

1977

## Provo City v. Hubert C. Lambert et al : Brief of Defendants-Appellants

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.

CASE NO. 14,685

BRIEF OF DEFENDANTS-APPELLANTS

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

FILED

JAN 20 1977

Clerk, Supreme Court, Utah

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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, )

Case No. 14,605

Defendants & Appellants. )

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BRIEF OF DEFENDANTS-APPELLANTS

---

STATEMENT OF THE KIND OF CASE

Action to review in part the decision of then State Engineer Hubert C. Lambert dated May 1, 1970 embodying his directive to defendant Hugh McKellar as Provo River Water Commissioner to deliver to plaintiff-respondent water from the Provo River under paragraph 4(c) of the "Provo River Decree" dated May 2, 1921 (Utah County Civil No. 2888) only when plaintiff-respondent could utilize the 16.5 second feet of water specified therein for a non-consumptive power use.

#### DISPOSITION BY STATE ENGINEER

In 1969, defendant Hugh A. McKellar, then Provo River Water Commissioner, was requested by Provo City to deliver the 16.5 c.f.s. of water under paragraph 4(c) of the "Provo River Decree" for use by Provo City for irrigation purposes, and Mr. McKellar refused. (R.8, 263; F.3, R.475). Opposition to the foregoing directive developed and a hearing thereon was conducted by the State Engineer on October 29, 1969 and additional studies were made by him. (R.8, 263; F.4, R.475). On May 1, 1970 the State Engineer amended the foregoing directive to deliver to Provo City the 16.5 c.f.s. of water only when Provo City could utilize the flow for non-consumptive use. (R.8, 263; F.4, R.475).

#### DISPOSITION IN THE LOWER COURT

This action was initially filed by plaintiff-respondent on June 26, 1970 to review the foregoing Decision of the State Engineer dated May 1, 1970. (R.4-10 incl.). The matter was thereafter submitted to the trial court in May, 1971, on mutual Motions for Summary Judgment with the Honorable Allen B. Sorensen, District Judge, presiding. (Defs' Motion - R.77-80 incl., 191; Pltf's Motion - R.122-128 incl.). Both motions were supported by documentation from the files of Civil No. 2888 (Defs' Docs. - R.81-121 incl., 132-137 incl.; Pltf's Docs. - R.150-187 incl.) which became the record in this case pursuant to stipulation of counsel at the pretrial conference held on April 16, 1971. (R.1576-1577).

Judge Sorensen denied plaintiff's Motion for Summary Judgment (R.193-195 incl.) and made and entered a Summary Judgment on August 16, 1971 in favor of defendants collectively affirming

the decision of defendant Hubert C. Lambert as State Engineer dated May 1, 1970 and adjudging that the award to plaintiff under paragraph 4(c) of the "Provo River Decree" was for power use only and shall be delivered to plaintiff only when it can utilize said flow for a non-consumptive power use. (R.196-198 incl.).

On September 14, 1971, plaintiff appealed to this Court from the Summary Judgment. (R.205, 206, 208, 209). On August 7, 1972 this Court issued its opinion (R.217, 217A, 218; 28 Utah 2d 194, 499 P.2d 1296) wherein it concluded and ordered as follows:

"It would seem to us that it would be helpful in making a proper determination and interpretation of what was intended by the language set forth in the "Provo River Decree" had the record contained some information as to what use, if any, the plaintiff had made of 16.50 second feet of water, since its use in the operation of the various mills has ceased. 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 August 29, 1972 this Court remanded the case back to the District Court with the recommendation that the District 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.216). After hearing and on September 22, 1972 Judge Sorensen referred the case to the State Engineer for such determination as may be helpful in view of the Decision of the Supreme Court. (R.221).

Pursuant to the foregoing ruling, a hearing was conducted by the State Engineer concerning paragraph 4(c) of the "Provo River

Decree" and further investigations were made by him culminating in a "Report of the State Engineer to the Honorable Allen B. Sorensen, Judge," which was filed with the trial court on June 18, 1975 together with exhibits and the transcripts of the hearings conducted by the State Engineer. (Ex. D, E, F, R.585-910 inclusive).

Meanwhile in the court below, plaintiff filed a Motion To Amend Complaint (R.249, 250) which was granted, (R.288) and an Amended Complaint was filed. (R.254-267 incl.). Defendants then filed a Motion To Dismiss, Motion to Strike and Motion For More Definite Statement directed at the Amended Complaint (R.268-272 incl.) and plaintiff filed a Motion To Bifurcate and Render Summary Judgment. (R.290, 291). Plaintiff then filed a separate action in the District Court of Utah County being Civil No. 42,405 concerning the same subject matter wherein Motions To Dismiss were filed by defendants. (R.315, 316).

On July 22, 1975 Judge Sorensen on his own motion disqualified himself and the case was assigned to the Honorable Don V. Tibbs, Judge of the Sixth Judicial District. (R.316). All pending motions in both cases (Civil Nos. 34,701 and 42,405) were set for hearing before Judge Tibbs on September 6, 1975 and a comprehensive order was entered in both cases disposing of all pending motions. (R.336-339 incl.).

Judge Tibbs concluded that the trial court had jurisdiction in this case (Civil No. 34,701) and further concluded from the opinion of this Court filed herein on the 7th day of August, 1972 (R.217, 217A, 218) that the Summary Judgment made and entered by the trial court on the 16th day of August, 1971 was neither affirmed

nor reversed but that the matter was remanded to the trial court for an evidentiary hearing on the use, if any, the plaintiff has made of the 16.5 c.f.s. of water since its use in the operation of the various mills has ceased. (R.337). The end result was that this matter was set for trial for a factual 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.339).

The evidentiary hearing was held before Honorable Don V. Tibbs, District Judge, sitting without a jury, on November 24-26, inclusive, and 28, 1975 (R.464-469 incl.) and was argued on December 11, 1975. (R.399). Plaintiff filed a motion to amend its Complaint (R.458-469 incl.) which was granted. (R.399).

On January 16, 1976 the trial court made and entered Findings of Fact and Conclusions of Law (R.404-410 incl.) and Judgment. (R.411-413 incl.). Motions to amend Findings of Fact, Conclusions of Law and Judgment (R.415-420 incl.; 428-432 incl.) filed by defendants were granted in part. (R.483-485 incl.). A Motion For New Trial (R.433-435 incl.) was filed by defendants which was denied. (R.484). Amended Findings of Fact and Conclusions of Law (R.473-478 incl.) and Amended Judgment (R.479-481 incl.) were made and entered by the trial court on May 4, 1976 over the objections of defendants. (R.445-447 incl.; 482). On May 25, 1976 defendants filed their Notice of Appeal. (487-488).

#### RELIEF SOUGHT ON APPEAL

Defendants seek to set aside the Amended Findings of Fact and Conclusions of Law in toto, reverse the Amended Judgment and affirm the Summary Judgment made and entered herein on the 16th day of August, 1971.

Decree" and further investigations were made by him culminating in a "Report of the State Engineer to the Honorable Allen B. Sorensen, Judge," which was filed with the trial court on June 18, 1975 together with exhibits and the transcripts of the hearings conducted by the State Engineer. (Ex. D, E, F, R.585-910 inclusive)

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#### STATEMENT OF FACTS

To simplify the nomenclature herein, plaintiff-respondent will be referred to hereinafter as Provo City and defendants-appellants collectively will be referred to herein as defendants. Defendant

and Hubert C. Lambert and/or his successor Dee C. Hansen, as State Engineer of the State of Utah, will be referred to herein as State Engineer. Defendant Hugh McKellar as Provo River Water Commissioner, or his successor, will be referred to herein as River Commissioner. Other defendants-appellants individually will be referred to as defendant by name.

Since the transcript of the testimony in this case exceeds 400 pages, an Abstract of Testimony has been prepared by defendants pursuant to Rule 75(e) Utah Rules of Civil Procedure and references thereto shall be designated herein as (A. ). References to the file shall be designated as (R.1-502 incl.) with the page designated by the number appearing in the very lower right hand corner as distinguished from the numbers 00003-00223 page designations in the prior appeal. References to the Amended Findings of Fact shall be designated (F. ), Amended Conclusions of Law (C. ) and Amended Judgment (J. ) and Exhibits (Ex. ).

The transcript of the proceedings in this case now comprises 6 volumes, ie. the transcript of the pretrial hearing held before Honorable Allen B. Sorensen, District Judge, on April 16, 1971 (R.1560-1578 incl.); the transcript of the hearings before the State Engineer (R.585-911 incl.); the pretrial proceedings before Honorable Don V. Tibbs, District Judge, on September 6, 1975 (R.504-585 incl.) and the transcript of the evidentiary hearing before the Honorable Don V. Tibbs, District Judge, (R.912-1559 incl.). References to the six transcripts shall be by page number only and designated as (R. ).

We believe it essential to a better understanding of this case to divide defendants' Statement of Facts into the following four categories, ie.

(1) General facts relating to the geographical locations of the Provo River and Utah Lake and the diversion of waters therefrom by the respective parties;

(2) Factual matters extracted from the Record in Utah County Civil No. 2888 (Provo River Decree) which are still a part of the Record and were before this Court on the prior appeal;

(3) Factual findings of State Engineer from investigations made pursuant to the referral of the District Court; and

(4) Factual matters from the evidentiary hearing in the District Court relating to the use made of the water here in question pursuant to the remand of the Court from the prior appeal.

