

1976

Provo City v. Hubert C. Lambert et al : Brief of Plaintiff-Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PROVO CITY, a municipal corporation of the State of Utah,

Plaintiff & Respondent,

vs.

HUBERT C. LAMBERT, State Engineer of the State of Utah; PROVO RIVER WATER USERS ASSOCIATION, a corporation; KENNECOTT COPPER CORPORATION, a corporation; SALT LAKE CITY, a municipal corporation, CENTRAL UTAH WATER CONSERVANCY DISTRICT; UTAH LAKE DISTRIBUTING COMPANY, a corporation; UNITED STATES OF AMERICA, BUREAU OF RECLAMATION, DEPARTMENT OF THE INTERIOR; HUGH McKELLAR, as Provo River Commissioner; and PROVO RESERVOIR WATER USERS COMPANY, a corporation,

Defendants & Appellants.

BRIEF OF PLAINTIFF

AN APPEAL FROM THE JUDGMENT OF THE SUPREME COURT, IN AND FOR UTAH, BY
HONORABLE DON V. HIGGS, JUDGE

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APR 25

IN THE SUPREME COURT OF THE STATE OF UTAH

PROVO CITY, a municipal cor- :
poration of the State of Utah, :

Plaintiff & Respondent, :

vs. :

HUBERT C. LAMBERT, State :
Engineer of the State of :
Utah; PROVO RIVER WATER USERS :
ASSOCIATION, a corporation; :
KENNECOTT COPPER CORPORATION, :
a corporation; SALT LAKE CITY, :
a municipal corporation, :
CENTRAL UTAH WATER CONSER- :
VANCY DISTRICT; UTAH LAKE DIS- :
TRIBUTING COMPANY, a corpora- :
tion; UNITED STATES OF AMERICA, :
BUREAU OF RECLAMATION, DEPART- :
MENT OF THE INTERIOR; HUGH :
McKELLAR, as Provo River Com- :
missioner; and PROVO RESER- :
VOIR WATER USERS COMPANY, a :
corporation, :

CASE NO. 14,605

Defendants & Appellants. :

BRIEF OF PLAINTIFF-RESPONDENT

AN APPEAL FROM THE JUDGMENT OF THE FOURTH DISTRICT
COURT, IN AND FOR UTAH COUNTY,
HONORABLE DON V. TIBBS, JUDGE

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Plaintiff & Respondent,

vs.

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CASE NO. 14,605

Defendants & Appellants.

BRIEF OF PLAINTIFF-RESPONDENT

STATEMENT OF THE KIND OF CASE

This is an action to review in its entirety, and not in part as the appellants have stated, the decision of the State Engineer relative to Provo City's right to water under paragraph 4(c) of the "Provo River Decree" of May 2, 1921. The general characterization by the appellants under this heading is erroneous.

DISPOSITION BY STATE ENGINEER

While this particular subdivision (Disposition by State

Engineer) is not prescribed for briefs by the Utah Rules of

Civil Procedure, the respondent has no objection to such discussion, except that the facts should be reported accurately. The corrected facts are:

1. In September, 1969, appellant Hugh A. McKellar, then Provo River Water Commissioner, unilaterally, ex parte, sua sponte and without authority, made the unprecedented determination that Provo City's right to 16.5 c.f.s. under the Morse Decree of May 2, 1921, was a non-consumptive right and, accordingly refused to deliver such water to Provo City.

2. Representatives of Provo City attempted to reason with Mr. McKellar, but their efforts were to no avail.

3. Mr. Richard Maxfield, then special counsel for Provo City, called the State Engineer's office and talked with Mr. Bryce Montgomery, who was acting State Engineer during the illness of Mr. Lambert. After reviewing the record, Mr. Montgomery wrote Mr. McKellar on September 19, 1969, and told him to redirect the 16.5 c.f.s. to Provo City. (Ex. 21).

4. Mr. McKellar notified Mr. Mendenhall, manager of the Provo Reservoir Water Users Company, of the decision. Shortly thereafter, Mr. Joseph Novak filed an objection with the State Engineer. This objection developed into a legalistic hearing involving the interpretation of paragraph 4(c) of the Decree.

5. On May 1, 1970, the State Engineer rendered his decision, holding that paragraph 4(c) of the Provo River

Decree was for non-consumptive power use only.

DISPOSITION IN LOWER COURT

In the first disposition before the Honorable Allen B. Sorenson, the matter was presented on motions for summary judgment made by each side. No testimony was taken. The defendants' motion for summary judgment was granted. On remand, the Trial Court found in favor of the plaintiff-respondent.

The balance of the appellants' chronology concerning the disposition in the lower court is substantially correct.

RELIEF SOUGHT ON APPEAL

The respondent seeks to have the judgment of the lower court affirmed.

STATEMENT OF FACTS

The appellants commence their statement of fact by stating that they will "strive to comply with the time-honored rules of appellee (sic) review and state those facts in the light most favorable to the Amended Findings of Fact and Amended Judgment below". After such a lofty pronouncement of purpose, the appellants then proceed to ignore salient evidence and testimony and to tailor the facts to their liking. For that reason, the respondent must make the following and somewhat lengthy restatement of facts.

On August 7, 1972, this Court remanded the cause to the Trial Court with this language:

"It is therefore ordered that this matter be remanded to the District Court with the recommendation that the court refer the matter

to the State Engineer for a determination from the historical or other data, or from other investigation as to the use, if any, made of the water here in question." (R. 217A).

On September 22, 1972, the trial Court ordered the case referred to the State Engineer for "such determination as may be helpful in lieu (sic) of the decision of the Supreme Court." The Court obviously intended the word "light" instead of "lieu".

Mr. Hubert C. Lambert, the previous engineer died on March 5, 1973 and thereafter, on May 1, 1973, Mr. Dee C. Hansen was appointed State Engineer.

After some prodding by Provo City, Mr. Hansen, the State Engineer, conducted a hearing. The hearing took approximately a day and a half, the first day being January 8, 1975, and the second January 18, 1975. He thereafter rendered his report. That report is undated and unsigned but it was filed with the clerk of the court on June 18, 1975.

