning, and the Legislature certainly is not prevented or prohibited from making changes which affect the rights, duties and obligations of parties involved in litigation or otherwise (Sperry & Hutchison Co. v. Rhodes, 220 U.S. 502 (1911)). The Fourteenth Amendment does not forbid statutes or statutory changes treating rights that existed prior to enactment of a statute differently from rights created after enactment of a statute.

Obviously, in the case of §73-3-15, the Legislature had t devise a system to dispose of cases already in existence when the statute was enacted, and the method it chose is fair and reasonable, and certainly has not resulted in the kinds of excesses that Appellants have attempted to conjure up in thei argument. Whether the method chosen is an ideal one—or whet there may be other possible solutions—is immaterial so long a the legislation adequately treats and provides a solution for both categories of litigation. There is no requirement that the two categories must be treated exactly the same. Equal pr tection does not require that legislation provide exactly the same procedure for different classes of litigants:

> Nor does the equal protection clause exact uniformity of procedure. The legislature may classify litigation and adopt one type of procedure for one class and a different type for another. (Dobany v. Rogers, 284 U.S. 362 (1929)).

Due process does not guarantee a particular form or method of procedure:

> Due process of law guarantees to every citizen the right to have that course of legal procedure which has been established in our judicial system for the enforcement and protection of private rights (citations omitted). It contemplates that the defendant shall be given fair notice, and afforded a real opportunity to be heard and defend (citations omitted), in an orderly procedure, before judgment is rendered against him. (State v. Chillingsworth, 171 So. 649 (Fl. 1936)).

In the case of Section 73-3-15, it was necessary that the Legi lature provide a procedure to deal with those individuals who appealed decisions of the State Engineer before the act, becau

they were not on notice at the time of filing that their suits were subject to dismissal upon two years failure to prosecute. Thus, they were given an additional two years to prosecute upon receiving notice of the statutory requirement in the form of a motion by the other party to dismiss. On the other hand, those (like Appellants herein) who filed after enactment of §73-3-15 were on notice at the time they filed an appeal that their actions could be dismissed upon motion of a defendant after two years for failure to prosecute.

Section 73-3-15 is not subject to the challenge that it violates equal protection by an unreasonable classification. The classification therein is reasonably based. It affords to those filing both before and after its enactment due process of law in the form of notice that they must prosecute their actions with expediency. The very classification which Appellants suggest to be a violation of equal protection is necessary to preserve due process of law to both classes of claimants, and is thus reasonably based.

The cases which Appellants rely on will not support the argument they have made. State v. Mason, 94 Utah 501, 78 P.2d 920 (1938), simply supports the general rule that there must be a reasonable basis to differentiate between classes or categories which are the subject matter of the law in question. Such a basis exists here.

Appellants also cite the New Mexico case of State v. Sunset

Ditch Co., 145 P.2d 219 (N.M. 1944), in support of their equal protection challenge, alleging that a legislative classification based entirely upon a time element, with no reasonable relation to the object of the legislation, is unconstitutional. However, as Appellants note at page 14 of their Memorandum, this Court stated in Dansie that Section 73-3-15 is "designed to put a time barrier against litigation, in determining the precious water rights in this arid state . . ." Thus, the time element is an object of the statute. The legislative classification of those filing before and after the act clearly bears a reasonable relation to that statutory purpose, and is not constitutionally objectionable.

D. No Denial of Access to Courts

Appellants' final constitutional argument is that Section 73-3-15 has the effect of closing the courtroom to Appellants in violation of Section 11, Article I, Utah Constitution. This is most difficult to understand. Appellants were in court for over a decade and had this matter set for Trial twice, but yet still maintain that somehow the Court has been closed to them. There is simply no basis for making such an argument. The constitutional guaranty providing for open courts does not create any new rights for Appellants, but is merely a broad declaration of a fundamental protection. If Appellants' argument were followed to its logical conclusion, the Court would never be able to dispose of stale litigation. Certainly such a result was never

contemplated by this constitutional provision. Appellants were given an express right to present their claim to the Court under the provisions of Sections 73-3-14 and 73-3-15, and the Legislature can prescribe the method and manner by which Appellants must pursue their appeal without transgressing Article I, Section 11. If this were not so, the Legislature would never be able to specify limitations and conditions on the procedural aspects of litigation. This just simply is not the law:

