

1979

# Provo City et al v. Dee C. Hansen et al : Brief of Plaintiffs-Appellants

Utah Supreme Court

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Jackson Brown; Attorneys for Plaintiff-Appellants;

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

---

PROVO CITY, a municipal cor- :  
poration, and TIMPANOGOS :  
CANAL COMPANY, a Utah cor- :  
poration, :

Plaintiffs-Appellants, :

Case No. 15,772

vs. :

DEE C. HANSEN, as State Engi- :  
neer of the State of Utah; :  
and UNITED STATES OF AMERICA, :  
Bureau of Reclamation, :  
Department of the Interior, :

Defendants-Respondents, :

PROVO RIVER WATER USERS ASSO- :  
CIATION, a corporation, MET- :  
ROPOLITAN WATER DISTRICT OF :  
SALT LAKE CITY, UTAH LAKE :  
DISTRIBUTING COMPANY, a cor- :  
poration, KENNECOTT COPPER :  
CORPORATION, a corporation, :  
SALT LAKE CITY, a municipal :  
corporation, CENTRAL UTAH :  
WATER CONSERVANCY DISTRICT, :  
SCOTT P. WALLACE and RUTH :  
WALLACE, his wife, DARREL A. :  
CONRAD, VILATE P. CONRAD, :  
CHARLES ELMWOOD CONRAD and :  
ALICE P. CONRAD, his wife, :  
and UTAH POWER AND LIGHT :  
COMPANY, :

Intervenors.

---

BRIEF OF PLAINTIFFS-APPELLANTS

---

APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL  
DISTRICT COURT, STATE OF UTAH  
HONORABLE GEORGE E. BALLIF, PRESIDENT

---

JACKSON HOWARD, JR.  
HOWARD, LEWIS & COMPANY  
120 East 300 South  
Provo, Utah 84601  
373-6345

Attorneys for Plaintiffs-Appellants

William W. Jensen  
Assistant Attorney General  
State Capitol Building  
Salt Lake City, Utah 84114  
Attorney for Defendant  
Engineer

Donald L. Reicher  
Attorney  
P.O. Box 100 Post Office and Courthouse Bldg.  
Main Street  
Salt Lake City, Utah  
Attorney for Defendant  
United States

James H. Deffen  
Attorney  
P.O. Box 100 Post Office and Courthouse Bldg.  
Main Street  
Salt Lake City, Utah  
Attorney for Individual Intervenor

James H. Deffen  
Attorney  
P.O. Box 100 Post Office and Courthouse Bldg.  
Main Street  
Salt Lake City, Utah 84111  
Attorney for Intervenor  
Utah Water  
District

James H. Deffen  
Attorney  
P.O. Box 100 Post Office and Courthouse Bldg.  
Main Street  
Salt Lake City, Utah 84111  
Attorney for Intervenor  
Salt Lake City Corporation

James H. Deffen  
Attorney  
P.O. Box 100 Post Office and Courthouse Bldg.  
Main Street  
Salt Lake City, Utah 84111  
Attorney for Intervenor  
Copper Corporation

James H. Deffen  
Attorney  
P.O. Box 100 Post Office and Courthouse Bldg.  
Main Street  
Salt Lake City, Utah 84101  
Attorney for Intervenor  
Utah River Water Users Association  
Metropolitan Water District of  
Salt Lake City and Utah Lake  
Contributing Company

IN THE SUPREME COURT  
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PROVO CITY, a municipal corporation, and TIMPANOGOS CANAL COMPANY, a Utah corporation,

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Case No. 15,772

vs.

DEE C. HANSEN, as State Engineer of the State of Utah; and UNITED STATES OF AMERICA, Bureau of Reclamation, Department of the Interior,

Defendants-Respondents,

PROVO RIVER WATER USERS ASSOCIATION, a corporation, METROPOLITAN WATER DISTRICT OF SALT LAKE CITY, UTAH LAKE DISTRIBUTING COMPANY, a corporation, KENNECOTT COPPER CORPORATION, a corporation, SALT LAKE CITY, a municipal corporation, CENTRAL UTAH WATER CONSERVANCY DISTRICT, SCOTT P. WALLACE and RUTH WALLACE, his wife, DARREL A. CONRAD, VILATE P. CONRAD, CHARLES ELMWOOD CONRAD and ALICE P. CONRAD, his wife, and UTAH POWER AND LIGHT COMPANY,

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---

JACKSON HOWARD, for:  
HOWARD, LEWIS & PETERSEN  
120 East 300 North  
Provo, Utah 84601  
373-6345

Attorneys for Plaintiffs-Appellants.