Provo City has the following observations, additions, and corrections to the appellants' Statement of Facts, taking the "facts" up in the order in which the appellants have set them forth:

A. General Statement re: Geographical Locations.

Provo City does not object to appellants' general statement of facts under this heading:

B. Statement of Facts From Record of Civil No.

2888 Before this Court on Prior Appeal.

The difficulty with stating the facts in this manner is that there was no record of testimony and evidence on the prior appeal. Further, by stating the so called facts this way, the appellants can be truthful to the extent of the "then" record, even though such "truth" is different than the facts considered by the trial court. It is essential, therefore, that the salient facts (those considered by Judge Tibbs) be considered along side the appellants' assumed facts from Judge Sorenson's abbreviated record.

Contrary to the appellants' assertion that "no one knows exactly how much acreage was irrigated by 4(c) water in 1921", it does appear that there were hundreds of acres irrigated by 4(c) water. For example, there were a number of blocks on both sides of the factory race, (R. 973), on the Third West diversion (R. 973), and blocks and open acreage south of Sixth South (Railroad Street) from Fifth West on the west to the arc made by the railroad track running east and circling to the southeast and from this west, north and east parameter south to Utah Lake, that were irrigated by 4(c) water. This area, however, excluded part of the First Ward Pasture, which had a separate water right under the Provo River Decree. The line to the south fluctuated because of the level of the lake; and sometimes hundreds of acres south of the meander line were amenable to irrigation (R. 967). The city engineer, Mr. Zirbes, calculated the number of acres amenable to irrigation in 1921 by use of the 4(c) water to the Utah Lake meander line to be not less

than 1407.87 acres. (R. 1270, Ex. 20). The total acreage irrigated by rights under 4(a) (b) and (c) was 4,758 acres. (R. 1270-1275, Ex. 20).

The interim decision of Judge Morse on November 26, 1917, is not material here for it was superseded by the decree of May 2, 1921. The asserted facts set forth on pages 11, 12 and 13 of the appellants' brief are simply not facts. They were merely 1917 pre-trial stipulations which were substantially changed by the Decree of 1921. Certainly, there were some similarities between the stipulations and the final decree but the appellants would be clairvoyant to be able to say they were incorporated as such, sans evidence and testimony, into the Provo River Decree.

C. Statement of Facts Found by State Engineer Pursuant to Referral from District Court.

Provo City protests this entire category of "facts" for a number of reasons. In the first place, it is an attempt to masquerade as facts erroneous conclusions of the State Engineer. It isn't his "facts" that were found and from which the appellants appeal, but rather those contained in the Findings of Fact of the trial judge. The Court, in its Findings, found the State Engineer's report to be erroneous in many particulars, among which were: the number of acres irrigated under the 4(c) right; the number of acres irrigated out of the factory race; and the dates the manufacturing mills stopped using the stream for power. (See Findings of Fact, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19,

20, 21, and 22).

The appellants prefer to ignore the evidence that is contrary to the State Engineer's Report. In particular, the court found all of the facts stated on page 13, 14 and 15 or appellants' brief under this heading, to be erroneous. In light of the fact that the engineer had this matter under investigation for nearly three years and conducted only a cursory hearing, it would seem pretentious to postulate that his conclusions concerning the "facts" make such conclusions "facts".

To quote "facts" which the court found to be erroneous and against the weight of the evidence is not a "Statement of Fact" no matter what title is attached.

The entire representation under this heading is contrary to the believable facts presented at trial and, therefore, should be ignored.

D. Statement of Facts from Evidentiary Hearing in District Court on the Use of the Water Here in Question.

Section 73-3-15, U.C.A. (1953), provides for a trial de novo in the district court to review decisions of the state engineer. If the appeal to the District Court gives the appellant a trial de novo, this subsection of appellant's "Statement of Facts" should be the only statement of facts to be considered.

Addressing ourselves to the facts before the Trial Court, the respondent would add the following:

Department and Provo City Engineer attempted to identify the number of acres irrigated by Provo City's 4(c) water. The calculation methods used were different. The State Engineer attempted, by the use of a 1937 Provo City map, to work backwards by identifying service ditches and then calculating the acreages to be served by such laterals. At best, his estimates were interpolations and speculations.

Contrasted to the State Engineer's technique, Provo City produced a variety of witnesses, to wit: Dean Wheadon, (R. 967), the transcript of Henry J. W. Goddard, George C. Swan, Thomas E. Thompson. T. F. Wentz, Oscar W. Thayre, (See Exhibit 2), Earl J. Stubbs, (R. 1005), Leon Stubbs, (R. 1048), Elmer M. Roberts, (R. 1054) Judge Maurice Harding (R. 1060), Robert S. Worwood, (R. 1114), John W. Goddard, (R. 1135), Grant S. Larsen (R. 1149) and Stanley A. Roberts, (R. 1151), all of whom testified from actual knowledge of the land irrigated by Provo City from the Factory Race. From the testimony of the above named witnesses, coupled with the testimony of Mr. Dean Wheadon, Director of Provo City's Water Department and the testimony of Mr. Jack Zirbes, Provo City Engineer, the evidence most favorable to the city was that 4(c) water was used to irrigate a minimum of 1,407.87 acres plus hundreds of acres of accretion ground when the lake was below compromise. (R. 1270, Ex. 18 and 20) (F. of F. 19 and 20). These facts are contrary to the appellants' assertion that the acreage irrigated by the Factory Race was not identified.

The Factory Race water was always used for irrigation. Before the last mill went off stream in February, 1931, the irrigation requirements of Provo City were sometimes fulfilled by putting the entire stream in other canals at night in order to supply power water from 8:00 a.m. to 5:00 p.m., Mondays through Fridays. (R. 1154). That same power water, when it passed the last mill, was utilized to water the acreage south of Sixth South, as generally described on pages 5 and 6 above. None of the water was wasted.

The fact is, further, that the above arrangement was not an exchange but rather an accommodation of the power needs by the owners of the irrigation water. (R. 1182, Ex. 9). The right of the mill owners was by license from Provo City, which did not own or operate one power plant on the Factory Race. The assertion by the appellants that the factory race water was only used for irrigation at night is untrue. (Appellants' brief, p. 13). The evidence clearly shows that all of the 4(c) water was used for irrigation, whether diverted in the City Race, the East Union Canal or sent down the Factory Race. Only in periods of low water was the night time and weekend accommodation utilized. These facts are contrary to the appellants' assertion that power water was exchanged for irrigation water.