In so doing, defendants will strive to comply with the time-honored rules of appellee review and state those facts in the light most favorable to the Amended Findings of Fact and Amended Judgment below.

A. General Statement of Facts Relating To Geographical Locations of Provo River and Utah Lake And Diversions Therefrom.

The Provo River originates in the Uintah Mountains near Bald Mountain and courses generally southwesterly through Summit, Wasatch and Utah Counties into Utah Lake. Deer Creek Reservoir, being a part of the Provo River Project, is constructed across the natural channel of the Provo River at the head of Provo Canyon in Wasatch County. The enlarged Provo Reservoir Canal has its point

of diversion at the Murdock Diversion Dam situated downstream from Deer Creek Reservoir and just above the mouth of Provo Canyon and conveys both natural flow Provo River water and Provo River project waters rediverted from Provo River.

Plaintiff diverts water from the Provo River below the mouth of Provo Canyon at two locations, ie.

(1) The City Race, Factory Race and East Union Canal, all divert water from a common canal which has its point of diversion from Provo River near the southwest corner of the Riverside Country Club (Ex. D, p.7,8) and downstream from the Murdock Diversion Dam, and

(2) The Tanner Race which has its point of diversion from Provo River near old Highway 91 west of the Utah Valley Hospital. All of the foregoing races and the East Union Canal have their terminus in the Provo Bay Area of Utah Lake. (Ex. D, p.7,8).

Defendant Provo River Water Users Association operates and maintains the Deer Creek Reservoir and the Provo Reservoir canal under contracts with defendant United States of America and diverts, stores and conveys natural flow Provo River waters and Provo River Project waters for use by its stockholders in both Salt Lake and Utah Counties. (Ex. I, R.1465, 1479). Defendant Provo Reservoir Water Users Company diverts natural flow Provo River waters into the Provo Reservoir canal under water rights evidenced by the Provo River Decree which are conveyed thereby for use by its stockholders in both Salt Lake and Utah Counties. (Ex. K, R.1481, 1482).

Defendant Salt Lake City stores water in and diverts water from Utah Lake into the Jordan River and the waters are conveyed thereby and rediverted therefrom near the Jordan Narrows under right

confirmed by the "Morse Decree" dated July 15, 1901 and supplemental decrees in exchange for the waters of the several Wasatch Front streams in Salt Lake County. (Ex. O, R.1487, 1491, 1492). Defendants Kennecott Copper Corporation and Utah Lake Distributing Company store water in and divert water from Utah Lake into the Jordan River and the waters are conveyed thereby and are rediverted therefrom at the Jordan Narrows and below for use by the stockholders of Utah Lake Distributing Company in both Utah and Salt Lake Counties and by Kennecott Copper Corporation in Salt Lake County. (Exs. J, L; R.1480,1481).

Defendant Central Utah Water Conservancy District is entitled to the project waters to be developed under the Bonneville Unit of the Central Utah Project to be constructed by the United States of America (Bureau of Reclamation) which will include storage waters from Provo River at the proposed Jordanelle Reservoir upstream from Deer Creek Reservoir near Hailstone Junction in Wasatch County for municipal, industrial, power, irrigation and miscellaneous uses within the Central Utah Water Conservancy District by exchange for waters saved and/or stored in Utah Lake. (Ex. N, R.1486, 1487).

Provo City concedes that if it does not get the 16.5 second feet of water under paragraph 4(c) of the Provo River Decree it will go in the Provo River (A.70, R.1511) and the trial court acknowledged that defendants' water rights will be affected by its decision in this case. (A.70, R.1511, 1512).

B. Statement of Facts From Record of Civil No. 2888 Before This Court on Prior Appeal.

The fundamental issue on this appeal as on the prior appeal is the correct interpretation of paragraph 4(c) of the Provo River Decree which reads as follows:

"(c) 16.50 second feet, during the irrigation season of each and every year. Which water has heretofore been used for irrigation purposes by said City and for the generation of power by the Provo Ice & Cold Storage Company, a corporation, E. J. Ward & Sons Company, a corporation, Knight Woolen Mills a corporation, Smoot Investment Company a corporation, and Upton Hoover, W. E. Hoover, Webster Hoover and Frank Hoover as partners doing business under the name of Excelsior Roller Mills. And the said use for power purposes has been under license and grant from said Provo City and at such times and in such manner as has been made by mutual arrangements therefor."

The foundational facts extracted from the Record in Civil No. 2888 which led to paragraph 4(c) and which were before this Court on the prior appeal are summarized as follows:

Testimony extracted from the Record of Civil No. 2888 by Provo City established that the Factory Race headed below the Tail Race of the Provo Pressed Brick Company's plant running in a southerly direction. (R.161). It irrigated a number of blocks laying north of Center Street and west of the canal and all of one tier of lots west of the Factory Race, with the exception of one block, and lands in the First Ward pasture and to the west thereof south of Sixth South Street. (R.162). There were 74.7 acres above the Provo Woolen Mills and 129.4 acres below. (R.167). The Factory Race was utilized for power purposes by the Provo Ice & Cold Storage Co., the Hoover's Mills, the Knight Woolen Mill, Ward & Sons Mill and the Smoot Lumber Company's Mill. (R.162, 163).

Under the City Race there were 358.2 acres above the power plant (foundry) and 365.2 acres below. (R.167). Under the Tanner Race there were a total of 430.5 acres. (R.167). The total acreage from all canals was 1925 farm acres and 701.4 acres in platted lots of which 133.6 acres were farm lots. (R.167). The total acreage

outside of the platted portion of this city was 2,058.6 acres and the total acreage under the several canals was 2,760.1 acres. (R.168). Under the Factory Race where the power users were located, the distribution of water to the irrigators was on a fixed time from one season to the other, (R.172,174) which was different from the East Union Canal where it was all-night watering in the summer and no day watering whatever by the farmers. (R.172,173).

The sequence of the events which led to paragraph 4(c) of the Provo River Decree as extracted from the Record of Civil No. 2888 by defendants established that in May, 1917 during the pendency of the trial of Civil No. 2888, the outline of the proposed distribution of water to Provo City for the year 1917 into the Factory Race provided for 13.75 second feet from June 30 to July 20 and 14.00 second feet from July 20 to September 1, with no irrigation thereunder, in a category separate and apart from the irrigation of the Provo City acreage of 2058.6 acres and 300 acres in Provo City lots. (R.81, 82).

The decision of C. W. Morse, Judge Pro Tem, dated November 26, 1917 awarded to Provo City 13.75 second feet of water for power purposes during the irrigation season theretofore used by the mill rights upon the Factory Race and other races within the city (R.88) separate from its award to Provo City for power purposes during the non-irrigating season (R.88) and separate and apart from its award to Provo City of the waters for irrigation purposes for the Provo City 2,058.6 farm acres and 300 acres of town lots. (R.83,84-90 incl.). The Decision also fixed the basis of assessment to Provo City as a power user for its mill rights along the Factory Race. (R.89)

By stipulation in open court in Civil No. 2888 on September 4, 1918 between the Provo Reservoir Company and Provo City the foregoing 13.75 second feet was changed to 16.5 second feet and was there specifically identified as "the power right water" (R.91, 93). Mr. F. S. Richards, then attorney for Provo City (R.94) subsequently offered evidence to show that the 13.75 second feet would not turn the machinery of the mills and that 16.5 second feet was essential for that purpose in support of the above stipulation substituting the 16.5 second feet for the 13.75 second feet. (R.95-98 incl.).

During the post 1917 Decision proceedings, the trial court noted that its award of 50 or 57 acre (per second foot) duty was an abundant award (R.134, 135) and thereafter denied Provo City's Motion to reopen the case with reference to the duty of water because of its exceedingly generous allowance of water. (R.136, 137).

The above award of 16.5 second feet of water was incorporated into paragraph 58(c) of the Findings of Fact of Civil No. 2888 dated May 2, 1921 as a right separate and apart from the irrigation rights of Provo City under paragraphs 58(a) and 58(b) thereof. (R.105,107). Provo City's farm acreage under paragraph 58(a) remained at 2,058.6 acres, but its city lot acreage was raised from 300 to 499.91 acres under paragraph 58(b) and the respective flows of water were fixed by dividing the duty of water (acres per second foot) into the respective irrigated acreages. (R.105).

Likewise, said 16.5 second feet was incorporated into the final Decree of Civil No. 2888 dated May 2, 1921 as paragraph 4(c) as a right during the irrigation season separate and apart from the power right during the non-irrigation season under paragraph 4(d) &

separate from the irrigation rights of Provo City under paragraphs 4(a) and 4(b) thereof. (R.108,121). Provo City's farm acreage, city lot acreage and respective flows of water as set forth in the above Findings of Fact were incorporated into paragraphs 4(a) and 4(b) of the final Decree. (R.108,121).

The assessment of Provo City for its power rights along the Factory Race was incorporated into paragraph 169 of the Findings of Fact (R.106) and paragraph 130 of the final Decree (R.107,120,121).

