

2001

# Provo City v. Hubert C. Lambert : Brief of Appellant

Utah Supreme Court

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17023

IN THE SUPREME COURT OF THE STATE OF UTAH

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

Plaintiff-Respondent, )

v. )

HUBERT C. LAMBERT, State Engineer )  
of the State of Utah, )

Defendant-Appellant, )

CASE NO. 14023

PROVO RIVER WATER USERS ASSOCIATION, )  
a corporation; KENNECOTT COPPER COR- )  
PORATION, a corporation; SALT LAKE )  
CITY, a municipal corporation; and )  
CENTRAL UTAH WATER CONSERVANCY )  
DISTRICT, ~~a public corporation of~~ )  
~~the State of Utah,~~ )

Intervenors-Appellants.)

BRIEF OF APPELLANTS

AN APPEAL FROM THE JUDGMENT OF THE FOURTH  
DISTRICT COURT, IN AND FOR UTAH COUNTY,  
HONORABLE J. ROBERT BULLOCK, JUDGE

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**FILED**

JUN 27 1975

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

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HUBERT C. LAMBERT, State Engineer )  
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CASE NO. 14023

PROVO RIVER WATER USERS ASSOCIATION, )  
a corporation; KENNECOTT COPPER COR- )  
PORATION, a corporation; SALT LAKE )  
CITY, a municipal corporation; and, )  
CENTRAL UTAH WATER CONSERVANCY )  
DISTRICT, a public corporation of )  
the State of Utah, )

Intervenors-Appellants.)

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BRIEF OF APPELLANTS

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STATEMENT OF THE NATURE OF THE CASE

Respondent Provo City filed this action on January 11, 1974, against the State Engineer, requesting the District Court to set aside or modify Certificate of Appropriation No. 3686 which was issued by the State Engineer on May 3, 1949, and to allow Respondent the use of more water from the sources covered by said Certificate. The only question on appeal is whether Respondent's action is barred for its failure to file this action until 23 years and 254 days after Certificate No. 3686 was issued.

#### DISPOSITION IN THE LOWER COURT

Appellants filed a motion to dismiss Respondent's Complaint on the grounds that the District Court lacked jurisdiction of the subject matter under the provisions of Section 73-3-14, Utah Code Annotated 1953, as amended, and that the action was barred by the express terms of Section 73-3-15, Utah Code Annotated 1953, as amended. The District Court denied Appellants' motion by Order dated February 14, 1975. On March 11, 1975, Appellants filed a Petition for Intermediate Appeal which was granted by this Court on April 30, 1975.

#### RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the Order of the District Court, and a remand to the District Court with directions to dismiss this action with prejudice.

#### STATEMENT OF FACTS

Respondent filed this action against the State Engineer on January 11, 1973, asking the District Court to compel the State Engineer to issue Respondent an amended certificate for 799 acre feet of water annually, or, in the alternative, to set aside the proof of beneficial use which Respondent had previously filed (October 1942), to allow Respondent a reasonable time within which to file a new proof, and to have the State Engineer issue a new certificate in accordance with the proof submitted (R. 3). The State Engineer filed an Answer to Respondent's Complaint on February 7, 1973 (R. 7). The Provo River Water Users Association, Kennecott Copper Corporation, Salt Lake City and the Cen-



tral Utah Water Conservancy District moved to intervene in this action (R. 11) and their motion was granted on January 25, 1974 (R. 56). Intervenors claim rights to the use of waters from the Provo River/Utah Lake System (R. 11).

As used in this brief, Appellants will include both Intervenors and the State Engineer. However, when the discussion is limited to one of these parties, they will be referred to as State Engineer and Intervenors, respectively.

Appellants moved to dismiss Respondent's Complaint on the ground that the District Court lacked jurisdiction of the subject matter of the action under the provisions of Section 73-3-14, U.C.A. 1953, as amended, and that this action was barred under the express terms of Section 73-3-15, U.C.A. 1953, as amended, because Respondent, after waiting more than twenty-three years, was attempting to review the decision of the State Engineer in issuing Certificate No. 3686 on May 3, 1949 (R. 18). This motion was denied (R. 28).