The mills which used the Factory Race water for power purposes began to shut down in 1921 when E. J. Ward & Sons went off stream and continued to February, 1930, when Excelsior Roller Mills ceased to operate. (R. 1246).

In respect to Exhibits 14, 15(a) (b) and (c) the appellants' statements concerning what the graphs represent is generally correct except for a few vital particulars. These are:

1. The black line represents that portion of the water shown by the red line which was actually diverted into the Factory Race, vis a vis, Tanner Race. (Appellant's Brief, p. 19).

2. Whenever the total water available, (red line) was insufficient to meet Provo City's 4(a), 4(b) and 4(c) right, the distribution was made proportionately. (Ex. 14). By use of Exhibits 15(a), (b) and (c), one can see that Provo City always had a proportionate amount of 4(c) water in the total water diverted.

3. The hydrographic study, Exhibit 14, commences for the year 1930. By way of example, for the year 1930 it shows, commencing July 1, 1930, that the water master only put 5 c.f.s. down the Factory Race and on August 1st, he reduced it to 2 c.f.s. The stream was not used at all for power thereafter.

4. Every year recorded on Exhibit 14 shows that very little of the 4(c) water was put down the Factory Race for power purposes. (Black line).

5. The 4(c) water, although delivered as reflected on Exhibit 14, except for April, May and June of 1930, has thereafter, until August of 1969, been used exclusively for irrigation purposes.

Returning to the appellants' assertion that in 1937-1938 the total acreage under the Provo City canal system was 2,303.38 acres (R. 1381, 82), the respondent asserts that this alleged fact is based upon the State Engineer's attempted reconstruction of the city system. This conclusion was not a fact, and, if it were, it would be irrelevant and immaterial for, at best, it shows his mathematics projected on what he reconstructed the canal system to be in 1938. The map itself, Exhibit "E", did not show the canal system and he, the State Engineer, had to develop it by extrapolation. He admitted that he had to do it this way because he claimed that the earliest map he could obtain was a 1937 map. (It should be noted that Ex. 19 is a 1921 map of Provo.)

The appellants' statement that the Provo City canal system in 1937-1938 would serve 2,303.38 acres ignores believable evidence to the contrary. The State Engineer in his computations on Exhibit "E" left out hundreds of acres of land south of Sixth South which were generally shown to be irrigated on Provo City's Exhibit 3 and on Exhibit 18. (R. 967, 1263). The respondent's evidence demonstrated that there was substantially more acreage irrigated by the canal system in 1937-1938.

Because the amount of acreage irrigated under Provo City's canal system in 1938 was immaterial to the issues before the court, Provo City did not develop engineering data on that subject. There was substantial reason to dis-

believe the State Engineer's measurements based upon his own testimony. To attempt to establish this conclusion of the engineer as a fact is to mislead this Court as to the "facts" of this case.

The appellants on page 10, under their statement of facts, argue that, based on the Engineer's 1975 interpolated reconstruction by use of a 1937 city map converted to 1921, that the duty on 4(c) water would be 8.76 acres per acre foot. To the contrary, Provo City established by its engineer, Mr. Zirbes, that the duty for 4(c) water based on the minimum acreage to be watered, would be 85.3 acres per acre foot. (Ex. 20, R. 1275).

Facts that are material but which have not been presented by the appellants are:

This Court in its remand was concerned with the question of whether the 4(c) water was part of, or in addition to, the 4(a) and 4(b) water. All of the parties agree and have stipulated that the 4(c) water is in addition to the 4(a) and 4(b) rights. (R. 946).

Appellant Hugh H. McKellar was Provo River Water Commissioner in 1969. In 1971, he was appointed Superintendent of the principal appellant, Provo River Water Users Association, at twice his previous salary. (R. 869). His present employer was a principal beneficiary of his decision to take Provo City's water. (R. 875).

Mr. McKellar, unilaterally and without instruction from his superiors, interpreted the Provo River Decree and deter-

mined that the 4(c) right was a non-consumptive right and he, therefore, of his own initiative shut off the water. (R. 946, 947, 948). He did this notwithstanding the fact that all of his predecessors for forty-nine previous years had interpreted the Decree to the contrary. (R. 945).

Mr. T. F. Wentz was Provo River Commissioner from 1912 to 1954. (R. 919). He was a principal witness in the Provo River trial which lasted from 1912 to 1921 and resulted in the Provo River Decree of May 2, 1921. (R. 914). Mr. Wentz died in 1954 and was succeeded by Mr. Marion Clark who served from 1954 to 1958. Mr. Clark resigned and was followed by Mr. Wallace Wayman. Upon Mr. Wayman's death in 1968, he was succeeded by Mr. McKellar.

All of the Water Commissioners except Mr. McKellar recognized the 4(c) right as a consumptive right for irrigation and delivered the 4(c) water to Provo City accordingly. This was done for each year from 1921 through the irrigation season of 1969, a period a few months short of fifty years.

All of the persons who had personal knowledge of the right in 1921 are dead.

Mr. Marion Clark, age 63 (R. 1085), who immediately followed Mr. Wentz said that he was personally close to Mr. Wentz from the time he was in the eighth grade. (R. 1107). He knew of his work concerning the river. (R. 764, 1108). He stated that he had delivered Mr. Wentz's records, including flow and distribution records to Mr. Wayman, his

successor. (R. 748). He stated he had read and was personally familiar with the Provo River Decree. (R. 749, 1086, 1108). His flow sheet (Exhibit 8) was received in evidence. (R. 1087, 1088, 1089). The entire 16.5 c.f.s. (4(c) water) was delivered to Provo City during his term and those of his predecessors from 1921 through 1950 for irrigation purposes. (R. 751).

Mr. Clark stated that Mr. Wentz' handwritten records were turned over by him to Mr. Wayman, his successor. He stated that these documents supported his conclusions. (R. 754). Mr. Clark has tried to locate these but finds that "a great deal of information had been removed from the files". (R. 755, 1092). The missing records were data sheets which Mr. Wentz had accumulated for Judge Morse (R. 751), and the documents supported his (Clark's) and Wentz' determination that 4(c) was an independent irrigation right. (R. 1094, 1095).

The Court took judicial notice of the Provo River Commissioners' published reports for the period of 1921 through 1969, a period of 50 years, which show delivery of 4(c) water (16.5 c.f.s.) to Provo City for irrigation purposes. (R. 751).

