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In the
Supreme Court of the United States

ASSOCIATED ENTERPRISES, INC.)
and JOHNSTON FUEL LINERS,)
Appellants,)
vs.)
TOLTEC WATERSHED IMPROVEMENT)
DISTRICT,)
Appellee.)

No. 71-1069

Washington, D. C.
January 8, 1973

Pages 1 thru 39

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IN THE SUPREME COURT OF THE UNITED STATES

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: ASSOCIATED ENTERPRISES, INC. :
: and JOHNSTON FUEL LINERS, :
: Appellants, :
: v. : No. 71-1069
: TOLTEC WATERSHED IMPROVEMENT :
: DISTRICT, :
: Appellee. :
: ----- X

Washington, D. C.
Monday, January 8, 1973

The above-entitled matter came on for argument
at 10:58 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

HENRY A. BURGESS, ESQ., P. O. Box 728, Sheridan,
Wyoming 82801; for the Appellants.

FRED W. PHIFER, ESQ., P. O. Box 180, Wheatland,
Wyoming 82201; for the Appellee.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 71-1069, Associated Enterprises against Toltec Watershed District.

Mr. Burgess, you may proceed whenever you are ready.

ORAL ARGUMENT OF HENRY A. BURGESS, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. BURGESS: Mr. Chief Justice, Members of the Court:

This case is before this Court on appeal from the mandate of the Supreme Court of Wyoming, affirming a judgment which was entered by the state district court for Albany County, Wyoming. The mandate and the judgment of the state court found that certain Wyoming statutes providing for the creation of a watershed improvement district did not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

This action was commenced by the Toltec Watershed Improvement District, which is organized under the provisions of the Watershed Improvement District Law of Wyoming, seeking entry upon the lands belonging to Associated Enterprises for the purpose of surveying and drilling a dam site preliminary to the construction of a dam.

The lands involved are owned by Associated

Enterprises and are under a lease to the Johnston Fuel Liners. Johnston Fuel Liners as lessee was not allowed to vote in the election which created the district.

Q Mr. Burgess, where in the record is there a finding by either the trial court or the Supreme Court of Wyoming that Johnston Fuel Liners was a lessee from Associated Enterprises?

MR. BURGESS: It is in the appendix, Your Honor.

Q Whereabouts?

MR. BURGESS: [Pause, no response]

Q The reason I ask, I did not find it in your stipulation of facts. I found it in questions and answers submitted in interrogatory form, but I did not find any finding, at least in my study, either by the trial court or the Supreme Court of Wyoming, that assumed it as a fact.

MR. BURGESS: On page 19 of the appendix, there is a stipulation of facts. Paragraph three says that Johnston Fuel Liners is not a land owner as defined by WS 1957 and so forth. Although given notice of the time and place of the referendum, had no legal right to vote and did not vote. That was in the stipulations of facts.

This case was not actually tried. It was submitted--

Q That does not sound to me like a stipulation that Johnston Fuel Liners is a lessee from a property owner in the district.

Q At least they allege that Johnston Fuel Liners owns cattle which grazes on the land.

MR. BURGESS: That is correct. They allege that they are in possession of the land and then there is an order and judgment from which the appeal was taken. And on page 24 in the interrogatories, interrogatory number three, starting at the bottom of the page 23, we go down through the interrogatories, the second interrogatory says that they commenced using the land in 1959. The use was continuous since 1959 to the date of the answer of the interrogatories. Interrogatory number four says Associated Enterprises purchased some cattle, in 1969 ran the cattle on lands in the Toltec District. Then in interrogatory number five it talks about the lease agreement between these two companies and the exchange of use of various lands.

Q This is Johnston Fuel Liners' position, I realize. But how are we to know that either the trial court or the Supreme Court of Wyoming accepted this position?

MR. BURGESS: Well, I believe in the Supreme Court-- [pause]--the order of intervention, of course, Johnston Fuel Liners was not originally a party defendant and they were allowed to intervene. And in the motion it says that the-- this is again on pages 14 and 15 of the motion--that they were a lessee. And the entry of the lands upon Toltec, of the entry by Toltec upon the lands of Johnston Fuel Liners

in interference with the movant's rights to its use and possession of the lands--that is on page 14 in the appendix.

Q Why do you not go ahead. I was just concerned about the point.

Q I notice, though, before you leave it, on the top of page 25 there is the request in the interrogatory, "Please attach all copies of leases between Johnston and Associated Enterprises." And then the answer is that the agreement is reflected on the journals of the company and that there is no single written lease document.

