

2001

Green River Canal Company v. Lee Thayne : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GREEN RIVER CANAL COMPANY,
Plaintiff/Appellee,

vs.

LEE THAYNE,

Defendant/Appellant.

)
)
) Case No. 20010357-SC
) District Court No. 950706174
) Priority #15
)

) APPELLANTS SECOND
) BRIEF
)
)
)
)
)

On Appeal from the Seventh Judicial District Court, County of Emery,
Hon. Bryce K. Bryner presiding.

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STATEMENT OF FACTS

(a) Thayn's response to GRCC's statement of facts.

1. GRCC states in ¶ 4 “the heavily sediment laden water from the Green River moves slowly through the system and sediment settles out onto the bottom of the canal, citing (R. 1902 V. 8, p.37). However, this reference was to the raceway, not GRCC's canal. The cited testimony refers to sluice gates which are in the raceway - NOT GRCC's canal. GRCC further states the canal must be kept full to “provide water at the top of the canal's banks where many of the shareholders inlets are located”, citing R. 1902, V.1, pp. 148-149. This factual citation is incorrect.¹
2. ¶8 of GRCC's statement of facts does not appear in this record and is false. Suffice it to say, Thayn has no “sluicing right” contained in his 35 cfs consumptive right, as there is no outlet from his “42 foot canal” except upon his own property for irrigation purposes.² Thayn does possess a 600 cfs year round non-consumptive right for pumping and power generation purposes.
3. In response to GRCC's statement of fact No. 12, ¶6 of the 1952 agreement did not

¹Obviously, like every other canal company, one puts in “checks” or “dams” to raise the level of the ditch for irrigation purposes to the particular shareholder. Otherwise the head loss of 31 some users would deplete all users ability to irrigate. Jack Erwin testified that GRCC used to maintain checks in their canal. (R. 1902, V. 6, p. 78).

²In reality, as counsel for GRCC knows, GRCC's water right has both a maximum flow restriction (cfs) and a total acre foot limitation. Once a party has consumed his total acre foot limit for the year, he has no additional flow. GRCC has a total irrigated acreage of 1443 (R. 1369) yet has a maximum 60 cfs right, inclusive of 20 cfs for stock watering and domestic consumption. GRCC has a total acre foot limitation of 5904 any one season (R. 1369) for all purposes. The ruling of Judge Bryner, however, gives GRCC 80 cfs for the entire season without any acre foot limitation whatsoever before Thayn gets any water. (R. 1670, ¶ 3).

specify any specific quantity of water to GRCC as stated in ¶12 of GRCC's statement of facts. That statement is false. (No citation to the record was made). ¶1 of the 1952 amendment does not purport to say what "GRCC's understanding and practice" was - nor does it in any manner reference how GRCC came up with its claim of 80 cfs. In fact, the record below is devoid of such testimony.³

4. ¶ 13 is denied as written. GRCC has no measuring device to know what their history and practice is.
5. ¶14 of GRCC's brief is not cited to any reference in the record and is denied as computed by GRCC's counsel.⁴ This is a mere attempt to introduce new evidence, untested by cross examination of any witness, into the Supreme Court record, but appearing nowhere in the record below. GRCC seems to be saying it needs 66.02 cfs "sluicing" for a consumptive right of merely 13.98 cfs actual water right.⁵
6. In response to ¶16 of GRCC's statement of facts, it is true Thayn examined the 1952 agreement at or near the time he purchased the property and water right from Wilson.

³GRCC has never even applied for a non-consumptive sluicing right of any type or nature. (See, R. 294-297; R. 1369). This "sluicing" right is a creature of this lawsuit, invented to attempt to justify claiming water over and above its state approved rights. Ironically, GRCC irrigates 1443.5 acres, with a per annum duty of 5774 acre foot limit on the irrigation. (R. 1369). What is really being sought by GRCC under the guise of "Sluicing" is water stealing, an unlimited right of GRCC's large shareholders to take all they desire to the detriment of junior water rights.

⁴U. R. A. P. Rule 24(7) requires all statements of fact to be supported by citations to the record below.

⁵Applying this ratio, every water right holder should be entitled to increase his claim by 472% for "sluicing".

Thayn had no notice of the 1952 amendment until after the renovation of the pump house and building of the power plant in August of 1992. (R. 1659, Par. 15).

7. In response to GRCC's ¶17, GRCC cites R. 1902 V.4, pp. 7-12 for the proposition that "at the time of the change application (for 600 cfs) no measurement of the water being diverted had ever been made nor would they be made for more than a decade". (Applee's brief, p. 7). However, the actual testimony of Lee Thayn, upon question by Mr. Smith was to whether the first measurement of Thayn's water use was in 1997, was answered "I don't know that". (R. V. 4, p. 90, ¶¶10-12).⁶
8. In response to GRCC's assertion in fact no. 18 that Thayn was receiving 753 and 463 cfs on the dates in question, the record cited to does not support GRCC's conclusion. Mike Millard took 3 measurements, which showed the raceway to have 797 cfs on May 5 and 826 on May 6 at about noon. Nowhere does Millard conclude from those measurements, nor could one, exactly what Thayn receives.⁷ Rather, what these

⁶GRCC misconstrues the application process. Initially, an application to appropriate water is filed. "The State Engineers Office checks it for accuracy and completeness" and then advertises the application in a paper. (Jack Barnett, R. 1902, V. 7, p. 9). U.C.A. 73-3-16(8) allows each applicant "to file a *verified* statement to the effect that the applicant had completed the appropriation" and elects to file a statement of water users claim "in lieu of proof of appropriation." U.C.A. 73-3-16. Wilson filed an election in order to "allow the state to determine what his use has been." (R. 1902 V. 7, p. 14, 10-16). There is no statute requiring the State Engineer to file written evidence of the examination made by his office. Mark Page, regional engineer for the Price, Utah division of water rights testified that the Thayns "water rights are in order and they are recognized by the state." (R. 1902, V. 9, p. 246). Page further testified that he was aware on the very day the 1981 change application was filed that Thayns intended to generate commercial hydro electric power (*Id.* at 242).

⁷Millard did not measure what water loss occurs at the radial sluice gates. Without that measurement, no one can mathematically determine what Thayn gets.

measurements do show is the raceway has more than adequate capacity to satisfy both parties needs, if properly maintained.

9. In response to ¶19, GRCC chose not to protest Wilson's application because he was a "good ole boy". (R. 1902, V. 1, p. 47).
10. In response to ¶21 of GRCC's facts, Thayn responds that the National Hydro agreement did not fix the existing total capacity of the raceway, only an estimate of "about 600 cfs"). Moreover, what the measurements of GRCC's own expert show is there is more than a 600 cfs capacity in the raceway. GRCC also asserts that it was to receive a royalty solely for the use of the facilities. (Appelle's brief, p. 9). This is another falsehood. Under the National Hydro contract, GRCC was to provide the land for construction of a power plant south of Thayn's existing pump house, (Ex. 46, ¶A), was to use its efforts to obtain easements for widening of the raceway (Ex. 46, ¶2) and withdraw their protest to the Thayn water right application for 1400 cfs non-consumptive use. (Ex. 46, ¶1). No royalty was proposed merely for the use of the existing facilities; rather, the royalty payment to GRCC was only upon the power supply over and above Thayn's existing 600 cfs use. (See Ex. 46, ¶12). Thayns were not contributing a royalty on the 600 cfs right they already had, because both Thayn and GRCC then understood that was Thayn's existing water right.⁸
11. ¶ 30 of GRCC's statement is misleading. Leon Thayn did say they were going to

⁸All parties understood Thayn's 600 power right was to be excluded in the compensation to GRCC. (R. 1902, V. 1, pp. 91-92 [Dean King]; V. 4, pp. 76, 102 [Lee Thayn]; V. 2, p. 58 [Leon Thayn]).

generate power for their own use, nothing about pumping water (R. 1902, V. 3, pp. 176-191), meaning in essence, they would only be using their existing 600 cfs water right, not paying a royalty.

12. In ¶32 of GRCC's statement of facts, GRCC states Thayn had completed various facilities prior to the time the decision was made in the spring of 1990 to go ahead with a hydro electric plant, citing (R. 1902, V. 4, pp. 7-8). In fact, Thayn testified exactly the opposite, that they had started working on those various portions of the renovation "primarily just for the pumping system" although some parts thereof could serve a dual purpose. GRCC's statement of the facts is erroneous.⁹ The record citations in ¶32 do not uphold the statements made by GRCC.
13. ¶33 of GRCC's statement of facts is denied as written. A review of the citations shows GRCC's witnesses varied in time as to when that conversation took place from the fall of 1991 (R. 1902, V.5, 142:1-143.7) to sometime in 1990 (R. 1902, V. 1, 221, 25). Moreover, as cited in Thayn's original brief, numerous board members, shareholder and agents of GRCC knew the hydroelectric facilities were being built.¹⁰ (Thayn's brief, pp. 53-55). Leon denied ever telling either Vetere such a statement.

⁹GRCC cites (R. 1902, V. 3, p. 143, L. 4-6) as proof Thayn had "decided to purchase a second turbine generator" prior to June 1990. (GRCC brief, p. 12). That testimony reads: "Q: When did you locate equipment that was needed for this project? A: As I recall, about the middle part of 1990".

¹⁰Tim Vetere was not a GRCC board member until 1991, at which time he searched and found GRCC knew something was going to happen at the power plant. (R. 1902, V. 6, p. 102). Blaine Silliman, board member of GRCC from 1989-1991, and president from 1991-1993 knew of the power plant construction and actually helped build it. (R. 1902, V. 1, pp. 126-132).

(R. 1902, V. 3, pp. 4-5).

14. In response to GRCC's ¶34, Thayn denies the statement that Thayn's use of the pump house caused severe water fluctuations. The citations to the record, in fact, establish that the fluctuations were due to "the low period", i.e. July and August. (R. 1902, V. 1, p. 91, 3-6). Further, that after a meeting with Thayns, the problem was "worked out". (R. 1902, V. 1, p. 217, 19-20; p. 89, 25-90:12). GRCC then cites exhibit 40, and R. V 1, p. 60:11-61:8 for the proposition that "Thayn refused to negotiate a new agreement or to cease diversions in violation of the 1952 agreements". In fact, what those references disclose is "We had many meetings. The problem wasn't completely ironed out. We worked at it. Some generators were shut off and we got a band-aid..." (R. V. 1, p. 60:24-61). That witness then acknowledged it was "OK". (*Id.* at 61:5). Exhibit 40, GRCC's own minutes show: "Thayns will shut 1 turbine down on 6/25/92 @ 1:00. Will measure ditch before and after to see what difference it makes. In the mean time, will resolve who owns raceway and dam. Will also look at maintenance on dam." (Ex. 40, minutes of June 24, 1992).¹¹ In other words, even as late as June of 1992, GRCC had still not disclosed the 1952 amendment, nor were its own members aware of it! If the 1952 amendment were such critical rights, why was that

¹¹Of course, in direct contravention to U. C. A. § 73-5-4 which mandates every user to have measuring devices, GRCC has not, even to this day, complied. It had no idea whether it got its flow or not. When GRCC did have measurement taken, those measurements showed a flow far in excess of its state allotted maximum water flow. (R. 1901, p. 21: 14-25; p. 73, 4-5; 138, 5-17). (Depending on witness measurements were 69.2 cfs, or 78.4 -82.7 cfs; state allowed maximum cfs for GRCC is 60 cfs). All of the actual measurements done show GRCC to be exceeding its water rights.

not then being pointed out to Thayns?

To resolve any problems, Thayn offered to clean the raceway, even at his own expense. (R. 256-259). The raceway needed cleaning well prior to Thayn's building of the power facilities, as it had last been cleaned in the 1970's. (R. 1903, p. 28-29). Evidence at trial was that GRCC has additional problems in its own gravity canal causing loss of head pressure. The "inverted siphon" is backing flow up the canal reducing the flow through the canal. (R. 1902, V. 9, p. 75:14-19)¹² and that GRCC's gravity canal needs vegetation removed. (R. 1902, V.9, p. 71-73). On March 14, 1989, Thayns offered to pay GRCC "as previously agreed" (under the National Hydro agreement). GRCC minutes show that three year later they had not even bothered to review the agreement.¹³

15. In ¶35 of its statement of facts, GRCC asserts "Thayn has realized economic gain from the commercial sale of electrical power.... but refused to compensate GRCC for the additional and unauthorized use of GRCC's diversion works...", citing to an affidavit submitted in opposition to summary judgment.¹⁴ That affidavit does not establish any gain to Thayn, it merely establishes he was selling electricity. Whether at a loss or a profit was never elucidated at trial. Moreover, that affidavit refers to an

¹²Measurements on April 21, 1999 showed over 100 cfs in GRCC's gravity canal (R. 1902, V.9, p. 74).