The Court received as evidence, Exhibit 1 (R. 958), Provo City's underlying application for the 4(c) water, which applications pre-dated the Decree. The water that was confirmed in Provo City by the Provo River Decree, Provision 4(c), was corroborated by this application which states as

follows:

"8. The water has been used for the following purposes: Irrigation and for power purposes on lands irrigated under Provo City System and for power rights located on the Factory Race in Provo - as designated in tentative decree of Fourth District Court."

Attached to this application under "Explanation" was the exact page from the Provo River Decree granting to Provo City the 4(c) water. The application was granted by the State Engineer.

Mr. Wheadon, Director of Provo City's Water Department, testified that the 1921 maps and records of Provo City indicated that there were 7,360 acres within Provo City in 1921 and that he had calculated that 5,280 acres were amenable to irrigation. By the use of Exhibit 3 (R. 967), he set forth in orange diagonal lines the area encompassing the 500 acres of city lots (Right 4(b) of Provo River Decree) and in green diagonal lines the area irrigated by the 4(c) right in 1921 (excluding the First Ward pasture) which he estimated to be between 1200 and 1400 acres and probably up to 20% greater. (R. 973).

Exhibit 2 (R. 960) was a transcript of a portion of the Provo River Decree covering the testimony of George C. Swan, Henry J. W. Goddard, Thomas E. Thompson, T. F. Wentz and Oscar W. Thayre.

Mr. Swan was Provo City Engineer from 1912 to 1921. (R. 981). On page 1580 of that transcript referring to the Factory Race Mr. Swan said "it irrigates all of the land to the Southwest - - east of the canal with the exception of

the First Ward Pasture lands". He further testified the water in the Factory Race was for irrigation purposes. (R. 987, 983, 984, 985, 986).

In 1921, Mr. Goddard was 58 years old, had lived in Provo all of his life, and was Provo City Commissioner in charge of the water department. He stated that the Factory Race was used for irrigation and power. (R. 988 through 996).

Mr. Thomas E. Thompson, Provo City Watermaster since 1914, testified that the Factory Race water was for irrigation. (R. 996-1002).

Mr. T. F. Wentz, court appointed water commissioner for the Provo River from 1913, testified that the Factory Race stream was used for irrigation as well as power. (R. 1991, 1882).

Mr. Oscar W. Flygare, master mechanic for Knight Woolen Mills for 26 years, stated that the Factory Race water was used for irrigation.

Witnesses were called by the Respondent who testified that they were familiar with the Factory Race, sometimes called the Mill Race, and that all of the 4(c) water was used for irrigation from 1921 on and that none was wasted. See Earl J. Stubbs (R. 1005 et seq.), Leon Stubbs, (R. 1048 et seq.) Elmer M. Roberts, (R. 1054 et seq.) John W. Goddard, (R. 1135 et seq.) Grant S. Larsen (R. 1119 et seq.) Stanley H. Roberts, (R. 1151 et seq.).

however, the Provo City records and the testimony of water-master Robert S. Worwood, who served as such after 1962, were to the effect that all of the 16.5 c.f.s. was used for irrigation and was not wasted. (R. 1114, et seq.)

Respondent introduced an affidavit of the Mayor Hansen of Provo City, dated September 8, 1925, four (4) years after the entry of the Provo River Decree. (Exhibit 9, R. 1182). The affidavit was in the form of a protest by Provo City against an application by Columbia Steel Corporation to the State Engineer to appropriate water flowing in the Factory Race. In paragraph 3 of that protest, the mayor declared that those making power use of the Factory Race had done so under license from Provo City for more than thirty-five (35) years. He affirmed, under oath, that all of the water in the Factory Race had been used for irrigation purposes during certain times of every year since the licenses were granted to the various power users. In paragraph 4, he further declared that at those times, none of the water was available to the power users, who were thus compelled to employ electricity or steam power. Mayor Hansen also affirmed in paragraph 4 that all of the waters so diverted from the Factory Race were necessarily and beneficially used for irrigation purposes.

The plaintiff-respondent introduced a sequence of documents from a variety of sources which uniformly imply that the 4(c) right of the Provo River Decree was for both irrigation and power purposes. (Exhibits 10, 11, 13; R.

Exhibit 10 was a summary of Provo City's water rights compiled in 1935 by T. F. Wentz, Provo River Commissioner from about 1941 to 1952. It clearly designated the 4(c) right of 16.5 c.f.s. as one to be used for irrigation and power during the irrigation season. (R. 1189, Exhibit 10, paragraph c.) Exhibit 11 was a similar compilation for 1940, also prepared by T. F. Wentz. It revealed that Mr. Wentz understood the 4(c) right to be one for both power and irrigation purposes. (R. 1191.).

The same view of that right was held by the Provo City Engineer in 1946. In a 1946 letter to Mr. Wentz, the Engineer directed the Commissioner to satisfy the City's contractual obligation to deliver water to one Mrs. Esthma Tanner from the 16.5 c.f.s. of paragraph 4(c). (R. 1194).

In Exhibit 13, the City presented a compilation of documents taken from the records of each of the four Provo River Commissioners between 1914 and 1969. The documents outline the distributions of Provo River water planned by the Commissioner. The 1951 plans of Mr. Wentz, commissioner from 1914-1952, are on page 2 of Exhibit 13. The water distribution plans of Mr. Clark, Commissioner from 1953-1958, are on page 3. Mr. Wayman, Commissioner from 1959-1967, made plans for 1962 which are on page 1 of Exhibit 13. The 1968 and 1969 plans of Mr. McKellar, Commissioner from 1968 to 1971, are found on pages 4 and 5 of the Exhibit. Collectively and individually, the water distribution plans through 1968 indicate that Provo City's rights were for both

irrigation and power. There was no indication that any of the rights were considered non-consumptive power rights until 1969, when Mr. McKellar refused to deliver the 16.5 c.f.s and labelled it a power use in his distribution outline. (Page 5 of Exhibit 13).

It was established beyond doubt that the last mill ceased to operate in February, 1930, and that the Factory Race water had not been a power source since that time. (R. 1237, 1238, 1241-1243, 1246, 1249).