Dallin W. Jensen  
Assistant Attorney General  
442 State Capitol Building  
Salt Lake City, Utah 84114  
Attorney for Defendant  
State Engineer

Ronald L. Rencher  
U. S. Attorney  
200 U.S. Post Office and Courthouse Bldg.  
350 South Main Street  
Salt Lake City, Utah  
Attorney for Defendant  
United States

M. Dayle Jeffs  
90 North 100 East  
Provo, Utah 84601  
Attorney for Individual Intervenors

Edward W. Clyde  
351 South State Street  
Salt Lake City, Utah 84111  
Attorney for Intervenor  
Central Utah Water  
Conservancy District

Ray L. Montgomery  
101 City & County Building  
Salt Lake City, Utah 84111  
Attorney for Intervenor  
Salt Lake City Corporation

James B. Lee  
79 South State Street  
Salt Lake City, Utah 84111  
Attorney for Intervenor  
Kennecott Copper Corporation

Joseph Novak  
520 Continental Bank Bldg.  
Salt Lake City, Utah 84101  
Attorney for Intervenors  
Provo River Water Users Association  
and Metropolitan Water District of  
Salt Lake City and Utah Lake  
Distributing Company

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APPEAL FROM THE JUDGMENT OF THE FOURTH JUDICIAL  
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### STATEMENT OF THE KIND OF CASE

This is an action both for declaratory judgment and to review the decision of the State Engineer, Dee C. Hansen, dated August 9, 1974, relative to Change Application No. a-5433, filed by Timpanogas Canal Company.

### DISPOSITION IN THE LOWER COURT

This action was initially filed by plaintiffs-appellants on October 4, 1974. (R. 231-248). The matter was thereafter submitted to the trial court on December 28, 1977, by Intervenor's motion to dismiss. (R. 39-43).

Judge George E. Ballif, after hearing oral arguments granted defendant-respondents' motion to dismiss with prejudice on March 27, 1978. (R. 15-19).

### RELIEF SOUGHT ON APPEAL

Appellants seek to have the District Court's decision reversed and the case remanded for a determination on the merits or in the alternative a dismissal without prejudice.

### STATEMENT OF FACTS

Change Application No. a-5433 was filed with the State Engineer by the appellant, Timpanogas Canal Company, on February 14, 1968. (R. 237-246). The application was filed to change the point of diversion and nature of the use of 4.0 second feet of water out of a total of 11.29 second feet of water during the nonirrigation season which had been contracted to Provo City by Timpanogas Canal Company. (R. 237).

The Change Application was advertised and protests were lodged by Utah Power and Light Company, Kennecott Copper

Corporation, the Central Utah Water Conservancy District, E.E. and Alice P. Conrad, Mrs. Warren A. and Darel A. Conrad, Provo River Water User's Association, Metropolitan Water District of Salt Lake City, Utah Lake Distributing Company, and United States of America, Department of the Interior, Bureau of Reclamation. (R. 237).

Hearings were conducted by the State Engineer at Provo, Utah on September 24, 1968 and February 10 and 11, 1969 and the defendant, Dee C. Hansen, rendered his Memorandum Decision on August 9, 1974. (R. 237-239).

The State Engineer, in his memorandum decision, concluded that the described Change Application should be approved but assigned limitations and express conditions to the time, amount, and use of the water. (R. 239).

The appellants then filed suit challenging the State Engineer's decision on October 4, 1974. (R. 231). The appellants alleged four separate causes of action. The first was brought pursuant to Utah Code Annotated, 73-3-14 (1953), as a trial de novo in accordance with the provisions of U.C.A. 73-3-15 (1953). (R. 231-33).

The Second Cause of Action was brought pursuant to U.C.A. 78-33-1 (1953) seeking a declaratory judgment that the improvement of appellants' water system would not adversely affect the rights of others in the drainage basin, that appellants are the owners of the waters which they would conserve by changing the distribution system from an earthen canal to a pipeline, and that conditions 1 and 3 of the Memorandum Decision of the State Engineer

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dated August 9, 1974 were beyond the authority of the State Engineer to impose. (R. 232-33).

The Third Cause of Action was likewise brought pursuant to U.C.A. 78-33-1 (1953) and sought a declaratory judgment that Utah Power & Light Company would suffer no loss of power revenues due to granting the Change Application, and that condition 4 of the Memorandum Decision of the State Engineer dated August 9, 1974, was beyond the authority of the State Engineer to impose. (R. 234-235).

The Fourth Cause of Action sought a Declaratory Judgment that there were no prior rights that needed satisfaction prior to the appellants' diversion into the proposed system, and that the State Engineer had no power or authority to impose Condition 5 of the Memorandum Decision of the State Engineer dated August 9, 1974.