¹³See GRCC ,minutes, excerpts attached as addendum 11.

¹⁴This affidavit was not offered into evidence at trial on the trespass and lost profits issues.

absence of any billing by GRCC for maintenance work on the facilities. It does not support the proposition that Thayn refused to compensate GRCC for the use of their facilities, but that GRCC had never billed for maintenance, likely because none had been done.

16. While GRCC has stated it protested “applications”, in fact GRCC protested only the National Hydro application for 1400 cfs. – one, not plural, application.

(b) Additional facts in response to GRCC’s cross appeal.

17. In N. 21 on page 26 of its brief, GRCC alleges the public policy issue cited by Thayn was never raised below. This is error. For example, Thayn’s counsel argued that to the court even as late as trial. (R. 1902, V. 5, p. 80).
18. GRCC states on page 38, N. 37 of its brief that Thayn denied building a commercial power plant. No citation to the record is made. As noted herein, GRCC and the community at large were aware of the project. In fact, tours were being done throughout the plant. (R. 1901, V. 3, pp. 7-9). Moreover, an environmental impact statement was done as a part of the FERC exemption permit. Therein, Ron Hagen, employee of Soil Conservation Service and shareholder in GRCC stated in his report of October, 1990 “The Green River Canal Company and local farmers and area residents are in favor of the project. Not aware of anyone opposed to this project”. (Ex. 49, p. 3).
19. In addition to the facts cited by GRCC regarding the radial sluice gates, the court did an on site visit. Pictures of what could be seen were also admitted into evidence.

Exhibit 42, pp. 1, 2, 4, & 7 also show that the radial sluice gates are a continuous part of the pump house structure. (Addm. 3). Exhibit 102 shows that the north wing wall of the radial gate structure and the new concrete walkway. (Addm. 5). Exhibit 5 shows the work in progress in renovating that building. (Addm. 7). Exhibit 77 showed the work involved in renovating the used turbines and generators for installation into the facility. (Addm. 9).

20. Exhibits 32 and 33 show the overgrown vegetation and condition of the raceway throughout this litigation. (Addm. 8).

ARGUMENT - REPLY

POINT 1. (a) Thayn did not admit GRCC's "right" to 80 cfs and reserved his right to appeal.

GRCC cites two grounds for its allegation that Thayn admitted a prior water right of 80 cfs. First, GRCC argues here, as it did below, that ¶12 of the Answer to GRCC's Second Supplemental Complaint is somehow a conclusive admission. A history of the pleading is apropos. GRCC's original complaint sets forth verbatim the language in ¶6 of the 1952 agreement and the language of ¶1 of the 1952 amendment. (R. 3 ¶10). Thayn's answer admits the wording of the two agreements, but specifically states:

Thayn specifically denies the allegation that those provisions "limit the use that Thayn may make of the water diversion structure and water diversion facilities". The provisions at issue do nothing more than establish priority in which Green River and Thayn's predecessor could use the facilities to transport their existing water rights. The provisions do not purport to allocate all of the capacity of the facilities, nor do the provisions address the question of how the facilities could be used to transport after acquired water rights. Nothing in the agreement or amendment limits Thayn's right to

transport additional water, so long as Green River's priority right to satisfy the needs of its shareholders is not impaired. (R. 24-25, ¶ 10). [emphasis added]

Thayn, in essence, admitted GRCC's water right had priority over Thayn, but denied such language in the agreements limited Thayn's after acquired rights and further that GRCC's prior right was limited to GRCC's shareholder's "needs". This is the exact same argument made at the Summary Judgment hearing, (R. 1905, pp.9-16). This same argument was made on appeal in Thayn's brief, (Applt.'s Brief, pp. 21-38)¹⁵. The court below denied Thayn's Motion for Summary Judgment, but granted partial summary judgment to GRCC on the contract interpretation issues.

Thereafter, in June 1997, GRCC filed its second supplemental complaint. (R. 263-312). ¶41 of the second supplemental complaint alleges GRCC's right (to 80 cfs) is prior in time and right to Thayn's junior rights. (R. 271). That was admitted. However, ¶48 of GRCC's second complaint alleges that GRCC is entitled to declaratory judgment that Green River is entitled to 80 cfs of water and that Thayn's water rights are junior to GRCCs (R. 272). That paragraph was specifically denied. (R.258). Moreover, GRCC plead exactly the same provisions it had in its original complaint, ¶¶1-20, to which Thayn incorporated its original answers thereto. (R. 256).¹⁶ What Thayn was admitting

¹⁵ GRCC's allegation that Thayn is raising new issues on appeal in this regard is false.

¹⁶ Attached to the second supplemental complaint was a copy of GRCC's statement of water users claim as Exhibit H. (R. 293-298); that copy, however, does not have the notation on it that GRCC's 60 cfs irrigation right is inclusive of its 20 cfs water right. However, in opposition to the Motion for Partial Summary Judgment, Thayn's counsel noted the confusion of whether GRCC's right was 60 or 80 cfs. (R. 457). Thereafter, Thayn's counsel apparently received the correct copy of GRCC's proposed determination which noted the water right was 60 cfs inclusive of the 20 stock watering and domestic right, and filed a Motion for Reconsideration of the Partial Summary Judgment (R. 571-593). This was denied by the trial court stating the motion had no new material facts or legal theories not considered by the court. (R. 873-874). Even though GRCC claims, on page 20 of their brief, that its water rights are unadjudicated and non-binding, such is not the law, U.C.A. § 73-4-11, and the state has denied any attempt to change their right (Addm 10).

was again the priority, not the quantity.

Second, GRCC cites to Mr. Martineau's statement in open court as an admission. The trial court had twice ruled on summary judgment motions that GRCC had an 80 cfs prior water right, (R. 314-318; 497-498) and denied Thayn's motion for reconsideration. (R. 873-874). At trial, Thayn attempted to elucidate evidence of GRCC's failure to maintain the raceway, the diversion dam and their own ditch as a part of their affirmative defenses raised in the pleadings. Mr. Martineau did refer to the 80 cfs as being "stipulated to", but a fair reading of the whole exchange between the court and counsel, (R. 78-83) reveals what Mr. Martineau meant was "ruled upon". Even Mr. Smith understood this at the time. His response argument to the Court was "Thayn's claiming we don't have a right to 80 cfs". (R. 1902, VI. pp. 81-82). The court held it was "ruled upon" not stipulated to. (R. 1902, V. 1, p. 86). As was stated by Thayn's counsel, "We recognize, your Honor, that 80 cfs is the amount specified in the order. We'll stipulate to that." (R.1901, p. 74).

In any event, this appeal *inter alia*, is upon the issue of the court's ruling on summary judgment, and the propriety of entering that summary judgment order. Martineau's statement some three years after those rulings bears no effect and can hardly be considered an abandonment of Thayn's appeal rights. This is especially true, where Defendant had repeatedly opposed entry of partial summary judgment in the first place and moved for reconsideration of the trial court's ruling on the very issue of the 60 versus 80 cfs water right claimed by GRCC.

Even if the court were to construe the foregoing statements as a conclusive admission, this would allow parties to a lawsuit to obviate the water right limitations statutes by means of collusive suits over individual contract issues. It is anticipated that GRCC may respond, that this action is certainly not collusive and Judge Bryner's ruling would not be binding on the state engineer. If so, then the ruling of the trial court limits Thayn to 435 cfs for no reason whatsoever. No useful

purpose is served either party by the limitation imposed. Thayn can't generate hydro power; GRCC is still limited to 60 cfs. Was that the parties original intent?

The trial court, rather than looking at course of dealing, custom and even the interpretation the parties themselves placed upon the 1952 amendment by their conduct,¹⁷ applied a "four corners" test and, Thayn believes, ignored the heart and principle of the contract. The true test of the contract was need, not want, desire or reckless disregard for waste, but need. Need, Thayn believes, is defined by the state approved rights, subject to limitation as to both acre feet and duty, preserving for the benefit of the citizens of this state all water not lawfully appropriated through the water law statutory process.

(b) (1) In court admissions cannot affect water rights not approved by the engineer's office or obtained in the general adjudication.

Even if Thayn's counsel's slip of the tongue were construed as an admission, nevertheless the trial court could not bestow upon GRCC a water right greater than that approved by the state engineer's office or approved in the general adjudication without joining the state engineer. U.C. A. § 73-3-14(a). GRCC now seems to be arguing that its right to 80 cfs arises not by following the water law statutes, or by participation in the general Green River adjudication, but under the 1952 amendment. If this is so, why did GRCC not appeal the determination of the state engineer's office that the 20 cfs stock watering and domestic rights are included in its 60 cfs irrigation right?

¹⁷ GRCC states that the state engineer unilaterally added the footnote making the 20 cfs stock watering and domestic part of the 60 cfs general irrigation right of GRCC. That conclusion is a mere assertion without factual basis in the record. It is the state engineer's duty to review and make beneficial use determinations. U.C.A. §73-4-11. GRCC did not protest the engineer's determination as provided for in U.C.A. §73-4-11. Ironically, GRCC then states only courts may adjudicate water rights, citing *In re General Determination, Murdock v Springville Municipal Court*, 982 P.2d 65 (Utah 1999). However, those are proceedings to which the state engineer is a party, not ones, as the present case where the state engineer's voice is left out.

(R. 1369). The answer is GRCC knows that use, need and necessity govern the allocation of scarce public resources.

GRCC knows one cannot obtain by private contract any right greater than that to which it is entitled by state water law. GRCC cites *S & G, Inc. v Morgan*, 797 P.2d 1085 (Utah 1990) for the proposition that a breach of contract issue is not within the purview of the state engineers office. This is true. But at the time GRCC was filing its statement of water user's intent, there was no issue of breach. If GRCC felt it had need for more than 60 cfs, it has had well over 20 years to raise that issue.¹⁸

Rather, GRCC placed upon the 1952 amendment the exact same interpretation that Thayn has argued in this appeal and as argued before. GRCC did not, at the time of its water filings, believe the 1952 amendment elevated it to a higher water right. It understood the language used therein was merely descriptive of the rights the parties believed they had, at the time, and such language was not used by way of permanent limitation.

(b) (2) "Duty" and "Need"

GRCC passes over, for the most part, the issue of duty and need. GRCC acknowledges in its brief that all water rights are subject to duty limitations. The duty limitations, of which the trial court declined to hear evidence inasmuch as it said it was only ruling on contract issues, is the essential argument as to the "need" required by the 1952 amendment. Neither party under the 1952 amendment can need any more water than that to which they are lawfully entitled to use under their water right as allowed by Utah water law. The contract cannot bestow a greater water right than that

¹⁸Footnote 26 of GRCC's brief asserts "unprecedented water shortages" alleging it was due to Thayn's plant. Ted Ekker, board member prior to 1992 and president in 1992 stated they had water shortages in the 1950's and described Thayn's use as a "bump". (R. 1895, pp. 175-176).

to which the State of Utah has allocated a party. If it could, the prohibitions of U. C. A. § 73-3-1¹⁹ would be meaningless. Accordingly, the parties existing water rights are the absolute definition of need under the contract. GRCC was unable to face this issue directly in its responsive brief, and, accordingly, elected to slight over it. However, the trial court's refusal to consider the parties existing water rights as the definition of need renders that word meaningless in the 1952 amendment. Accordingly, as a matter of law the trial court misconstrued the contract and reversal of the summary judgment ruling is mandated.

Moreover, GRCC has no basis for claiming a need for 80 cfs until it has an approved water right for 80 cfs, which it has never obtained or even applied for. On the other hand, an approved water right to Thayn for 600 cfs year round demonstrates Thayn's "need" under the contract because it has both an approved water right for such quantity of use and the facility built by which to use it. The trial court simply ignored the "need" language of the contract in direct opposition to the principle elucidated in *Dixon v Pro Image, Inc.*, 987 P.2d 48 (Utah 1999) (Court must construe a contract so as to harmonize and give effect to all of its provisions). Under the construction of the

¹⁹ U. C. A. § 73-3-1 provides:

Rights to the use of the unappropriated public water in this state may be acquired only as provided in this title. No appropriation of water may be made and no rights to the use thereof initiated and no notice of intent to appropriate shall be recognized except application for such appropriation first be made the state engineer in the manner hereinafter provided, and not otherwise. The appropriation must be for some useful and beneficial purpose, and, as between appropriators, the one first in time shall be first in rights; provided, that when a use designated by an application to appropriate any of the unappropriated water of the state would materially interfere with a more beneficial use of such water, the application shall be dealt with as provided in Section 73-38. No right to the use of water either appropriated or unappropriated can be acquired by adverse use or adverse possession. [emphasis added]

contract as elucidated by Judge Bryner, what role does “need” play?

(c) The trial court failed to look at the parties course of conduct in construing the agreements.