Mr. John A. Zirbes, Provo City Engineer, identified Exhibit 18 as an aerial photograph of Provo City, with all irrigation ditches marked and labeled. He identified the legend attached thereto as a summary of the City's class A water rights including the 4(c) right, as the City believes them to be. (R. 1259-1260). Mr. Zirbes also identified Exhibit 19 as a 1921 map of Provo City. (R. 1270). He testified that the area within the city, as bounded on the north, east and west by the red line, and on the south by Utah Lake, (approximately the bottom of the map) was 4758 acres. (R. 1270). He further described his calculations (as illustrated by Exhibit 20, R. 1275) of the area irrigated under the 4(c) right of the Provo River Decree in 1921. He assumed that the 4758 acres were subject to the City's 4(a), 4(b), and 4(c) rights in 1921. From that total he subtracted all of the farm acreage subject to paragraph 4(a) of the Decree, and all of the city lot acreage of paragraph 4(b), with a 33% adjustment in the 4(b) acreage to

and buildings. This adjustment operated in favor of the appellants' interests in the calculations. (R. 1272-1273). Mr. Zirbes then made a further deduction for the 147 acres of the First Ward Pasture, which was irrigated under the separate right of paragraph 9 of the Provo River Decree. As a final deduction, he measured and subtracted 478 acres as the area occupied by roads existing in 1921. After accounting for all the land occupied by roads and by buildings on City lots in 1921, and all the acreage irrigated under other decreed rights, (4(a), 4(b) and 9), there remained a total of 1407.87 acres unaccounted for by the acreage duties for Provo City's irrigation rights under the Provo River Decree. (R. 1274).

INTRODUCTION TO ARGUMENT

The entire thrust of the appellants' arguments is that the remand from this Court did not reverse the former summary judgment entered by Judge Sorensen. This position is basically unsound, for if the remand was not for the purpose of finding additional facts and entering conclusions of law based on those facts, it was meaningless. Judge Tibbs had no alternative but to try the matter anew in order to find the necessary facts and to enter conclusions of law accordingly. Once the facts were found, the judgment which was entered naturally and legally followed.

For the appellants to speak of the trial court in the following language: "ignoring the balance of the record", [of not following] "the remand of this Court while leading

counsel all along to believe that it was going to do so," and in speaking of the summary judgment, "simply paid it lip service in passing and thereafter ignored it," "and even more shocking is the Court's conclusion that the Morse Decree is not ambiguous", [the court] "let the case get out of hand", [which] "justice and fair play demand be rectified by this Court on appeal," is to demean that competent Judge. Such charges seriously impugn the quality of the appellants' claims. It was the appellants who did not want the Court to know the facts and who wanted the Court to consider some of the facts in a disjointed manner while ignoring facts that they found to be inconsistent with their position. It was impossible for the Court to sift and sort the facts as the appellants wanted, however, a review of all the facts clearly discloses that the 4(c) water belonged to the respondent. It must be noted that the manner in which the water was obtained by appellants from 1969 to 1975 is not above reproach.

POINT I

THE TRIAL COURT COMPLIED WITH THE REMAND OF THIS COURT AND DID NOT ERR IN ENTERING ITS FINDINGS OF FACT AND JUDGMENT.

Appellants have argued this question four times under the titles of Introduction and Points I, II and III, of their brief. Respondent believes it to be sufficient to reply to all variations of appellants' argument under this single point.

The language of this Court was that the case was "remanded

to the District Court with the recommendation that the court refer the matter to the State Engineer, etc." It seems clear that this Court intended a complete remand to the trial court. The above quoted language subsequent to "District Court" are only words of recommendation and it is apparent that by the use of the term "recommend", that this Court intended to leave to the discretion of the trial court the procedures necessary to conduct a trial concerning all of the issues raised by the pleadings and the implications of the remand.

This Court had previously stated in this same paragraph as follows:

"It would seem to us that it would be helpful in making a proper determination of what was intended by the language set forth in the Provo River Decree if the record contained some information as to what use, if any, the plaintiff had made of 16.5 second feet of water, since its use in the operation of the various mills had ceased. It is therefore, ordered that this matter be remanded to the District Court. * * *

Respondent and the trial court rightfully concluded that the Court had to make a "proper determination of what was intended by the language set forth in the Provo River Decree, * * *" For that reason, and giving ordinary construction to the language of remand, the trial court conducted a trial de novo. Any other procedure would have made the remand a procedural exercise, if the trial court did not have the power to enter findings and judgment consistent with the facts established.

further proceedings to determine the factual issues involved. Section 962 of Vol. 5, Am.Jur.2d, p. 389, discusses the effect of a remand for further proceedings:

§962. Remand for further proceedings; in general.

If, because of the condition of the record, the court on appeal cannot determine, what judgment should justly be rendered, it will ordinarily remand the case for further proceedings in the trial court. If the record does not justify entry or direction of a decree, as where the bill or complaint is considered insufficient, or the evidence inadequate, to support a material issue, no final decree is rendered in the appellate court except to the extent of setting aside the decree in the lower court and requiring further proceedings to be had therein.

Although the Supreme Court did not specifically remand for a new trial, its decision had the same effect. The State Engineer, by direction of the district court, has held two "hearings" to determine the factual issues involved. The "hearings" actually were "trials" by the State Engineer. Needless to say, the State Engineer is not equipped or trained to make rulings on evidence, testimony or legal arguments. Any findings or decisions made by him which were contrary to the interests of the respective parties had to be reviewed by the district court. In addition to the scope of the referral order, the State Engineer also conducted some independent research which he presented to the trial court in the form of testimony and evidence. This additional evidence, of necessity, required the Court, on review, to conduct an evidentiary hearing (trial) and further, of necessity, required the Court to make new findings of fact

consistent with such new evidence. The "remand", therefore, had to take on the aspects of a new trial.

Section 963, Vol. 5 of Am.Jur.2d, p. 390, also discusses the effect of a remand for a new trial:

On reversing, the appellate court will ordinarily direct a new trial if, under the circumstances of the case, this is required to attain justice, and usually appellate courts will not undertake to render a final judgment in a case where questions of fact are present even though it may have the power to do so. The necessity for a new trial is deemed to exist whenever a jury verdict might be different from what it was in a trial where errors were committed. Accordingly, if the rights of the parties turn on issues of fact as to which the evidence is in conflict, the reviewing court in reversing will ordinarily not direct judgment to be entered for either of the parties but will remand to permit the facts to be resolved by the proper fact-finding agency.
(Emphasis added).