The applications to appropriate water which form the basis for Certificate No. 3686 are Applications Nos. 2077-3-1, 10547 and 10586. These Applications were approved in the 1930's, and various extensions of time were allowed within which to submit proof of appropriation on said Applications. Proof was submitted by Respondent in October of 1942. The State Engineer, after reviewing the proof submitted by Respondent, issued Certificate of Appropriation No. 3686 to Respondent on May 3, 1949.

Certificate of Appropriation No. 3686 involves an appropriation

by exchange. Under the provisions of the Certificate, water which has been stored in Lost Lake Reservoir on the headwaters of the Provo River is released and allowed to flow down the natural channel of the Provo River for use by the appropriators therefrom at their various points of diversion. In exchange for the water which Respondent releases from Lost Lake Reservoir, it is allowed to divert 2.57 c.f.s. and 1.71 c.f.s. from Bridal Veil Falls Creek and Lost Creek, respectively, near the mouth of Provo Canyon. Such water is diverted into the Provo City municipal system and co-mingled with other municipal water for use within Provo City. However, the maximum quantity of water that Respondent is allowed to divert and use under Certificate No. 3686 is 321.78 acre feet annually. A copy of Certificate No. 3686 is attached to this brief as Appendix A. This Court has ruled that it can take judicial notice of the records in the State Engineer's office, McGary v. Thompson, 114 Utah 442, 201 P.2d 288 (1948); American Fork Irr. Co. v. Linke, 121 Utah 90, 239 P.2d 188 (1951).

#### ARGUMENT

POINT I. THE DISTRICT COURT LACKS JURISDICTION OVER THE SUBJECT MATTER OF RESPONDENT'S ACTION FOR FAILURE OF RESPONDENT TO FILE AN ACTION TO REVIEW THE DECISION OF THE STATE ENGINEER WITHIN SIXTY DAYS AFTER THE STATE ENGINEER ISSUED CERTIFICATE NO. 3686 ON MAY 3, 1949.

- A. Section 73-3-14, Utah Code Annotated 1953, as Amended, Provides the Exclusive Procedure for Reviewing the Decisions of the State Engineer.

The express purpose of Respondent's action is to have the Court overturn and set aside the State Engineer's decision of May 3, 1949 limiting Respondent to the use of 321.78 acre feet of water under

Certificate No. 3686. In essence, Respondent is requesting the Court to direct the State Engineer to allow Respondent to more than double this right. This is a direct attack upon Certificate No. 3686 and upon the State Engineer's decision of May 3, 1949, limiting Respondent to 321.78 acre feet of water annually under said Certificate. Respondent elected not to appeal the Engineer's decision within sixty days after the Certificate was issued, but is now belatedly attempting to challenge it. However, Respondent's action is fatally defective because it was filed 23 years and 194 days too late. There is absolute no basis for such an action at this late date. While all decisions issued by the State Engineer are subject to judicial review, such review can only be accomplished by following the terms and provisions of Section 73-3-14, Utah Code Annotated 1953, as amended. This statute provides the exclusive procedure for reviewing decisions of the State Engineer, and any such review must be initiated within sixty days following the State Engineer's decision. Section 73-3-14 provides in part that:

In any case where a decision of the state engineer is involved any person aggrieved by such decision may within sixty days after notice thereof bring a civil action in the district court for a plenary review thereof.

This Court has expressly held that this procedure is the only method by which a decision of the State Engineer may be reviewed, Smith v. Sanders, 112 Utah 517, 189 P.2d 701 (1948). In Glenwood Irrigation Co. v. Myers, 24 U.2d 78, 465 P.2d 1013 (1970), the State Engineer had, on February 11, 1973, approved defendant's application within which to resume use of water from Glenwood Springs over plaintiff's protest. Plaintiff waited almost five years after the decision

of the State Engineer to file an action in the District Court to declare defendant's right forfeited and to enjoin the further use of water. The trial court granted plaintiff's motion for summary judgment. On appeal, this Court reversed the trial court and remanded the matter to the District Court with directions to enter judgment for the defendant. In doing so, this Court ruled that Section 73-3-14 is the only method by which a decision of the State Engineer may be reviewed:

