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Provo City v. Hubert C. Lambert et al : Supplemental Abstract of Record

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.

SUPPLEMENTAL ABSTRACT

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Defendants & Appellants.

CASE NO. 14,605

SUPPLEMENTAL ABSTRACT OF RECORD

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HUBERT C. LAMBERT, State
Engineer of the State of Utah, :
et al, :

Defendants-Appellants.

SUPPLEMENTAL ABSTRACT OF RECORD

Plaintiff-Respondent submits this Supplemental Abstract of Record pursuant to Rule 75(e), Utah Rules of Civil Procedure, and pursuant to a stipulation by all the parties. It contains a narrative summary of essential facts which the appellants' failed to include in their abstract of the testimony of various witnesses. It also restates testimony where the appellants' abstract failed to properly summarize or characterize the testimony. In this supplement, respondent does not include its objections to evidence, as the appellants did in their abstract.

This Supplemental Abstract of Record employs the same format and style of reference that has been used by the appellants. It is intended that it be read jointly with the Abstract of Record, and that it be used to locate in the Abstract those facts which are cited in respondent's brief. It should be noted that this abstract does not include the testimony of all of the witnesses, but only abstracts that

testimony which the appellants omitted or mischaracterized.

EXAMINATION OF DEAN WHEADON

(From State Engineer's Transcript)

In addition to the testimony set forth in the appellants' abstract, Mr. Wheadon testified that of the 7,360 acres within the city in 1921, he had calculated that 5,280 acres lay within the extreme north, east, and west limits of the irrigation system. (R. 661, 966). Mr. Wheadon also testified that there were between twelve and fourteen hundred acres in the area south of Sixth South Street, east of Fourth West Street, and west of the railroad tracks that run generally north and south. (R. 972). This is the green hatched area on Exhibit 3. (R. 971). During dry years, there were also many acres of accretion land located to the south of the acreage described above that were amenable to irrigation. None of this acreage was included in the computations of the State Engineer. (R. 1413-1415). All of this land was amenable to irrigation by the 4(c) water. (R. 973).

Mr. Wheadon testified that these measurements could possibly vary by as much as 20%, but that he did not think they were that inaccurate. (R. 973).

DIRECT EXAMINATION OF JOHN A. ZIRBES

John Zirbes, Provo City Engineer, testified concerning the acreage to be watered by the 4(a), 4(b) and 4(c) rights. His testimony is summarized and illustrated on Exhibit 20.

As shown by that Exhibit, Mr. Zirbes testified that he had

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computed the acreage subject to the 4(a), 4(b) and (c) rights to be 4,758 acres. From this figure, Mr. Zirbes subtracted: (1) the 4(a) acreage duty of 2058.6 acres; and (2) the city lot (4(b) right) acreage of 499.91 acres. To attach a conservative construction of the city lot water provided under the Morse Decree (R. 1279-1280), the City lot acreage was increased by a factor of 33% to allow for homes, barns, etc., giving a figure of 666.5 acres subject to the 4(b) right. (R. 1273). Mr. Zirbes also testified that exclusions were made for the First Ward Pasture right (147.0 acres) and for the existing roads in Provo City (478.0 acres). (R. 1274). This left a minimum of 1407.87 acres for irrigation by the 4(c) water, which figure does not include the many hundreds of acres of accretion land irrigable during the dry years when the level of Utah Lake had subsided. This would attach a minimal duty of 85.3 acres per c.f.s. to be irrigated by the 4(c) right. (R. 1274). Mr. Zirbes testified that such a duty does not include the accretion land to the south of the old Utah Lake meander line, (R. 1265) even though such land was irrigated by the water in question. (R. 1276).