In regard to the remand, appellants have cited as authorities: Allred v. Allred, 12 Utah2d 325, 366 P.2d 478 (1961); Rule 76(a) Utah Rules of Civil Procedure; LeGrande Johnson Corporation v. Peterson, 18 Utah2d 260, 420 P.2d 615 (1966); and Shelmidine v. Jones, 550 P.2d 207 (Utah, 1976). These authorities do not stand for the proposition for which they are cited. The substance of these cases is that once further proceedings have been ordered, it is the duty of the Supreme Court to pass upon all questions of law involved in the case presented upon the appeal that are necessary for a final determination in the lower court. These cases do not support the argument that the trial court thereby has no latitude for evidentiary inquiry or remand.

The governing principles have been stated by this Court in Koch v. J. C. Penney Company, 534 P.2d 903, 905 (Utah, 1975) which cites Johnson, supra, and states:

It should be apparent that there is a dispute between the Parties on mutual issues upon which rights depend, so there should be a trial and both parties given an opportunity to adduce their evidence. The comments in this opinion on matters of law have been made because it is appropriate to do so when a case is remanded for trial. But we do not desire to be understood as indicating any opinion as to how the issues of fact should be resolved. (Emphasis added).

See also Lopes v. Lopes, 30 Utah2d 393, 518 P.2d 687 (1974); and Russell v. Park City, 29 Utah 2d 184, 506 P.2d 1274 (1973).

The appellants argue that the trial court had no authority at all to make findings contrary to the previous Summary Judgment. If there were substance to this argument, then the remand would have been a ridiculous imposition on the trial court and of no assistance to the Supreme Court. It is respectfully submitted that there is no merit to appellants' Point I.

It should also be noted that upon remand, Judge Sorenson, before he recused himself, interpreted the language of the Supreme Court to mean that he would allow an evidentiary trial, vis a vis, a legal argument based on motion for Summary Judgment. Judge Sorenson conducted a pre-trial conference, and permitted extensive argument accompanied by written briefs. After full consideration, he allowed the respondent to amend its complaint (P. 287,288) and to allege

new matters, making a repeat judgment within the framework of the original pleadings impossible. How was Judge Tibbs to dispose of these new pleadings by both the appellants and respondent except by conducting a trial de novo? Appellants somehow find Judge Sorenson's original judgment sacrosanct, but his decision after remand not worth mentioning. It is, however, important to note that they do not appeal from Judge Sorenson's ruling allowing the amended complaint.

In Point III, appellants go on to contend that the trial court's decision was unsupported by competent evidence. Such a representation to this court is incredible. The course of appellants' argument, however, is not that there was not evidence to support the Trial Court's findings but, rather, that the trial court erred in taking evidence in areas beyond what the appellants interpret to be the parameters of the Supreme Court's remand. This again, is the same argument that the respondent has heretofore twice addressed.

To the extent that there seems to be any specificity to this segment of appellants' appeal, we shall address such claimed error as it is mentioned, particularly the allegations concerning Findings of Fact 12, 15 and 16.

Amended Finding 12:

12. From 1921 through August of 1969, all of the Provo River Commissioners delivered Provo City's rights under paragraphs 4(a), (b) and (c) as separate and distinct rights and treated each right as being useable for irrigation purposes.

the contrary.

Appellants seem to think that because there were times when there was not sufficient water in the river to fulfill all of Provo's 4(a), (b) and (c) rights, that Provo City did not receive its 4(c) water. The argument seems to imply that the Provo River Commissioner would first fill the 4(a) and 4(b) rights and, if there were anything left, he would apply it to 4(c). This is not the fact. (R. 751). If, for example, in the vernacular of the water men, the river was an 80% river, then Provo would receive 80% of each of its 4(a), (b), and (c) rights.

The respondent asks this Court to consider the language of this finding. How the appellants, within the plain syntax of paragraph 12, can conclude that such finding is in error 92.5% of the time, etc. is a mystery to the respondent and defies reply. It is simply a false syllogism and as such cannot be answered except to say it is logically unsound and contrary to the evidence at trial.

The testimony of Mr. Clark and all previous water commissioners from 1927 through August of 1969 was that the 4(c) water was for irrigation and was delivered accordingly. (R. 757, 1086, 1108). There is absolutely no variance between fact and Amended Finding No. 12.

Amended Finding 15:

15. During the years from 1921 to 1969, all of the water delivered to Provo City by the Provo River Commissioners was beneficially used and there was no water wasted.

years after the fact and, consequently, this testimony was elicited from both elderly people who were familiar with the stream flow from 1921 (R. 1005-1135), augmented by present users (R. 1048, 1149). The appellants describe the knowledge of such users as Stubbs (R. 1005), Goddard (R. 1135), and Roberts (R. 1151) as casual observations.

Compare these casual observations with what the appellants state are actual measurements. The measurements referred to on page 32 of their brief (R. 880-887) were simply weir measurements made in the southwest part of Provo by Robert White, an engineer of the Bureau of Reclamation. All he knew was what water was in the ditch at a given time. He made no effort to determine its source. Consider the following testimony by Mr. White:

R. 880, L. 13 to L. 22

Q. How much of the water that you've measured in those ditches or in those canals were return flow?

A. I have not made a study to determine how much is return flow.

Q. You say there was return water in the ditches?

A. There is.

Q. By that term, you and I both understand that that's water that's once been used for irrigation purposes, do we not?

A. Yes.

R. 895 L. 4 to R. 896 L. 21

Q. Why do you put numbers on the ditches different than the street numbers?

A. When I first started out there, I noticed in my notes the other day, I called it 10th West. For some reason I changed it to 11th West, but I don't know why.

Q. Can you tell us, in your measurements, how much of the water that you measured was run-off water from Rock Canyon?

A. No, I can't.

Q. Tell us how much was run-off from Slate Canyon?

A. Slate Canyon is south of the city, and I did not get into those ditches.

Q. Can you tell us how much was run-off water from Timp canal?

A. No, I can't.

Q. Or from the Upper East Union Canal?

A. No.

Q. Can you tell us how much of that water entered the system because it was subsurface water, just percolated up?

A. No.

Q. Can you tell us how much of that water was well flow water?

A. No.

Q. There were wells out there above your measuring devices, were there not?

A. Yes, the purpose of this study was to determine the in-flow to Provo Bay and these are the flows that I found.

Q. Did you determine how much of that water was spring water?

A. No.

Q. There were springs, weren't there, in that area -- in everyone of the areas that you measured, there were springs?

A. I haven't observed springs myself.

Q. Now, when you say that the water in the Mill race was high in the wintertime, is that correct?

A. Yes.

Q. Low in the summertime?

A. Yes.

Q. Well, that just meant that whoever was opening the gates was running the flood water down the Mill race; isn't that true?