Appellee, GRCC, asserts that Thayn was arguing in its original brief that the court should look to “other agreements” after the 1952 agreement and that such issue was not raised below. Thayn did not argue in his original brief there were other agreements (beyond the National Hydro contract). Rather, Thayn argued at the original summary judgment hearing on October 15, 1996:

In our view, your honor, there is simply no basis for seeking, at this point, to challenge a situation that has persisted, in fact, for 40 some odd years. In our view the contract does not address the issue of who gets the capacity of these facilities over and above the 515 cfs. (R. 1905 p.13).

Thayn’s counsel went on to state:

A second and related point is that in our view the parties have simply construed the contract one way for 40 some odd years and under the rule of practical construction the interpretation the parties have given a contract over a long period of time is viewed as the best evidence of what the parties mean. (R. 1905, p.15).

That, is a course of dealing argument made by Thayn’s counsel at the very inception of this case.

GRCC has created nothing more than a red herring, misconstruing Thayn’s argument to this Court and then outrageously arguing the issue was not raised below.²⁰ As argued in his prior brief, Thayn maintains that the trial court failed to do the proper contract interpretation analysis in trying to ascertain the parties intent. It is wholly illogical that Wilson was intending by the 1952

²⁰ GRCC argues it should be awarded attorney fees under U. R. A. P. Rule 33. In view of the number of red herrings made by GRCC, the pot is indeed calling the kettle black, and it is Thayn who should be awarded his fees for having to respond to “non-issues” created in the mind of GRCC’s counsel only.

amendment to preclude himself or his successors from hydroelectric power.²¹ Wilson was utilizing water turbines for mechanical based water pumping. (Ex. 54, Ex. 25-26). It is equally as illogical that GRCC was intending to violate the law and derive by contract a water right greater than its shareholders could legally use. Yet, the trial courts interpretation necessitates both of the foregoing axioms were within the parties intent at the time of contracting in 1952, if we accept the summary judgment rulings as valid. In *Hodges Irr. Co. v. Swan Creels Canal Co.*, 111 Utah 405 (1947) this Court held that a practical construction of the terms of the contract as applied by the parties thereto was appropriate and entitled to greater weight.

POINT 2. (a) GRCC was under a duty to record the 1952 amendment.

GRCC argues that it can bind subsequent purchasers, such as Thayn, to the 1952 amendment despite their failure to record. The 1952 agreement was recorded, so the issue as to that in irrelevant. In fact, therein lies the rub. Because the 1952 agreement was recorded, and because Thayn had notice of the 1952 agreement, he believed he had an operable contract in place which contained the following language:

It is understood and agreed that before the party of the second part can or may use any water from said dam, diverting works or space way that the first party shall have enough and sufficient water to supply its stockholders. The quantity of water to supply the stockholders of the first party is to be exclusively determined by the first party.

Thus, Thayn was under no notice that the GRCC party was claiming an 80 cfs priority. The language, “exclusively determined by the first party”, would, of necessity, be reasonably determined. The first party could not claim 10,000 cfs and deprive the second party of all water

²¹ In note 27 GRCC cites alleged facts appearing nowhere in the record. Apparently, GRCC feels it is appropriate to just make them up as it goes along.

without any basis in law or fact to utilize same. The same is true for claiming 80 cfs, when GRCC's state right is 60 cfs, inclusive of its 20 cfs stock watering. This Court has long held that parties to a contract owe duties of good faith and the construction of one-sided language has always been so construed. *Brown v Moore*, 973 P.2d 950 (Utah 1998) (The Supreme Court is not limited to the express contractual provisions in determining whether a party has breached the covenant of good faith and fair dealing; Court will also consider the course of dealing).

If Thayn had no contract of record between GRCC and Wilson, perhaps the lower court's ruling that the duty was on Thayn to further investigate would be appropriate. But where a contract is presented, how, if not recorded, would one ever know there was an amendment thereto? U. C. A. § 73-1-10 specifically states that water rights are to be transferred by deed in the same manner as real estate and shall be recorded in the county office. Such filing at the county level is notice to all. Filing with the state engineer's office serves as notice to the world likewise. (See, U.C.A. § 73-3-18). But it is not just a failure to record of which Thayn complains. Even as late as the negotiation of the National Hydro agreement, the county records showed nothing more than the 1952 agreement without the 1952 amendment. In other words, what is recorded in the county records is a half truth. This 1952 agreement was set forth in an attachment to the Federal Energy Regulatory Commission (FERC) application. (Ex. 54). GRCC was party to that contract negotiated with National Hydro and Thayns and still, as of 1983, had not revealed the secretly held 1952 amendment of which GRCC had full knowledge.

As a matter of policy, this Court must ask itself how to prevent similar suits in the future. Shifting the burden to purchasers to somehow discover secret, unrecorded, and undisclosed contractual agreements (or amendments thereto) will undoubtedly lead to a plethora of future litigations. On the other hand, imposing the burden upon the contract holder to record, disclose, or

otherwise protest when adverse water rights are filed by a party, will minimize future litigation. This is the rationale of the statutes already passed by Utah's legislature. This should be the rationale of this Court. The conclusion of law made by the trial court that the burden was upon Thayn to discover, instead of that the burden was upon GRCC to record and disclose, was error as a matter of law and is bad policy for the State of Utah and should be reversed.

Finally, on this point, GRCC argues that the 1952 amendment is not extrinsic evidence. If it was not utilized by the trial court to interpret the original 1952 agreement, but, as GRCC asserts, is a part and parcel of the original agreement, what has been recorded in the county records by recording of the 1952 agreement is a falsity. It is a false and misleading notice. It doesn't contain all the material terms. It does not put subsequent purchasers on notice of the true state of affairs. This would be tantamount to allowing someone to record half a contract or "a notice of contract" but never recording the actual contract. Imagine if you will, because of the length, a prospective purchaser ran across a notice of contract in the county records. Upon inquiry to the canal company, an obsolete copy of the contract was sent (even in innocent error) to the purchaser. In reliance thereon the purchaser procures the property, only to have the updated version of the contract later asserted against him to his prejudice. Here, the situation is actually worse, because what purports to be the complete contract is recorded. In fact, it is not the complete contract, as so any purchaser would not have notice whatsoever of a duty of further inquiry. As a matter of good court policy, for the reduction of future problems and for the elimination of these kinds of errors, this Court should hold that the duty is upon the canal company to record all of its agreements, and not merely "half truths".

POINT 3. (A) The trial court erred in not granting Thayn leave to amend his counterclaim and assert eminent domain.

GRCC argued vehemently below, but apparently abandons that claim on appeal, that what was at issue was private property rights. (R. 1905, pp. 19-20).²²

Unable to cite even a scintilla of evidence for their proposition, other than a jury instruction having nothing to do with water rights, (GRCC's brief, p. 27, ¶24), GRCC now reiterates nothing more than the same old cases dealing with the division of maintenance responsibilities where parties had contracted a formula for assessment thereof.²³ As noted in the original brief of Thayn, those cases are not precedent as to new or expanded uses not in existence at the time of the contract.

Appellant stands on the reasoning cited in his opening brief.

POINT 4. GRCC was not properly awarded attorney's fees where the conduct sought to be enjoined of was illegal.

During the course of the litigation GRCC built a 40 foot wall in the raceway to impede water to Thayn's pump house under the guise of increasing water to GRCC's ditch.²⁴ (R. 1895, p. 166; Addm. 1 shows location of rebar where wall was built). The trial court ultimately ruled there was

²² GRCC contends in footnote 21 that the public policy issue was not raised below; actually Plaintiff raised and argued that public policy was against the statutory right of eminent domain. (R. 1905, p. 25). Moreover, as noted in Thayn's first brief, the trial court said it was only ruling on the contract, then in the end what the court did was adjudicate water rights. (R. 1646). Thayn also argued public policy at trial. (R. 1902, V. 5, p. 80).

²³ Ironically, GRCC now argues U. C. A. § 73-1-6 was not raised below. (GRCC's brief. 27, N. 23). Thayn's counsel sought leave to file a counterclaim which sought the right to clean and enlarge the raceway. While not citing 73-1-6, this is the clear intent and objective of the counterclaim, which motion was denied by Judge Brynner without explanation as to why that portion of the counterclaim was not applicable. Thus, GRCC contends that Thayn has no rights under the contract and none by statute either.

²⁴ No evidence was ever submitted at trial that the wall had any effect of increasing the water flow in the ditch. With no modifications to the ditch itself there was no evidence that the wall did anything but impede the water flow to Thayn. Moreover, the trial court ultimately found the place where the wall was built was Thayn's property (R. 1705). Accordingly, GRCC was also trespassing at the time.

no underlying cause of action and therefore dissolved the temporary restraining order. (R. 625-626). However, Thayn had previously applied to amend his complaint to raise a counter claim for both maintenance of the raceway issues and for eminent domain under U. C. A. § 73-1-6. (R. 148-150). The trial court ruled that the eminent domain statute did not apply and thereby denied Thayn's right to file the counter claim. No reason was given by the trial court for denial of allowance of the maintenance issues (R. 242-243). The trial court further denied Thayn's attempt to raise the maintenance issues at trial. (R. 1902, V. 1, pp. 82-86). The sole reason Thayn had no underlying cause of action in the pleadings upon which to premise a preliminary injunction, was because Thayn had been precluded from raising maintenance issues of the raceway throughout the litigation. The net effect of Judge Bryner's rulings was to preclude Thayn from himself having any rights under the 1952 agreement (and amendment) while granting all rights asked for by GRCC under the contract.

Moreover, the conduct complained of and sought to be enjoined is strictly illegal under Utah law. U. C. A. § 73-1-15 provides in relevant part:

Whenever any person, partnership, company or corporation has a right-of-way of any established type or title for any canal or water course it shall be unlawful for any person, persons, or governmental agencies to place or maintain in place any obstruction, or change in the water flow by fence or otherwise, along or across in such canal or water course, except as where said water course inflicts damage to private property, without first receiving written permission for the change and providing gates sufficient for the passage of the owner or owners of such canal or water course. That the vested rights in the established canals and water course shall be protected against all encroachments... Any person, partnership, company or corporation violating the provisions of this section is guilty of a misdemeanor and is subject to damages and costs.

Similarly, U. C. A. § 73-1-14 provides:

Interfering with water works or with a portioning official -

penalty and liability

Any person, who in any way unlawfully interferes with, injures, destroys or removes any dam, head gate, weir, casing, valve, cap or other appliance for the diversion, apportionment, measurement or regulation of water, or who interferes with any person authorized to apportion water while in the discharge of his duties, is guilty of a misdemeanor, and is also liable in damages to any person injured by such unlawful act.

In this case, the conduct of GRCC which Thayn sought to be enjoined of is illegal.²⁵ Thayn sought nothing from the trial court but to uphold the law. Instead, GRCC was awarded attorney's fees for its intentional participation in an illegal act.²⁶ GRCC established no damages for the restraint against the 40 foot wall and could not because such was an illegal act. In fact, to this counsel's belief, counseling or assisting your client in committing an illegal act (not challenged as to the constitutionality of the law), is inappropriate and unethical. To award attorney's fees to a party committing an illegal act is to turn the law on its head.

The Rules of Civil Procedure "shall be liberal construed to secure the just, speedy, and inexpensive determination of every action". U. R. C. P. 1(a). In the present action, the Rules of Civil Procedure were strictly construed against Thayn and in favor of GRCC. Virtually every motion filed by GRCC was granted by the trial court, but not so as to Defendant Thayn. While each individual decision may fall within the discretion of the trial court rule, when viewed as a whole, it is hard to comprehend that justice was done here. Form over substance is the hallmark of the trial courts rulings below in this case and is not consistent with the overall purpose of the Rules of Civil Procedure. It is not coincidental that the canal company chose a date after the cut off deadline for

²⁵The court found that the proposed wall would reduce the efficiency and out put of the water turbines, resulting in insufficient power to pump water into Thayn's irrigation canal as well as generate electricity. (R. 624).

²⁶ The 40 foot wall was ultimately ordered removed by Federal officials.

amendment of pleadings, and after the trial court had already denied Thayn's attempt to amend his pleadings, as its time to construct the 40 foot wall. Awarding attorney's fees for participating in the commission of an illegal act is so appalling as to demand the court reverse the order on public policy grounds alone. Justice is supposed to be blind, not stupid. The award of attorney's fees below should be reversed.

POINT 5. (a) The proper burden of proof for estoppel is the preponderance of the evidence standard.