C. Statement Of Facts Found By State Engineer Pursuant To Referral From District Court.

At the outset it should be noted that pursuant to the referral from the District Court, the State Engineer held two days of hearings (R.589-911 incl.) and conducted further investigations which culminated in his Report and appendices which he filed with the District Court on June 18, 1975. (Exs. D,14, C, E, F, G). The foregoing report contained eight basic Findings of Fact (Ex. D, pars. A-H incl., pp. 17-21 incl.) summarized as follows with no conclusions as to his interpretation of paragraph 4(c) of the Provo River Decree. (Ex. D, p.17).

During the period when the five mills referred to in paragraph 4(c) of the Provo River Decree were in operation, water was diverted into the Factory Race for power purposes and some of the water was used for irrigation purposes. However, it does not appear that irrigation from the Factory Race exceeded approximately 200 acres during the period of time the mills were operating. (Ex. D, p.18).

After the mills on the Factory Race ceased operation,

changes occurred whereby water diverted into the Factory Race is no longer used for power purposes, but is used for irrigation purposes. Part of the ditches and laterals making up the Factory Race system have been covered and are now underground. Some laterals have been discontinued, others have been extended and in some instances new ones constructed. The point of diversion of the City Race has been moved downstream so that today the Factory Race, City Race and East Union Canal all divert water from approximately the same point on this canal. After the mills ceased operation on the Factory Race, Provo City modified its distribution system and extended certain of the laterals on the Factory Race to irrigate lands which were formerly irrigated from the City Race. (Ex. D, p.19).

The total land irrigated by Provo City did not exceed the total of 2,558.51 acres of farm land and city lots specified in paragraphs 4(a) and 4(b) of Civil 2888, all of which land was irrigated from the Factory Race, City Race, Tanner Race and East Union Canal. There is no evidence that Provo City irrigated any additional land. (Ex. D, p.19).

The First Ward Pasture Company was awarded a right in Civil 2888 independent of awards to Provo City for the irrigation of the so-called "First Ward Pasture" of 147 acres and there is no evidence that the irrigation of this area exceeded the 147 acres provided for in the Provo River Decree. (Ex. D, pp. 19,20).

Provo City's distribution pattern on the Factory Race changed considerably after the mills ceased operation. From the mid-1940's to 1969, the flows diverted into the Factory Race were

more uniform throughout the entire irrigation season than prior to that time. (Ex. D, p.20).

The combined total quantity of water which Provo City diverted into the Factory Race, City Race, Tanner Race and East Union Canal began to decrease after the mills ceased operation. While the mills were operating, there were times when Provo City diverted sufficient water into these four canals to equal the combined flows of paragraphs 4(a), (b) and (c), but this occurred very infrequently after the mills ceased operation. At various times the diversions into these four canals exceeded the combined flows of paragraphs 4(a) and (b) during the 20 years following the time the mills ceased operating, but the average quantity of water diverted did not greatly exceed the combined flows of paragraphs 4(a) and (b). From 1962 to 1969 the water diverted into these four canals did, on occasion, slightly exceed the combined flows set forth in paragraphs 4(a) and (b), but the average quantity of water diverted during this latter period was somewhat less than the combined flows provided for in these two paragraphs. (Ex. D, pp.20,21).

After the water is delivered to Provo City from the Provo River, the city varies and changes the flow along its various canals and ditches to accommodate the varying demands of its irrigation system. It appears this practice has been followed by the city both before and since the mills ceased operation, but there is no evidence that the total irrigation by the city exceeded the 2,558.51 acres specified in paragraphs 4(a) and 4(b) of the Provo River Decree. (Ex. D, p.21).

D. Statement Of Facts From Evidentiary Hearing In District Court On The Use Of The Water Here In Question.

In 1921 and years prior thereto, the Factory Race irrigated irregular lands comprising a number of blocks lying north of Center Street and west of the Factory Race and some lands in the First Ward Pasture and to the west thereof. (A.4, R.983,984; 988-990 incl.; A.7, R.1005; A.9, R.1020,1021). However, the total irrigated acreage under the Factory Race was not identified. (A.9, R.1023,1024; A.10, R.1030). At the same time, the water in the Factory Race was definitely used for power purposes. (A.4, R.984; A.6, R.1001). An arrangement had been worked out where irrigators exchanged water with the mills in the evenings and on Sundays when the Provo River was at low stage. (A.4,5, R.991-994 incl.; A.6, R.1001,1002; A.30, R.1153,1154,1158-1160 incl.).

A stipulation was entered into in Civil 2888 whereby Provo City and the various mill owners agreed that Provo City was the owner of the right to the use of the waters theretofor distributed to it from Provo River and the mill owner's use of such waters for power purposes were under grants from Provo City and recognition was given to the prior exchange between the irrigators and mill owners. (A.6, R.999,1000).

In 1924, the water was taken out of the Mill Race over the objection of one of the mill owners and was used for irrigation purposes because the river was low. (A.15,16, R.1063,1064; A.16, R.1069,1070). A part of the water diverted into the Factory Race and used for power purposes at the Provo Brick & Tile Company was

returned to the Provo River below the Penstock which includes some of the waters owned by that company under its own filing. (A.18, R.1081,1082).

In about 1915, water was used from the Mill (Factory) Race to irrigate lands near the golf course and the First Ward Pasture. (A.27, R.1135,1138). Although several acreage parcels were identified, the total acreage was not fixed. (A.28, R.1135,1138,1140,1142-1145 incl.).

After 1921, the same water from the Mill Race was used for irrigation and power. However, the water was used for irrigation in the evening when it wasn't being used for power. (A.30, R.1153). The water was used for irrigation only when it wasn't being used for power. (A.30, R.1160).

The Knight Woolen Mills ceased to use water power to operate its machinery after the big fire of 1914. (A.38, R.1238). The Provo Ice and Cold Storage Company ceased operating sometime prior to 1932. (A.38,39, R.1243). The Excelsior Roller Mills ceased to operate with water power when it burned down in February of 1930. (A.39, R.1246). The Smoot Lumber Company ceased to use water power shortly after 1920. (A.39, R.1248). The E. J. Ward and Sons Lumber Company ceased to use water in approximately 1921 or 1922. (A.39, R.1249).

The actual daily diversions of water from Provo River to the Provo City Canal System for each year from 1921 to 1969, incl., were submitted in evidence as Exhibit C. (A.50, R.1327), and the monthly average of the quantities of water tabulated therein are graphically represented on Exhibit 14, both of which exhibits were

a part of the report submitted by the State Engineer to the District Court on June 18, 1975. (A.50, R.1327). Exhibits 15(a), (b) and (c) are further graphical representations of Exhibit 14 in chart form. (A.35, R.1213; A.68, R.1460).

Referring to Exhibits 14, 15(a), (b) and (c):

(1) The red line shows the actual diversions into the Provo City Canals which include the Lower East Union Canal, City Race, Factory Race and Tanner Race. (A.46, R.1311).

(2) The black line indicates the average actual diversions into the Factory Race, being part of (1) above. (A.46, R.1311).

(3) The green line is the summation of the quantities of water under paragraphs 4(a) and 4(b) during the periods of time specified thereunder as adjusted for those periods when the total flow of the Provo River was less than that necessary to satisfy all class "A" rights in full. Thus, the green line represents the average quantities of water available for diversion to Provo City under paragraphs 4(a) and 4(b). (A.47, R.1319).

(4) The blue line is the summation of the quantities of water under paragraphs 4(a), 4(b) and 4(c) during the periods of time specified thereunder as adjusted for those periods when the total flow of the Provo River was less than that necessary to satisfy all class "A" rights in full. (A.47, R.1311,1316,1317).

Thus, when the red line is below the green line, the actual quantities of Provo River water diverted to Provo City were less than it would be entitled to receive under paragraphs 4(a) and 4(b) combined. (A.48, R.1319). Likewise, when the red line is below the blue line, the actual quantities of Provo River water

diverted to Provo City were less than the total quantities under paragraphs 4(a), 4(b) and 4(c) combined. When the red line is above the blue line, the actual quantities of Provo River water diverted to Provo City were in excess of the awards under paragraphs 4(a), 4(b) and 4(c) combined because the river was high. (A.48, R.1317,1318). And the black line represents that portion of the water shown by the red line which was actually diverted into the Tanner Race. (A.47,48, R.1318).

The irrigated acreage in 1921 under the Provo City canal system excluding city lots was 2,069.9 acres as shown by Exhibit 5, the base map of which is a copy of Exhibit 58 from the files of Civil 2888. (A.53, R.1338). The 1921 city lot irrigated acreage of 499.91 acres was verified by the State Engineer from the Morse Decree proceedings. (A.54, R.1352,1353).

The total irrigated acreage under the Provo City canal system in 1937-1938 was 2,303.38 acres as shown by Exhibit E. (A.58, R.1381,1382). The base map of Exhibit E was obtained from Provo City by the State Engineer during his investigation and shows the Provo City irrigation system and defines such area. (A.55, R.1362). The green figures shown on Exhibit E are irrigated acreages in the farmland areas as of 1937 and total 1,732.60 acres. (A.58, R.1381). The red figures are the irrigated acreages within the city lots as of 1938 as computed by the State Engineer from Exhibit F comprising at least 68 separate plats of the Provo City lots in 1938 obtained from Provo City by the State Engineer as a part of his investigation and totals 570.78 acres. (A.56, R.1367; A.57, R.1379).

