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Salt Lake City Corporation v. Utah Wool Pulling Co. : Brief of Defendant-Respondent

Utah Supreme Court

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IN THE SUPREME COURT
OF THE STATE OF UTAH

SALT LAKE CITY CORPORATION,
a municipal corporation of
the State of Utah,

Plaintiff-Appellant,

-vs-

UTAH WOOL PULLING COMPANY,
a Utah corporation,

Defendant-Respondent

Case No. 14659

BRIEF OF DEFENDANT- RESPONDENT

Appeal from a Judgment of the Third District Court
in and for Salt Lake County, State of Utah
Honorable Gordon R. Hall, Judge

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BRIEF OF DEFENDANT- RESPONDENT

NATURE OF THE CASE

This case involves a jury verdict awarding \$50,000.00 to defendant-respondent for the fair market value of its water and water rights taken in a condemnation action brought by Salt Lake City Corporation to acquire real properties necessary for the enlargement of the Salt Lake International Airport,

STATEMENT OF FACTS

Appellant's Statement of Facts utilizes nearly 4-1/2 pages of its brief, much of which is devoted to argument. Respondent acknowledges that the trial in the lower court before a jury was had on the issue

of arriving at the fair market value of the water and water rights taken from it as part of the condemnation action and admits that its position at the trial was that the value of the water and water rights had to be considered in relation to the uses to which the water had been put and that the water constituted an appurtenant portion of the total value of the entire property being condemned.

The Statement of Facts furnished by appellant in its brief appear to respondent to be so argumentative in nature and so slanted toward appellant's version of the case that respondent will not at this point particularize further differences. Rather, respondent will detail and incorporate pertinent differences in the evidence in argument which follows.

ARGUMENT

POINT I

THE USE TO WHICH WATER IS PUT, AS PART AND PARCEL OF THE TOTAL PROPERTY OF WHICH IT IS APPURTENANT, IS AN IMPORTANT FACTOR IN ESTABLISHING ITS VALUE.

In arriving at the value of the properties condemned and taken from Utah Wool Pulling Company, the parties were able to agree to values separately assigned to lands, buildings, fixtures, and various other improvements taken. The value of the water rights represented

the sole area of dispute, and the parties in their Stipulation for Judgment (R. 32) reserved this issue for separate determination, as follows:

" 7. In this action the defendant has made claim that the water rights from which well water was secured for use on the condemned premises had a market value at the time of the taking which would be reflected in the market value of the total properties, as a unit, so as to result in a total fair market value in excess of the aforesaid sum of Six Hundred Thirty Five Thousand Six Hundred Ninety Four (\$635,694.00) Dollars; that plaintiff denies that such water rights had value as contended by defendant. The value of such rights, if any, has been excluded from this Stipulation. "

Although the Stipulation clearly indicated that the parties contemplated the contribution which the water rights would make to the "... market value of the total properties, as a unit. ..." appellant tried the case on the theory that the water rights had no value " standing alone" and that it would be improper to consider " the diversionary uses to which the water was put" in arriving at its value (Br. 1, 2). The City contended that the test of the value of the water rights would be the price they would bring " separate and apart from the land", and offered to allow defendant to sell the water rights after the condemnation had taken place (Br. 7). Defendant contends that the approach taken by the City is both contrary to the Stipulation and to basic condemnation law inasmuch as the water rights under Utah law are appurtenant to the properties condemned

and, as such, are necessarily included in the taking in a condemnation action,

As the trial progressed, the issue of whether the City had actually taken the water rights in the condemnation suit or whether, to the same effect, the water rights were rendered valueless by reason of the taking, became moot by stipulation of the parties that after the taking they had no remaining value:

" THE COURT: The Court accepts the stipulation of the parties that upon the taking there remains no value to the water and water rights; however, the Court denies the motion to direct a verdict on that ground and after our long discussion I am going to allow Mr. Fuller to go into those matters as to how the water affected the value of the property;... "

(R. 187)

In determining the value of water and water rights involved in a taking or affected by a taking in condemnation, it is not uncommon to find that the parties can settle other elements of value and reserve for separate determination the value of the water and water rights. This was done in the following cases, among others: Salt Lake County Cottonwood Sanitary District v. Toone (1960), 11 U.2d 232, 357 P. 2d 486 (involving the issue of whether damages resulted from the loss of water supplied by springs affected by the construction of a sewer line); Carson

City v. Estate of Lompa, (1972-- Nevada), 501 P. 2d 662 (involving the value of an appurtenant water right put to beneficial use upon lands condemned and as to which land values were separately stipulated); and State Road Commission v. Tanner, (1973), 30 U. 2d 19, 512 P. 2d 1022 (involving the separate valuation of drainage waste water where the value of other properties taken had been previously determined).