GRCC cites, in support of its argument for application of the clear and convincing evidence standard, footnote 6 of *Soter's Inc. v Desert Federal Saving & Loan Ass'n*, 857 P.2d 935, 942 (Utah 1993). An in depth review of the cases cited by GRCC reveals that a number of those cases do not actually support the principle cited, or the Courts have used the term "equitable estoppel" interchangeably with "fraud".²⁷ Few, if any of the cited cases have analyzed the propriety

²⁷ *Dodd v Dodd*, 181 Ariz. 183, 888 P.2d 1370 (Ariz. App Div.1, 1994) (holding latches, not estoppel, requires clear and convincing evidence in child support cases). *Arkansas National Bank v Boles*, 133 S. W. 195 (Ark. 1910) (estoppel must be strictly proved; This equity [estoppel] being merely an instance of fraud, requires intentional deceit.; *International Text Book Co., v Pratt Mercantile & Pub. Co.*, 158 P.2d 712 (Colo. 1916) (It was a jury question as to what inferences were to be drawn from the evidence; rights are not be diverted by means of estoppel unless clearly and fully established); *Reader v Sanford School Inc.*, 397 A.2d 139 (Del. super.1979) (holding promissory estoppel requires clear and convincing evidence); *Cochlo v Fernandez*, 384 P.2d 527, 530 (Hawaii 1963) (stating that the estoppel claim was in fact a specific performance claim, for which the burden is clear, definite and unequivocal evidence; the court does not apply this to all estoppel claims nor did it overrule, or even cite, *Gushiken v Shell Oil Co.*, 354 Hawaii 420, which specifically held the standard of proof for estoppel is preponderance of the evidence). *D. G. v D. M. K.*, 557 N. W. 2d 235 (S. D. 1996) (requires the presence of fraud, false representation or concealment to apply equitable estoppel in child support cases); *Fisher v West Virginia Coal and Transport Co.*, 73 S. E. 2d 633 (W. V. 1952) (To preclude a landowner from legal title on the basis of estoppel, actual fraud or fault or negligence equivalent to fraud on his part must be shown). Two cases, *Central Fed. Sav. FSB v Laurels Sullivan Country Estates Corp.*, 145 A.2d (N.Y.A.D. 1989) and *St. Paul Ramsey Med. Center v Wisconsin Dept. of Health*, 519 N. W. 2d (Wis. Ct. App. 1994) are bad citations and the cases not found.

of applying such a heightened standard.

In researching this matter, counsel discovered that the real origin of the “clear and convincing evidence” rule, insofar as estoppel goes, is an ALR Digest, 4 ALR 3d 361. That digest, in fact, categorized cases into courts applying a “clear” evidence standard, a “clear and satisfactory” standard, a “clear and convincing” and the “preponderance of the evidence” burdens on the estoppel claimants.

As noted previously, many courts, especially the older cases, interchangeably utilized the doctrine of equitable estoppel with fraud, and of course the clear and convincing evidence standard would then apply.

The courts applying the “clear” and “clear and satisfactory” standards really were not elucidating whether they in fact were imposing a higher quantum of proof, or were merely criticizing the nature of the proof in the particular circumstances. This is significantly apparent in those jurisdictions where no definitive statement of the elements of estoppel had been elucidated.

Then there are courts specifying that estoppel requires only the ordinary burden of proof standard. *DeYoung v Del Mar Thoroughbred Club*, 159 Cal. App 3d 858, 206 Cal. Rpt. 28 (Cal. App. 4th 1985); *Drake v Eggleston*, 123 Ind. App. 306, 108 N. E. 2d 67 (1952); *Junker v Crory*, 650 F.2d 1349 (A. 5th 1981) (applying Louisiana law); *Chapman v Chapman*, 473 S. 2d 467 (Miss. 1985); *Joseph R. Awad & Co. v Pillsbury Mills, Inc.*, 193 NYS 2d 306 (App. Div. 9, 1959); *N. Y. Cent. RR Co. v General Motors Corp.*, 182 F. Supp 273 (D. C. Ohio, 1960) (applying Ohio law); *Webb v Board of Trustees*, 271 S. W. 2d 6 (Tenn. 1954); *Ford v Culbertson*, 308 S. W. 2d 855 (Tex. 1958); *Re: Walkins Est.*, 30 A.2d 305 (Vt. 1943) cert den. 319 U. S. 757, 63 S. Ct. 1177.

The better reasoned cases is that the three doctrines, waiver estoppel and latches should all be governed by the same preponderance of the evidence standard. See, *Maletis, Inc. v Schmitt*

Forge, Inc., 127 Or. App 37, 870 P.2d 865 (Or. App. 1994) Rev. den. 330 Or. 110 (1994).

The courts have long applied a higher burden upon a party alleging fraud; however, no rationale has been provided as to why such higher burden is applicable in estoppel cases. As noted in *Kilduff v Adams, Inc.* 593 A.2d 478 (Conn. 1991) in N.14:

The following reasons are commonly cited as justification for requiring a more exacting burden of proof in fraud actions: (1) fraud usually must be proven through the use of circumstantial evidence so that a heightened standard is imposed to reflect the latitude allowed in admitting evidence of fraud; *Disner v Westinghouse Electric Corporation*, 726 F.2d 1106, 1110 (6th Cir. 1984); *Smith v Rhode Island Co.*, 39 R. O. 146, 154, 98 A. 1 (1916); 37 Am. Jur.2d, Fraud and Deceit § 468, p. 646; 37 C. J. S., Fraud § 114, p. 431; (2) evidence of fraud must be sufficient to overcome the presumption that people are innocent of moral turpitude or crime; *Verrastro v. Middlesen Ins. Co.*, 207 Conn. 179, 183, 540 A.2d 693 (1988); *Apolito v Johnson*, 3 Ariz. App. 232, 236, 413 P.2d 291, modified on other grounds, 3 Ariz. App. 358, 414 P.2d 442 (1966); 37 C. J. S., Fraud § 114, p. 430; (3) in equity cases, a higher burden of proof is imposed to justify the availability of broader remedies than those available in an action at law for damages. *Batka v. Liberty Mutual Fire Ins. Co.*, 704 F.2d 684, 688 (3d Cir. 1983) (applying New Jersey law); C. McCormick, Evidence (3d Ed.) § 340; and (4) a person found guilty of fraudulent conduct suffers a “stigma of guilt” regardless of whether the underlying action was civil or criminal. *Riley Hill General Contractor, Inc., v Tandy Corporation*, 303 Or. 390, 407, 737 P.2d 595 (1987).

A review of the case law on the development of the burden of proof in fraud actions sheds no light on which, if any, of these factors were determinative in this court’s adoption of the “clear, precise and unequivocal” standard. In *Basak v Damutz*, 105 Conn. 378, 382-83, 135 A. 453 (1926), we applied the “clear, precise and unequivocal” standard to the plaintiff’s claim that the defendant was equitably estopped from denying ownership of certain land on the ground that the defendant was party to a fraudulent conveyance. That standard was applied for the first time to an action at law for damages resulting from fraud in *Shaub v. Phillips, Inc.*, 117 Conn. 54, 58, 166 A. 671 (1933), citing *Basak v Damutz, supra*, 105 Conn. at 382, 135 A. 453. *Shaub* implicitly overruled prior case law in which we had indicated that fraud need be proven only by a preponderance of the evidence. *Daly Bros., Inc. v. Spallone*, 114 Conn. 236, 240-43, 158 A. 237 (1932); see *Bennett v. Gibbons*, 55 Conn. 450, 454, 12 A. 99

(1887); cf. *Water Commissioners v Robbins*, 82 Conn. 623, 640, 14 A. 938 (1910) (fraud must be proven by “clear, strong, natural, and logical” evidence, but the fact that fraud is not to be presumed does not add to the plaintiff’s burden of proof). The *Shaub* court, however, gave no explanation of why it was imposing the higher standard. *Shaub v Phillips, Inc.*, *supra*.

It does not appear that any of the four reasons noted above provide a clear explanation for our imposition of a higher burden of proof. We had recognized the latitude allowed in the admission of evidence of fraudulent conduct long before we imposed a higher burden of proof in fraud actions. See, e.g., *Robert v. Finberg*, 85 Conn. 557, 562, 84 A. 366 (1912); *Hozie v Home Ins. Co.*, 32 Conn. 21, 37 (1864). Similarly, our recognition of the role played by circumstantial evidence in proving fraud predates our decision in *Shaub v. Phillips, Inc.*, *supra*. See e.g., *Sallies v. Johnson*, 85 Conn. 77, 80-81, 81 A. 974 (1911).

We have also rejected the suggestion that proof of criminal activity in a civil action requires a more stringent quantum of proof. *Verrastro v. Middlesex Ins. Co.*, *supra* 207 Conn. at 183, 540 A.2d 693, citing *Mead v Husted*, 52 Conn. 53 (1884), and *Munson v. Atwood*, 30 Conn. 102 (1861). Similarly, we have stated that the fact that fraud is not to be presumed does not serve to increase the burden of proof otherwise applicable to a plaintiff in a fraud action *O’Dea v Amodeo*, 118 Conn. 58, 60, 170 A. 486 (1934); *Water Commissioners v Robbins*, *supra*. Moreover, this rule was part of our law while the preponderance of the evidence standard was still the burden of proof in fraud actions. See *Morford v. Peck*, 46 Conn. 380, 384-85 (1878); *Huntington v. Clark*, 39 Conn. 540, 557 (1873).

The third rationale for imposing a higher burden of proof for fraud was clearly not relevant in the development of our case law. Ever since the “clear, precise and unequivocal standard” was first applied to an action at law for fraud in *Shaub v Phillips, Inc.*, *supra*, we have required a higher burden in legal as well as equitable actions. See, e.g., *Miller v Appleby*, 183 Conn. 51, 55, 438, A.2d 811 (1981); *DeLuca v. C. W. Blakeslee & Sons, Inc.*, 174 Conn. 535, 546, 391 A.2d 179 (1978); *Creelman v Rogowski*, 152 Conn. 382, 284, 207 A.2d 272 (1965). Finally, although we have never discussed the stigma attached to allegations of fraud, it is not clear whether this rationale is distinct from the previously noted presumption that one is innocent of criminal or morally base acts.

Although the rationale for our imposition of a higher burden of proof for fraud claims is shrouded in the mist of the common law, we do not find it necessary in deciding this case to articulate our rationale for continuing to apply an elevated standard or to address whether we should abandon that standard. [emphasis added]

As well articulated by the *Kildof* case, none of the four (4) elements claimed justify a higher standard of proof in fraud cases would be applicable to equitable estoppel. First, equitable estoppel is not a crime, it does not carry the stigma of moral turpitude that fraud does, and does not carry the broader remedies that fraud does. For example, punitive damages aren't being awarded in a equitable estoppel case as they are in fraud. If we're going to raise the bar, so to speak, on equitable estoppel cases, should not those parties having successfully proved equitable estoppel also receive the heightened advantage of punitive damages? Second, the allowance of circumstantial evidence is present equally as well in waiver and latches cases, which this Court has already held apply on the "preponderance of the evidence" standard. *Soters Inc. v Desert Federal Savings and Loan Association, supra*. Other types of estoppel cases require only a preponderance of the evidence standard even in jurisdictions which apply the clear and convincing rule to equitable estoppel. See e.g., *Zick v Krob*, 872 P.2d 1290 (Colo. App. 1993) (claim for promissory estoppel must be established by a preponderance of the evidence). And what of judicial estoppel? Will we have a different standard for a judicial estoppel, or promissory estoppel, than equitable estoppel? Finally, unlike fraud, equitable estoppel is not a quasi criminal action and the presumption of innocence of criminal wrongdoing is inapplicable.

Application of the clear and convincing rule may be justified when applied to fraud. Application to other doctrines, such as equitable estoppel, only serves to confuse the administration of the judiciary. Absent compelling reasons, the standard ordinarily applied to all other defenses should equally apply to equitable estoppel. There are no compelling circumstances which would justify elevating this standard and the Court should hold that the appropriate burden of proof for estoppel is the same as it is for latches and for waiver, i.e. preponderance of the evidence presented.

Latches, waiver and estoppel are often, if not routinely plead and considered together by the trier of fact. To draw a heightened burden of proof for one doctrine, while retaining the standard burden for the other two is to draw a distinction so fine as to be incapable of being maintained by the mind for conscious thought. Such a rule adds nothing but confusion and complexity to the law without any incumbent benefits and this Court should reject it outright.

(b) Evidence supports application of estoppel, waiver and latches to preclude GRCC from asserting its rights under the amendment.

GRCC asserts that Thayn claims estoppel because GRCC did not sue prior to the power plant construction. GRCC cites to nowhere in the record for this red herring proposition.²⁸ Rather, it is GRCC's failure to protest Wilson's application for 600 cfs, Wilson's application for 600 cfs year round non-consumptive use, and to at any time prior to building of the power plant disclosing the unrecorded 1952 amendment to Thayn's of which Thayn asserts estoppel, waiver and latches.