The total irrigated acreage under the Provo City canal system

in 1969 as shown by the hydrographic surveys of the State Engineer (Ex. G) prepared in connection with the Utah Lake and Jordan River general adjudication was a total of 2,154.56 acres of which 1,338.11 acres were in crops and 816.11 acres were in lawns. (Ex. H, A.60 R.1395,1397). The hydrographic survey was based on aerial photographs controlled by ground measurements and verified by field examination (A.58, R.1383,1384).

The foregoing irrigated acreages under the Provo City canal system as compared with the awards under paragraphs 4(a) and 4(b) of the Provo River Decree are tabulated as follows:

<u>Irrigation</u>	<u>1921 Acres</u>	<u>1937-38 Acres</u>	<u>1969 Acres</u>	<u>Provo River Decree</u>	<u>Par. No.</u>
Farm lands	2,069.9	1,732.60	1,338.45	2,058.60	4(a)
City lots	<u>499.91</u>	<u>570.78</u>	<u>816.11</u>	<u>499.91</u>	4(b)
Totals	2,569.81	2,303.38	2,154.56	2,558.51	

The duty of water under paragraphs 4(a) and 4(b) of the Provo River Decree would supply the 2,558.6 acres specified therein with 6.2 acre feet per acre annually assuming a 100% supply which is not only adequate to irrigate those lands, but is excessive. (A.61, R.1407). Paragraph 4(c) of the Provo River Decree does not specify acreage or duty as do paragraphs 4(a) and 4(b). If the 16.5 cfs. under paragraph 4(c) were added to the quantities provided for under paragraphs 4(a) and 4(b) for the irrigation of the 2558.6 acres, the duty would be raised to 8.76 acre feet per acre per year and that would be more than adequate. (A.61, R.1407).

## ARGUMENT

### Introduction

The focal point on this appeal is whether Provo City's water right evidenced by paragraph 4(c) of the Provo River Decree

is limited to a non-consumptive use for power purposes or whether it includes a consumptive use for irrigation purposes. That was the precise issue before this Court on the prior appeal and was submitted to it on mutual Motions for Summary Judgment as supported by documentation extracted from the files of Civil No. 2888 as the agreed-upon record on appeal.

The Summary Judgment made and entered on August 16, 1971 was neither vacated or reversed by this Court on the prior appeal. In its prior opinion this Court noted that

(1) Paragraph 4(c) fails to specify any acreage to be irrigated, nor does it fix the duty of water, in contrast to the language of subparagraphs (a) and (b); (R.217A) and

(2) Paragraph 4(c) contains the following language "Which water has heretofore been used for irrigation purposes by said City and for generation of power..." which language may indicate that the award provided by the 1921 Decree referring to power purposes was intended to be taken from the allocations to the plaintiff for irrigation purposes. (Underscoring ours). (R.217A).

The clear import of the foregoing is that this Court was of the view that on the surface, at least, paragraph 4(c) provided for an additional non-consumptive power use of 16.5 second feet of the same water awarded for irrigation purposes under paragraphs 4(a) and 4(b) of the Provo River Decree rather than a right in addition thereto. Such was the initial position taken by the defendant water users before the State Engineer in 1969. However, the defendant water users accepted the directive of the State Engineer dated May 1, 1970 as being correct rather than contest it in the lower court. (R.609,

Accordingly, the remand was for the purpose of ascertaining whether such was the correct interpretation of paragraph 4(c) by directing that a determination of the past use of the water be made, ie. whether the 16.5 second feet of water used for power purposes under paragraph 4(c) was a part of the same water used for irrigation purposes under paragraphs 4(a) and 4(b). If so, the Summary Judgment would have to be modified to so provide. If not, the Summary Judgment would stand. By no stretch of the imagination did the remand authorize the trial court to retry the whole case and make and enter a new judgment which would wholly nullify the Summary Judgment. But that is precisely what the trial court did and in so doing committed reversible error.

Beginning at the hearing before the State Engineer, the defendant water users urged that the inquiry be limited to a factual determination of the use made of the water in question pursuant to the remand of this Court and objected to a retrial of the whole case. (R.622-625 incl.). Prior to the evidentiary hearing in the lower court, defendants objected to expanding the issues beyond the specific remand of this Court by their Motion to Dismiss and Motion to Strike Plaintiff's Amended Complaint (R.268-272 incl.) and arguments at the pretrial hearing held on September 6, 1975 before the Honorable Don V. Tibbs, District Judge. (R.506,507,510,512,521,522,554).

After extensive arguments on the matter, the trial court concluded that the Summary Judgment entered herein on August 16, 1971 was neither affirmed or reversed by this Court in its opinion filed August 7, 1972, but was remanded to the trial court for an evidentiary hearing on the use, if any, Provo City made of the 16.50 cfs. of water.

since its use in the operation of the mills had ceased. (R.337,574). The trial court ruled on all motions accordingly and set the matter for a factual determination as to the use, if any, made of the water in question. (R.336-339 incl.).

At the evidentiary hearing in the lower court, defendants repeatedly objected to evidence beyond the scope of the remand of this Court and/or moved that such evidence be stricken which were overruled or denied. (R.953; A.6, R.1002; A.41, R.1275,1276; A.42, 43, R.1288; R.1464). The upshot of it all was that the trial court reddecided the whole case supposedly on the basis of the evidence presented at the evidentiary hearing only and ignored the balance of the record before it and before this Court on the prior appeal. Obviously the trial court was impressed with only the fact that at times Provo City received more water than the total of its 4(a) and 4(b) rights and concluded therefrom that Provo City was entitled to an additional 16.5 second feet of water for consumptive use in perpetuity.

Most discouraging is that the trial court did not follow the remand of this Court while leading counsel all along to believe that it was going to do so. Instead, it entered a complete new set of Amended Findings of Fact, Conclusions of Law and Amended Judgment, all over the strenuous objections of defendants and to their great surprise. (R.436-438 incl.). In so doing, the trial court did not even purport to vacate or set aside the Summary Judgment made and entered herein on August 16, 1971, but simply paid it lip service in passing and thereafter ignored it.

Even more discouraging is that the trial court made crucial

findings which are not only unsupported by the evidence but are contrary to the great weight of the evidence. But even more shocking was the trial court's conclusion that the Morse Decree is not ambiguous. This Judge Tibbs concluded after some 79 pages of extrinsic documents extracted from the record in Civil No. 2888, some 975 pages of transcript of extrinsic testimony and argument, and some 36 exhibits. And this Judge Tibbs did in the face of Judge Sorensen's prior conclusion that paragraph 4(c) is ambiguous, which this Court acknowledged in the prior appeal, and in spite of the specific remittitur of this Court to consider extrinsic evidence.

While defendants are critical of the end result reached by the trial court, they fully recognize that Judge Tibbs, having been assigned this case in the middle thereof, had a most difficult task to perform. His task was unduly complicated by the incessant efforts of Provo City to retry the whole case with its shotgun-blast approach to pleading and of offering evidence. With all due respect to the trial court, it let the case get out of hand and in so doing committed serious and grievous error with devastating end results which justice and fair play demand be rectified by this Court on this appeal.

#### POINT I

THE TRIAL COURT ERRED BY ITS FAILURE TO COMPLY WITH  
THE REMITTITUR OF THIS COURT UNDER ITS REMAND FROM  
THE PRIOR APPEAL.

On appeal this Court may reverse, affirm or modify any order or judgment appealed from...or may direct...further proceedings to be had. (underscoring ours). Rule 76 (a), Utah Rules of Civil Procedure. 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. 5 Am.Jur.2d, Appeal and Error, Sec. 962, p.389.

Where a cause is remanded for further proceedings, it is the duty of the Supreme Court in the interest of expediting the processes of justice to pass upon matters which will be pertinent in determining the rights of the parties. Allred v. Allred, 12 Utah 2d 325, 366 P.2d 478 (1961), Rule 76(a) Utah Rules of Civil Procedure, LeGrand Johnson Corporation v. Peterson, 18 Utah 2d 260, 420 P.2d 615 (1966), Shelmidine v. Jones, Utah 2d 550 P.2d 207 (1976).

In the prior appeal, this Court neither vacated or reversed the Summary Judgment of the trial court made and entered herein on August 16, 1971. Instead it issued the following remittitur on August 29, 1972, to-wit:

"This cause having been heretofore argued and submitted, and the Court being sufficiently advised in the premises, it is now ordered, adjudged and decreed 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. No costs awarded." (R.216).

Thus, it was the duty of the trial court under the remittitur of this Court to make findings as to the use made of the water under paragraph 4(c) of the Provo River Decree. Implicit in the remittitur was to certify those findings back to this Court such that this Court could determine whether the Summary Judgment should be affirmed, reversed or modified.

Instead, the trial court made and entered a whole new set of Amended Findings of Fact, Conclusions of Law and Amended Judgment

considering solely the evidence supposedly relating to the past use of the water and giving no consideration to the remainder of the record in this case. And in so doing, it failed to comply with the remittitur of this Court under its remand from the prior appeal. This was repeatedly called to the attention of the trial court. (R.400-402 incl.; 433-438 incl.; 446-447).