MR. BURGESS: Correct.

Q This is just an occupancy of sufferance?

MR. BURGESS: I would assume that you could term it that. The two corporations own lands which are intermingled. And one of them uses lands in one area and one uses the other. There is a monthly payment. I would take it that it is a tenancy which could be revoked at the end of any annual period of time.

Q Do you think that that might bear if it is a tenancy of sufferance, an occupancy of sufferance, it might be relevant to the consideration of their interest in voting on the matter?

MR. BURGESS: Yes, I would think that the interest of any user of this land who occupies it, that his interest is as great as the interest of any person who owns the title

to that land. Secondly, of course, anything which affects the rent which would be charged upon that land would also affect a person who uses that land.

Q Would you think the right to vote might be different if it is a 99-year lease or occupancy of sufferance terminable at will?

MR. BURGESS: No, Your Honor, I think the right to vote is something that is granted by the--in this particular case--by the particular act, and the act says that a land owner may vote and all other parties are excluded. So, it would seem to me that if you are not a land owner, it does not make any difference whether your tenancy is one of sufferance for a year or for 99 years. In any event, you are excluded from voting.

Q But in order to have standing to maintain your constitutional issue, you have got to show that if the Constitution were applied in the way you say it should be, that your client would end up having a right to vote, do you not?

MR. BURGESS: Correct. I understand that. And that is why the interrogatories and the order of the court--the court did allow Johnston Fuel Liners to intervene, finding perhaps not expressly but certainly by implication and a general order that all of the facts and legal conclusions necessary to enter the order are embodied in that order.

As I say, the case arises under the statutes relating to the Watershed Improvement District. The purposes of that district, of course, are to provide for the prevention and control of erosion, flood water, sediment damage, is to provide for the storage, conservation, development, utilization, and disposal of water and thereby to preserve and protect land and water resources.

It is also designed, as the statutory purpose states, to promote the health, safety, and general welfare of the people of a state.

This district is formed by the written petition being filed by land owners with the board of directors of what is called a water and soil conservation district, which board then determines whether or not in their opinion the district would be feasible. Thereafter, if it is determined that it would be feasible, a referendum is had. Our statute provides no qualifications for the voters except that you have to be a land owner.

The land owner is defined by the statute as being one who holds the legal title or is acquiring title by a contract. There is no qualification as to residence, a non-resident land owner, one outside of the state, may vote. A minor may vote by a guardian, a deceased estate by an executor, and there is no registration requirement.

Prior to the actual casting of a ballot, the land

owner must make an affidavit in which he states the number of acres he owns. He then votes. And the ballots are counted and in order to pass, the referendum must have voting in favor of it a majority of the land owners who also represent a majority of the acres.

So, in effect, the vote is weighted. Now, then, after the creation of the district, a board of directors is elected to operate the district. There are five of them, and in order to be nominated, you have to be nominated by ten land owners.

Upon the creation of the district, the statute states it constitutes a governmental subdivision in the state and a public body corporate and politic. They have the authority to levy taxes, make assessments, build structures, accept grants, apportion benefits against irrigated lands. They also have the authority to submit to the land owners a proposition for the issuance of the bond.

Once again, only the land owners vote on the bond. The vote must carry by two-thirds of the land owners voting and those two-thirds must own a majority of the acreage. So, once again you have a weighting of the vote in comparison to the number of acres owned.

In this particular case, it was argued of course in the lower courts that the limiting of the voting franchise to the land owners in the creation and maintenance of a

watershed improvement district violates the Fourteenth Amendment Equal Protection Clause in that it creates an unreasonable, arbitrary and capricious voting classification.

The second argument was that the weighting of these votes by requiring a majority of the acreage is a debasement of the votes of the people resident in the district and the owners of small acreages.

Our Supreme Court held that while Wyoming has always recognized the distinction between governmental and proprietary functions of a legal subdivision and that this was a legal subdivision, that a watershed improvement district's functions are primarily proprietary. And then they stated that the appellants in that case would fail to show that the statute was unconstitutional and that the classification, the burden showing the classification of orders, was upon the appellant.

Our court also made the observation that there is an overreaction to the decisions of this Court, both by judges and lawyers, that the one-man, one-vote rule has now been extended to a local specialized unit of government. And the Wyoming Supreme Court rejected the idea that it would extend the rule to include such a water improvement district.

Q What if under Wyoming law a watershed improvement district was to be formed on the vote of all

registered voters within the proposed district?

MR. BURGESS: What if it were to be?

Q Yes.