Invocation of estoppel does not necessarily involve any contract or agreement and consideration is not required to invoke estoppel. *Koch v. J. C. Penny*, 534 P.2d 903 (Utah 1975). Intent to mislead is not required for equitable estoppel to preclude landowner from asserting his legal title, and mere silence can be sufficient to support application of equitable estoppel if landowner's silence in fact misleads other party and landowner was silent when he had a duty to speak, *Littlefield v Adler*, 676 A.2d 940 (Maine 1996).

Here, Wilson, as Thayn's predecessor, applied first for a 600 cfs power permit, and

²⁸Nowhere below or in Thayn's appeal brief did he argue anticipatory repudiation.

then for year round power use of 600 cfs. (Ex. 54, Appd.2). GRCC had a duty to protest said permit or water right application. U. C. A. § 73-3-6 provides that upon the application for right to use water, the state engineer must publish notice in the newspaper for three consecutive weeks, which was done here as to both water application submitted by Thayn's predecessor, Wilson (*Id.*) U.C.A. provides:

Protests. (1) Any person interested may, at any time within 30 days after notice is published, file a protest with the state engineer.

(2) The state engineer shall consider the protest and shall approve or reject the application.

GRCC, the one party to this suit who had possession of and full knowledge of the unrecorded 1952 amendment, with full knowledge of the facts waived their right to protest the Wilson water filings because Wilson was a good old boy. (R. 1903, pp. 13-15).

Based in part upon the lack of any protest, the state engineer approves the application and the water right is perfected under the "Election Process". As noted in U. C. A. § 73-3-8(1) in relevant part:

If the state engineer, because of information in his possession obtained either by his own investigation or otherwise, has reason to believe that an application to appropriate water will interfere with its more beneficial use for irrigation, domestic or culinary, stock watering, power or mining development or manufacturing, or will reasonably affect public recreation or the natural stream environment, or will prove detrimental to the public welfare, it is his duty to withhold his approval or rejection of the application until he has investigated the matter. If an application does not meet the requirements of this section, it shall be rejected. [emphasis added]

While it is true the state engineer is not a court, and cannot adjudicate disputed rights,

Wardley v Terry, 77. P.2d 362 (Utah 1938), nevertheless had GRCC protested, the state engineer would have “withheld approval” thereby alerting Thayn’s to the 1952 amendment and entirely preventing the present action, and further preventing Thayn’s from building a power plant and expending some \$300,000 on a facility now standing idle. Fault for this entire litigation resides with GRCC and GRCC alone for withholding protest, for remaining silent until after the plant was built, then ambushing Thayn with the 1952 unrecorded amendment.

Equitable estoppel is invoked to promote justice, honesty and fair dealing, and the purpose of the doctrine is to prevent a party from taking unconscionable advantage of his wrong while asserting strict legal right. *Billings Post No. 1634 v. Montana Dept. of Revenue*, 943 P.2d 517 (Mont. 1977).

Here, GRCC did not protest its own allocation of a water right at 60 cfs, inclusive of the 20 cfs stock watering right, and subject to duty limitations. GRCC filed a statement of water user’s claim in 1969, (R. 1365-1366) from which the state engineer issued its proposed determination in 1969. Under the adjudication procedures, GRCC had 90 days to protest this determination but which they did not. Therefore, the proposed determination becomes binding until such time that it may be set aside by a court. U.C.A. 73-4-11.

An adjudication provides the state [engineer] an opportunity to assure that water use is restricted to beneficial use and thereby protect unappropriated water. *Huntsville Irr. Ass’n v District Court of Weber City*, 72 Utah 431, 439, 270 P. 1090 (1928). Accordingly, if GRCC was concerned, or claimed an additional 20 cfs as a “carrier”

right,²⁹ its opportunity to do so was in that adjudication. This court has strictly construed the 90 day protest period, even to the detriment of a party complaining of lack of actual notice. *Jensen v Morgan*, 844 P.2d 287 (Utah 1992). Here, GRCC has never alleged it was unaware of the adjudication, rather its tact is to attempt to obtain by contract water rights not afforded it by the State, by means of failing to include the State at all, a principle rejected in the *Huntsville, supra*, case.

GRCC maintains here, as below, this case is simply a contract issue of private rights. Thayn argued unsuccessfully below, at summary judgment, that, **no**, this is a question of public rights, as all water use is public and not private. U. C. A. § 73-1-5. As was noted in *Huntsville, supra* at 442, “it is not so much what the court said, but what it actually did”, Here, while the court said it was simply ruling on the contract, what it did was to afford a “water right” to GRCC, unlimited by any duty, of 20 cfs more in flow than accorded GRCC by the State and to take away from Thayn 200 cfs non-consumptive water right during the irrigation season and all 600 cfs in the off season. All of this was done despite GRCC’s failure to protest its own water right as allocated by the state engineer, failure to protest in

²⁹ GRCC alleges a “carrier or sluicing” right is long established in Utah law. (Aplee. Brief, pp.4, 28), citing *Jackson v Spanish Fork West Field Irr. Co.*, 120 Utah 509,235 P.2d 918 (1951). However, *Jackson* involved a case where “no other party to this action claims a right to use this water so the award was made without contest.”. *Id* at 510. Moreover, even absent a contesting party this case was remanded to this district court for specific determinations as to any “additional amount, if any, required under the present system in order to make the water conveniently available without unnecessary waste”. *Id*. at 512. Here, however, GRCC has never filed for a non-consumptive carrier use. Should they do so, they would bear the burden of proving such carrier right was “without unnecessary waste”, U. C. A. § 73-3-21. In any event, Thayn’s non-consumptive power right has priority over sluicing. U.C.A. § 73-3-8(1).

the general adjudication, failure to protest Wilson's water right application for 600 cfs, and failure to protest Wilson's 1981 change application for year round use of the 600 cfs power right.. At each stage GRCC had an affirmative duty to protest; at each stage it declined to do so. GRCC did not even record or take any action to put persons on notice of the 1952 amendment. Rather, GRCC kept the 1952 amendment secret until after the power plant was built and then seeks to extort profits of another's labor, capital and ingenuity by means of the secret document.

The elements necessary to invoke equitable estoppel are a statement, admission, act or failure to act by one party inconsistent with a claim later asserted, reasonable action or inaction by the other party taken on the basis of the first party's statement, admission, act or failure to act, and resulting injury to the second party if the first party were allowed to contradict or repudiate the statement, admission, act or failure to act. *Orton v Utah State Tax Com'n*, 864 P.2d 904 (Ut. App. 1993).

Here, Thayn's conduct was abundantly reasonable. Thayn, an innocent purchaser for value, receives a title report disclosing the original 1952 agreement, but because of lack of recordation, has no knowledge of the 1952 amendment. The water rights of GRCC are on file. The water rights of Wilson are also on file, and are amended, without protest by GRCC, to allow for year round use of Thayn's existing 600 cfs. Thayn first negotiates for a large scale hydroelectric project, which would require use of additional land of GRCC and modification of the raceway. Under that agreement, GRCC will be compensated for its land by means of a 1% royalty over and above the 600 cfs water right of Thayn. When that

project fails, Thayn begins looking at a more economical smaller scale project, which, as the court found, did not evolve into a firm plan to build until 1990 (R. 1659, ¶ 2). At any time prior to this, in its own water right application, in the adjudication, in the original perfected water right of Wilson, or in the 1981 change application converting that to year round use for power generation, GRCC had only to disclose its position that it would hold Wilson to 400 cfs and all of the present litigation and \$300,000 expenditure on the power plant would have been averted. But no, Wilson was a “good ole boy”, so it was okay with GRCC. Thayn, apparently not a good ole boy, doesn’t deserve the same rights according to GRCC. However, having sat on their rights this long, GRCC should be estopped, or found to have waived, or at a minimum laches should apply to bar and preclude the unconscionable conduct of GRCC.³⁰ As a matter of law the Court should reversed the ruling of the trial court on estoppel, waiver and laches or, at a minimum, should direct remand and retrial on the issue applying the proper burden of proof.

(c) GRCC’s claim of unclean hands is without basis in fact.

GRCC argues in its brief that Thayn’s injury was of his own making and/or that Thayn has unclean hands. (Aplee Brief pp. 50-54). GRCC first argues that Thayn’s claim for laches fails because they assert any failure was due to Thayn’s own fault and not to

³⁰ On page 37 GRCC argues that Thayns equitable defenses are based on the fact that GRCC should have filed an action for anticipatory repudiation of the contract. No citation to the record below, or to the appellant’s brief is made for this proposition. This is a red herring of record proportion. Thayn’s theory was that the equitable defenses of estoppel, laches and waiver apply because GRCC never asserted, never recorded, never raised, never even revealed the 1952 amendment in any water right establishment, either their own or that of Wilson, or in any manner asserted such right prior to the building of the co-generation facility.

GRCC. Their first argument is that Thayn needed to refurbish his pump house in any event. However, that argument fails to address the fact of why Thayn would put in additional hydro electric turbines to generate electricity that he can neither use nor sell at this point. This argument insults the intelligence of the reader and needs no further elaboration.

Their second argument is Thayn has unclean hands and is not entitled to any equitable relief. (Applee brief pp. 52-54). The basis of this argument is GRCC's supposed belief that Thayn made misleading statements. However, they cite to no statements of truth in the record other than an alleged statement of Leon Thayn to Dean King in 1987 or 1988 that Thayn had no plans at that time to generate power. Each of the statements they recite were completely rebutted.³¹ As was acknowledged in the original brief, Tim Vetere, a current board member of GRCC, himself acknowledged that he had gone to the pump house in 1989 and talked with Leon Thayn who told him they were putting generators in to generate power. (R. 1902, V. 1., pp. 220-223). Vetere was the vice-president of GRCC at the time and was aware that Thayn was going to sell power. (*Id* 224). However, his understanding was there was an agreement with the canal company regarding the generation of power for sale. (*Id* 228). Moreover, GRCC was more than aware by virtue of the 1981 change application of Wilson, which sought to change the 600 non-consumptive water right from irrigation season only to year round use. GRCC knowingly waived any right to protest because Wilson was

³¹See response to Statement of Fact 33, *infra*.

“a good ole boy”.³² GRCC’s attempts to say that Thayn somehow concealed his intentions to generate electricity during the construction of the hydro electric plant is wholly contrary to the facts, but moreover contrary to the admissions and acknowledgments of GRCCs own agents. GRCC is a company which can only act through its agents. (See citations noted in Appellee’s brief footnote 55).

POINT 6. The trial court improperly excluded evidence on the maintenance of the raceway.

GRCC makes two arguments in this regard. First, that the raceway only need have capacity of 515 cfs under the 1952 agreement and, secondly, that the issue of maintenance was somehow subject to a second proceeding. Addressing the second issue first, while there was a second action filed, same was not against GRCC, but individual shareholders thereof.³³ But the fact was, whatever may have been in the action between Thayn and GRCC shareholders individually, Thayn in this case had specifically raised maintenance as an affirmative defense and specifically denied that any of the alleged problems in receiving

³²Dean King, GRCC board member from 1970 to 1988 acknowledged that he knew from the size of the pump house renovation that it would be used to generate electricity. (R. 1902 V.1, p. 96). Further, GRCC’s ditch rider from 1987 to 1989, Clinton Thompson also testified that he knew Thayn was putting in electrical generation facilities. (R. 1902, V.1, p.31). Even counsel for GRCC admits, despite its contention of unclean hands, that the pump house and facilities were being refurbished with the capacity to generate electricity. (Appellee brief p.42-43). Blaine Silliman, vice president and later president of GRCC throughout the plant construction, not only knew of the construction, but actually helped build it.

³³In fact, the court said that it “assumed” that the maintenance issue was in the other suit. The court had never seen the other suit and the only thing it knew was what counsel had told the court. The court had specifically avoided reading anything contained in the other lawsuit. (R. V.1, p.81, L. 6-10).

water claimed by GRCC were the result of Thayn's actions. Rather, Thayn alleged it was a result of the failure to maintain the raceway. (R. 258, ¶15). Said answer to the supplemental complaint states in relevant part "and specifically avers that if Green River was at any time unable to receive the 80 cfs of water to which it has priority, that failure was due to Green Rivers own failure to property maintain the diversion works, the raceway, and its own canal, and was not in any way attributable to the acts or omissions of Thayn". Unquestionably, Thayn timely raised the issue of maintenance of the raceway either as a direct denial of the allegations of difficulty in receiving water asserted by GRCC, or as a specific affirmative defense, and the issue was properly preserved. In response to the Motion for Partial Summary Judgment, Thayn asserted in his third affidavit that:

"At no time, in 1986 or otherwise, has there been insufficient water available at the dam and at the head of the raceway to satisfy the requirements of both the Plaintiff and me. The problem has been entirely with the Plaintiff and its representatives. They have wholly failed to properly maintain the dam and diversion works as required by the 1952 agreement so that the rate of flow to sustain the needs of both the Plaintiff and myself could be satisfied. Specifically, they have refused, despite my repeated requests, to close the gates on the west end of the dam to permit an increase in the flow into the raceway. In fact, they have locked them open with chains and locks so they could not be closed by anyone else to increase the flow into the raceway, even when the flow in the river has been low. More importantly, they have refused in spite of my urgent requests to clean out the raceway so more water could reach the power house and the head of Plaintiff's irrigation canal. In fact, they have refused my repeated requests that I be permitted to clean out the raceway at my own considerable expense".