The precise question of forfeiture was put in issue before the state engineer, and plaintiff had available the procedure in Section 73-3-14, U.C.A., 1953, to determine the validity of defendant's right. An appeal is the only method provided in the statute by which a decision of the state engineer may be reviewed. (Emphasis added)

The sixty day period therein provided for in Section 73-3-14 is jurisdictional. In re Application No. 7600, 63 Utah 311, 225 Pac. 605 (1924). In that case, this Court, in construing Chapter 67, Section 54, Session Laws of Utah 1919, which has since been amended and is now Section 73-3-14, Utah Code Annotated 1953, noted on page 607 of the Pacific Reporter that the manner of taking an appeal under that statute was indefinite, except that the appeal must be taken within sixty days counting from the date when notice is given to the party affected by the decision. It was also pointed out that the appeal should be taken in the manner provided for appeals from Justices Courts. Timely filing of a Notice of Appeal from the Justices or City Court to the District Court, together with payment of the fees for docketing the appeal in the District Court, is jurisdictional.

Buckner v. Main Realty and Insurance Co., 4 U.2d 124, 288 P.2d 786 (1955); Bish's Sheet Metal Company v. Luras, 11 U.2d 357, 359 P.2d 21 (1961); Marsh v. Utah Homes, Inc., 17 U.2d 248, 408 P.2d 906 (1965). Likewise, timely filing of a Notice of Appeal from a judgment in the District Court to the Supreme Court is jurisdictional. Anderson v. Anderson, 3 U.2d 277, 282 P.2d 845 (1955); Watson v. Anderson, 29 U.2d 36, 504 P.2d 1003 (1973). Thus, the District Court in this action is clearly without jurisdiction to entertain Respondent's request to overturn a decision made by the State Engineer more than twenty-three years ago and should have dismissed this action.

B. A Decision of the State Engineer Which is not Appealed Within Sixty Days is Final and not Subject to Collateral Attack.

A Certificate of Appropriation issued by the State Engineer pursuant to the statutory procedure is not subject to a collateral attack which would nullify its effect. Warren Irrigation Company v. Charlton, 58 Utah 113, 197 Pac. 1030 (1921). Similarly, in North Salt Lake v. St. Joseph Water & Irrigation Company, 118 Utah 600, 223 P.2d 577 (1950), it was held that property owners who claimed an impairment of their rights by a ruling of the Public Service Commission, and who were not satisfied with the order as entered, should have sought relief by requesting a further hearing before the Public Service Commission or by an appeal to the Supreme Court. Since they did not, the order of the Public Service Commission was binding upon the parties the same as a judgment, and was not subject to collateral attack in a subsequent condemnation proceedings:

If defendant Gibbs or other affected property owners claimed an impairment of their rights by the rulings made and were not satisfied with the order as entered, then their relief was by requesting a further hearing before the Public Service Commission or by appeal to this court. Not having taken steps to have the order modified or changed, the same has the effect of a judgment and its legality cannot be attacked in this proceedings. (Emphasis added).

For similar decisions from other Western States, see Southeast Colorado Power Ass'n. v. Public Utilities Comm., 163 Colo. 92, 428 P.2d 939 (1967); Campbell v. Superior Court in and for Maricopa County, 18 Ariz. App. 287, 501 P.2d 463 (1972); Mosman v. Mathison, 90 Idaho 76, 408 P.2d 450 (1965); In re Malo's Estate, 244 Or. 490, 356 P.2d 957 (1960).

The purpose of the time limit prescribed in Section 73-3-14 is the same as the purpose behind the time limit of all other appeal statutes. It is to settle controversies once and for all within a prescribed period. In Croft v. Croft, 21 U.2d 332, 445 P.2d 701 (1968), this Court noted that litigation must be put to an end, and it is the function of a final judgment to do just that. A judgment is the final consideration and determination of a court on matters submitted to it in an action or proceeding. This Court further noted that if a judgment can mean one thing one day and something else on another day, there would be no reason to suppose that the litigation had been set to rest. The same is true with respect to decisions of administrative agencies such as the State Engineer. Individual water rights are a matter of extreme importance in this State. Every water user is entitled to know with certainty that

once his right is defined he can rely upon it without fear of collateral attack. Likewise, once a certificate of appropriation is issued and the time for appeal has expired, junior appropriators are entitled to rely on the rights established thereby without fear that such rights will be enlarged in the future. Further, sound and proper water administration can only be carried out by the State Engineer with a firm and fixed definition of the individual users rights. Anything short of this will lead to chaos in our water right structure. As pointed out in the following section, these are the very things our Water Code was designed to avoid.