MR. BURGESS: It could not be under our statute.

Q I know, but what if the statute just provided that?

MR. BURGESS: I think it would be constitutional.

Q Why would it? I do not know why your corporate lessee should not demand, on the same argument, the right to vote.

MR. BURGESS: The corporate lessee in this case would not have a right to vote if, as the Justice says, it were upon the basis of an individual voting.

Q I know they would not. I said that they would not have the right to vote under the statute. But would the statute be constitutional if it, like the present one, excluded your corporate lessee from voting?

MR. BURGESS: My understanding of the law is that it would be constitutional.

Q Why cannot the state then exclude it under this statute?

MR. BURGESS: Sir?

Q Why cannot the state exclude your corporate lessee under this statute?

MR. BURGESS: We contend that it is an unreasonable

and capricious exclusion.

Q I do not know why it would not be under the other one. You would have exactly the same interests.

MR. BURGESS: What we are talking about here, as I understand it in a sense, is the purpose of an election. And running counter and at the same time going along with that is the question of the qualification of a voter. I think that when you vote--

Q You mean you think you have a case here only because they proceeded on the basis of land owners being voters?

MR. BURGESS: And voting the acreage. You weight the vote. What you are doing is you are voting the number of acres you own.

Q So, you say, therefore, since they proceed on the basis of land owners, it is invidious to exclude lessees?

MR. BURGESS: Right. What we are talking about, as I understand previous decisions of this court is people and certainly not acres or corporations.

In the Cipriano case you are talking about striking down a statute which provided for the passage of sewer bonds. There is really no difference between this case and that case, and one case of sewerage is what you are talking about on a bond issue. In this case we are trying to get the water.

Q Mr. Burgess, who pays the bonds that have been issued by your district?

MR. BURGESS: The bonds are paid by the owner of the land who benefits from the improvements made in the form a dam and canals and ditches.

In the first instance, that is assessed against the land owner. He is the one who has the obligation to pay, the taxes are collected by the county treasurer. For failure to pay the taxes, the lands are sold under the regular laws relating to delinquency of taxes.

We contend that that payment in the case of a lessee is passed over to the lessee in increased rents.

Q Is the assessment based on the number of acres?

MR. BURGESS: It is based upon the value of benefits on certain acres. For instance, if a total project would cost \$100,000 and there is ten thousand acres, it would be \$10 per acre, would be the assessment.

Q But the general public has no obligation directly or indirectly to pay the bonds that are issued by the district?

MR. BURGESS: Correct.

Q You referred to a case involving the issuance of sewer bonds. Who paid for the interest and principal on those bonds?

MR. BURGESS: Property owners.

Q Only property owners?

MR. BURGESS: Only property owners. It is my understanding that is Cipriano v. City of Houma.

In that case they are talking about paying for the bonds for the sewage. In this case, we are talking about paying for the bonds for the purpose of getting the water.

Q Is it your position that one must have an interest in land by a lease or otherwise to be entitled to vote, or would you suggest that anyone who lived in the district, regardless of whether he had an interest in land, also should be entitled to vote?

MR. BURGESS: I would respectfully suggest that anybody in the district has a right to vote. I think that in this day and age, the Government being as complex as it is--

Q But you do not have to go that far.

MR. BURGESS: No, I do not have to go that far. But I think that the people have a right to vote.

We are talking about an arid state, and there are only three things of value in Wyoming. One of them is the earth, the air, and the water. And the water is an illusory, transitory thing. And if you do not get the water when it is there, if you do not use it, it is forever gone. Where you have it, you have wealth, you have homes, you have an irrigated farm, you have towns, you have communities. And it

is our contention that everybody in the community where there is an irrigated project has a vital interest.

Q What is the priority on the use of water in Wyoming?

MR. BURGESS: Doctrine of prior appropriation.

Q But what about if there is a conflict between domestic consumption and irrigation?

MR. BURGESS: We go on the doctrine of priority. We have five preferred uses. If you have a preferred use which is subsequent in time to an irrigation right, the irrigation right prevails.

However, the preferred right can by eminent domain take the prior use lower on the scale.

Q The water conserved by this district might be available for higher uses or not?

MR. BURGESS: The contemplated use is use for agricultural purposes. Wyoming is growing. I suppose in a sense it could be used. It would be kept in Wyoming.

Q It would have to be bought.

MR. BURGESS: It would have to be purchased by someone else.

Q The improvement district does not acquire any water rights of its own as a result of constructing this facility, does it?