The rule is well settled that when a case has been determined by a reviewing court and remanded to the trial court, the duty of the latter is to comply with the mandate of the former. Utah Copper Co. v. District Court, 91 Utah 377, 64 P.2d 241 (1937); Street v. Fourth Judicial District Court, 113 Utah 60, 191 P.2d 153 (1948). As stated in Utah Copper Co. v. District Court, Supra, on page 250 of the Pacific Reporter and quoting from Street v. Fourth Judicial District Court, Supra, at page 157 of the Pacific Reporter

"The lower court upon remand of a case from a higher court, must obey the mandate or remittitur and render judgment in conformity thereto and has no authority to enter any judgment not in conformity with the order. Whatever comes before and is decided and disposed of before the reviewing court is considered as finally settled and the inferior court to which a mandate issues is bound by the decree as the law of the case and must carry it into execution according to the mandate, and after the reviewing court has determined the case before it and remanded it to the lower court, the latter is without power to modify, alter, amend, set aside or in any manner disturb or depart from the judgment of the reviewing court; that the judgment of the higher court is not reviewable in any way by the court below and the lower court cannot vary or examine the decree of the higher court for any other purpose than execution, or give any other or further relief or review it even for apparent error upon any matter decided on appeal, or meddle with it further than to settle so much as has been remanded."

It is respectfully submitted that the trial court failed to comply with the remittitur of this Court and its failure to do so constitutes

## POINT II

THE TRIAL COURT ERRED IN MAKING AND ENTERING ITS  
AMENDED FINDINGS OF FACT, CONCLUSIONS OF LAW AND  
AMENDED JUDGMENT.

As the record stood, a Summary Judgment was made and entered by the trial court on August 16, 1971 adjudging that the water right evidenced by paragraph 4(c) of the Provo River Decree is for a non-consumptive power use. In the prior appeal, this court neither vacated nor reversed the Summary Judgment. Yet the Summary Judgment is conclusive upon the parties so long as it remains unreversed. Mathews v. Mathews, 102 Utah 428, 132 P.2d 111 (1942). To "reverse" means to set aside, annul or vacate the Judgment or Order entered by the Court below. 5 Am.Jur.2d Appeal and Error, Sec. 948, p.374. A reversal of a judgment places the case in the position it was before the lower court rendered that judgment or decision which was reversed. Phebus v. Dunford, 114 Utah 292, 198 P.2d 973 (1948). That clearly is not the case here.

Rather, this Court remanded the matter to the trial court with the recommendation that it 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. To "remand" means the return of a case by the appellate court to the trial court for entry of a proper judgment, further proceedings or a new trial. Ballentine's Law Dictionary, 3rd Edition, p.1088.

Such recommendation was followed by Judge Sorensen and pursuant thereto the State Engineer conducted a comprehensive investig-

ation including two days of hearings. Thereupon, the State Engineer submitted his Report with appendices to the District Court on June 18, 1975 setting forth specific findings on the past use of the water as supported and documented by extensive records, maps and surveys. In his Report, the State Engineer reached no legal conclusions as to whether paragraph 4(c) of the Provo River Decree was a non-consumptive power right or a consumptive irrigation right. Rather, his report carefully analyzed the data compiled and made eight specific findings as to the past use of the water by Provo City under paragraph 4(c) and particularly during the period of time since the mills ceased operation.

Judge Tibbs then conducted an evidentiary hearing during which the report of the State Engineer was received in evidence piecemeal and additional evidence was taken. Upon the conclusion thereof, it was the duty of the trial court under the remittitur of this Court to make findings as to the use made of the water under paragraph 4(c) of the Provo River Decree. Instead, the trial court reddecided the whole case and made and entered a whole new set of Amended Findings of Fact, Conclusions of Law and Amended Judgment, reaching a result opposite to that of the Summary Judgment. In so doing, it did not even purport to vacate or set aside the Summary Judgment but simply noted it in passing and thereafter ignored it.

The Summary Judgment is binding on the parties both as to the issues that were tried and to those that were triable, and the parties were precluded from further litigating the matter since all parties had an opportunity to present their case to the Court before the Summary Judgment was rendered. Wheadon v. Pearson, 14

Utah 2d 45, 376 P.2d 946 (1962); National Finance Co. of Provo v. Daley, 14 Utah 2d 263, 382 P.2d 405 (1963); Richards v. Hodson, 26 Utah 2d 113, 485 P.2d 1044 (1971); Belliston v. Texaco, Inc., Utah 2d 521 P.2d 379 (1974).

The Summary Judgment made and entered herein on August 16, 1971 is res judicata of all of the issues raised by Provo City's Amended Complaint, except those issues specifically embraced within the remand of this Court. Thus the trial court was duty bound under the remittitur of this Court to make Findings of Fact as to the use made of the water under paragraph 4(c) of the Provo River Decree and to certify those findings to this Court such that this Court determine whether the Summary Judgment should be affirmed, reversed or modified. The trial court was without authority to make and enter a whole new set of Amended Findings of Fact, conclusions of Law and Amended Judgment in this case and in so doing committed reversible error.

### POINT III

THE AMENDED FINDINGS OF FACT ARE UNSUPPORTED BY AND ARE CONTRARY TO THE COMPETENT EVIDENCE.

Under the remand from this Court on the prior appeal, the authority of the trial court was limited to making and entering Findings of Fact as to the past use of the water here in question. The only amended findings which directly relate thereto are Amended Findings 18 and 20. However, Amended Findings 12 through 17 inclusive and 19 are peripherally related. All other amended findings were beyond the authority of the trial court to make and should be stricken in their entirety. Amended Finding 18 is crucial to the

rights of the parties and will be treated separately under Point IV hereinafter.

We are mindful that under traditional rules of appellant review the findings of the trial court are indulged with a presumption of correctness and the burden is upon the attackee to demonstrate that they are in error and should be overturned. Hardy v. Hendrickson, 27 Utah 2d 251, 495 P.2d 28 (1972); First Security Bank of Utah, N.A. v. Wright, Utah 2d 521 P.2d 563 (1974). Here the findings of the trial court are not only unsupported by the competent evidence but are clearly contrary thereto. And this being an equity case this Court will review the evidence and will reverse if it concludes that the evidence clearly preponderates against the decision. Constitution of Utah, Art. VIII, Sec. 9; Rule 72(a) Utah Rules of Civil Procedure; Barker v. Dunham, 9 Utah 2d 244, 342 P.2d 867 (1959); See also Stanley v. Stanley, 97 Utah 520, 94 P.2d 465 (1939); Nokes v. Continental Mining & Milling Co., 6 Utah 2d 177, 308 P.2d 954 (1957); Hardy v. Hendrickson, Supra; Utah National Bank of Provo v. Oliver, Utah 2d 523 P.2d 1222 (1974); Foster v. Blake Heights Corp., Utah 2d 530 P.2d 815 (1974).

Amended Finding 12 is based upon how Marion C. Clark, Provo River Commissioner, testified that he distributed the water from 1951 to 1958 under paragraphs 4(a), (b) and (c) to Provo City, his conclusions as to how T. F. Wentz, his predecessor, distributed the water and upon distribution schedules of T. F. Wentz and Wallace R. Wayman, successor to Mr. Clark, all of which evidence (Exhibit D) was received over defendant's objections. (A.34, R.1198-1200 incl. At odds therewith is Exhibit C which comprises the actual quantities

of water delivered each and every day to Provo City during the irrigation season for every year from 1921 to 1969 inclusive.

How the commissioners say they delivered or intended to deliver the water became meaningless when the evidence [Exs. C, 14, 15(a), (b) and (c)] show the recorded quantities of water actually delivered by them. Thus on Exhibits 14 and 15(a), (b) and (c), whenever the red line (Provo City actual diversions) falls below the blue line (sum of 4(a), (b) and (c) adjusted) Amended Finding 12 is erroneous. More specifically, out of the 280 months (7 months each year for 40 years) of Record shown thereon, the red line is below the blue line

(1) during 251 full months and 16 half months or 92.5% of the time;

(2) during the entire year for 29 out of the 40 years or during 72.5% of the years; and

(3) during the entire year from 1957 through 1969, ie. the last 13 years of record.

Thus, Amended Finding 12 is in error for 92.5% of the time and for 72.5% of the years and is wholly in error for the last 13 years of record.

As to Amended Finding 13, defendants have no real quarrel therewith except for the comments under Amended Finding 16 hereafter.

As to Amended Finding 14, the same is erroneous under the same analysis noted under Amended Finding 12 hereinabove.

As to Amended Finding 15, the only basis thereof are casual observations on isolated occasions of several of the witnesses which hardly preponderates against actual measurements of waste waters

returning to Utah Lake. (A.76,77, R.880-887 incl.; Exs. Q,R,S). It is noted that Exhibits Q, R and S were offered by defendants at the evidentiary hearing as a part of the transcript of the testimony presented to the State Engineer (A.71, R.1512-1514 incl.) and it was agreed that Judge Tibbs would rule on the admissability of those exhibits as he read the testimony (A.71, R.1520,1521) and would call in his reporter and make a Memorandum to be inserted in the Record. (R.1527). We assume that Judge Tibbs read the testimony as offered. However, nowhere in the Record does it appear that Judge Tibbs ruled on those exhibits or Exhibits P, T, U and V similarly offered, and we wonder why.