The respondent, Dee C. Hansen answered the complaint on October 24, 1974. (R. 222-228). A motion to intervene was made by Provo River Water Users Association, Metropolitan Water District of Salt Lake City, Utah Lake Distributing Company, Kennecott Copper Corporation, Salt Lake City, and Central Utah Conservancy on December 30, 1974. (R. 209-212). The pre-trial, held on January 3, 1975, was therefore occupied primarily with consideration of the motions to intervene and the appellants' objections thereto. (R. 182). The Court after hearing argument allowed the parties additional time to file memoranda and affidavits supporting their respective positions on the intervention issue. (R. 182).

On January 10, 1975, the Court granted the motions of the applicants for intervention as defendants but reserved its ruling on the Motion to Intervene made by Central Utah Water Conservancy District pending the submission of additional memoranda. (R. 153-154).

Subsequently, additional parties applied for intervention on January 23, 1975 (R. 147-148). These parties, Scott P. Wallace, Ruth Wallace, Darel A. Conrad, Vilate P. Conrad, Charles E. Conrad and Alice P. Conrad, had made no previous protest before the State Engineer contesting the proposed Change Application. (R. 147, 237).

Intervenors then filed a motion to dismiss and objection to the appellants' pre-trial order on January 24, 1975. The Intervenors among other things, contended that the order was premature. (R. 134-135).

The Court ruled on February 27, 1975, that Central Utah Conservancy District and the other applicants for intervention could intervene and file their answers. (R. 127). The Court further held that Utah Power and Light Company and the United States of America were indispensable parties and ordered the appellants to join them. (R. 102, 128).

Appellants filed an Amended Complaint on March 19, 1975. (R. 103-108). Answers to the Amended Complaint were filed by April 15, 1975. (R. 77).

Intervenors filed a Motion to Dismiss on December 29, 1977, which was granted on March 24, 1978. (R. 15).

## POINT I

THE TRIAL COURT IMPROPERLY APPLIED UTAH CODE ANNOTATED 73-3-15 TO DISMISS THE ACTION OF PROVO CITY AND TIMPANOGOS CANAL COMPANY.

The respondents based their Motion to Dismiss on U.C.A. 73-3-15 (1955) which provides that "an action to review a decision of the State Engineer may be dismissed upon the application of any of the parties upon the grounds provided in Rule 41 of the Utah Rules of Civil Procedure for the dismissal of actions generally and for failure to prosecute such action with diligence." The statute then states that "for the purpose of this section failure to prosecute a suit to final judgment within two years after it is filed, or, if an appeal is taken to the Supreme Court within three years after the filing of the suit, shall constitute lack of diligence."

It is the appellants' contention that the trial court misinterpreted this statute and improperly applied it.

### A. The Trial Court Erred in Dismissing the Action With Prejudice.

It is important to note initially that there is no language in U.C.A. 73-3-15 (1955) that would lend credence to the supposition that the failure to prosecute an action to final judgment within the delineated time period warrants, of necessity, a dismissal of the action with prejudice. The statute only establishes the time period which is to be deemed by the Court to constitute "lack of diligence" under

Rule 41 of the Utah Rules of Civil Procedure. There is no indication in the statute of any legislative intent to modify the established rules for determining whether an action should be dismissed with or without prejudice. It would seem that once the court has ferreted out, by use of the two and three year limitation outlined in the statute, a "lack of diligence" on the part of one of the parties, the Court then must determine whether the action should be dismissed with or without prejudice by using established guidelines which stand unmodified by U.C.A. 73-3-15 (1955).

Justice Crockett in Westinghouse Electric Supply Co. v. Paul W. Larsen Construction, Inc., 544 P.2d 876 (Utah, 1975) stated the guidelines to be employed by the courts in determining whether a cause should be dismissed with or without prejudice as follows:

. . . It is not to be doubted that in order to handle the business of the court with efficiency and expedition the trial court should have a reasonable latitude of discretion in dismissing for failure to prosecute [citing cases] if a party fails to move forward according to the rules and the directions of the court, without justifiable excuse [citing cases]. But that prerogative falls short of unreasonable and arbitrary action which will result in injustice. Whether there is such justifiable excuse is to be determined by considering more factors than merely the length of time since the suit was filed. Some consideration should be given to the conduct of both parties, and to the opportunity each has had to move the case forward and what they have done about it [citing cases]; and also what difficulty or prejudice may have been caused to the other side; and most important, whether injustice may result from the dismissal.