EXAMINATION OF STANLEY ROBERTS

Mr. Roberts testified that the 16.5 feet of water in the Mill (Factory) race was used for irrigation after it had passed through the factories and power plants. (R. 1153). The water was used to irrigate the land south of the railroad tracks near Eighth and Ninth South. (R. 1153). The

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record is exactly contrary to the appellants' abstract which states that "Water for irrigation was only used when it was not being used for power." (Abstract p. 30). At night, the 16.5 feet would be taken and used through different irrigation diversions because it was not needed at the power plants and factories. (R. 1153-1154). Mr. Roberts named many of the townspeople who would use the water for irrigation purposes and specified the acreage irrigated. (R. 1154-1166). This testimony was very exact and constitutes an extensive list of property owners who used 4(c) water for irrigation purposes along the entire length of the Factory race. Mr. Roberts also testified that many of the diversion ditches that were used at the time are now destroyed. (R. 1154).

Mr. Roberts also testified that the Mill race water irrigated the land south of the railroad tracks and east of Fourth West Street. This is the green hatched area identified on Exhibit 3. Mr. Roberts testified that all of that "country" was farming ground and identified several of the irrigation users. (R. 1165-1166). Mr. Roberts carefully described the methods used to preserve the water for irrigation and further testified that none of the water was wasted, but was all used for irrigation purposes. (R. 1166-1167). He stated that any waste water south of the railroad tracks could have been water coming from the sewer, but not from the Mill race. (R. 1167). He stated that the entire flow was used for irrigation, even when there was not

sufficient flow to provide power. (R. 1167-1168).

On cross-examination, Mr. Roberts testified that all of the water used by the various mills (Provo Ice and Storage Co., E. J. Ward & Sons, Knight Woolen Mills, Smoot Investment Co., and Excelsior Roller Mills) was always returned to the Factory race. (R. 1168-1173). To the best of Mr. Roberts' recollection, most or all of the mills had ceased operation by the early 1930's. (R. 1172-1173). Mr. Roberts testified that the only water returned to the Provo River was "foreign" water coming from a Rock Canyon stream or elsewhere, as well as water used by Provo Pressed Brick Company under a separate nonconsumptive right. (R. 1176-1178).

At this point, Exhibit 9 was received into evidence, which was a protest by Provo City filed in opposition to a petition by Columbia Steel to appropriate water from the Factory race. The protest included an affidavit by O. K. Hansen, mayor of Provo City, stating that all of the water in the Factory race was used for irrigation purposes. (R. 1180-1185).

EXAMINATION OF MARION J. CLARK

Mr. Clark was Provo River water commissioner from 1953 to 1958. He became water commissioner on the death of Mr. T. F. Wentz. Mr. Clark reviewed the Provo River Decree and the notes of his predecessors and made an independent determination as to the allocation of water in the Provo River. (R. 1085-1087). Exhibit 8 was introduced, which was Mr.

Clark's flow sheet to determine distribution of the Provo River water. This flow sheet showed that Mr. Clark had always delivered the 16.5 c.f.s to Provo City for irrigation purposes, and he so testified. (R. 1091-1092). On cross-examination, Mr. Clark testified that some of the Wentz records contained supporting data showing summaries of the acreages watered by 4(c) water. (R. 1093). These records were removed from the file after Mr. Clark had delivered the records to Mr. Wayman, his successor. (R. 1094-1095). Mr. Clark had known Mr. Wentz and known of his work since Mr. Clark was in the eighth grade. (R. 1107-1108).

EXAMINATION OF HUGH A. MCKELLAR

Mr. Hugh McKellar was the Provo River Water Commissioner who decided not to deliver Provo City's 4(c) water in 1969. (R. 945-946). Contrary to the statements in the appellants' abstract, Mr. McKellar had much more to guide him than just the Morse Decree. Mr. McKellar admitted that he examined the records of Mr. T. F. Wentz and Mr. Wayman, previous Provo River Water commissioners, and found that they had delivered the 16.5 c.f.s to Provo City for irrigation purposes. (R. 949-950). The only records he did not review were those of Mr. Marion J. Clark, Provo River water commissioner from 1953 to 1958. (R. 1085). He offered no explanation as to why he did not review Mr. Clark's records. (R. 946). Mr. McKellar admitted that he had examined the records of the previous commissioners who had controlled the distribution from the Provo River for forty-two of the forty-

seven years since the entry of the Morse Decree. Despite the fact that the 16.5 c.f.s. had been delivered up to the time he took over, Mr. McKellar spontaneously decided to refuse delivery of the 4(c) water to Provo City. (R. 950-951). This was done even though it was apparent that there were no power uses on the Provo River during the period from 1953 to 1968. (R. 951).