Appellant's attempts to exclude all evidence at the trial, except for what the " paper" water right might bring if sold in some manner totally disassociated with and unrelated to the other properties taken and condemned from Utah Wool Pulling Company, brought the matter to a head for a legal ruling by the Court after each side had argued its position to the Court. Judge Hall made his ruling, which appellant has attacked in its brief:

" THE COURT: The right to use it always; so to the Court's view it is almost impossible to distinguish between a purchasing of water and purchase of a right to use the water. And I am of the opinion that the testimony that bears upon a purchase of water or the right to use the water would have bearing upon what the actual value of the right is as it becomes an exclusive right; and I recognize, Mr. Montgomery, that you have a differing view. . . "

(R. 238)

Consistent with the Court's ruling, respondent put on its case and its expert appraiser placed a value upon the water right. The City did not alter its position, but continued with the trial on the theory that the water rights had no value whatsoever. In its requested Instructions respondent submitted a proposed Instruction which it felt was consistent with its theory of the case and the Court's ruling (R. 102), but the Court and both counsel re-worked the Instruction in chambers to the satisfaction of all concerned. When formal exceptions were taken to the Instructions, the City made no exception whatsoever to Instruction 16 (Tr. 207). The only exception taken by the City was to Instruction 15 pertaining to the respondent's wool pullery facility being classified as a " specialty property" (which proposed instruction was submitted by respondent as No. 4). In the absence of such exception, it seems inappropriate for the City to now complain that a jury, following the Instruction, arrived at a verdict consistent with its provisions:

" Instruction No. 16.

A Certificate of Appropriation issued by the State Engineer is evidence that its owner has a right to beneficially use the quantity of water specified therein. The right of use represented by the Certificate of Appropriation is the factor which buyers and sellers in the market place must consider in arriving at the fair market value of the water right, "

(R. 119)

This right of use, as evidenced by a certificate of appropriation,

is recognized as a compensable right. In Carson City v. Estate of Lompa, 501 P. 2d 622 (Nev, 1972), the city condemned a parcel of real property and the appurtenant water. The Supreme Court of Nevada held the water right to be compensable on page 662:

"When a right to use water has become fixed either by actual diversion and application to beneficial use or by appropriation as authorized by the state water law, it is a right which is regarded and protected as real property." (Emphasis added)

The Utah Supreme Court has similarly found the taking of a right to beneficially use water as compensable and, in so doing, has held that the value of water can be determined by the uses to which it has been put. In North Point Irrigation Co. v. The Canal Co., 23 Utah 199, 63 Pac. 812 (1900), the landowner was permitted to introduce evidence as to the use made of water upon his lands and the Utah Supreme Court held that the value of water for those purposes was a proper inquiry. In Whitmore v. Utah Fuel Co., 42 Utah 470, 479, 131 Pac. 907 (1913), the Court found error in the failure of the trial court to consider the uses made of the water before its diversion:

"The court, in determining the amount of damage sustained by appellant because of the diversion of water by respondents, should have taken into consideration the different uses appellant made of the water on his ranch..."

The Whitmore case has been cited with approval in the more recent case of Sigurd City v. State, 105 Utah 278, 142 P. 2d 154 (1943).

The statement of law as found in Whitmore and Sigurd City is

consistent with the law generally applied in valuing properties taken by the power of eminent domain. In Southern Pacific Co. v. Arthur, 10 Utah 2d 306, 352 P. 2d 693 (1960), the Court was called upon to determine the severance damages sustained to grazing lands. On appeal this Court considered the specific use to which the grazing lands had been put and affirmed a determination of damages which were special to the grazing use to which the lands were fitted. The Court adopted the following language on page 697 to tie the measure of damage to the use:

"... The evidence was that the value of respondents' remaining lands which were used for sheep grazing purposes were substantially diminished by the condition in which the land was left after the taking of the fill materials, since the value of range lands depends on factors peculiar to its use and a person buying from a person willing to sell would take all such factors into consideration in determining what he would be willing to pay, "