As to Amended Finding 16, the unfairness of it all is that if State Engineer was in error he was led into that error by Provo City withholding the evidence from him. Thus the notice of the hearing stated that the Engineer was going to attempt to establish when the mills ceased operation and welcomed information from anyone who could supply it. (A.43, R.1292). At the hearing he told all those present that he was gathering information to try to establish the use made of the water after cessation of the mills. (A.65, R.1441,1442). He had to rely on the testimony supplied at the hearing and based his conclusions on cessation of the mills on the testimony of Judge Harding. (A.65, R.1443). In all fairness, plaintiff should have produced the evidence at the hearing before the State Engineer rather than lead him into what Provo City considers to be error and then produce such evidence in the District Court in an effort to discredit the report of the Engineer. Be that as it may, the testimony produced in the District Court relative to the closing

the mills did not change the conclusions or the findings of the Engineer as to the hydrograph comprised in Exhibit D. (A.52, R.1334).

As to Amended Finding 17, the conclusion (finding) of the State Engineer that Provo City had not irrigated more than 2,558.51 acres described under paragraphs 4(a) and 4(b) [of the Provo River Decree] is accurate. However, the Engineer made no conclusion in his report filed June 18, 1975 as to whether the 4(c) right was a non-consumptive use right. Rather he made eight separate Findings of Fact (Ex. D, pp. 17-21 incl.) leaving all matters of law and legal conclusions for the Court (Ibid. p.17). However, in response to a question from Judge Tibbs in the evidentiary hearing the State Engineer did state that he reached the conclusion that paragraph 4(c) was a non-consumptive power right. (A.68, R.1456).

As to Amended Finding 19, we are at a loss to understand its relevancy to this case. If the import thereof is that Provo City has the right to change the place or nature of use of the water without complying with §73-3-3 Utah Code Annotated, 1953, it is clearly in error. Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co., 104 Utah 202, 135 P.2d 108 (1943), United States v. District Court, 121 Utah 1, 238 P.2d 1132 (1951).

The best that can be said for Amended Finding 20 is that it is so vague it becomes innocuous. It is true that there were times during the period 1921 to 1969 when Provo River water in excess of the quantities specified in paragraphs 4(a) and 4(b) were delivered to Provo City, but nothing is said in the finding as to the quantity thereof. Even so during some of those years, notably 1965, 1967 and 1968, Amended Finding 20 simply is untrue. Thus, on

Exhibits 14, 15(a), (b) and (c), whenever the red line (actual diversions) is below the green line [summation of 4(a) and 4(b)] is Amended Finding 20 in error. A casual review of those exhibits demonstrates that Amended Finding 20 was not true at all during three out of the last five years shown thereon, ie. 1965, 1967 and 1968. On the other hand such was true on only isolated occasions during the last 10 years. But more important is the fact that during the twenty-year period following the time the mills ceased operating, the average quantity diverted by Provo City did not greatly exceed the combined flows of paragraphs 4(a) and 4(b) and from 1962 to 1969 the average quantity diverted was less than the combined flows of 4(a) and 4(b). [Ex. D, pp.19,20; Exs. C, 14, 15(a), (b) and (c)]

We respectfully submit that the sum and substance of the foregoing amended findings demonstrates a superficial analysis of the evidence relating to the past use of the water in question presented at the evidentiary hearing to the exclusion of the remainder of the whole record. Apparently the trial court was so engrossed by evidence that at times Provo City was delivered some water in "excess" of its 4(a) and 4(b) rights which were apparently used for irrigation purposes that it gratuitously awarded Provo City an additional 16.5 second feet of Class A irrigation water in perpetuity. This it did without making any finding as to the quantity of the so-called "excess". In so doing it awarded Provo City a block of Class A water equivalent to that area on Exhibits 14, 15(a), (b) and (c) between the red and blue lines. This has to be a most shocking end result.

#### POINT IV

AMENDED FINDING OF FACT 18 IS NOT ONLY UNSUPPORTED BY AND CONTRARY TO THE COMPETENT EVIDENCE, BUT IS BARRED BY RES JUDICATA.

Amended Finding 18 has to be the most patently erroneous one of all and yet is the most crucial. There the trial court found 18. In 1921, and to the present time, Provo City has substantially more than 2558.51 acres being irrigated by water granted to Provo City under provisions 4(a), (b) and (c) of the Morse Decree. (R.477).

Amended Finding 18 is contrary to Provo City's own evidence extracted from the record in Civil No. 2888; it is contrary to the findings of the State Engineer in his Report filed with the District Court on June 18, 1975; and it is contrary to the overwhelming weight of the evidence presented at the evidentiary hearing. As a matter of fact the record in this case is devoid of any competent evidence to support Amended Finding 18. And all the while it is barred under the principles of res judicata.

If anything came out loud and clear in the whole evidentiary hearing, it was that Provo City never irrigated more than 2558.51 acres at the time of the entry of the Provo River Decree in 1921 or at any time since. The State Engineer conducted a most meticulous, in-depth, factual investigation of this facet of the case which the trial court summarily brushed aside and in lieu thereof accepted as fact nebulous, speculative and conjectural testimony as to irrigable acreage under the Provo City irrigation system over the strenuous objections of defendants and to their utter dismay. Yet pursuant

to the recommendation of this Court on the prior appeal, the trial court referred the matter to the State Engineer for his expertise and assistance to investigate and furnish all information which the Court deemed essential. While we realize that the lower court was not bound to follow the findings of the State Engineer, we believe that such findings are entitled to fair consideration particularly where, as here, there is no competent evidence to the contrary. To do otherwise is hardly consonant with the confidence reposed in the State Engineer by the Legislature under §73-4-14, Utah Code Annotated 1953, and as consistently acknowledged by this Court. Wayman v. Murray City Corporation, 23 Utah 2d 97, 458 P.2d 861 (1969).

Provo City's evidence extracted from the Record of Civil No. 2888 and made a part of the record in this case established that prior to 1921 the total irrigated acreage outside of the platted portion of the city was 2,058.6 acres (R.168), comprising 1925 farm acres and 133.6 acres of farm lots (R.167) and was the exact acreage awarded to Provo City under paragraph 4(a) of the Provo River Decree. The city lot irrigated acreage, ie. 701.4 acres of platted lots less 133.6 acres of farm lots (R.167) was disputed, a resurvey was made resulting in 505.73 acres of city lots which was reduced after further studies to an irrigated acreage of 499.91 acres (A.54, R.135, 1353) and was the exact acreage awarded to Provo City under paragraph 4(b) of the Provo River Decree. Thus, even Provo City's own evidence established that the irrigated acreage under the Provo City Irrigation system was a total of 2558.6 acres at the time of the entry of the Provo River Decree.

The most that can be said for Provo City's evidence in the

evidentiary hearing on this point is that as of 1921 the total area within the Provo City boundary was approximately 7,360 acres (A.2, R.962; 655) of which there were 4,758 acres of irrigable land within the area from the East Union Canal to the Little Dry Creek System and the area south to the meander line of Utah Lake. (A.40, R.1270). Such evidence was admitted over the objections of defendants (Exs. 19, 20; R.1273,1274) and a proper Motion to Strike such evidence was overruled. (R.1288). Yet, Provo City offered no competent evidence to show how much of that irrigable land had in fact been irrigated.

Provo City did offer evidence of past irrigation of isolated parcels, but nowhere did it put it all together to show the total acreage actually irrigated under its irrigation system. Yet, to establish a water right, it must be made to appear that the water diverted has been put to a beneficial use, and as bearing upon that question the area irrigated and the duty of water on the land irrigated are of controlling importance. (underscoring ours). Richfield Cottonwood Irrigation Company v. City of Richfield, 84 Utah 107, 34 P.2d 945 (1934).

On the other hand, the State Engineer literally reconstructed the irrigated acreage in 1921 under the Provo City irrigation system from the old map designated as Exhibit 58 in Civil 2888 under the ditch system shown thereon. He then measured the area of each parcel of land shown on the map under the ditch system and totaled the farm acreage so measured at 2,069.9 acres. (Ex. 5; A.53, R.1338).

The 499.91 acres under paragraph 4(b) of the Provo River Decree as shown by the testimony in the Morse Decree proceedings

were embraced within 190.5 blocks which contain 701.4 acres (A.54; R.1352, 1353). The area was disputed, a re-survey was made and they came up with 505.73 acres. Further studies reduced the acreage to 499.91 acres (R.1352, 1353). Thus, the total acreage irrigated under the Provo City irrigation system in 1921 which the State Engineer came up with was 9 acres over the 2,558.6 acres in the Morsee Decree. (A.55; R.1361).

Next the State Engineer computed the total acreage irrigated under the Provo City irrigation system in 1937-1938 based on Provo City's own maps of its irrigation system. (Ex. E; A.44, R.1362; Ex. F; A.56, R.1367). The irrigated farm acreages as of 1937 were based on the ditch markings on the base map and the acreages thereof were calculated directly therefrom by the State Engineer. (A.58, R.1379, 1380). The total farm acreage under the Provo City system as of 1937 was 1,732.6 acres as shown by the summation of the green figures on Exhibit E. (A.58, R.1381).

The irrigated lot acreage as of 1938 were based upon 68 separate plats (Exhibit F) furnished by Provo City to the State Engineer showing all of the city blocks and the irrigated acreages. (A.57, R.1378). The State Engineer computed the irrigated area of each block based on plat codes and transferred those figures to Exhibit E in red and the total irrigated acreage thereof was 570.78 acres. (A.57, R.1379). Thus the total irrigated acreage under the Provo City system as shown by the 1937-1938 Provo City maps was 2,303.38 acres. (A.58, R.1381, 1382).