MR. BURGESS: That is correct. You have to file

with the state engineer, make a beneficial use of the water, and then you get a water right. But this is the facility in the structure.

Under this the water district could file an application to construct a dam and get what they call a primary permit, which would authorize them to impound and store within the dam for the benefit of the members of the district the water.

Q But the water it does store is not for its own benefit as such but simply for the benefit of its members?

MR. BURGESS: Of the members, and it can also be used for recreation purposes, fishing.

We submit that this is a case which probably was raised by the dissent of Justice Harlan in which he said I believe in the Hadley case that this principle which was handed down in that case applies to an irrigation district. And for all the reasons enunciated by this Court in previous cases, we feel it is only logical that this principle be applied to the watershed improvement district acts of the State of Wyoming.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Burgess.

Mr. Phifer.

[Continued on page following.]

ORAL ARGUMENT OF FRED W. PHIFER, ESQ.,

ON BEHALF OF THE APPELLEE

MR. PHIFER: Mr. Chief Justice, and may it please the Court:

Possibly to give a little bit more background on this case, the question that was raised about tenancy and sufferance was raised in the Wyoming Supreme Court and was specifically not passed on. There is no written lease in this case, as the interrogatories show. This was a working arrangement between two corporations to use the land.

What is not shown in the record, but I am sure Mr. Burgess would concede, is that one man is the primary stockholder in these two corporations. They both belong to a man by the name of Eldon Johnston. He has several ranches. As you indicated by the record, Johnston Fuel Liners is a trucking company which also owns cattle.

Q And the boards are the same?

MR. PHIFER: The boards are the same, yes. There is some differentiation in some of the minority stockholders but--

Q The stockholdings are not the same?

MR. PHIFER: The stockholdings are not quite the same but almost the same, Mr. Justice.

Secondly, in Wyoming there is a statute which specifically provides that you are a tenant at sufferance

unless you have a specific written lease. So, in this case they are a tenant at sufferance, although the Wyoming Supreme Court passed over that question when I raised it in my brief.

Secondly, with regard to the question on paying for this, the district as originally formed, as the name would indicate, on a watershed area, the drainage is all the same.

Then after the district is formed and after they have decided that it is feasible to build a dam in a certain location, then only the lands that are benefited below that dam are assessed. In other words, not all of the land that is in the watershed district--much of it is mountainous area. This area in particular is an alpine area. The lowest elevation, I suppose, in the district would be 6,900 feet, running from there to about 7,200 feet. It is quite an arid area. The dam is on the North Laramie River, which is a very small river. Normally in the middle of the summer you could step across it in places.

There is a large spring runoff, and it is the purpose of this type of law in Wyoming to catch the spring runoff so that it can be used later for irrigation. The meadows that are irrigated here will only grow hay, because of the altitude and the shortness of the growing season. There probably is 2,000 acres involved belonging to about 12 different families.

The production on these meadows is very limited, again because of the fragility of the soil. It is very thin alpine soil, mostly gravel. It will produce a half a ton to a ton of hay; with very good cultivation and some fertilizer it might produce a ton and a half of hay. Here again it is not alfalfa, as Mr. Justice White would be familiar with from his background in northern Colorado, but primarily wild hay. It has no market. This area is located about 60 miles from the nearest town. The hay is used primarily by the ranchers.

Q For cattle.

MR. PHIFER: For cattle.

Q It is in the vicinity of--

MR. PHIFER: Laramie Peak is right on the edge of this. So, it is in the vicinity of Laramie, Wyoming. It would be about 60 to 70 miles north of Laramie, Wyoming.

Q It is irrigated pasture then?

MR. PHIFER: It is irrigated meadows.

Q Irrigated meadows?

MR. PHIFER: Yes.

Q Of course, you harvest the hay?

MR. PHIFER: You harvest the hay.

Q You pick it up.

MR. PHIFER: You have to have it for winter.

Q And you bale it?

MR. PHIFER: Oh, in most part they do not bale it here, primarily because the meadows are too rough.

Q But you keep the cattle there in the winter?

MR. PHIFER: Keep the cattle there and feed them there.

Q In the winter?

MR. PHIFER: In the wintertime.

This will provide only supplemental water, incidentally, to existing water rights. It would not bring any new land under irrigation. Here again, to go back to the question of who pays for this, once this question is decided, if we are still constitutional, then appraisers are ordered by the court to go out and appraise the land that will be benefited, only the land that will be under ditch.