It is indeed commendable to handle cases with dispatch and to move calendars with expedition in order to keep them up to date. But it is even more important to keep in mind that the very reason for the existence of courts is to afford disputants an opportunity to be heard and to do justice between them . . . (Emphasis added)

Westinghouse, supra at 878-9.

Justice Wilkins applied the same guidelines in Polk v. Ivers, 561 P.2d 1075 (Utah, 1977) and reversed the decision of the district court dismissing the plaintiffs' action with prejudice.

Finally, the Court in Utah Oil Company v. Harris, 565 P.2d 1135 (Utah, 1977) listed numerically the guidelines previously advanced by the Court as:

1. The conduct of both parties.
2. The opportunity each has had to move the case forward.
3. What each of the parties has done to move the case forward.
4. What difficulty or prejudice may have been caused to the other side.
5. And, most important, whether injustice may result from the dismissal.

Utah Oil Company v. Davis, supra, at 1137. The court in Utah Oil Company, Supra, stated explicitly that "where all of the litigants had power to obtain relief and failed to do so, it is error to dismiss with prejudice." Utah Oil Co. v. Harris, supra at 1137.

Although it could conceivably be argued that a trial court, because of statutory usurpation, does not retain any discretion to modify the two or three year limitation period which is outlined in U.C.A 73-3-15 (1955), the trial court

has never been stripped of its power to dismiss an action without prejudice by either the legislature or the court.

The only case discussing the statute was Dansie v. Lambert, 542 P.2d 742 (Utah 1975), the issue was not raised by the parties nor discussed by the majority opinion. The only mention was by Justice Ellett in a concurring opinion in which he stated that he would "concur but would add that in his opinion the Court could have dismissed without prejudice." Dansie, supra at 744. There can be no inference from that statement by Justice Ellett that the majority held that all cases dismissed under U.C.A. 73-3-15 (1955) must be dismissed with prejudice. The logical inference from that statement, since that issue was not before the Court, is simply that Justice Ellett added that statement as dictum to serve as a guide for future determinations.

Certainly, in the absence of clear legislative intent, the Court should not require a mandatory dismissal with prejudice in situations which would not require a dismissal under Rule 41 U.R.C.P. A simple illustration might be helpful. Under Rule 41(b) U.R.C.P., a party moving for dismissal must show both inordinate delay and the other factors outlined in the Westinghouse, supra, before the action would be dismissed, and even then, the determination of whether it is to be with or without prejudice is discretionary with the judge. Under U.C.A 73-3-15, a party moving for dismissal need only show a failure to bring the action



to final judgment in two years and is not required to show any of the factors outlined in Westinghouse, supra. To hold that the cases falling into the latter group must, as a matter of course, be dismissed with prejudice without giving the trial court the opportunity to examine the cause of the delay, the complexity of the case, the amount of harm caused by the delay and the opportunity of both parties to advance the case, would be the height of injustice, especially when a statutory mandate to that effect is totally lacking. A fortiori, in matters of this type, involving public rights, where both sides have equal ability to advance the case, it is totally unfair to punish one side.

The facts of this case show that the state engineer took in excess of five years, from February 14, 1968, (the date Change Application No. a-5433 was filed), until September 9, 1974, to notice the application, hold the appropriate hearings and then issue a Memorandum Decision. (R. 237-246). The extended amount of time taken by the state engineer certainly authenticates the plaintiffs' claim relating to the complexity of the case as it existed before the state engineer.

The evidential intricacy inherent in the issues of the case was compounded further by the events occurring after the filing of the complaint on October 4, 1974. Despite the fact that the state engineer promptly answered the complaint on October 24, 1974 (R. 222-228), and despite the fact that



the case had been set for a pre-trial conference to be held on January 3, 1975 (R. 207), the Motions to Intervene made by twelve new parties (R. 147-149, 209-212), seriously impeded the tempo of the entire proceeding and complicated the burden the plaintiff had to bear.

The appellants' contention in this regard is simply that the trial court erroneously interpreted the statute (U.C.A. 73-3-15) as mandating a dismissal with prejudice, and therefore, did not consider or evaluate any of the factors outlined in Westinghouse, supra. Although the appellants concede that the reversal of a dismissal with prejudice normally requires the court to find an abuse of discretion by the lower court, the appellants contend that when the district court has refused to use its discretion, the court need only find that the district court erroneously failed to employ its discretion in the matter.

Finally, Utah Code Annotated 73-3-3 (1959) states in part that:

Any person entitled to the use of water may change the place of diversion or use and may use the water for other purposes than those for which it was originally appropriated, but no such change shall be made if it impairs any vested right without just compensation.

If the Court finds that this case should be dismissed with prejudice, the problem then becomes one of deciding what issues can be raised in the form of res judicata in a subsequent case.