The law as found in the above-cited Utah cases is also consistent with that applied in other states. In United States v. 4.105 Acres of Land in Pleasanton, 68 F. Supp. 279 (N. D. Calif. 1946), the United States condemned lands belonging to the City and County of San Francisco. The Court held that the taking of the " fee title " included a taking of the water right and that the water right was a compensable property right. In determining the market value of the water right, it was held that consideration should be given to all factors affecting price,

In State Road Commission v. Tanner, 30 Utah 2d 19, 512 P. 2d

1022 (1973) , this Court similarly looked for the use to which water had been put. However, this Court found that there was no appropriation for beneficial use upon the claimant's land. A comparison of the two cases will show that the Tanner water was undesirable drainage water (not pumped industrial quality water) , was obtained through drains installed to rid the land of high water (not pumped from deep wells) , was diverted and sold upstream without being used on the property (not an integral part of an industrial process carried out on the property) , and there was no evidence of a filing with or order by the state engineer (not evidenced by certificates of appropriation). This Court based its decision in the Tanner case on three considerations: (1) damages were speculative, (2) damages were consequential, and (3) the defense of sovereign immunity. None of those considerations have any application to this case. In Tanner, the subject water was percolating through the soil five miles upstream from the claimant's land. The evidence showed that subdividing of property upstream, making it residential instead of agricultural, would diminish the seepage flow. In the instant case the water was from established aquifers on the landowner's property. In Tanner the damage was a consequence of the construction of a roadway. There was no direct taking of the water in Tanner as in the instant case. The Court considered the Tanner case to be "... a tort claim for interfering with... the flow of waste water...", and a case "... not structured

on a taking of land for a public purpose. " The doctrine of sovereign immunity was thus held to apply. In this case there is a direct taking of land and appurtenant water rights for a public purpose.

Appellant has not cited a single case, nor has respondent been able to find one, which attempts to value an appurtenant water right by any standard which disregards the use to which it has been put.

As the appraisers explained during the trial, there are several methods utilized for the purpose of appraising a given piece of property. One quite frequently utilized is the market data approach wherein the appraiser seeks to find sales of other comparable properties so as to fix a value upon the subject property. Another method commonly used is that of utilizing the replacement or reproduction cost, less accrued depreciation. This latter approach is generally applied to buildings and improvements.

Certain properties are so unique or have such a specialized use as to come under the well-recognized category of " specialty" properties. The importance of this classification is simply that the market data, or comparable sales, approach in arriving at their value is inadequate in that such properties are simply so different as to generally defy proper comparison with other properties. As to " specialty" properties the reproduction cost-- less depreciation approach is generally followed, particularly so if the property is not obsolete or otherwise so improperly

valued thereby as to appear out of line with economic reason. In addition to the unique character of the use made of such properties, their " specialty" status is also substantially affected by an assemblage of fixtures within the buildings which are limited in use to specified purposes.

Several recent cases adopting the foregoing valuation approach to specialty properties are: Lapides v. State, (New York 1970) , 323 N.Y.S. 2d 179 (a slaughterhouse); North Park v. No. N.Y. R.R., (New York 1971) , 324 N.Y.S. 2d 158 (a lumberyard); Ruppert Brewery v. Urban, etc., (New York 1972) , 325 N.Y.S. 2d 438 (ice cream plant); and Sinoyan v. Mass Turnpike, (Mass. 1965) (a bowling alley), 203 N. E. 2d 380.

The replacement cost-- less depreciation approach was utilized in arriving at the value of the improvements, structures and fixtures by the parties to this action. The City's expert appraiser, Solomon, specifically utilized the replacement cost-- less depreciation approach in arriving at a figure of \$12,749.00 for the pipe, drilling costs and other physical features of the wells taken in this case (R. 245, 253, 257).

In view of the procedure followed in valuing the non-litigated properties involved in the taking, coupled with clear-cut statements from its own appraiser and admissions by its counsel that the reproduction or replacement cost approach was used when he made a Motion for Judgment Notwithstanding the Verdict (R. 356, 357) , appellant is now in an

awkward position to claim error in the Court's giving of Instruction No. 15 (R. 118) relating to what is a " specialty property" and how it may be valued(See Br. 14). Incidentally, Instruction No. 15 was the only Instruction to which plaintiff took exception.