Now, the land will be classified by these appraisers so that some of it will probably pay a little bit more than others. But for the total area of the watershed district itself might be fifteen or twenty thousand acres; the area that will pay for it is only the area that is benefited, that would come under, I would say, under 2,000 acres of meadow.

In regard to the question on priority of water rights in Wyoming, domestic consumption does come first, and it can at any time condemn any other industrial or agricultural water if it is necessary. In this case, it is very unlikely. It is located in a remote area.

There is under the provisions for setting up the

watershed law in the first place--Congress enacted specific legislation making grants in aid to watershed districts to build these sort of things in the interests of conservation and particularly in the interests of flood control, and we have a flood control problem here, nothing that menaces life but it does cause damage, quite extensive damage, down the river each year.

They grant about 50 percent of the cost of these projects as an outright grant. Then the other half of it is loaned to the projects by the Farmers Home Administration.

Q How did this case get started?

MR. PHIFER: The case got started primarily right after the district was formed; we asked permission to go on to Johnston's land to make a survey to see if the foundation studies would be proper to build a dam.

Q I take it Johnston must have voted against the formation of the district.

MR. PHIFER: He will obviously go on first.

He voted against the formation of the district, yes. Then he allowed us to go on his land and check to see. Then, as it often happens with government projects, we had inadequate data.

Q There were other owners who owned more land than he did in this?

MR. PHIFER: Yes.

Q So, they outvoted him?

MR. PHIFER: Well, actually the vote--there were only three land owners that voted against it. There were about 12 that voted for it. There are two large land owners in the area; both of them voted for it.

Q But, anyway, he got outvoted?

MR. PHIFER: He got outvoted.

Q If this lessee is entitled to vote, that is not going to do any good, because he will have been outvoted also, except what? You have to get to the acreage limitation as well as--it has to be a nose count rather than an acreage count.

MR. PHIFER: I think that based on the decisions in this Court, all of which are concerned with so-called popular elections--I am not exactly sure what a popular election is except that it is where we go into a voting booth and it is a secret ballot and whether we are voting on sewage bonds or anything else, it has a particular form to it. And the decisions of this Court apply to popular elections and they will stand unless there is invidious discrimination.

In fact, I think there is some language in some cases of this Court that say once the popular election process is chosen, then you must do so and so.

Q How would this election have come out if, in the first place, the rule had been to count the votes rather

than the acreage?

MR. PHIFER: It would still have passed, both ways. But here is the thing. This is not a popular election.

Q Let us assume that you lose this suit.

MR. PHIFER: If we lose this suit, the entire Wyoming watershed law I think is unconstitutional. Then probably we have plans to go back--

Q I am just asking, is this really a very live lawsuit?

MR. PHIFER: I beg your pardon?

Q What interests have the other side got? They would still lose the election. They still would have lost the election.

MR. PHIFER: Well, they would not in one particular instance. If lessees are allowed to vote, then what is to prevent the land owner who is against this from leasing ten acres out of 10,000 acres to 50 different people.

Q That does not happen to be the situation at the time the vote was held.

MR. PHIFER: Yes, but I think it leaves it open to fraud.

Q If you lose this lawsuit, there will be a new vote; that is the point. And you do not know how that is going to come out.

MR. PHIFER: We know how the new vote will come

out, because we not only have a majority in number, we have a majority in acreage both. Either way we are all right.

Q Except that before the new vote, as you say, one of the land owners might lease an acre apiece to 200 people.

MR. PHIFER: That is right, and they will control the election. It leaves it open to fraud, I think. I think that this is the compelling state interest that the State of Wyoming had in setting up this proposition of land owners only, is that it does leave it open to fraud if you do it on the basis of letting lessees also. Not only that, but let us take this particular instance. Here is Johnston Fuel Liners and Associated Enterprises. Are you going to say that only lessees can vote and the land owner cannot if there is a lease? Or are you going to say both lessees and land owners can vote? If that is the case, Mr. Johnston would be allowed to vote twice in this instance, because he owns the land as one corporation; he is a lessee as another.

Q He is a lessor, to put it in the first instance.

MR. PHIFER: Yes.

Q He was his lessor.

MR. PHIFER: He was his own lessor.

Q He was his own lessor.

MR. PHIFER: Going back to this popular election

proposition, this is not a popular election. There is no secret ballot to start with, because they have to write down how many acres they have so that we will know when we look at their names at the counting of the ballots how many acres are involved. There is no age limit in this case. There is no residency requirement. In fact, there is not even any citizenship requirement nor is the vote limited to persons.