Would a dismissal with prejudice operate as an adjudication

of the issue that the proposed change application interefered with vested rights when the state engineer, in his determination, found to the contrary? If another application was submitted by the appellants changing the point of diversion to an area six inches down the river from the point designated in the application involved in this case, would the present case preclude the approval of such an application? The questions are endless. The fact of the matter is, that this application and the issues involved in the case have not been determined on the merits. In fact, the dismissal of this case with prejudice would contradict most of the findings of the state engineer if it acted as an adjudication of the validity of the change application. The facts are that the state engineer approved the change application and then assigned certain conditions to his approval. The engineer, in effect, found no vested rights that would be damaged under the terms of his approval. Under such circumstances the meaning and effect of a dismissal with prejudice are, to say the least, tenuous.

It would seem that a better interpretation of the statute under such facts would be for a dismissal without prejudice recognizing the problems involved in any other determination. After all, the dismissal with its accompanying loss of time and money is sufficient punishment for a party not complying with the statute.

B. The Trial Court Erred in Dismissing the Plaintiffs' Complaint in its Entirety.

The amended complaint filed by the appellants in this case recited four causes of action. Only the first cause of action was brought pursuant to the provisions of Utah Code Annotated 73-3-14 (1953). The other three causes of action were brought pursuant to Utah Code Annotated 78-33-1 (1953) for declaratory judgment. (R.103-118).

The statute forming the basis of the respondent's motion to dismiss only encompasses those actions brought pursuant to Utah Code Annotated 73-3-14 (1943) to review, by means of a trial de novo, the decision of the state engineer. There is no basis in the statute to justify the imposition of the two and three year limitation on causes of action that are brought pursuant to the Declaratory Judgment Act.

The court therefore erred in dismissing the complaint in its entirety without making a determination on the factors outlined in Westinghouse, supra.

POINT II

THE COURT ERRED IN DISMISSING THE COMPLAINT PURSUANT TO U.C.A. 73-3-15.

The appellants are aware of Dansie v. Lambert, supra, which characterizes the statute's requirement that any action brought pursuant to U.C.A. 73-3-14 which is not brought to final judgment in two years be dismissed as a mandatory requirement. It is the appellants' contention

that a statute delineating a time period in which a party must prosecute a case is very different from a typical statute of limitations. Under the latter, a plaintiff can commence his action without being hindered by any adversary party and therefore most statutes of limitations have been interpreted as being reasonable. But under the former type of statute the adversary parties are totally free to prolong the litigation, in effect, depriving the plaintiffs of their cause of action.

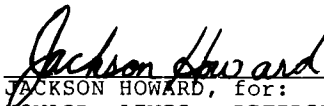
It is only logical that the complexity of a case coupled with the actions of the adverse parties could easily carry a case over the two year limitation. To hold that an equity court has no ability to modify the limitations period under those circumstances would impose an unreasonable restraint on a plaintiff who attempts to pursue his equitable remedy.

### CONCLUSION

Appellants' contention is based on the assumption that the court misinterpreted the statute (U.C.A. 73-3-15) and then erroneously dismissed the appellants case without considering and evaluating the guidelines previously announced by the Court. The court also erroneously dismissed all of the appellants' complaint which is tantamount to an enlargement of the scope of U.C.A. 73-3-15. Finally, this case presents the question of whether a court retains the equitable power to modify the limitations statute when the

facts so warrant. It is the appellants position that justice and equity require the retention of such a power by the court.

Respectfully submitted this 28<sup>th</sup> day of August, 1978.

  
JACKSON HOWARD, for:  
HOWARD, LEWIS & PETERSEN  
Attorneys for Plaintiffs-  
Appellants  
120 East 300 North  
Provo, Utah 84601

CERTIFICATE OF MAILING

I hereby certify that on the 28<sup>th</sup> day of August, 1978,  
I mailed two (2) copies of the foregoing Brief of Plaintiffs-  
Appellants to:

Dallin W. Jensen  
Assistant Attorney General  
442 State Capitol Building  
Salt Lake City, Utah 84114  
Attorney for Defendant  
State Engineer

Ronald L. Rencher  
U.S. Attorney  
200 U.S. Post Office and Courthouse Bldg.  
350 South Main Street  
Salt Lake City, Utah  
Attorney for Defendant  
United States

M. Dayle Jeffs  
90 North 100 East  
Provo, Utah 84601  
Attorney for Individual Intervenors

Edward W. Clyde  
351 South State Street  
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Attorney for Intervenor  
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Conservancy District

Ray L. Montgomery  
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Attorney for Intervenor  
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