The UtahWool Pulling facility had various buildingsand specialized equipment and other types of fixtures peculiar to the business (R. 179, 180). The primary activity of the total plant involved the processing of sheepskins which respondent purchased from packing houses located west of the Mississippi River (R. 153). The skins were initially washed in vats of water which respondent secured from its wells and a holding reservoir adjacent to their buildings. After being washed the skins were painted with a sulfide solution so as to permit easy removal of the wool, and the hides were then placed in a pickling solution for further treatment involving the use of a large revolving drum which acted like a washing machine. Without detailed elaboration, Joseph Summerrhays explained the whole process was a " highly technical operation" and that water was used at various stages of the treatment process (R. 189, 190). He further explained that most of the water was not consumed but that, after utilizing it for washing and treatment of the hides, it was discharged into the adjoining waste canal which flowed through the area, pointing out that they could not use the water if they were unable to get rid of it (R. 191). In sum, he stated

that they had a profitable business for many years and that the family lived well from it (R. 194).

The evidence established that the Certificates of Appropriation which defendants had on file in the Office of the State Engineer gave a total usage right of .415 cubic feet per second (R. 319). Translated, this would represent a water source equivalent to .83 acre feet of water per day during a 24-hour period, or approximately 271,000 gallons of water per day. To furnish technical support for the testimony of Joseph Summerhays, defendant secured the expert services of Mr. Oscar Wederbrand of Haddonfield, New Jersey, a Harvard graduate and an independent consultant for many years in the specialty field of the chemistry of wool pulling and leather production (R. 195-199). In pointing out the importance of water to the wool pulling operation, he stated:

"A. A clear, cool, pure water supply is the most important raw material in the operation of a wool pullery. Without it the pullery cannot operate, "

(R. 199)

The City's expert appraiser witness, Solomon, although refusing to find any value in the water right, acknowledged that the large volume of water being used in the pullery operation was " very necessary" (R. 261), and made further observations on cross-examination by Mr. Fuller:

"A. He wouldn't pay as much if the water did not exist because of the plant that has been developed for the use of this water, you see.

Q. O. K. So the buyer comes to buy the Utah Wool Pulling plant, and we assume that the water is (n't) flowing; how much less, in your opinion, with these question marks in the buyer's mind, would be paid for this facility-- and I am speaking of the land, and buildings and, and everything?

A. He would pay nothing for it anymore than he would for an automobile without an engine, "

(R. 271)

POINT II

THE VALUE OF DEFENDANT'S WATER AND WATER RIGHTS, AS ESTABLISHED BY THE VERDICT, WAS SUPPORTED BY COMPETENT AND ADEQUATE EVIDENCE.

In addition to the sum of \$635,694.00 which was stipulated as the value of all of the properties condemned other than the water and water rights, the jury verdict added \$50,000.00 to that amount, thereby making the total fair market value of the total properties of respondent \$685,684.00. It is submitted that this total amount, of which the

value of the water and water rights represents approximately 7% of the total, was a fair market value of all of the properties taken from respondent in the condemnation proceeding. The portion of the total represented by the \$50,000.00 assigned by the jury to the water rights is well within the range of the evidence and is supported by logic and economic reality.

Respondent's appraiser, Memory Cain, approached his valuation of the water and water rights in a manner consistent with the Court's ruling and Instructions 15 and 16 by a valuation approach which utilized both the market data (comparable sales) approach and the replacement cost approach, with modifications (R. 203, 213). He valued the water as "... an appurtenance of the total property;" (R. 206). He specifically tied the value he assigned to the water and water rights to what a willing buyer and a willing seller would pay for the entire property in the market place, considering the water and water rights as an integral part of the total sales transaction (R. 207, 208, 215). The appraiser then arrived at the value of the water and water rights by (1) locating two sales involving a water right and the flow of water represented thereby, and (2) analyzing the cost of commercially replaceable water in the general area. By utilizing a combination of the two approaches he testified that in his opinion the water rights of defendant company were worth \$77,250.00 (R. 213). Mr. Cain first determined that

similar quality industrial water could be purchased from the Deer Creek Reservoir source (Salt Lake Metropolitan Water District) which supplies water into Salt Lake County, and then determined what it would cost to replace the amount of water used with Weber Basin Water Conservancy District industrial water, which is available in Weber and Davis Counties. He stated that Weber Basin water was available at a point approximately four miles distant (R. 213) , which would be at the division line between Davis and Salt Lake Counties. Weber Basin water was in fact available and being sold adjacent to the aquifer basin wherein were located the water rights of the respondent (Exhibit 9-D-- See Designation of Additional Portion of Record on Appeal). The assertion by appellant in its brief (p. 13) that the availability of Weber Basin water was in Weber County is incorrect since the District furnishes water as far south as the North line of Salt Lake County.