A Swiss corporation, if it filed to do business in Wyoming, could own land and vote in this. So, it has no real comparison to a popular election which, to my mind, distinguishes this from the whole line of cases on one man, one vote.

Q If you distinguish the cases where that--say, there is really no difference between a land owner and a lessee and there is not enough of a difference between a land owner and a lessee to warrant excluding the lessee simply because the land owner has the formal obligation to pay the bill.

MR. PHIFER: That is right, because actually, as you have said in previous cases, the renter or the lessee ends up paying the bill and increased rent at least at the next rent period.

Q Do you accept that?

MR. PHIFER: I do accept that, except that I am afraid that the compelling state interest in this case is to

exclude lessees because it would leave the election open to fraud, and that any land owner that was opposed to it could bring in enough so-called lessees to entirely control the election.

Q But other than that, you have no answer to the other?

MR. PHIFER: No, sir.

Q Mr. Phifer, Justice Powell asked Mr. Burgess about the case of Cipriano. Do you read Cipriano the same way Mr. Burgess does as involving an obligation that was to be ultimately paid only by property owners?

MR. PHIFER: No. I read Cipriano and all the other cases, once you get into the bond election sort of process. Everything that this Court had passed on before with regard to school districts, sewer bonds, and so forth, the benefits in those cases were such that benefited the entire community. Everybody in a sewer district is interested in sewers, whether they own land and have to pay for the bonds.

Q Regardless of who pays the bill?

MR. PHIFER: Regardless of who pays the bill. Everybody is directly affected by sewage disposal. It is a matter again of the health of the whole community. And like schools, whether you have children in school or whether you own property, everyone in the community is directly affected and directly interested in the benefits to schools.

Everyone in the community is not directly interested nor directly benefited by a watershed district. This is only concerned with irrigation water.

I cannot differentiate too much between lessees and land owners. But you can certainly differentiate between people who are summer residents, for instance, that would own a cabin site in the watershed district or are employees on ranches. Another way of bodily controlling this election would be to bring a multitude of employees in just prior to election and allowing them to vote, because they are located on the ranches.

Q Would you not have that same possibility with one-man, one-vote? Somebody can go out and bring in a thousand people.

MR. PHIFER: Well, here again--

Q Yes, yes, yes.

MR. PHIFER: You do, Mr. Justice, up to the point that they have to support them for about 30 days, I believe, now under your--

Q What prevents you from putting a residence requirement?

MR. PHIFER: A residency requirement in here?

Q Yes.

MR. PHIFER: Well, I think that it would be unconstitutional to make a residency requirement here,

because here we go back to the matter of discrimination. Is the class which is excluded more directly interested in the results than the class which is included? And in this case, if you put a residency requirement in, all the corporations that owned lands would be non-residents.

Q All this man says is to let the lessee vote. He does not say that the lessee that comes in today votes or anything.

MR. PHIFER: No, but the only alternative, I think, to the present system, is a system that would put it back on the old residency requirement.

Q Do you know of any lessor who pays taxes himself?

MR. PHIFER: Lessor?

Q Yes.

MR. PHIFER: In our areas, yes, sir. They all pay the taxes directly themselves. Generally speaking, the leases--

Q I mean, if you have got a lessor and a lessee, who pays the tax?

MR. PHIFER: Well--

Q I know who signs the check, but who pays the tax?

MR. PHIFER: Of course, ultimately it goes back to who is paying the bill, and the renters do.

Q How many people are in this district?

MR. PHIFER: Probably 12 families.

Q What is wrong with letting 12 people vote?

MR. PHIFER: Not a thing, except that they are not the people who are directly interested in the election. The land owners are. There are quite a few land owners who do not live in this area. For instance, neither one of the corporations here actually headquarter here. They would not be classified as residents.

Q But you said the difference between this and the other cases is that it is for the benefit of all the people in the district.

MR. PHIFER: Yes. The other cases are for the benefit. I think service or bonds or bond issues--

Q Is this not of interest to all of the people in the district?

MR. PHIFER: No, sir. It is only of interest to the people who own or lease irrigated land. It is not of any interest to summer people, except for the remote possibilities of fishing.

Q Suppose there is a sewer for 12 families. Would that be different?

MR. PHIFER: I beg your pardon?

Q A sewer, 12 farms.

MR. PHIFER: That would make a great deal of

difference. Because even if you are a ranch-hand, you are interested in that.

Q I do not see the great trouble with letting 12 people vote.

MR. PHIFER: I think that if you limited it, again as I said, to residents, then you would be excluding a great number of land owners who are directly interested in this, and I think then it would be unconstitutional.