Finally, the State Engineer reviewed his hydrographic surveys prepared by his office in 1969 in connection with the general

adjudication of the Utah Lake and Jordan River Drainage. (A.58, R.1382). Such hydrographic survey was made from aerial photographs accurately controlled from actual measurements on the ground of distances between known points to establish proper scale. (A.58, R.1383). Acreages were calculated therefrom based upon actual field examinations. (A.58, R.1383). Exhibit G covers all of the area irrigated under the Provo City irrigation system in 1969 without regard to source, ie. sources in addition to Provo River. (A.58, R.1384; A.59, R.1392; A.60, R.1393). There were a total of 1,338.45 acres in crops and 816.11 acres in lawns for a total irrigated area of 2,154.56 acres under the Provo City irrigation system as of 1969. (Ex. H; A.60, R.1395,1397). Such total acreage approximates the 2,000 acres of irrigated land determined by the Provo City Watermaster as of 1974. (R.1541-1544 incl.).

Thus, the State Engineer found from three separate and independent studies covering the years 1921, 1937-1938 and 1969 that the total irrigated acreage under the Provo City irrigation system did not exceed 2,558.51 acres covered by paragraphs 4(a) and 4(b) of the Provo River Decree and stands uncontradicted in the record. Such evidence was developed by the State Engineer from an investigation conducted pursuant to his statutory duty imposed under §73-4-14, Utah Code Annotated, 1953 and as such was entitled to fair consideration. Thus, we are at a complete loss to understand how or why the trial court could completely ignore such evidence and then find otherwise

Equally important is the fact that Amended Finding 18 flies square in the face of the res judicata effect of the Provo River Decree and literally undermines and destroys the integrity thereof under which the waters of the Provo River have been distributed for

more than 55 years. The Provo River Decree (Civil No. 2888) is res judicata and binding on Provo City, both as to the issues that were tried and those that were triable. Wheadon v. Pearson, 14 Utah 2d, 453, 76 P.2d 946 (1962), Richards v. Hodson, 26 Utah 2d 113, 45 P.2d 1044 (1971), National Finance Co. of Provo v. Daley, 14 Utah 2d, 263, 382 P.2d 405 (1963), Belliston v. Texaco, Inc., Utah 2d, 521 P.2d 379 (1974).

The ultimate issues tried in Civil 2888 were the total irrigated acreages and the respective duties of water for all of the irrigation rights (with minor exceptions) for those determine and fix the respective quantities of water to which each party was entitled. The irrigation rights of Provo City were determined and fixed both by the Findings of Fact and final Decree in Civil 2888 on the basis of a total of 2,558.51 acres under paragraphs 4(a) and 4(b) as the maximum irrigated acreage to which it was entitled. If Provo City had additional irrigated acreage, it was encumbent on it to assert its claim thereto in Civil 2888 and obtain an award for such additional acreage. Having failed to do so, it was and is barred from subsequently asserting such claim under the principles of res judicata.

The fact is that the maximum irrigated acreage of Provo City in 1921 was 2,558.51 acres as was verified by the in-depth study of the State Engineer in this case. Accordingly, Amended Finding 18 is not only unsupported by any competent evidence, but is contrary thereto and in clear violation of the principles of res judicata, and must be stricken in its entirety.

The end result reached by the trial court is predicated on Findings which are unsupported by and are contrary to the competent

evidence. That being so, it is the prerogative, and we believe the duty, of this Court under the Constitution to modify or make new Findings and correct such erroneous end result. First Security Bank of Utah, N.A. v. Demiris, 10 Utah 2d 405, 354 P.2d 97 (1960).

#### POINT V

THE AMENDED CONCLUSIONS OF LAW AND AMENDED JUDGMENT  
ARE CONTRARY TO AND EMASCULATE THE PROVO RIVER DECREE.

Amended Conclusion 1 is based on the erroneous Amended Findings of Fact as discussed above and a fortiori it too is erroneous. Whether one characterizes the decision of the State Engineer as executive is of no moment here since the State Engineer and his river commissioners are expressly charged by statute to carry out the decrees of the courts and to distribute the water accordingly. Sections 73-5-1 and 73-5-3, Utah Code Annotated, 1953. Caldwell v. Erickson, 61 Utah 265, 213 Pac. 182 (1923); Rocky Ford Canal Company v. Cox, 92 Utah 148, 49 P.2d 935 (1936); Jennings v. Graham, 15 Utah 2d 205, 390 P.2d 123 (1964); Bullock v. Hanks, 22 Utah 2d 308, 452 P.2d 866 (1969). In performing this statutory duty, the State Engineer and river commissioners are officers of the Court. Caldwell v. Erickson, Supra.

One of the most startling revelations of the whole case was the trial court's Amended Conclusion 2 that the Morse Decree is not ambiguous. This Judge Tibbs concluded after some 79 pages of extrinsic documents extracted from the record in Civil No. 2888, some 975 transcript pages of extrinsic testimony and argument and some 36 exhibits. And this Judge Tibbs did in the face of the prior conclusion of Judge Sorensen that paragraph 4(c) was ambiguous and the acknowledgment thereof by this Court on the prior appeal, and in spite of the specific remittitur of this Court to consider extrinsic

evidence. If Amended Conclusion 2 is correct, the trial court erred in considering any extrinsic evidence at all and should have looked only to the Provo River Decree and ruled on the meaning of paragraph 4(c). Continental Bank & Trust Co. v. Bybee, 6 Utah 2d 98, 306 P.2d 773 (1957), Davis v. Payne and Day, Inc., 10 Utah 2d 53, 348 P.2d 337 (1960), Moon Lake Water Users Association v. Hanson, Utah 2d P.2d 1262 (1975). Amended Conclusion 2 is so obviously incorrect that it is erroneous as a matter of law.

As to Amended Conclusion 3, the record is clear that although the River Commissioner initially refused to deliver the 4(c) water in 1969 for irrigation purposes, the directive covering such delivery came from the State Engineer by his decision dated May 1, 1970. (R. 263; F.4, R.475). The authority of the State Engineer to initially interpret a decree for the purpose of distributing the water thereunder must necessarily exist otherwise he could not function in this capacity. Hotel Utah Company v. Industrial Commission, 107 Utah 2d, 151 P.2d 467 (1944). And his authority to do so subject to judicial review has been consistently recognized by this Court. Salina Creek Irrigation Co. v. State Engineer, 13 Utah 2d 335, 374 P.2d 24 (1962) modified 14 Utah 2d 146, 379 P.2d 376 (1963). Orderville Irrigation Co. v. Glendale Irrigation Co., 17 Utah 2d 282, 409 P.2d 616 (1965).

The actual delivery pattern for the 40-year period prior to 1969 is demonstrated by Exhibits 14, 15(a), (b) and (c) which clearly show that Provo City had not been delivered the full 4(c) water. Otherwise the red line (actual diversions) would coincide with the blue line [sum of 4(a), 4(b) and 4(c)]. During the last three years shown thereon there were only two months (August and September, 1968) when Provo City received any water in excess of its 4(a) and 4(b)

rights. To suggest that the historical delivery pattern would be changed by such directive finds no support in the record. To conclude that it would be erroneous as a matter of law.

Amended Conclusions 1, 2 and 3 exemplify the erroneous treatment of the whole case in the trial court. Yet those erroneous conclusions form the basis for its Amended Judgment which we submit is equally impregnated with error as hereinafter demonstrated.

The Provo River Decree fixed the irrigation rights of Provo City including the duties and flows of water under paragraph 4(a) for the irrigation of 2,058.51 acres of farm land and under paragraph 4(b) for the irrigation of 499.91 acres of city lots. Paragraphs 4(a) and 4(b) are res judicata of the duties, flows and irrigated acreages of Provo City's irrigation rights from the Provo River and have been for some 55 years last past. Wheadon v. Pearson, Supra; National Finance Co. of Provo v. Daley, Supra; Richards v. Hodson, Supra, and Belliston v. Texaco, Inc., Supra.

The Amended Judgment in this case awards Provo City the right to use the full 16.5 second feet of water under paragraph 4(c) for irrigation purposes without identifying or fixing the acreage upon which it can be used. However, the only lands upon which the additional 16.5 second feet could be used are the 2,558.51 acres specified under paragraphs 4(a) and 4(b) for that was the maximum irrigated acreage under the Provo City irrigation system in 1921 and at all times thereafter. The 16.5 second feet would yield an additional 6,550 acre feet annually (16.5 second feet for 200 days) for use on the same lands for which the trial court in Civil No. 2888 generously awarded 6.2 acre feet per acre. Under a full supply, the additional 6,550 acre feet would amount to 8.76 acre feet per acre annually

which clearly is excessive.

To say that Provo City is entitled to use an additional 16 second feet on top of the liberal awards made under paragraphs 4(a) and 4(b) would give Provo City 35% to 45% more water per acre than any other award. To do so would result in the modification of the duties fixed under paragraphs 4(a) and 4(b). Such would not only do violence to our fundamental concepts of beneficial use of water but would abrogate the duty basis upon which the entire Provo River Decree is founded.