Mr. Cain then proceeded to utilize two sales of water and water rights located in Wasatch County, a " closed" water basin, and another near Brigham City in Box Elder County, an " open " water basin. He made adjustments for time, location and other factors to each of the two comparable sales which he used, and also made adjustments to the cost of replacement water in the general area (including a deduction for the amount of \$12,749.00 previously paid to defendant for drilling costs, pipes and other physical features associated with the

distribution of water) (R. 211-213).

Mr. Solomon appeared as an expert valuation witness for the appellant and, notwithstanding his recognition of the value of the water in use to the total property of defendant, contended that the water and water rights had no value whatsoever. He placed the emphasis of his testimony on a consideration of the costs involved in securing the " paper " Certificates of Appropriation but, apparently recognizing a certain weakness in such dogmatic approach, took the general position that other water could be secured in the general area by filing to appropriate the water with the State Engineer, and therefore gave no value to the water and water rights of defendant (R. 249). He considered the possibility of moving the " . . . plant within a reasonable distance to the west, to the south or to the north-- not to the west, not to the east, " (R. 249). However, since his final determination was that the plant could be moved to the south or north-- and not to the west or the east, he made a very faulty assumption inasmuch as the airport utilized the lands immediately to the north and, in addition, an analysis of wells actually producing in the area to the north, northwest, west and northeast of respondent's wells made by Mr. Wederbrand for respondent (R. 327, and following), and concurred in by the City's own expert engineering witness Jay R. Bingham (R. 288, 348), clearly established that the quality of the water in those areas

was unsuitable for a wool pullery operation and that the only logical places to secure equal quality water were immediately to the south of the subject property or up in Davis County west of Woods Cross (R. 302). Further, at the time of the condemnation it was well known that, in addition to defendant's properties, the lands generally located to the south were also being acquired for airport uses and the inter-state freeway interchange and road system. Farther to the south one would enter an area of residences, business and industry which would hardly accommodate a business such as that conducted by Utah Wool Pulling Company and its associated use of chemicals and resulting smells (R. 302-304). In short, respondent had no place it could have relocated and moved to within several miles in the general area.

Mr. Bingham, appellant's engineer, made it clear that one is never quite sure what he is going to get in the form of underground water when drilling is undertaken at any given location and that one does not always encounter the type of water expected when drilling through different strata, commenting on cross-examination that " Nature holds her own surprises " (R. 293). Dee C. Hansen, State Engineer, further explained that the filing of an application to appropriate water simply turns the applicant loose to search for water and that his office neither guarantees how much flow will be secured from a given well nor the quality of the water which might be secured (R. 325). On the other

hand, Mr. Solomon, not confining himself to any similar measure of exactness, utilized a convenient "hindsight" approach, as illustrated by the following interesting answers given on cross-examination:

MR. FULLER: Now where would this water have been replaced that you spoke of, at what point?

A. At the point that they could have drilled it, right on the very property owned by the Summerhays; and that's the well informed, willing and prudent buyer who should have known that.

Q. So you are saying in effect then that because the Summerhays were able to drill and get water on their property, and that they did not have to buy the water, that for that reason essentially, it has no value, isn't that correct?

A. Not because Summerhays did it.

Q. The subject property is some fourteen or fifteen acres of land, is that correct?

A. That could be owned by anyone that the Summerhays would sell it to, and anyone could go up and get a permit to drill a ten inch well, and they could drill it anywhere upon that 14 acres.

Q. Right.

A. Without payment of any royalty to anyone for the water it would produce.

Q. I understand you, so you are saying then, that since this could be done on this property, the water has no value,

A. The water itself would have no market value, "

(R. 267, 268)

Many interesting analogies could be furnished to Mr. Solomon's logic, but his approach smacks of Alice in Wonderland for the simple reason that one would never find a wool pullery plant all built and ready to go into operation without a guaranteed flow of water having been previously developed. Perhaps an apt analogy would be the contention that oil discovered on a desert wasteland or a mountain would have no value solely because it didn't cost the owner much of anything to secure the land,

The simple fact which Mr. Solomon overlooked is that this water did have considerable value precisely because it did not cost the respondent anything to acquire it initially, nor did it have to pay recurring monthly or annual amounts for its use, But once having established the water rights and a use for the water, it is certainly naive to believe that respondent would have sold its entire plant and properties in the market place without recognizing and placing a value on that water as part of the sales " package".