After refusing to deliver the 16.5 c.f.s to Provo City in 1969, Mr. McKellar was hired in 1971 as Superintendent for the principal appellant, Provo River Water Users Association. His present salary in that position is twice what he was paid as Provo River Commissioner in 1969. (R. 869). The Provo River Water Users Association was a principal beneficiary of his decision to deprive Provo City of the 4(c) water. (R. 875).

Plaintiff's counsel then read the Morse Decree testimony of Mr. Swan, an early Provo City water master. Mr. Swan described the course of the Factory race and the many acres irrigated by it along its length. (R. 981-984). Mr. Swan also testified that the Factory race water was used for power purposes in addition to the irrigation use. (R. 984). The recorded testimony of Mr. Goddard also showed that the Mill (Factory) race water was beneficially used for irrigation. (R. 987-996). Mr. Thompson, another Morse Decree witness, testified that the water in the Factory race was distributed to the farmers by means of written notice. (R. 996-997). This water was distributed to the lots above the

first "power house" and to those below the last mill. (R. 997). Mr. Thompson testified that whenever the farmers needed more water, it was taken from the factories. (R. 997-998). This was done with notification, but did not require the permission of the mills. At such times the mills would receive no water for power purposes. (R. 998).

EXAMINATION OF J. EARL STUBBS

Mr. Stubbs is a life-long resident of Provo and has farmed and irrigated 673 acres of land in the southern part of Provo for the last 40 years. (R. 1003-1004). He has served on irrigation boards and is familiar with the Provo City irrigation distribution system. (R. 1004-1006). Mr. Stubbs identified many of the farmers who used the Factory race water for irrigation (R. 1009-1020), and stated that he had never seen irrigation water go to waste (into the lake) in his life. (R. 1020). This includes his recollection of all the ditches over a 65 year period. (R. 1031-1044).

EXAMINATION OF THOMAS RICE

Mr. Rice testified concerning Exhibit 13, which consists of five xerox copies of distribution sheets from previous Provo River Water Commissioners; Mr. Wentz's, Mr. Wayman's Mr. Clark's and two from Mr. McKellar (1968-1969). (R. 1195-1196). These sheets show the contemplated distribution of all of the Provo River water in the respective years during the administration of each of the Provo River Commissioners. (R. 1195-1198). Mr. Rice explained that, under these sheets, Provo City was to be given 63.08 c.f.s

from May through June of each year, (R. 1200-1201) with the exception of 1969 when Mr. McKellar made his decision to change the distribution. (R. 1196). The 4(c) right of 16.5 c.f.s. was included in the 63.08 c.f.s allocated to Provo City during this entire time period before 1969. (R. 1201-1202).

EXAMINATION OF DEE C. HANSEN

Mr. Hansen, the Utah State Engineer, rendered a report to the trial court pursuant to the recommendation of this Court in its previous ruling on this matter. (R. 217 A). In that report, Mr. Hansen admitted making an assumption that the mills on the Factory race ceased operations by the early 1940's. (R. 1291). When questioned about the accuracy of that assumption, Mr. Hansen stated that hearings had been held but that he felt that it was the responsibility of the hearing invitees to produce the evidence, even though none of them had been referred the responsibility of making the investigation, conducting the hearing or making the report. (R. 1291-1292).

