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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. 14,605

PETITION FOR REHEARING

Pursuant to Rule 76(e), U.R.C.P., defendants and appellants petition the above entitled Court for a rehearing and respectfully allege that the Court erred in the following particulars:

POINT I.

THE COURT ERRED IN ASSUMING THAT ON THE PRIOR APPEAL THIS COURT IN SUBSTANCE FOUND A MATERIAL FACT OR FACTS TO BE IN ISSUE AND REVERSED THE SUMMARY JUDGMENT.

Nowhere in the prior opinion of this Court does it appear or was it ordered that the summary judgment was reversed. Provo City Court v. Lambert, 28 Utah 2d 194, 499 P.2d 1296 (1972).

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Likewise, on the prior appeal, both sides had filed mutual Motions For Summary Judgment and in so doing, both sides specifically represented to the court that there was no genuine issue as to any material fact (Defs.' Motion - R.77-80 incl., 191; Pltf.'s Motion - R.122-128, incl.) This was so because the construction or interpretation of a judgment presented a question of law for the court. Callan v. Callan (Wash.) 468 P.2d 456 (1970).

Both sides having sought an interpretation of paragraph 4(c) of the Provo River Decree, laid the controversy in the lap of the trial court by filing mutual Motions For Summary Judgment. Mastic Tile Division of Ruberoid Co. v. Acme Distributing Co., 15 Utah 2d 136, 389 P.2d 56 (1964). We are mindful of the rule that once both parties move for summary judgment the court is not bound to grant it to one side or another. Diamond T Utah, Inc. v. Travelers Indemnity Co., 21 Utah 2d 124, 441 P.2d 705 (1968). However, where the parties do not dispute each other as to the essential facts, and each relies on them insisting on its right to prevail as a matter of law, it is proper to determine the issue on summary judgment. Robinson v. Employers' Liability Assurance Corp., 22 Utah 2d 163, 450 P.2d 91 (1969); Annotation: 36 ALR 2d 881, §4(a), pp. 901-905 inclusive.

Accordingly, this Court should have decided the matter on the basis of the record then before it. However, it then seemed that it would be helpful to this Court 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

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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 had ceased. That was the basis upon which this Court remanded this case to the District Court.

The sum and substance of it all was that there was no genuine issue of fact before the Court on the prior appeal, but this Court created one by remanding the matter for a determination of the past use of the water which neither party then asserted had any probative value as to the interpretation of paragraph 4(c) of the Provo River Decree. We respectfully suggest that this Court re-examine that aspect of this case in light of the above.

POINT II.

THE COURT ERRED IN CASTING THIS APPEAL AS A CONTEST BETWEEN THE STATE ENGINEER'S FINDINGS AND THE FINDINGS OF THE TRIAL COURT.

In its opinion, this Court quoted from the testimony of Judge Maurice Harding in the hearing before the State Engineer and then stated:

> "On the basis of such testimony, the Engineer found that the mills ceased operating by 1941, and because his hydrograph showed a sharp decrease of the diverted water in the early 1940's, concluded that the decrease was due to the cessation of the mills, and that, therefore, the 16.5 second feet granted under paragraph 4(c) of the Decree was for power purposes, and not for irrigation."

We respectfully submit that the foregoing is an erroneous analysis of the record in this case. Nowhere in the State Engineer's report (Exhibit D) filed with the trial court, is <u>any</u> conclusion

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made as to whether paragraph 4(c) was a nonconsumptive use power right or an irrigation right. His report was strictly a factual determination of the matters referred to him. It was only during the evidentiary hearing before the trial court that he expressed any conclusions thereon. Thus, pursuant to a series of questions from the trial court, the State Engineer concluded that if he could not find more land irrigated than was described in paragraphs 4(a) and 4(b), which supplied 6.2 acre feet per acre without the 4(c) water, then the 4(c) water was not needed on the acreage described in paragraphs 4(a) and 4(b) but was simply a power right, nonconsumptive use power right. (A.68, Tr. 1456).

That was the only point in the whole remand proceedings where the State Engineer expressed any conclusions as to whether paragraph 4(c) was a power right. And the only basis upon which he expressed that conclusion was the lack of any additional irrigated acreage.

Nowhere did the State Engineer state or express any conclusion as to whether paragraph 4(c) was a power right on the basis of when the mills ceased operating. The fact that he found that the first mill appears to have ceased operation as early as 1930 and that all of the mills had ceased operation and the use of water for power purposes by the early 1940's (Ex. D, p.18) was not that material to the controversy. Yet the trial court seized upon the error in the State Engineer's report as being crucial to the credibility of the whole report and controlling as to its ultimate decision. And as we read the opinion

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of this court, it too considered that really inconsequential error as being decisive of the whole case.

The main thrust of this appeal is that the Amended Findings are unsupported by and are contrary to the competent evidence. It is not a contest between the State Engineer's findings and the findings of the trial court. In appellant's primary Brief we labored to point out how and why the Amended Findings are unsupported by the evidence. Likewise, we fully documented the many respects in which the Amended Findings are contrary to the overwhelming weight of the evidence. To cast this controversy as a contest between the State Engineer's findings and the findings of the trial court is clearly erroneous and to settle that contest by finding that the State Engineer's findings are based on questionable evidence whereas the findings of the trial court are supported by substantial evidence when there is none, is most discouraging and results in a great injustice to the water user defendants.