C. Stability of Individual Water Rights and Proper Water Administration Depend Upon the Finality of the State Engineer's Decisions.

The fundamental purpose in the creation of the office of State Engineer in Utah, as in other Western States, was to provide an order system for the allocation and administration of water rights. When appropriation practices first developed in the West, users established rights by simply diverting the water from its accustomed channel and placing it to beneficial use. But, as the settlement and development progressed, more and more people used water from a common supply, and problems developed when there was not sufficient water to satisfy all the uses on the stream. Thus, as disputes arose, users were forced to litigate their rights, and—while the courts were an adequate forum to solve these individual disputes—there was no means to solve the repeating nature of the problem. In other words, a user may have been required to defend his right against a number of different users at various times in order to obtain the water to which he was legally en-

titled. Because there was no administrative regulation, there was nothing to stop additional users from attempting to initiate a right, even though the stream was already over-appropriated. Further, there was no record defining the amount and extent of the various rights. Existing users were left in the difficult position of not knowing the interrelationship of all of the rights on the stream, and potential users had no way of knowing the amount of water available for new development. Such uncertainties made the investment of capital in water projects risky, and hampered the development and utilization of the State's water resources. Thus, it became imperative to provide a system for the orderly administration of the water resources which would make all water rights of record and would define individual rights with certainty and finality. The Utah Water Code which created the office of the State Engineer was enacted by the Legislature to satisfy this need.

All applications, as well as all change applications, must be initiated with the State Engineer and first must be decided by the Engineer, and second by the court if his decision is appealed. However, if no appeal is taken within the sixty-day period, the decision of the State Engineer becomes final. Also, the Engineer fixes the time when the water must be placed to beneficial use under an approved application or change and, for good cause shown, may grant additional time to accomplish the development. When the development is complete, the applicant must file his Proof of Appropriation or Change with the State Engineer. The Engineer then issues a Certificate of Appropriation or Change, based upon such proof. The Certificate becomes the applicant's evidence of the perfected right.



Thus, the State Engineer has the statutory responsibility for the administration and appropriation of the waters of the State. In carrying out this responsibility, he must make literally hundreds of decisions each year with respect to individual water rights. While the Legislature has made the State Engineer's decisions subject to judicial review, only a small percentage of his decisions are actually appealed. However, if users are able to reach back and challenge decisions of the State Engineer without regard to the limitations contained in Section 73-3-14, titles to individual water rights are placed in jeopardy and the certainty which our Water Code was intended to provide to individual users is lost. For example, many applications to appropriate water are protested, and numerous of these applications are approved over protest. If protestants are not required under the provisions of Section 73-3-14 to appeal the State Engineer's decision within sixty days, applicants are placed in the untenable position of having to expend funds to develop the water while lacking the confidence which now exists that their right is valid and justifies the expenditure of funds.

When an appropriation is completed, the Certificate of Appropriation constitutes the measure and limit of the user's right. If users are able to go behind a Certificate years after it is issued and enlarge the quantity of water to which they are entitled, all rights with a later priority will suffer. This is so because for whatever increased right is acquired there will be a corresponding reduction in the amount of water available for subsequent rights. Since most of Utah's streams are fully appropriated, any enlargement in earlier rights can only result in an impairment of junior rights. Further,

the State Engineer must be able to rely on the records in his office when administering these streams and in making decisions with regard to whether there is water available for appropriation. If users are to continue to expend funds for the development and use of our water resources, and if the State Engineer is to be able to properly administer water rights, it is imperative that decisions of the State Engineer be final and binding when not appealed in accordance with the provisions of Section 73-3-14. Anything short of this will result in instability and uncertainty in individual water rights and will destroy the orderly administration of water rights which has existed in this State since the enactment of our Water Code, more than seventy years ago.