Q I am only saying that you want to protect them against fraud. You are out here bringing the thousand people in here with leases. That is not in this case at all.

MR. PHIFER: If lessees were allowed to vote and if Johnston Fuel Liners is classified as a lessee when it has no lease--

Q Suppose you said bona fide lessee.

MR. PHIFER: Bona fide lessees, again you can make out 50 leases in an afternoon. I think that a lessee's interest is not different than the land owner's. I think they both have a commonality of purpose in irrigation ditches, so that they are not going to be voting at odds.

I think also that it is not fair for a lessee who may be a tenant at sufferance or at least for a term of years to be allowed to come in and push through a large expensive project. The payoff on this is estimated at 50 years. And he may be there a year or two and pull out and leave the landlord

with a three and a half or four dollar a year assessment to pay on this project.

I agree that it does not seem on the surface to be fair, except that you have to draw the line somewhere. And I think that it is more fair to draw the line against lessees than it would be to set up a residency requirement and draw the line against non-resident land owners who have a very direct interest in both the benefits and the costs of this project.

Secondly, I really believe this is not again a matter of a governmental--

Q Do you think anybody could be persuaded to go up in the backwoods of Wyoming and just stay there for the purpose of voting?

MR. PHIFER: No, I do not think so. I am differentiating here again, Mr. Justice, between--if the lessees--

Q It depends on how good the fishing may be.

MR. PHIFER: Yes. Here again the lessees would not have to come up here if lessees were allowed to vote without a residency requirement. If there is a residency requirement, I am not worried about fraud, because I do not think they are going to move lessees into the area and make them stay there a month to fulfill, let us say, a fractional residency requirement. It is a pretty remote and cold area.

But I do think that then you are probably excluding a great many people who are directly interested in the thing, that are non-residents or even non-citizens, non-persons, as these corporations are, who should be allowed to vote in it, I do not think you could devise a fairer system. I do not believe there is any injustice here; no large land owner can force through a vote on his small neighbors, because it has to pass by a majority of the people.

Conversely, no group of small land owners could come in and force a project against one large land owner who would have the burden of paying for it, because it must pass by a majority of the acreage. And limiting it to land owners, here again is the only logical way that it can be done, I think.

Here again, I think this should be differentiated from a governmental unit. It is a governmental entity. But it exercises no sovereign power over the people. It is more in the nature of a quasi-private organization or quasi-public. It has the power to levy and collect assessments, which almost any mutual company would have. It has the power to buy and sell real estate and personal property, and the power to borrow money and sell bonds, which any private corporation can do. It does have the power to receive government grants and loans, and I think the Lockheed Corporation has that power also evidently. And it has the

power of eminent domain. There seems to be in counsel's brief a great distinction made because of this granting of power of eminent domain.

Every public utility has the power of eminent domain. So, I think this thing has much more in common with private corporations than it does with any public governmental entity.

Q I know you were contrasting the situation here with what you called a popular election and as you rightly said, in a popular election generally there is a vote and a polling place by secret ballot by individual voters. Since so many of these voters are corporations, how is the vote taken? Is it public? Is it just done by letter or how?

MR. PHIFER: No, we have a meeting and they come in and vote.

Q Individual representatives of corporations?

MR. PHIFER: Individual representatives of the corporations.

Q Who, if questioned, show their authority to represent the corporation.

MR. PHIFER: Yes. Of course, in this instance, this is a small community; there is no question about who is the owner of the corporation. He just comes in and votes; there is no question. And, of course, only one man would be

allowed to.

Q But it is a public meeting?

MR. PHIFER: Yes, it is an open meeting and there is quite an involved due notice requirement here. Every time anything is done by this thing, by the watershed district, due notice must be given and it must be posted at four or five places prominent in the district, which is kind of hard to do when the ranches are ten miles apart. They post them on the bridge post. And it has to be advertised in the newspaper in the area for three weeks, I think, prior to that time. So, there is good notice given.

Not only that, but because we anticipated that there would be problems in the first place, we always sent certified letters to every one of the voters, giving them due notice of any elections.

Q Actual notice by mail?

MR. PHIFER: Yes.

Q Mr. Phifer, where are these bonds marketed?

MR. PHIFER: They only have one market, and that is the United States Government. The bonds as such are merely security for the obligation under the FHA loans. It would be interesting to see how they would foreclose on those bonds if they had to, since almost all of the land involved was privately mortgaged to insurance companies or to the State of Wyoming prior to this time. So, the bonds are an

overriding obligation on the watershed district, and they would have quite a time collecting on them.