> Plaintiff's counsel, however, also contend that the act is unconstitutional because it deprives a person whose rights are affected from seeking redress in the courts. This contention, for the reasons already pointed out, cannot prevail. There is no reason why the Legislature may not limit the right to assail the regularity of the formation or organization of a district, provided a reasonable time is given within which to bring an action for that purpose. This is practically all that is attempted by the limitation imposed in the act in question. (Horn v. Shaffer, 47 Utah 55, 151 Pac. 555, 558 (1915)).

Also see Brown v. Wightman, 47 Utah 31, 151 Pac. 336 (1915) and Brown v. Lufkin Foundry and Machine Co., 487 P.2d 1104 (N.M. 1971).

Appellants can derive no comfort from Oklahoma City v. Castleberry, 413 P.2d 556 (Okla. 1966), upon which they rely to support their argument under this point. In that case the court correctly set aside a default judgment against a landowner (who was not represented by counsel) because he had been misinformed by one of the district judges as to when his case would be heard. Hence, the landowner was not present when the hearing was held and his

default was entered. Certainly the court was correct in sett this default aside. However, that case bears no factual rela- tion to this matter. Appellants attempt to develop the argum that the trial court was somehow forever foreclosed from dism ing this action because it did not do so following issuance o the court's Order to Show Cause on January 10, 1978. This is sense! As previously pointed out in this Brief, this action on the court's own motion and was not initiated pursuant to t provisions of Section 73-3-15. Further, the trial court did pursue the matter—it simply struck the Order to Show Cause a indicated that the matter would be set for Trial (R. 14). App lants conveniently overlook the fact that this action has been pending for over a decade, during which Appellants had two dif erent opportunities to try the case but failed to do so. This a far cry from a situation where the courts have been closed t party.

> We agree with the appellant that every litigant should have his day in court; but he should abide by the rules (Averette v. Hutchinson, 420 S.W.2d 581 (Ky. 1967)).

E. Conclusion

As a concluding comment, it should be noted that the validity of legislation establishing state control over the administration of water has uniformly been upheld in the Western United States as a valid exercise of the states' policy power against a variety of constitutional objections (Hutchins, Water Rights Laws in the Nineteen Western States, Vol. I, p. 314 (Mis

Pub. No. 1206, U.S. Dept. of Agriculture, 1971)). There is a substantial public interest in sound water right administration. Utah's water code had its beginning around the turn of the century when various statutory provisions were enacted to afford a more active state role in the administration and distribution of the water resources of the State. From that time until 1919, various statutory provisions were enacted governing Utah's water resources. In 1919, the Utah Legislature revised and re-enacted a comprehensive water code for the State of Utah which encompassed the allocation, distribution and adjudication of the water rights of this State. There have, of course, been a number of amendments to Utah's water code since that time. The constitutionality of this water code has been challenged and, while Section 73-3-15 was not addressed in that litigation, this Court had no difficulty approving and endorsing the constitutionality of those aspects of Utah's water code which it has considered. See Spanish Fork West Field Irrigation Company v. District Court, 99 Utah 527, 104 P.2d 353 (1940); Eden Irrigation Company v. District Court of Weber County, 61 Utah 103, 211 Pac. 957 (1922); and Huntsville Irrigation Ass'n. v. District Court of Weber County, 72 Utah 431, 270 Pac. 1090 (1928).

IV. CONCLUSION

This action—which had been pending for over a decade when Respondent filed his Motion to Dismiss—was properly dismissed

with prejudice by the trial court for failure to prosecute. Appellants have completely failed to demonstrate that the trial court abused its discretion in dismissing this action, and the decision of the lower court should be affirmed.

Further, Section 73-3-15 is clearly a constitutional exercise of legislative power, and Appellants have failed to show otherwise.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of Respondent was served upon the following by mailing the same, first class postage prepaid, this sixth day of December , 1979:

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