POINT II. RESPONDENT'S ACTION IS BARRED AND MUST BE DISMISSED UNDER THE EXPRESS PROVISIONS OF SECTION 73-3-15, UTAH CODE ANNOTATED 1953, AS AMENDED, FOR FAILURE TO FILE AN ACTION TO REVIEW THE STATE ENGINEER'S DECISION OF MAY 3, 1949, WITHIN SIXTY DAYS AFTER CERTIFICATE NO. 3686 WAS ISSUED.

Section 73-3-15, U.C.A. 1953, as amended, specifies, in part, that:

. . . An action to review a decision of the State Engineer shall be dismissed upon application of any party or by the court on its own motion, if the complaint was not filed or the summons not served within sixty days after notice of the decision. (Emphasis added)

The clear and positive language of this statute makes the dismissal of Respondent's action mandatory, since it provides that any action to review a decision of the State Engineer which is not commenced within sixty days shall be dismissed. The use of such positive

language certainly indicates that the Legislature intended such result. Sands, Sutherland Statutory Construction, §§25.04 and 57.03, 4th ed. (1972). To interpret such a clear legislative mandate as discretionary would violate the literal meaning of the statute and would ignore a clearly expressed legislative intent contrary to the accepted canons of statutory construction. Sands, Sutherland Statutory Construction, §§46.02 and 46.03, 4th ed. (1972). Even if there were any doubt—which there is not—concerning the legislative intent this statute must be interpreted in a manner consistent with the over-all public purpose which our Water Code sought to achieve. The public policy of this State favors stability of individual water rights and orderly water right administration, and the Legislature adopted and implemented our Water Code for this purpose. As discussed under Point I.C., the finality of the State Engineer's decisions is an integral and necessary part of this legislative program. If Section 73-3-15 were considered to be discretionary, it would frustrate this legislative purpose. Any doubts concerning the meaning of this statute must be resolved in furthering and carrying out the public policy of the State. Sands, Sutherland Statutory Construction, §§56.01, 56.02 and 57.04, 4th ed. (1972). To suggest that Respondent can directly attack a decision 23 years and 254 days after it is issued is to ignore and violate the unequivocal mandate of Section 73-3-15. This section is a bar to Respondent's action, and the trial court should have dismissed Respondent's Complaint in accordance with Appellants' Motion to Dismiss.

In any event, the case of Glenwood Irrigation Co. v. Myers, supra, is dispositive of this matter. In that decision, this Court squarely held that an aggrieved party could not sit by and ignore the sixty-day statutory appeal period provided for in Section 73-3-14, and then challenge a decision of the State Engineer in a collateral action some five years later. The statutory procedure for reviewing a decision of the State Engineer is exclusive. Since Respondent elected not to follow this procedure, it cannot now complain that the decision of the State Engineer is final and binding upon it.

#### CONCLUSION

Section 73-3-14 provides the exclusive procedure for reviewing decisions of the State Engineer, and the sixty-day limitation provided in this statute is jurisdictional. Consequently, the District Court had no jurisdiction to entertain Respondent's action, which is a direct attack upon Certificate No. 3686 filed more than twenty-three years after the State Engineer's decision was issued. If the filing of this action at this late date is proper under the law, then none of the Certificates issued by the State Engineer during the past seventy-two years from which no appeal has been taken is final, and any person who may have been aggrieved thereby could today file an action in the District Court and have that Certificate modified or set aside. This is the very thing which the appeal statute was designed to prevent. We respectfully submit that under the clear, positive and mandatory language of Section 73-3-15, Respondent's action must be dismissed with prejudice.