Q Are they subordinate to the private debt?

MR. PHIFER: They are really not a private debt. They are a debt of the watershed district itself, and the land under assessment is of course subject to liens for assessment and it might be subject to foreclosure by these. But I think the Government would have to step in and pay off a lot of insurance company loans before they could do it. It is not spelled out very well.

Q How do you know that these assessments and the liens they represent are subordinate to the private liens, does the statute say so?

MR. PHIFER: No, the statute does not say so.

Q Has it been adjudicated?

MR. PHIFER: No, it has not been adjudicated.

Q Certainly this would not be true of an ordinary tax lien?

MR. PHIFER: I am sorry, I think you are right. It would not be subordinate. But the assessments are not subordinate. But the assessments do not represent the bond. The assessments are merely assessments made by the district to help pay the bills of the district, and it could not only be bonds but improvements in everything else, and the assessments are an obligation owing to the district from

the land owner. There is no other obligation from the district to the Federal Government for the loan except the bonds. And what their priority is, I have no idea.

Q But occasionally one recalls, at least, cases where the bond owner has sought an action against the issuer to make the issuer take such action as it can by a marshaling of assets to collect funds that may be available to it but not directly to the bond owner. I take it that if a land owner fails to pay an assessment made by this district, the district has the power to have the property sold to pay the assessment under Wyoming law.

MR. PHIFER: That is right. Here again I do not know what the priority of that would be.

Q Prior to the insurance company lien, I would think.

MR. PHIFER: Yes, might be.

Thank you, gentlemen.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Phifer.

Mr. Burgess, you have got about nine minutes left.

REBUTTAL ARGUMENT OF HENRY A. BURGESS, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. BURGESS: Mr. Chief Justice and Court:

Several observations I would make. One of them is that I think we got a little bit outside of the record here in discussing this district. The fact of the matter is there

is some gerrymandering that went on here. Johnston Fuel Liners does have a number of employees who do reside in the district. Of course, they are not allowed to vote.

The site for their proposed dam would take in and destroy much of the land of Associated Enterprises who, in turn, have upstream dams. And what we are talking about--

Q You are pretty well outside the record too.

MR. BURGESS: I will stop it, Your Honor, if you do not believe it should go on. But the point is that the people did not decide this. It was said it was two big land owners. And they voted the acreage. That is how we are here.

This business of voting, I can't visualize, as one of the Justices said, anybody moving to the Laramie Peak country with a lease just to vote. And I am sure every election case, which is brought before this Court has thrown out to it this bugaboo about fraud and election. That is no problem in a small community like Wyoming. In the first place, we all think we are honest. Secondly, the people come in and they are pretty well known to their neighbors, and they are there.

When you get all through looking at this case, I think that historically these cases started on the question of voting for a Congressman. Then it got over to the voting of a school trustee, and then the county commissioner. And

you keep going down and down and down into this spectrum of local self-government. And we contend that this principle should also be extended into the lower unit of this particular water improvement district.

Q Your colleague said that the question of the tenancy at sufferance was presented to the Wyoming Supreme Court and was not decided. It was passed by by them, which I take it means that it would not make any difference to the Wyoming Supreme Court in terms of its rationale, if this were a wholly independent lessee with a lease for ten years.

MR. BURGESS: Correct. Or even if it were an individual. And I would just like to point that out. The thing that this case--

Q There are only 12 people involved?

MR. BURGESS: I think there may be 12 families that voted for it. I am not sure of the exact vote. There were three who voted against it, as I understand it. But there are no families above the upper limit which are interested in this, and of course they were not brought in. If this is a live issue in the community, it is a very live issues.

Q Are those families up there lessees or land owners?

MR. BURGESS: Both.

Q Will the land owners be allowed to vote?

MR. BURGESS: Certainly they should be allowed to

vote. But they weren't. They weren't even put into the proposed boundary.

Q Is that raised in this?

MR. BURGESS: No.

Q In this case there are 12 families involved?

MR. BURGESS: Correct.

Q Why do you call this an election. Everybody sits around a living room and talks about something.

MR. BURGESS: That is correct. That is probably what it was.

Q That is an election?

MR. BURGESS: Well, that is for this Court to determine.

Q If it was not called an election, would you have any case?

MR. BURGESS: I suppose not, except it is a governmental and political subdivision of the state.

Q That is right.

MR. BURGESS: Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.
The case is submitted.

[Whereupon, at 11:47 o'clock a.m. the case was submitted.]

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