Thus, the pot has indeed attempted to call the kettle black once again. GRCC created

any alleged lack of flow problems it may have had³⁴ by both diverting water at the head of the raceway back to the river³⁵ (for no known reason whatsoever) and by failing to clean the raceway to allow sufficient flow. This leads us back to their first argument, that GRCC need only provide 515 cfs in the raceway. This ignores the common fact and knowledge that Thayn and GRCC depend on both the flow and head pressure provided by the dam and raceway. The head available at the inlet to the raceway is directly proportional to the flow of the river. In order to maintain and deliver the flow and head to the foot of the raceway, the raceway must be kept clean and free of obstructions. (R. 1895, pp. 106, 203-205). This head pressure is what causes Thayn's turbines to produce power and water to flow into GRCC's ditch. By opening the head gate at the top of the raceway, and by refusing to clean or in any manner maintain the raceway, (R. 1895, pp. 37-40; 79) GRCC can assure that it creates a shortage of water, upon which to complain in this action. It is GRCC who acted with unclean hands. It is GRCC who acted in bad faith. It is GRCC who wholly refused to honor its contract to maintain the facilities, and then attempts to blame Thayn for its own folly. GRCC's arguments to the contrary are more than just intellectually dishonest but border, if not completely encroach, upon false representations to the court. In any event, the court made no factual findings that Thayn acted with unclean hands and this argument is without proper basis from the trial court below for which GRCC could argue on this appeal.

³⁴However, all actual measurements taken show GRCC exceeding its state approved maximum flow rights by 9 to 40 cfs in its canal.

³⁵Addm 2 shows the slide gate at the head of the raceway. (Ex. 17).

POINT 7. GRCCs conduct entitles Thayn to costs and attorney's fees under

U. R. A. P. Rule 33.

As shown previously, Thayn did preserve each and every one of the issues raised in this case for appeal, with the exception of the public policy issue, which was adequately explained by counsel in its initial brief. GRCC's request for attorney's fees should be denied. On the other hand, Thayn should be awarded his attorney's fees under U.R.A.P. Rule 33 inasmuch as Thayn has had to go to great costs and expense controverting the false facts cited to in the record by GRCC, as well as pointing out all of the facts attempted to be introduced into evidence in GRCC's brief, but for which there was no evidence in the lower court. Such conduct is without basis in fact or law and Thayn should be awarded his attorney's fees and costs.

THAYN'S RESPONSE TO GRCC'S CROSS APPEAL

Point 1. The trial court properly denied litigation expenses not proper under U.R.C.P. Rule 54 in GRCC's claim for wrongful injunction.

However, GRCC fails to attach copy of the orders from which it appeals. U. R. A. P. Rule 24(a)(11)(C). The trial court ruled that the trial costs recoverable under Rule 65(a) are the same as those contemplated under Rule 54(d)(1) and as further refined by *Frampton v Wilson*, 605 P.2d 771 (Utah 1980).³⁶ GRCC argues that *Mountain States Tel. & Tel. Co. v Akin Wright and Miles, Chartered*, 681 P.2d 1258 (Utah 1984) for the principle that damages

³⁶GRCC failed to attach as an addendum a copy of the order from which it appeals. See, U.R.A.P. Rule 24(a)(1)(c).

included in defending a wrongful injunction may include attorney's fees. GRCC then analogizes that such damages could also include additional costs not allotted under Rule 54(d)(1). However, as GRCC acknowledges, the *Mountain States* case was denied under the prior Rule 65(a). The legislature has now amended that Rule to provide for a recovery of attorney's fees and costs. Thus, the legislature has spoken to the matter. If the legislature intended damages to include costs other than those allowed ordinarily under Rule 54, it would have so spoken. To allow, as GRCC argues, that any costs not legally recoverable under 54(d) can then be shifted into "damages" is a slippery slope and obviates the limitation of costs as this Court has elucidated under Rule 54. GRCC cannot sneak in through the back door of "damages" that to which it is legally not entitled to take through the front door of the courthouse. The ruling of the trial court below should be affirmed.³⁷

Point 2. The trial court properly denied judgment on the third cause of action for failure of the Plaintiff to put on evidence of any profits.

GRCC does not contend that it put in any evidence of any profits earned by Thayn in response to the third cause of action. There was no evidence submitted at the summary judgment level, nor was any submitted at trial. GRCC attempts to point to one of Thayn's proposed trial exhibits, (GRCC brief, p. 64 ref. R. at 1547) as an attachment to its Motion for Entry of Judgment on its third cause of action filed August 11, 2000. However, this was after trial had been consummated. Moreover, such document was never admitted. Finally,

³⁷Again it should be emphasized that the trial court found the 40 foot wall to be an obstruction to the free flow of water to Thayn, (R.624) which violates U.C.A. §73-1-15, and ultimately was found to have been constructed on Thayn's property. (R. 1691).

said document does not show profits of \$289,500.17.³⁸ Said exhibit shows a “Summary of Lost Production” caused by the lack of maintenance on the raceway. Plaintiff further misconstrues the difference between gross profits and gross revenues.

In *Combe v Warren’s Family Drive-Ins*, 680 P.2d 733, 736 (Utah 1984) this Court has held that a trial judge is not privileged to determine matters outside the issues of the case, and if he does, findings will have no force and effect. In *Combe*, unlike the present case, the issue was neither plead nor tried. In the present case, while the Plaintiff may have an argument for pleading, the fact of the matter is that it was never tried. The Plaintiff, for whatever design, purpose, or intention, failed to put on any evidence at trial as to any damages or lost profits. Had the Plaintiff raised the issue, Thayn’s evidence would have shown that there were no profits obtained. However, because the Plaintiff did not go forward with its case in chief, Thayn had no standing to attempt to rebut same. It is error to adjudicate issues not raised before or during trial and unsupported by the record, *Combe*, *supra* at 736. This is true whether the action sounds in law or equity. *Id in Wineglass Ranches, Inc. v Campbell*, 473 P.2d 496, 500-01 (Ariz. Ct. App. 1970) the court took much stock in the Plaintiff’s failure to raise a claim not only at trial, but also at the pretrial conference. *Id* at 500, stating, “[Plaintiff’s] attorney’s attended a full dress pretrial conference at which the necessity of all parties stating all claims to be adjudicated was strongly emphasized”. (See also *Leonard Farms v Carlsbad Riverside Terrace*, 599 P.2d

³⁸In fact, such revenues are not contained in the unadmitted document. It only shows kilowatts generated, and not the price thereof.

411, 413(N.M. 1997)(a party may not split his demand and prosecute it piece meal, or present a part of the grounds upon which such cause of action is founded and leave the remainder to be presented in a subsequent suit if he first fails).

Plaintiff simply has no evidence of any “profits” of which to disgorge.³⁹ Even if there were evidence of such profits, the ruling of the trial court at summary judgment would be error as a matter of law. Green River’s original Motion for Summary Judgment sought judgment that (1) The agreement and amendment are unambiguous and enforceable against Defendant’s breach (R. 94); (2) Green River is entitled to an order of specific performance (R. 96); (3) Green River is entitled to an injunction (R. 99); and (4) Green River’s third and fourth causes of action are not barred by Utah Code Ann. § 73-1-7. (R. 100). Thus, when the court stated that it was granting summary judgment on the third and fourth causes of action, what the trial court was in fact ruling was that Thayn’s claim for eminent domain did not preclude the third and fourth causes of action. In essence, it was granting summary judgment against Thayn on the issue of eminent domain, but not granting summary judgment for Plaintiff establishing that they had shown their third cause of action to be recoverable. GRCC’s Motion for Partial Summary Judgment sought judgment under its eighth and ninth causes of action (R. 363) and under trespass (R. 365). Thus, no where in the record did GRCC specifically move for judgment on the third cause of action. The first ruling of the trial court was one of granting partial summary judgment, again, only on the issues raised

³⁹Rick Kaster testified at trial that the hydro electric facility was in fact not generating any profits. (R. 1902, V. 9, p.196).

before it. The second summary judgment ruling of the trial court was on the eighth and ninth causes of action. GRCC simply misconstrues the action of the trial court and attempts to elevate a ruling which precluded Thayn's affirmative defense/counterclaim of eminent domain as being a bar to Plaintiff's third cause of action, to an actual judgment upon the third cause of action. This case, like *Combe, supra*, involves claims not presented at trial and not litigated. The judgment of the trial court precluding Plaintiff's third cause of action was proper.

GRCC next attempts to argue that the trial court's rulings were inconsistent with its prior ruling. However, when one looks at the relief actually sought by GRCC in its original motion for summary judgment, it is apparent that GRCC sought only a ruling that Green River's third and fourth causes of action were not barred by U. C. A. § 73-3-1. The trial court then granted GRCC the relief which it had requested, namely a ruling that Thayn's claim for sovereign immunity would not preclude the third and fourth causes of action. Nowhere in the record does it appear that GRCC actually submitted evidence as to liability or damages or actually sought any further ruling on the third cause of action. Nowhere at trial did GRCC submit any evidence or argue its third cause of action. Only after trial, did GRCC attempt to raise the issue. This is piece meal litigation within the edicts of the *Combe* case and is improper.

In any event, as Thayn's own exhibit shows, there were no profits. The operations of the pump house have been deducted at a loss. Had there been a hearing, Thayn would have shown that until the higher rate of pay under the contract with Utah Power had kicked

into effect, the operation of the hydroelectric facility would have been at a loss. By the time the higher kilowatt rate came into effect, this action had pursued, and Thayn has been stayed. Accordingly, there are no “profits” of which to disgorge. Further action on this issue would be a nullity.

The Court has long held canal owners cannot recover the economic benefit of another water user’s rights. In *Tanner v. Provo Bench Canal & Irrigation Co.*, 40 Utah 105, 121 P. 584 (1911), *aff’d* 239 U.S. 323 (1915), Tanner had obtained the right to divert a quantity of water from the Provo River. He intended to convey the water through an existing canal, lengthen the canal and rent the water to those who would settle the newly developed area – a purely speculative, for-profit venture. In *Salt Lake City v. East Jordan Irrigation Co.*, 40 Utah 126, 121 P. 592 (Utah 1911), decided on the same day as *Tanner*, the city sought to divert Jordan River water through the irrigation company’s canal, which, because of its higher elevation, could service much more of the Salt Lake valley than could the older city canal, thereby saving Salt Lake City significant construction costs.

In both instances, the second user based its claim of a right to use on the statute now numbered Section 73-1-7. In both cases, the principal question was the measure of damages.

In *Tanner*, the Utah Supreme Court made a number of pertinent holdings, as follows:

- (1) The burden of proving damages is on the owner of the canal or ditch, not upon the second user. 121 P. at 589. The measure of damages is the extent to which the existing canal or ditch is rendered less valuable to the owner by the second use. *Id.* It is immaterial whether the second user will profit, because the canal owner “cannot recover for any benefit

respondent may receive.” *Id.* The canal owner has no better right than anyone else to apply for the right to appropriate water and convey it through the canal. Consequently, even though the second use might preclude the owner’s use of the canal for future diversions that might be approved in the future, that preclusion is not compensable. If and when the owner obtains the right to make additional appropriations, he can again enlarge the canal. 121 P. at 591.

In *Tanner*, the canal company could not show that the second use of the canal diminished the canal’s value to the company. Therefore, only nominal damages were awarded.

In the *East Jordan Irrigation* case, the canal owner argued that the city’s second use of the canal constituted a constitutional “taking,” and that the appropriate measure of damages was the value of the second use to the city. The trial court and jury accepted that argument at least in part, for although the jury found that the irrigation company’s use of the canal would not be impaired by the city’s second use, it nonetheless awarded the irrigation company substantial damages.

The Supreme Court reversed. It held that the canal owner was properly compensated

when the owner receives compensation for whatever damages, if any, he sustains by having the use he is making of the property interfered with. If the owner continues in the possession and use of his property. . . . and where there are no additional costs or expenses incurred in either the use of maintenance of the property . . . then we can see no escape from the conclusions that the owner can sustain only nominal damages, and cannot recover more.

121 P. at 588. The Court concluded

[T]he question, under no circumstances, can be what the appropriator gained; but it is, what has he from whom the property is taken or in whose hands it is damaged lost, when such loss is expressed in dollars and cents? This is the question, and the only question, to be solved in this case.