A. That could have been.

The trial court was well advised to take such "casual observations" against the conclusions of such "scientific" studies.

Amended Finding 16:

16. The State Engineer's report, which has been submitted to the Court, is erroneous as to the date when the Mills ceased operation. The State Engineer's report used the early 1940's as the date when the Mills ceased operation while evidence presented at trial clearly established the date as 1931; consequently, the Court does not find a trend in the usage of water in the Provo City system as mentioned by the State Engineer in his report.

Somehow appellants think the respondent is responsible for one of the State Engineer's major mistakes. Most glaring is the statement (p. 37 of Brief) that "he was led into error by Provo City withholding evidence from him". This assertion is totally untrue. At the time the engineer was conducting his investigation, this information was unknown to the respondent. This was a material area that the engineer was assigned to investigate by Judge Sorensen and into which area this court recommended that he inquire. The

facts. A superficial reading of his report would cause a long time resident of Provo to note the obvious mistake. After the inquiry, the respondent made an effort to find the true facts which could have been found by anyone willing to conduct a simple inquiry. The facts were equally available to anyone. To say that the respondent led the engineer into error by not doing his work for him is unwarranted.

Be that as it may, appellants admit that the engineer was off in his facts by over ten years, making Finding 16 absolutely true.

The appellants' observations concerning Findings 17 and 19 are immaterial to their appeal and, consequently, will not be argued. The argument made to Finding 20 is identical to their argument to Finding 16 and has been answered.

Suffice it to say that, in respect to each finding of fact complained of, there was a plethora of believable proof. In the case of Bullock v. Hanks, 22 U.2d 308, 452 P.2d 866 (1969), a case involving this exact issue, this Court expressly held that a trial de novo under U.C.A. §73-3-15 is equitable in nature and that "the findings of the court will be disturbed only if the evidence clearly preponderates against them". (452 P.2d at 868, n. 2). This rule is clearly established in all areas of Utah law. See e.g. Shields v. Dry Creek Irrigation Company, 8 U.2d 55, 61, 328 P.2d 175 (1958). The respondent believes that the appellants have failed to show that the evidence clearly preponderates against the findings.

POINT II

AMENDED FINDINGS OF FACT NO. 18 IS SUPPORTED BY THE EVIDENCE AND IS NOT BARRED BY THE PRINCIPLE OF RES ADJUDICATA.

Contrary to appellants' assertion in Point IV of their brief, there was ample evidence that Provo City, for all of the time it was taking 4(c) water and before, irrigated substantially in excess of 2558.51 acres. The evidence presented by the testimony of Wheadon (R. 967), the transcript of Goddard, Swan, Thompson and Wentz (Ex. 2), Earl Stubbs, (R. 1005) Leon Stubbs (R. 1060) Worwood (R. 1114), Goddard (R. 1135) Larsen (R. 1149) Roberts (R. 1158) Zirbes (R. 1270) and Exhibits 3, 18 and 19, all clearly demonstrate that Provo City in 1921 had at least 4133 acres under irrigation in addition to the First Ward Pasture. (Exhibit 20). Appellants simply refuse to allow that the abundant evidence submitted by the respondent is believable, however, the trial court obviously found it considerably more reliable than that offered by the appellants. The court had the absolute right to weigh all of the evidence in accordance with its significance and to consider the testimony of the individual lay witnesses in conjunction, for example, with the testimony of Wheadon and Zirbes.

Appellants' arguments seem to be that their evidence is competent while the respondent offered "no competent" evidence. In reply, we state that the evidence offered by the respondent was at least of equal quality and certainly of greater quantity than that of the appellants.

Appellants have stated their version of the facts and their interpretation of their own evidence as if there were no facts to the contrary, and rather, in the face of overwhelming evidence to the contrary. It seems beyond argument that the trial court may determine which evidence it cares to believe and that decision should be overturned only upon a showing of clear error.

POINT III

THE PROVO RIVER DECREE, RE: 4(a), 4(b) AND 4(c) WATER IS NOT AMBIGUOUS.

The court, in his pronouncement from the bench on December 11, 1975, said: "The Court concluded that the Morse Decree is not ambiguous and that Provo City is entitled to A, B, and C, rights for irrigation purposes even though no acreage or duty figures are set forth on the C right". The basis for the court's conclusion was that, after hearing all the facts, he understood the reason that Judge Morse did not attach a duty to the 4(c) right. When one understands the circumstances, it is clear that Judge Morse knew what he was doing.

It seems apparent that the primary reason for not attaching a duty to the 4(c) water is that it had to irrigate the area contiguous to the shore of Utah Lake, which in 1921 was subject to major annual fluctuations. At times there would be hundreds of acres more of accretion land to be irrigated, and at times of high water, hundreds of acres

less. Consequently, it would have been impossible to attach

an acreage duty to such water.

Judge Morse was an experienced trial judge. There were at least 50 lawyers who participated in the trial during the many years in which evidence was taken. The record clearly demonstrated that the trial was conducted with skill and to professional standards.

After the trial, there were motions to amend the findings including one by Provo City to increase the duty on the water awarded under 4(a) and 4(b) of the Decree. It is evident that the Findings and Decree were scrutinized by Court and counsel with infinite care. It is inconceivable that the Court and counsel in 1921 did not understand the meaning of Provision 4(c) or even more incredible, inadvertently and by mistake used these words in writing the Decree:

"during the irrigation season" * * * "Which water has been heretofore been used for irrigation purposes by the City * * *

The defendants in this case would have the Court believe that the reference to irrigation rights as set forth in Findings of Fact Nos. 57 and 58 was just a coincidental compounding of the error and mistake made by Judge Morse in Provision 4(c) of the Decree.