It is significant that the trial court in Civil No. 2888 rejected the very argument asserted by Provo City in the court below and apparently upon which the decision was based. Thus following the 1917 Decision, Provo City applied to the court to reopen the case with reference to the duty of water. (R.136). At the hearing on Provo City's application, its counsel suggested that inasmuch as the court awarded Provo City 13.75 second feet for power purposes, it must be in the mind of the court that the waters be applied for power purposes during the daytime and applied to irrigation purposes during the nighttime because the city needed at least 35 second feet or its equivalent for six days in a week. (R.137). In response thereto, the trial court in Civil No. 2888 denied Provo City's application and rejected such contention, wherein it stated:

"THE COURT: I have felt, gentlemen, that the court gave the city and the Lake Bottom land and the Provo Bench and these lands a high duty of water; that I gave them an exceedingly generous allowance of water. I felt that way, I may be mistaken, but I felt that way. I felt the court gave every drop of water, or more, than the most liberal construction of the evidence would justify or authorize the court to give..." (R.136, underscoring therein ours).

And further stated:

...but as to the duty of water, the court has placed

it so low and given such a large quantity of water I would not feel a discussion of that would really be a benefit. When you come to put six to ten feet of water upon land in a season it is an enormously low duty for the water, so that your application to re-open the case with reference to the duty of water will be denied, and you may have an exception in the record for it." (R.137, underscoring therein ours).

Thereupon Provo City noted its exception to the court's ruling. And it is noteworthy that Provo City was subsequently awarded in excess of 35 second feet for irrigation purposes under paragraphs 4(a) and 4(b) combined in the Provo River Decree, ie. 39.41 to 46.12 second feet.

The net effect of the Amended Judgment is to award Provo City an additional block of Class A Provo River water represented by that area shown on Exhibit 14, 15(a), (b) and (c) between the red line (actual diversions) and the blue line [sum of paragraph 4(a), 4(b) and 4(c)]. That is to say, Provo City hereafter would be entitled to use in perpetuity the full block of water up to the blue line instead of that block of water below the red line as it has in the past. Provo City has not used such additional water in the past since it has been allocated to and used by the junior appropriators. Under the Amended Judgment that block of water would be taken away from the junior appropriators, notably the defendant water users in this case, and would be given to Provo City. Needless to say the impact thereof would be devastating on the rights of the defendant water users and that is what this lawsuit is all about.

The magnitude of the impact becomes even more apparent when the quantity of water involved is considered. Thus under a full supply the additional 16.5 second feet would yield approximately 6,550 acre feet annually or by comparison enough to twice fill

## Mountain Dell Reservoir in Parleys Canyon.

But even that is not the full impact of the Amended Judgment. If Provo City is entitled to expand its acreage, what is to prevent other parties to the Provo River Decree from now asserting that they too are entitled to irrigate additional acreages over and above the acreages specified under their respective irrigation rights in that Decree. Such would not only do violence to the Decree but would lead to endless litigation. And it takes little imagination to realize that if they were successful, there would be no water left in the Provo River for any of the junior appropriators, notably the defendant water users. Needless to say, the end result thereof would be ruiness.

The whole purpose of the Provo River Decree, imperfect and troublesome as it is, was to settle the rights of the parties to the use of the waters of the Provo River. With minor exceptions, ie. isolated Provo Canyon rights, all Class A irrigation rights specify the number of acres of irrigated land and duties in terms of acres per second foot and a corresponding flow based thereon. (R.108-119 incl.). Such is true with Provo City's irrigation rights awarded under paragraphs 4(a) and 4(b). However, such is not true for its second feet under paragraph 4(c) and is the genesis of this long and overly protracted litigation.

Litigation must be put to an end and it was the function of the Provo River Decree to do just that. All are bound by the original language used in the Decree and all ought to interpret it the same way. Crofts v. Crofts, 21 Utah 2nd 332, 445 P.2d 701 (1968). It was the purpose of the instant litigation to interpret the ambiguity of paragraph 4(c) and not to expand or modify it. It is well settle

that an ambiguous judgment is subject to the same construction according to the rules that apply to all written instruments. Moon Lake Water Users Assoc. v. Hanson, Utah 2d 535 P.2d 1262 (1975). While it is permissible to interpret an ambiguous decree to ascertain its true meaning, it is not permissible to modify it or to change or cancel one word. Fairfield Irrigation Co. v. White, 28 Utah 2d 414, 503 P.2d 853 (1972); Crofts v. Crofts, Supra.

The Amended Judgment in this case nullifies the duties and flows of water and the irrigated acreages of paragraphs 4(a) and 4(b) of the Provo River Decree by awarding an additional 16.5 second feet to Provo City for irrigation purposes. As such, it emasculates the Provo River Decree by abrogating the duty provisions thereof and opens the door to claims for additional irrigated acreages to all rights across the board. In so doing it destroys the integrity of the Provo River Decree and all for which it stands. Yet the waters of the Provo River have been distributed on the basis of the duty and acreage provisions thereof for some 55 years, economies have been built thereon and the rights of all junior appropriators, notably the water user defendants herein, have been established on the basis thereof. For the trial court to permit Provo City to take an additional 16.5 second feet of the base flow of the Provo River, ie. some 6,550 acre feet annually, with no demonstrated beneficial use thereof is not only unjust and unreal, but does violence to the fundamental concepts of the beneficial use of water as the main cornerstone of Utah water law. Constitution of Utah, Art. XVII, Sec. 1; Sec. 73-1-3 Utah Code Annotated, 1953.

If the principles upon which the Amended Judgment is based are allowed to stand, Utah water law will take a giant step backwards

into antiquity. It is the solemn responsibility of this Court not to let that happen and we respectfully submit that it is the constitutional duty of this Court to reverse the Amended Judgment in toto and enter its decision affirming the Summary Judgment made and entered herein on August 16, 1971. Constitution of Utah, Art. VIII Sec. 9; Rule 72(a), Utah Rules of Civil Procedure; First Security Bank of Utah, N.A., v. Demiris, 10 Utah 2d 405, 354 P.2d 97 (1960).

#### CONCLUSION

Looking back over some six years of litigation in this case, we marvel at how such a relatively simple issue became so complex. The precise issue still is and always has been whether Provo City's water right evidenced by paragraph 4(c) of the Provo River Decree (Utah County Civil No. 2888) is limited to a non-consumptive power use or whether it includes a consumptive use for irrigation purposes. In the beginning it was identified as the power right water and after six years of protracted litigation the conclusion is compelling that it is still a non-consumptive power right.

The whole purpose of the Provo River Decree was to settle the rights of the parties to the use of the waters of the Provo River in 1921. The very foundation of the irrigation rights was the irrigated acreages and the duty of water in acres per second foot. With minor exceptions the irrigated acreages and duties were determined and were fixed for all irrigation rights in 1921 including the irrigation rights of Provo City by the Findings of Fact and Decree in Civil No. 2888. As such the irrigated acreages and duties became binding and res judicata on all parties and the waters of the Provo River were distributed on the basis thereof for 55 years.

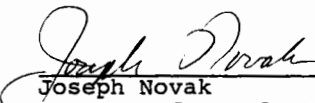
On May 4, 1976 the Court below entered an Amended Judgment and changed it all. With one fell swoop of the pen it carved an additional 16.5 second feet of water out of the base flow of the Provo River and awarded it to Provo City to be consumptively used for irrigation purposes with no demonstrated beneficial use thereof and in violation of the very fundamental concepts of Utah water law and the principles of res judicata. In so doing it took away in perpetuity some 6,550 acre feet of water annually from the allocations of the junior appropriators to their utter dismay. Needless to say it is not only the prerogative but is the constitutional duty of this Court to rectify that end result.


While defendants strongly criticize the proceedings in the trial court and the end result reached by it, they do so with deference and respect for the trial judge. From the time he came into the case he was plagued with the incessant efforts of Provo City to expand upon the issues and to retry the whole case. The record is replete with motions, arguments and irrelevant evidence which becloud the relatively simple issue of interpreting paragraph 4(c) of the Provo River Decree. Under the attendant circumstances the trial judge had a most difficult task to perform and we respect him for his judicial temperment and ability in the performance thereof.

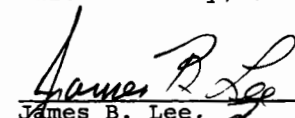
This litigation must come to an end. We respectfully suggest that after six years of protracted litigation it would serve no useful purpose to remand this case back to the court below for further proceedings. Rather we strongly urge that this Court exercise

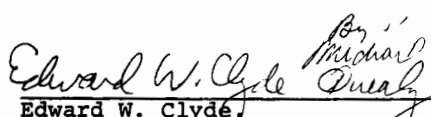
its constitutional duty in this, an equity case and set aside the Amended Findings of Fact and Conclusions of Law in toto, reverse the Amended Judgment and affirm the Summary Judgment made and entered herein on the 16th day of August, 1971.

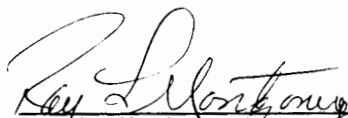
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CERTIFICATE OF MAILING

I hereby certify that on the 20<sup>th</sup> day of January, 1977, I mailed two (2) copies of the foregoing Brief of Defendants-Appellants and two (2) copies of the Abstract of Record to

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