121 P. at 590.

A much more recent case from Idaho, interpreting a statute virtually identical to Section 73-1-7, demonstrates the continuing vitality of the damage rules developed in the 1911 Utah cases. In *Canyon View Irrigation Co. v. Twin Falls Canal Co.*, 619 P.2d 122 (Idaho 1980), the canal company claimed that the proper measure of damages for the second use of its facility should be the amount the second user saved by not needing to build its own canal. The court rejected that argument, holding that damages must be measured by the canal company's loss of value, not by the second user's benefit. 619 P.2d at 132. Alternatively, the canal company argued that it should receive a portion of its original costs of construction. The court also rejected that argument, noting that the canal company was not being deprived of the existing system. So as was true in the *Tanner* case, the Idaho court said only nominal damages would be appropriate.

For the foregoing reasons the ruling of the trial court on the third cause of action should be affirmed. Thayne should be awarded his attorney's fees under U. R. A. P. Rule 33 inasmuch as the Plaintiff's claim in this regard is without basis in either fact or law.

POINT 3. The Supreme Court upholds the lower court's findings of fact unless the evidence supporting them is so lacking that the Court must conclude the

finding is clearly erroneous.

Even according to the marshaling submitted by GRCC, be it somewhat inadequate, that alone is clearly sufficient to uphold the court's finding in the regard that the wing wall, trash racks and radial gates are adjuncts and appendages to the pump house and pump house facilities. As can be seen from Plaintiff's exhibit 104, the south wall of the radial sluice way is the footing for the north wall of the pump house. In other words, absent the south wall of the sluiceway, the pump house would collapse. Moreover, the control mechanism by which the radial gates are raised and lowered has always been adjunct and appurtenant to the pump house facilities.⁴⁰ The concrete is amongst the oldest on both walls as can be seen from exhibit 104. (Addm. 4). Further, the evidence was that, as taught by Wilson, the sluicing had always been done by Wilson, or Thayn. (R. 1902, V. 2, pp. 67-71) If GRCC believed the radial gates were its property, why then did it not take the time to man and operate and run the sluicing facility?

While GRCC desperately tries to argue there is no evidence that the radial sluice gates existed in 1952, this statement mischaracterizes the testimony. The testimony was that the concrete comprising the radial sluice gates wash way was amongst the oldest of the concrete out there.⁴¹ Further, that sluicing was necessary on a regular basis in order to keep the

⁴⁰The Court actually visited the site on May 28, 1999. (R. 1902, V. 5, pp. 196-197; V. 6, p. 200). Addm 3 shows the radial gate structure is monolithic with the pump house. (Ex. 42, pp. 1, 2, 4, 7; *See also* Ex. 104, addm. 4).

⁴¹Ex. 85 shows that the newest portion of the pump house was built in approx. 1915. GRCC claims Rick Kaster stated that portions of the building were built after 1940. (GRCC's brief, p. 68). Their record citation is false.

raceway delivering water to both parties. Absent the radial gates, the raceway simply would not have functioned at the time the 1952 agreements were entered into.

Additionally, GRCC failed to marshal all of the evidence in support of the trial court's findings. ¶ 4 of the 1952 agreement provides in relevant part:

The ownership, maintenance, upkeep, repair, supervision, control and operation of said diverting works situated upon the lands herein above described in ¶ 2 shall be and remain with the second party. Each party agrees to keep the portion of said diverting works under its supervision in a state of reasonably good repair and condition so that insofar as the diverting works situated on the lands described in ¶¶ 2 & 3 respectively in this agreement are integral to or essential to the use, operation and enjoyment of the other party that the same will be maintained and kept in reasonably good repair and condition at all times.

If the radial gates were not a part and parcel of the property being afforded to Wilson, then what portion of Wilsons is a “diverting works”?⁴² Certainly Wilson’s pump house, trash racks and wing walls are solely used by Wilson and only for Wilson’s benefit. The only possible “diverting work” that Wilson would be retaining under the 1952 agreement would be the radial sluice gates. As constructed, without the machinery and facilities of the pump house, the radial sluice gates cannot be operated. The finding of the trial court that the radial sluice gates were appurtenant to and a part of the pump house property is more than adequately supported by the record below. Thayne should have and recover his costs and attorney’s fees for having to respond to the cross appeal pursuant to U.R.A.P. Rule 33.

⁴²There was evidence GRCC mistakenly cost shared in a portion of the radial gate improvements. However, GRCC failed to cost share on the upper slide gate improvements. (R. 1902, V. 4, p. 17). It is clear GRCC had no idea which diversion works it was claiming ownership to until the court’s ruling below.

CONCLUSION

For the foregoing reasons, the Court should reverse the trial court on its summary judgment of the interpretation issues and in granting judgment on Plaintiff's eighth and ninth causes of action. The injunction entered should be dissolved. In the alternative, the Court should find as a matter of law that GRCC is estopped, has waived, or is otherwise precluded by laches from asserting its contractual issues. The Court should also hold that the contract, as interpreted by Judge Bryner, violates public policy, particularly the water law statutes. The Court should rule that the trial court erred in disallowing Thayn from raising his maintenance issues and, at a minimum, remand for new trial allowing those issues to be raised. The judgment of the trial court against Plaintiff on its third cause of action for lost profits, and against Plaintiff on the issues of trespass and the radial sluice gates should be affirmed. Defendant should be awarded his costs and attorney's fees on appeal.

DATED this 26 day of March, 2002.


STEVEN A. WUTHRICH

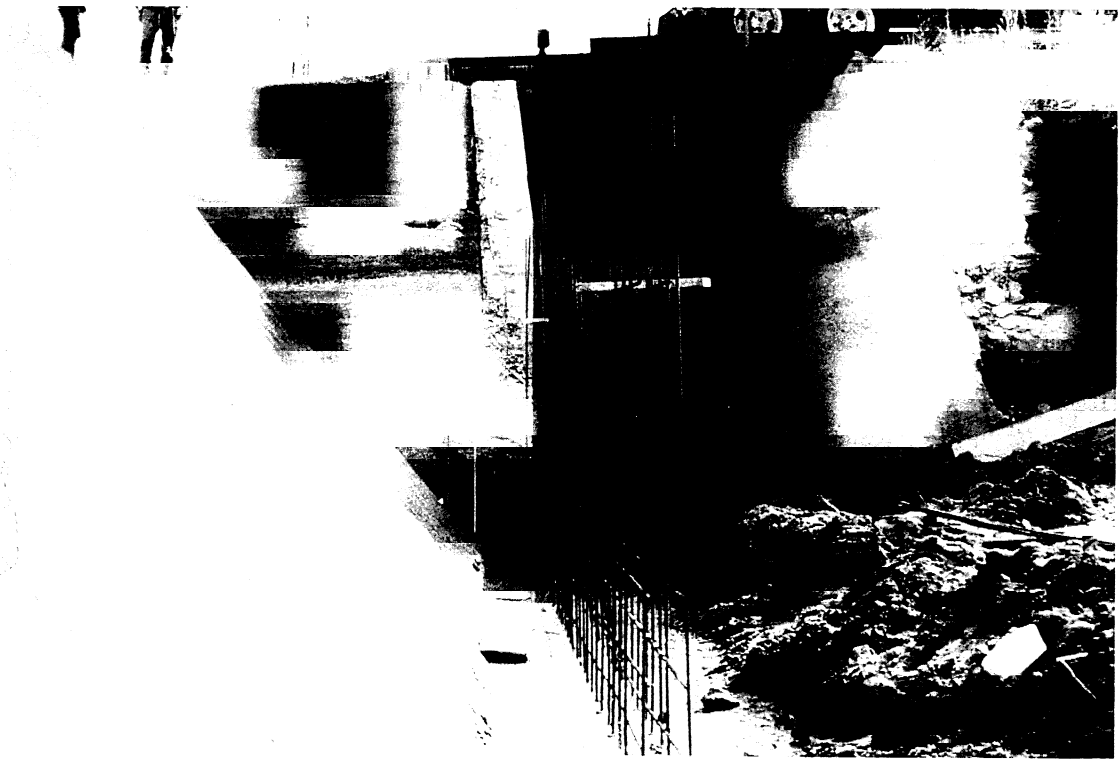
CERTIFICATE OF MAILING

I certify that on the 26 day of March, 2002 I mailed two correct copies of the foregoing brief to the following:

J. Craig Smith
Nielsen & Senior
60 East South Temple, Ste. 1100
P.O. Box 11808
Salt Lake City, Utah 84111
(801) 532-1900
FAX (801) 532-1913