Respectfully submitted,

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# CERTIFICATE OF APPROPRIATION OF WATER STATE OF UTAH

APPLICATION NOS. 2077-c-1, 10586 and 10547

CERTIFICATE NO. 3686

APPENDIX A

NAME AND ADDRESS OF APPROPRIATOR PROVO CITY, A CORPORATION, PROVO, UTAH  
LOST LAKE APPROPRIATION, BRIDAL VEIL  
 SOURCE OF SUPPLY FALLS CREEK & LOST CREEK, EXCHANGE IN UTAH COUNTY, UTAH: UTAH LAKE AND JORDAN RIVER DRAINAGE AREA  
THREE HUNDRED TWENTY ONE AND SEVENTY EIGHT/ 10547 - DECEMBER 22, 1928  
ONE HUNDREDDAYS (321.78) ACRES-FOOT PRIORITY OF RIGHT 10586 - JANUARY 19, 1929  
2077-c-1, SEPTEMBER 15, 1908  
 PERIOD AND NATURE OF USE STORED FROM OCTOBER 1 OF ONE YEAR TO JULY 1 OF THE YEAR FOLLOWING; RETURNED AND EXCHANGED FOR USE FROM  
JUNE 1 TO OCTOBER 1 OF EACH YEAR FOR MUNICIPAL PURPOSES

Whereas, It has been made to appear to the satisfaction of the undersigned that the appropriation of water has been perfected in accordance with the Laws of Utah; Therefore, Be it known that I, HAROLD A. LINKE the duly appointed, qualified and acting State Engineer, by authority of the Laws of Utah, do hereby certify that said appropriator is entitled to the use of water as herein set out, subject to prior rights, if any, for diversion and use as follows, to-wit:—

The water covered by this combined appropriation and exchange is yielded by Lost Lake on the head waters of Provo River, the intersection of the longitudinal axis and center line of the stream bed being situated S18°49'N 3496.8 ft. from NE Cor. Sec. 5 T2S R9E SLE&M. The water after having been stored is released as hereinbefore defined, allowed to flow down the natural channel of Provo River and is used by the appropriators therefrom at their various points of diversion as heretofore established, and used in accordance with the rights provided in each instance. In lieu of said water thus used there is diverted from two sources of supply, for convenience described as Nos. 1 and 2 as follows: No. 1 is a right to the exchange of water from Bridal Veil Falls Creek under Exchange Application No. 10547, the point at which it is diverted being situated S5°45'W 676.4 ft. from W $\frac{1}{2}$  Cor. Sec. 34 T5S R3E SLE&M. The maximum rate of diversion from this source is 2.57 sec. ft. The water thus diverted enters the municipal supply line from Provo City at a point situated S78°18'W 1232.3 ft. from E $\frac{1}{2}$  Cor. Sec. 33 T5S R3E SLE&M. No. 2 is a right to the exchange of water from Lost Creek under Exchange Application No. 10586,

the point at which it is diverted being situated N41°02'W, 2530.5 ft. from S $\frac{1}{4}$  Cor. Sec. 33 T5S R3E SLB&M. The maximum rate of diversion from this source is 1.71 sec. ft. The water thus diverted enters the municipal supply line of Provo City at a point situated S75°54'W 1536.8 ft. from S $\frac{1}{4}$  Cor. said Sec. 33. The limit of the yearly diversions from the two sources taken in exchange are as follows: Bridal Veil Falls Creek 111.48 acre ft., Lost Creek 210.30 acre ft. The water under the two exchange applications mentioned is commingled in said Provo municipal supply line with the other water and flows down said supply line through Sec. 33, last aforesaid township and range, through Secs. 4, 5, 6, 7, 18, 19 and Sec. 30, T5S R3E SLB&M, and enters the municipal distribution reservoir, situated N31°08'W 1034.3 ft. from S $\frac{1}{4}$  Cor. Sec. 30 last aforesaid township and range, from which it is distributed through the municipal water system to the inhabitants of Provo City, where it is used for municipal purposes.

The rights under this certificate entitle the holder to divert water from Bridal Veil Falls Creek and Lost Creek in exchange purposes, only in identical flows and in equal amounts concurrently with equal releases from Lost Lake and its delivery to the various points of diversion, especially that of the parties to whom the various rights are entitled particularly the Utah Power & Light Co., both as to present diversions and as they may be constituted in the future.

The works employed in this appropriation are to be operated and maintained in such manner and condition as will prevent waste of water.

In Witness Whereof, I have hereunto set my hand and affixed the seal of my office this 3rd. day of May, 1919.

  
STATE ENGINEER

Cert. No. 3686 Page No. 2 of 2 Pages.