Mr. Hansen admitted that no one in his office had talked to any of the witnesses who testified of the trial concerning the cessation of operation by the mills. (R. 1292). He admitted that better information would have been obtained if that had been done. (R. 1292). Contrary to statements in the appellants' abstract, Mr. Hansen never conclusively testified that he ascertained and measured the exact land that was irrigated. His figures were based on

assumptions, presumptions and extrapolations. Upon further examination, Mr. Hansen admitted that, in the areas served by the Provo City water system, the State Engineer's office did not find any lands that were not irrigated, except some of the land that was under buildings, roads, and railroad tracks. (R. 1303-1304).

Mr. Hansen admitted that all of the witnesses indicated that they have never seen any water wasted. (R. 1305-1306). After considerable evasion, Mr. Hansen admitted that the reports of the Provo River Water Commissioners from 1921 to 1969 indicate that the 4(a), 4(b) and 4(c) rights were divided on a percentage basis. (R. 1309-1310). Mr. Hansen testified that the 4(a), 4(b) and 4(c) rights were all "A" (first priority) rights. (R. 1325).

In reference to the First Ward Pasture land, Mr. Hansen testified that the land is now irregular and Mr. Hansen suspected that it was not susceptible to irrigation in 1921, although he could not say of his own knowledge that it was not irrigated in 1921. (R. 1420-1422).

Mr. Hansen admitted that his figures on Exhibit E were for the year 1938 and do not purport to accurately reflect the water use in 1921. (R. 1426). He made no adjustments for schools, churches and houses built between 1921 and 1938, nor for population increase. (R. 1426-1427). Mr. Hansen admits that some of the property which previous witnesses had identified as being irrigated from the Provo water system (the Strong estate) was not included in the

Engineer's total of irrigated land. (R. 1436-1437). This exclusion was directly contrary to testimony given to the engineer at his own hearing. (R. 1435-1438).

Mr. Hansen admitted that in his own independent research, he never found out when the mills ceased operation on the Factory race. (R. 1442-1443). In making his report, he relied on the statement of a witness who said the mills had ceased operation by the 1940's. (R. 144). Mr. Hansen conceded that this statement was erroneous. Contrary to the appellants' statement in their abstract, the Engineer did not testify that he had to rely on testimony produced at the hearing. (R. 1443). By his own admission, he was free to conduct independent research. (R. 1442-1443).

Mr. Hansen testified that during the period from 1930 to 1969, whenever it was necessary to deliver less than all of Provo City's water under their rights, the Provo River Water Commissioner delivered a percentage of all of the Class A rights, i.e. 4(a), 4(b) and 4(c). (R. 1447-1449). Mr. Hansen admitted that this interpretation was made by Mr. T. F. Wentz, the Provo River Water Commissioner from 1914 to 1953. (R. 1449). Mr. Wentz was a registered engineer and Hansen admitted that Wentz had more information and knowledge than anyone concerning the Provo River. (R. 1449-1450). Mr. Hansen recognized that Mr. Wentz was the prominent witness at the trial which produced the Morse Decree, (R. 1449), that he tabulated the total acreage involved, (R. 145), and probably knew of the mills shutting down by 1931.

(R. 1450). Mr. Hansen admitted that the allocations from the Provo River for forty-nine years were made by Mr. Wentz. (R. 1450). (It is interesting to note that the appellants omit reference to any of this testimony in their abstract).

EXAMINATION OF HUGH MCKELLAR

On cross-examination, Mr. McKellar gave contradictory testimony concerning whether or not his current employer would be benefitted by his taking of the 4(c) water. (Cf. R. 869 and R. 875-876). Note was made by counsel for the respondent of his evasive and misleading answers. (R. 876). Mr. McKellar admitted that his salary was increased from \$6500 per year as Provo River Commissioner to \$13,000 per year as superintendent of the Provo River Water Users Association. (R. 869). Mr. McKellar also admitted that he questioned the State Engineer's office concerning Provo City's rights to water in Lost Lake (R. 870), thereby initiating termination of that right.

-End-