POINT III.

THE COURT ERRED IN BASING ITS OPINION ON AN ERRONEOUS CONCLUSION OF IRRIGATED ACREAGE.

If there was anything that came out loud and clear in this case, it was that Provo City had never irrigated more than 2,558.6 acres from the entry of the 1921 Decree until the present time. None of the several witnesses referred to in this Court's

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opinion, who testified at the Engineer's hearing, stated that the parcels of land that they remembered as having been irrigated in 1921 were not included in the land set forth in the Decree.

The only witness who testified one way or the other about it was J. Earl Stubbs who testified that all of the lands he irrigated were included in the Morse (Provo River) Decree for Provo City Irrigation. (A.10, R.1034, 700). None of the other witnesses at the State Engineer's hearing testified one way or the other as to whether the irrigated lands were included in the Provo River Decree. Thus, we are at a loss to understand where the record supports the statement in the opinion that "several witnesses testified at the Engineer's hearing that they remembered certain parcels of land, not included in the land set forth in the Decree, as having been irrigated in 1921."

The only evidence relating to acreage in excess of the 2,558.6 acres was based upon irrigable acreage, ie. lands susceptible to irrigation, as distinguished from irrigated acreage, ie. lands in fact irrigated. The net effect of it all is that the trial court awarded Provo City a right to divert and use additional water from the Provo River to irrigate some nebulous acreage without fixing the number of acres or where located or the beneficial use requirements thereof, all of which has to be a most erroneous result and contrary to the fundamental principles of our water law. Irrigable acreage never has been the basis of establishing a water right in this state. Yet that is the effect of the opinion of this Court and we respectfully submit must be

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reversed on a rehearing of this matter.

POINT IV.

THE COURT ERRED IN ITS FAILURE TO HOLD THAT THE ACREAGE LIMITATIONS OF PARAGRAPH 4(a) AND 4(b) OF THE PROVO RIVER DECREE ARE RES JUDICATA

Respondent Provo City and Appellant Provo Reservoir Water Users Company, as successor in interest to Provo Reservoir Company, are both parties to the Provo River Decree (Civil No. 2888). The irrigation rights of Provo City were determined and fixed by the Provo River Decree 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. The Provo River Decree 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), 521 P.2d 379 (1974).

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 foregoing issue was squarely raised in appellant's primary Brief under Point II thereof. Nowhere in the Court's opinion is the foregoing issue resolved or discussed unless it comes within the category of other arguments

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presented by defendants which the court believes are without merit.

We respectfully submit that the issue of res judicata is not only crucial to this appeal but is crucial to every irrigation right from the Provo River. The very foundation of the irrigation rights under the Provo River Decree was the irrigated acreages and the duty of water in acres per second foot. If the irrigated acreages as decreed therein are not res judicata, the Provo River Decree has been emasculated. We respectfully urge that this Court re-examine this issue and come to some decision as to whether the principles of res judicata apply to the total of 2,558.51 acres of land awarded to Provo City under paragraphs 4(a) and 4(b) of the Provo River Decree. We respectfully submit that it does, and this Court should accordingly so hold.

POINT V.

THE COURT ERRED IN ITS OPINION THAT DEFENDANTS AS JUNIOR APPROPRIATORS WILL NOT BE DEPRIVED OF WATER TO WHICH THEY ARE ENTITLED.

In its opinion, the Court concludes that there is no evidence in the record that defendants, or anyone else, have filed for the appropriation of the waters in question. As such, the Court not only misconstrues the law, but misinterprets the record in this case.

The substance of it all is that one does not file on a specific corpus of water. Rather, one files an application to appropriate the unappropriated waters of the stream. This the

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defendants did and evidence of their respective water rights was received and are in the record. (Exhibit I, r.1465, 1479; Ex. K, r.1481, 1482; Ex. O, r.1487, 1491, 1492; Ex. S, J, L, r.1480, 1481; Ex. N, r.1486, 1487). Furthermore Provo City conceded 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 into 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).

It is elementary to our water law that water rights are administered on a priority system and any reversion of water rights to the public would go first to satisfy the rights of junior appropriators. Wellsville East Field Irr. Co. v. Lindsay Land and Livestock Co., 104 Utah 448, 137 Pac. 2d 634 (1943). If the waters in question remain in the Provo River, such waters will be distributed to the defendants water users to fill their junior rights in accordance with their respective priorities. If such waters are delivered to Provo City, the defendant water users will be deprived of the use thereof in inverse order of their respective priorities. To suggest as does the opinion of this Court that defendants were required to file on that water is clearly erroneous.

The hydrographs [Exs. 14, 15(a), (b) and (c)] factually demonstrate the quantities of water which have been delivered to Provo City over the years. It is undisputed that the block of water between the red line and the blue line on those exhibits was

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never called for, received or used by Provo City. Likewise, it cannot be disputed that such block of water will be taken away from the junior appropriators, notably the defendant water users. Those are the disastrous consequences of the Amended Judgment.

We respectfully urge that this Court grant a rehearing and remedy those disastrous consequences.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that on the 27TH day of February, 1978, I mailed two (2) copies of the foregoing Petition For Rehearing to

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