Mr. Solomon again exposed his inconsistency on cross-

examination:

MR. FULLER: And if this entire plant, the 18 acres, and the buildings, and the fixtures and the well system were there; but there was no water established as a flow or as a quality, then I take it you would say that the well informed buyer would still pay as much as he would with the water actually proven up and flowing?

A. No sir, He would not.

Q. Oh, He wouldn't?

A. He wouldn't pay as much as if the water did not exist because of the plant that has been developed for the use of the water, you see.

(R. 271)

Appellant attempted to elicit evaluation testimony concerning the subject water rights from Mr. Dee Hansen, State Engineer, with the following interesting results:

MR. MONTGOMERY: All right, Do you have an opinion as to whether or not water that may be available in this area has a particular value that could be obtained out of it by sale to someone else?

A. I have to answer that with some qualification, Your Honor, if it's water or a water right,

THE COURT: He said water.

A. He said water?

MR. MONTGOMERY: Excuse me, I meant certified water right.

(R. 327-328)

After appellant restricted Mr. Hansen's answer to the " paper" water right, he was further questioned as to the matter on cross-examination:

MR. FULLER: Mr. Hansen, back away in your testimony, you seemed to make a distinction between a water right and the use of the water itself. Do you perceive instances that there is such a distinction considering value to the water?

A. Yes.

.

MR. FULLER: Now, let's take the Utah Wool Pulling Company water right, and let's assume that as a result of that right they are taking from flow and through pumps in excess of 8/10th of an acre foot a day. Based on this figure of .41 cubic feet per second, and assume that that water in the operation is so critical that without it the total operation would cease...

(Objection by Mr. Montgomery overruled)

And further assume that this water is being used in this business. Would you, under those conditions, concede that the water being used is very valuable?

A. Sure.

(R. 333, 334)

.

MR. FULLER: But if he is using it, whether or not it be on a farm, or in a wool pulling business or whatever, and if the water contributes to the operation, then the water does have value, doesn't it?

A. Yes.

(R. 335)

Appellant's expert witness Solomon admitted that his search of the general area surrounding defendant's properties failed to reveal any single well or any group of wells producing water in the quantities being produced on the subject properties (R. 259), even though there were many wells in the area. Nor did he attempt to determine the quality of the water from the surrounding wells. On the other hand, he recognized that the value of water was associated with its proximity to a "center of manufacturing" and the supply of the type of land necessary for a particular purpose (R. 255), the volume of water necessary in a business (R. 260), where the water is located with respect to a highway system

and market considerations , and the quality of the water (R. 264) -- a " composite of increments that can develop a price paid on the open market by this willing , informed and prudent buyer , " (R. 269).

The valuation of water and water rights which are integrated in use with a total property such as a wool pullery contains certain considerations similar to those which would be encountered if the water had been lost to a going business and the determination involved severance damages to the remaining properties. Mr. Solomon reached briefly into this area in his claim that there was plenty of water in the area which could be filed upon and that the cost would be practically zero. Although subsequent testimony proved him wrong in his premise , nevertheless his approach followed that of a " substitute-for - the thing-taken" approach , which is also similar to the " cost of cure" approach. He made a feeble attempt to say that defendant could have located its plant elsewhere in the general vicinity and , in the process , could have secured replacement water without cost.

The difficulty with Mr. Solomon's contention , however , was that Mr. Wederbrand (for respondent) and Mr. Bingham (for appellant) both agreed that there was no basis for such a conclusion and , further , Mr. Solomon failed to take into account many other necessary ingredients necessary to support his position. Joseph Summerhays , in anticipation of such defense by the City , was asked whether the

business activity of wool pulling was terminated, and it was represented to the Court that further interrogation of Mr. Summerhays would be had to show the efforts which were made by him to attempt to relocate the wool pullery and to find replacement water. To this line of questioning and proffer, counsel for appellant objected on the grounds that such matters were not relevant, and the objection was sustained (R. 194). The matter came up again near the end of the trial, however, and at that time the Court did permit a showing that to have re-located the plant in an area of available water of suitable quality was a hypothetical consideration which could not have been achieved as a matter of fact (R. 304, 305).