At the time of the Decree, all the parties recognized that the 16.5 c.f.s. (4(c) water) was owned by Provo City for irrigation purposes. There was no dispute. This is why they conceded and the Court adjudged the water to be Provo City's for the purposes set forth in the Decree. Those

upstream parties included the present defendants, Provo Reservoir Water Users Company, and the predecessors in interest of the Provo River Water Users Association. The principle of res adjudicata should bar the defendants from now disputing such ancient fact. See 46 Am.Jur.2d, Judgments §533, §534. It was also understood by the downstream users that once Provo City took that 16.5 c.f.s. of water into it's system, they had no claim upon it and Provo City was not obliged in any way to return that water to the river. The City took it into it's system for consumptive and beneficial use. Those are the simple facts, otherwise the language of the Decree would be meaningless.

POINT IV

THE DOCTRINE OF PRACTICAL CONSTRUCTION MAKES THE ACTUAL INTERPRETATION OF THE DECREE FOR FIFTY YEARS RES ADJUDICATA AND THE APPELLANTS BY REASON OF THEIR CONDUCT ARE NOW ESTOPPED FROM DENYING THE TIME HONORED INTERPRETATION.

It is a firmly established principal of law that if a decree or judgment becomes the subject of dispute due to ambiguity or misinterpretation, the Courts will look to the common interpretation that the parties have recognized in the past. If one of the parties to a decree acquiesces to a particular interpretation for many years, he is not permitted to later complain of a different interpretation. This is known as the doctrine of practical construction. (See Annotation, 120 A.L.P. 862).

The same problem of the interpretation of a decree has

developed in this case. The Morse Decree, entered in 1921, has now become a subject of dispute. The defendants claim that the water awarded under paragraph 4(c) of the Morse Decree cannot be used for irrigation purposes. They first discovered this new interpretation in 1969, some 49 years after the Decree was entered.

At this date, there are no witnesses alive that know of their own personal knowledge the facts giving rise to the Morse Decree. All of the prior Provo City water masters have passed away and only one prior Provo River Commissioner is presently alive. It would seem that the defendants are guilty of laches in the extreme. They should not now be able to change the interpretation of a decree to which they have acquiesced for almost fifty years.

All of the defendants have had notice of the amounts of water claimed and used by Provo City. The rule of practical construction is stated in Partten v. First National Bank & Trust Company, et al., 283 N.W. 403 (1938), where a probate court decree entered pursuant to a District Court Judgment did not in fact conform to the judgment of the District Court. An ambiguity arose because one of the clauses had been omitted. The Court stated:

The trustee accepted that construction as the correct one and acted under it without challenge or question for at least 12 years in the performance of its duties. While there might be strong reasons for holding that the plaintiffs are estopped to question that construction of the judgment, because of the position taken by the beneficiaries on the motion to amend, it is clear beyond dispute that the parties have

solemnly adopted that construction of the probate decree and acted under it until the instant action was begun. The construction which the parties have placed upon a judgment or decree ordinarily will not be changed except for strong reasons.

The same principle has been applied to the determination of water rights. In La Luz Community Ditch Co. v. Town of Alamogordo, 34 N.M. 127, 279 P. 72 (1929), plaintiffs brought suit for declaratory judgment of their rights under an 1898 decree. The defendants had waited approximately 30 years before disputing the plaintiff's claim to a .89 c.f.s. water right that had been continuously delivered to the plaintiff. The Court upheld the historical or "practical construction" of the Decree because of the defendant's acquiescence over the years. In respect to this principle, the Court stated at page 77:

Appellant argues that, as the decree of 1898 is a judgment by consent, it is to be regarded as a contract between the parties, and must be construed as any other contract, quoting from 34 C.J., p. 133 to the effect that its operation and effect must be gathered from the terms used in the agreement, and should not be extended beyond the clear import of such terms, etc.

This does not help appellant, because, while the rule he cites is well recognized, there is another one equally well established to the effect that: "If a contract is ambiguous in meaning, the practical construction put upon it by the parties thereto, is of great weight, even though the contract is in writing, and ordinarily, is controlling, at least if such practical construction has lasted for a long period of time." Page on the Law of Contracts, §2034.

We are in accord with the rule thus stated * * *

The court invoked the rule of practical construction placed by the parties in interest upon doubtful or ambiguous terms in a contract,

and concluded: "That the construction which the owners of the power for years placed upon the terms of their grants, it appearing that such construction is reasonable and definite, should and must prevail." (emphasis added)

The principal of estoppel should also be considered in determining the interpretation of the Decree (La Luz Community Ditch, supra, page 78). The City of Provo has developed over the years with the impression that its decreed rights were secure and could be used to meet future needs. To help understand the City's claim to the waters awarded under paragraph 4(c), reference should be made to paragraph 58(c) of the Findings of Fact which corresponds substantially to paragraph 4(c) of the Decree.

(c) That said defendant Provo City, during the irrigation season of each and every year, is the owner of the right to the use of 16.5 c.f.s of water. Which water has heretofore been used for irrigation purposes.
* * * (emphasis added).

If the respondent had understood that it did not own the water and that it could not use the water for further expansion, it would have purchased more water when Deer Creek Reservoir was built or would have acquired water rights from other sources to supplement the present supply. By not raising their objections forty (40) years ago when the mills stopped, the defendants are now estopped from trying to deprive Provo City of its water.

CONCLUSION

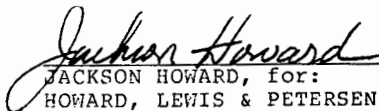
Respondent does not dispute any of the authorities cited by the appellants except to state that, where they are

true holding of the case is different, as we have pointed out. Where appellants use authorities for general propositions, the respondent has had no dispute with the proposition. In short, in spite of the size of the record and the significance of the issues, this is a case in which the appellants have not been able to cite any case in point for their contentions.

In respect to the facts, the appellants have attempted to develop a set of "facts" which they could argue. They did so by dividing their "facts" into categories, two of which, B and C, were not facts before the Trial Court. It was on these "facts" that appellants have attempted to build their case on appeal. The true facts, those elicited from witnesses and evidence submitted to the trial court, the appellants have, in large, chosen to ignore.

Respondents submit that the Trial Court had before it ample evidence in support of each and every finding it made. Further, the judgment entered was well within the purview of the remand and is not outside the law. Such a conclusion is also supported by the doctrines of res adjudicata and practical construction.

Respectfully submitted this 12th day of April, 1977.


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CERTIFICATE OF MAILING

I hereby certify that on the 25 day of April, 1977, I mailed two (2) copies of the foregoing Brief of Plaintiff-Respondent and two (2) copies of the Supplemental Abstract to:

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