In Answers to Interrogatories submitted by the City to respondent prior to trial defendant spelled out some of the ingredients, including water, which had to be found in a " package" in order that one could locate a wool pullery activity:

"1. Available land of approximately 20 acres for a plant site so as to accommodate all of the necessary facilities, and a buffer zone, upon which a specialty plant such as we had could be operated;

2. A surplus canal or a suitable similar waste way by which all of the water which was used in the operation could be discharged and drained away;

3. Water, whether underground or otherwise available, which would meet chemical and other requirements for use in the pulling operation;

4. Suitable zoning , plus a general neighborhood situation which would provide sufficient distance between the processing plant and neighboring houses , businesses , or industrial activities as would permit the operation to continue without the problem of nuisance suits which would be generated from the strong sulfide smells generated by this activity;
5. Reasonable proximity to a suitable labor force;
6. Availability of natural gas; and
7. Location sufficiently close to a central market area providing reasonable availability to customers bringing hides to the location and as a depot from which processed hides and other materials could be readily moved into the market place--preferably in a location not already covered by other competing activities.

(R. 42-43)

Mr. Summerhays was fully prepared to give testimony to the effect that his company had made diligent efforts to relocate and to re-establish itself and thereby continue the business. Mr. Solomon, had he diligently pursued his theory that the water had no value, could have bolstered his position by coming into court and furnishing proof that there was in the general area an available site of adequate size which could have been purchased for approximately what defendants had been paid for their lands, that the site was located on a canal or wasteway so that the waters used in the operation could be discharged, that the site also was reasonably certain to produce water in the amount and of the quality needed by defendant (preferably supported by proper engineering data) , that the zoning was adequate and that the

type of construction in the area would accommodate the smells of this business, that there was a road system which would provide movement of labor to and from the plant and make the location available to customers, and that there was available natural gas and electricity. Had he been able to come into court with a representation that there was a location available (and which was for sale) with all of the foregoing factors and elements present, then there might have been some substance to his contention that the water on the subject property had no value, because under such circumstances the water might have been available in the " relocation" transaction at no additional cost. But he was totally unable to show the availability of such a substitute site, even though defendant had furnished this information to the City long before trial, and it can only be concluded that he could not have met the test. In any event, defendant was certainly ready, able and willing to furnish testimony through Mr. Summerhays as to whether or not a relocation could have been made anywhere in the general area.

When a condemnor suggests an alternate solution which will cure or remedy the loss of an appurtenance to a property, it is really the burden of the condemnor to come forth and justify its position. The Utah law on the subject is set forth in the case of State Road Commission v. Bingham, 20 Utah 2d 246, 436 P. 2d 803 (1968). There the State

contended that the landowner had the burden of proving that he had attempted to minimize the damages sustained in a condemnation action. This was the sole issue of that appeal. This Court specifically rejected the State's contention and held that the burden was on the condemnor. As authority for its holding this Court cited the Sigurd City case, *supra*, a water case,

The New York courts reached the same result in a case with considerable similarity to the case at bar: In re West Farms Road, 47 Misc. 216, 95 NYS 894, 896, affirmed, 130 App. Div. 899, aff'd mem., 115 NYS 1149 (1909). In that case certain land and a well situated upon the land were taken for a street. The water had been used for a peculiar industrial purpose. The question there arose whether substitute water would be of similar quality. The burden of showing the availability of water of comparable quality was placed upon the condemnor city in the following language:

"... To reduce the damages to the mere cost of digging a new well at some place upon the owner's remaining land, rather than to be charged with the expense which would measure the owner's loss in the purchase of water from others, the burden was obviously upon the city to show that a new well would in fact be a substitute for the old, in view of the legitimate uses to which it was put. The relative position of the two wells, in their proximity to the tide water, which might affect both to some extent, disclosed a situation in which the similarity of quality of the water could be determined only by a chemical test, and the city's burden of showing that a substitute

for the old well was available was not sustained by the mere proof that a new well would supply water, . . . "

CONCLUSION

Appellant adopted an improper and unsupportable valuation theory in this case. It also totally failed to disprove or counter respondent's evidence as to the value of the water and water rights taken from it under the power of eminent domain.

The verdict and judgment should be affirmed.

Respectfully submitted,

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