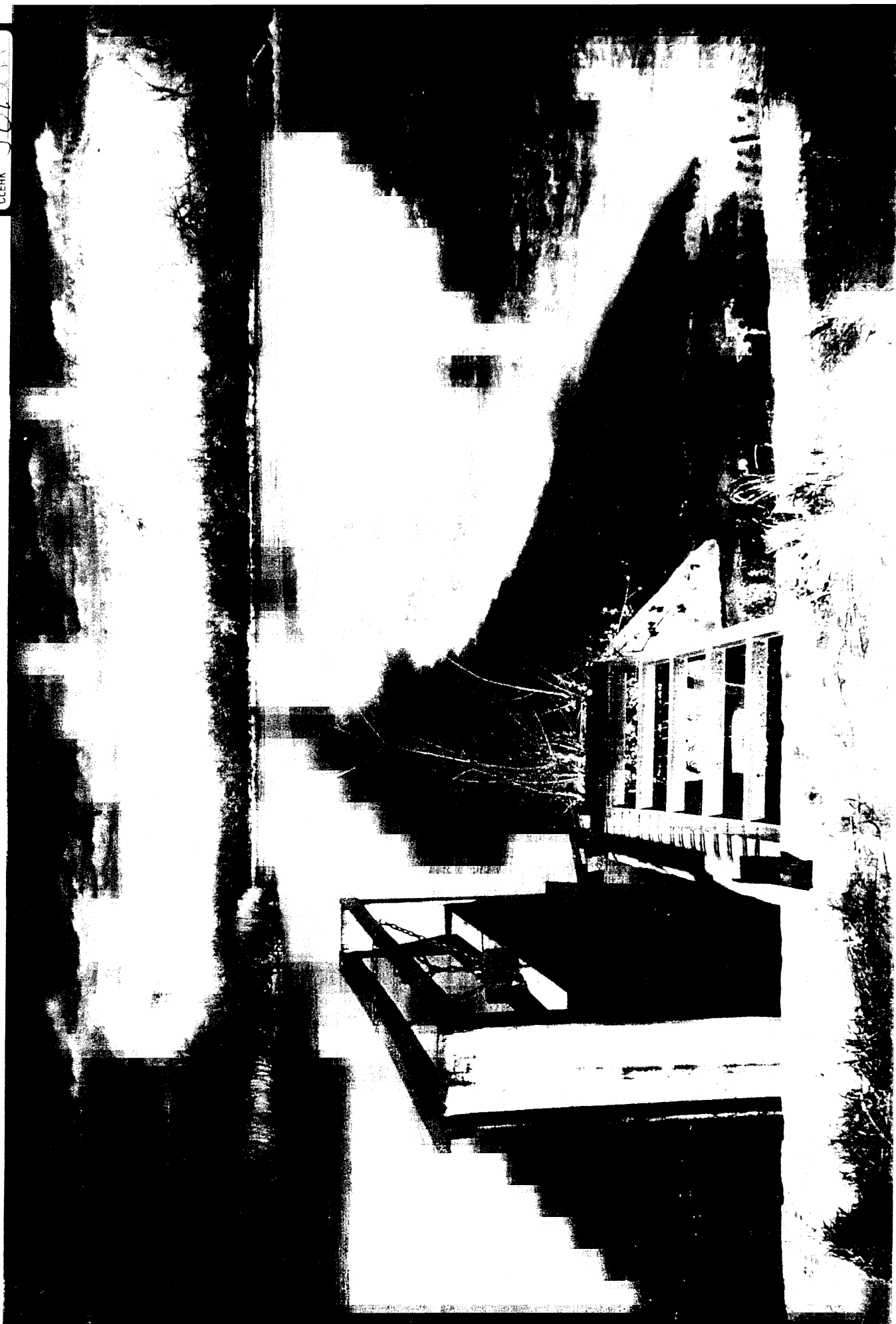


Tab 1



Tab 2

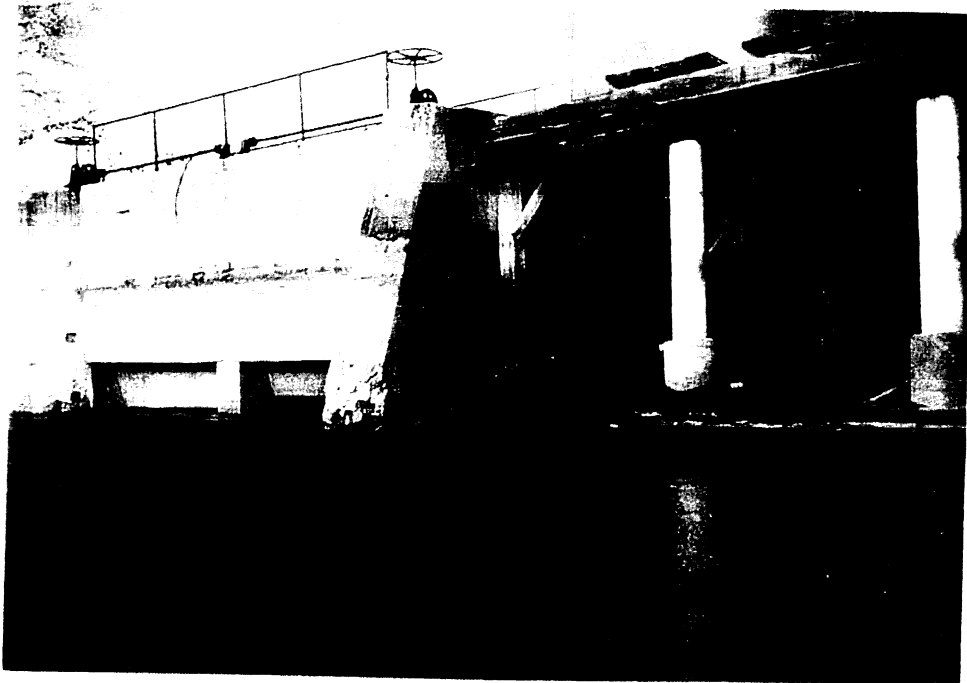
DATE REC'D 3-23-64
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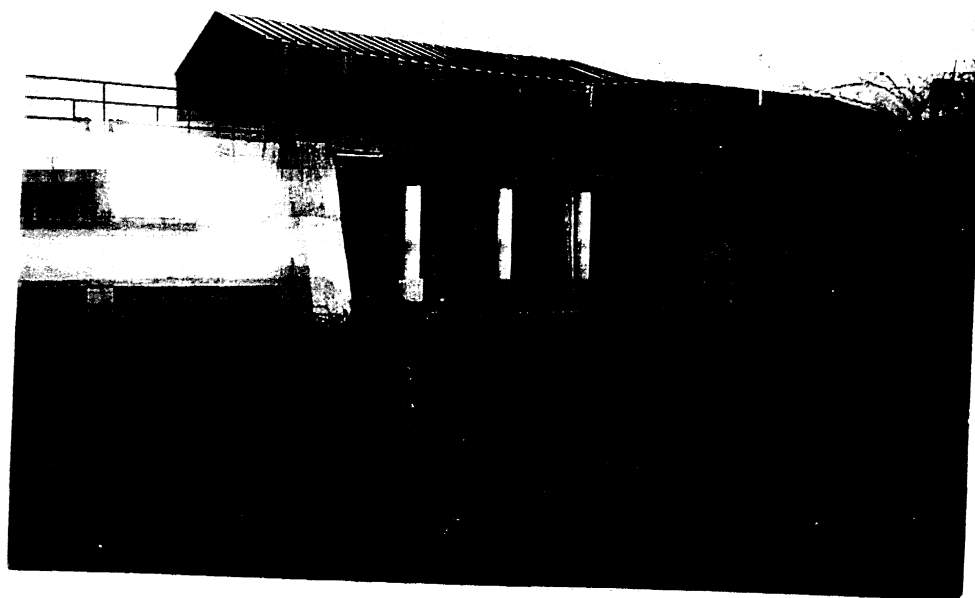
Tab 3

Wor EP 42

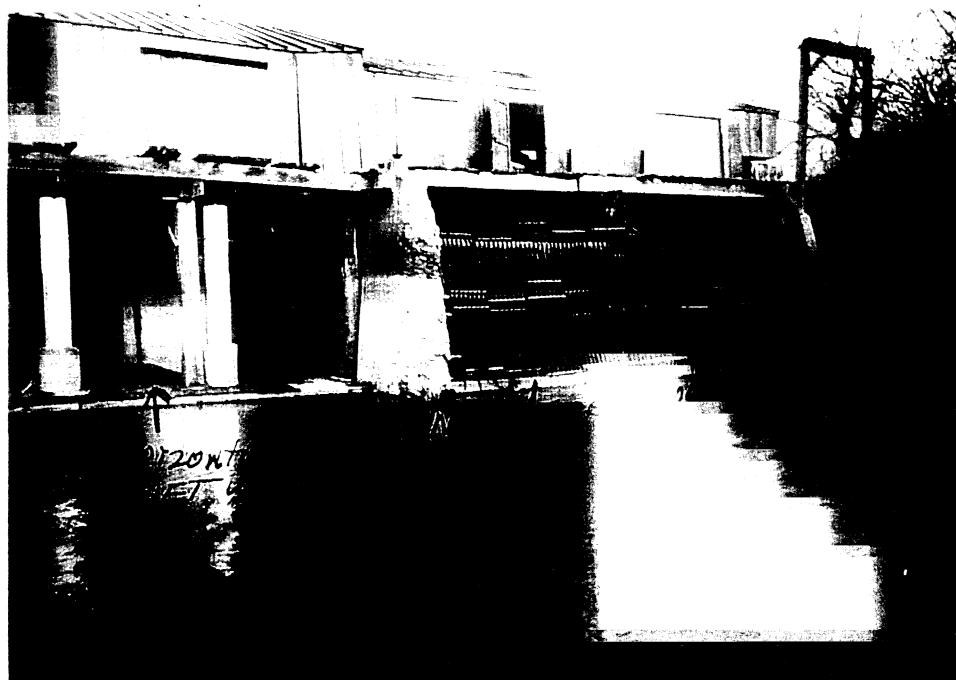
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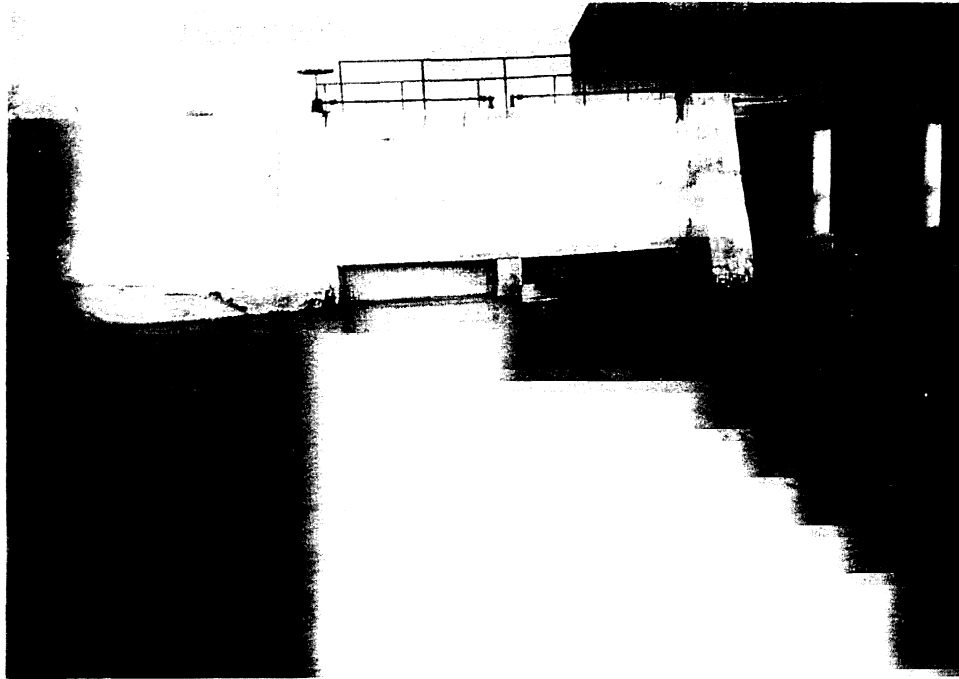
2



Status of pumphouse, trash racks, and wooded deck prior to start of hydro plant construction in 1990. Note condition of wooden deck; this was the only access to the raceway canal bank.



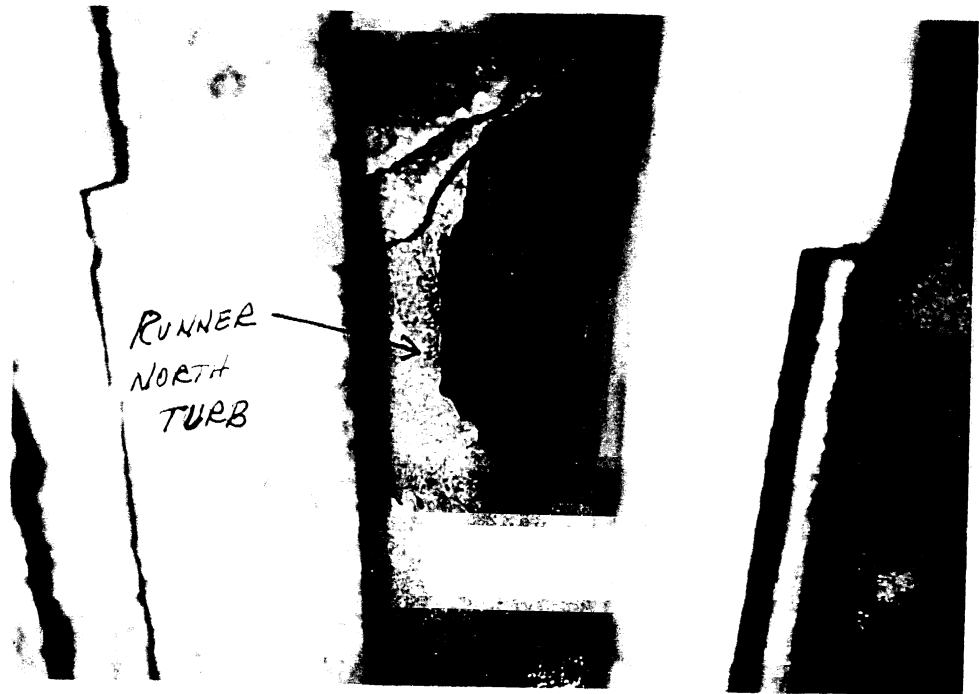
4



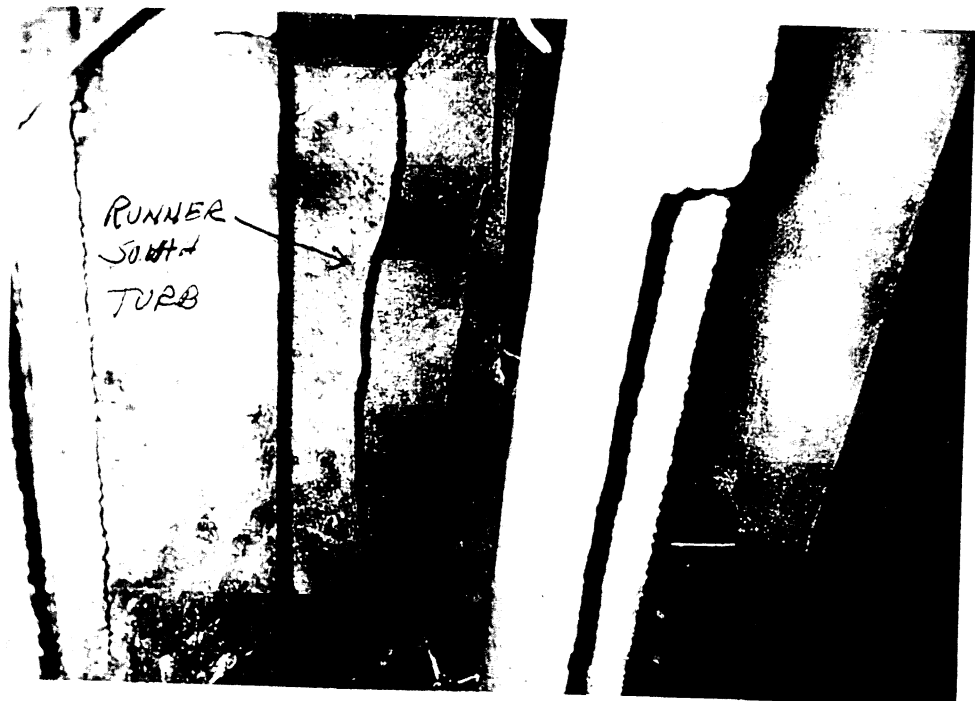
Above. Radial Spill Gates. One collapsed in 1994. Both gates were subsequently replaced by Thayn and Kaster.

Below. Location of new slide gate at dam site; built and installed by Thayn and Kaster. Note log wedged in opening.





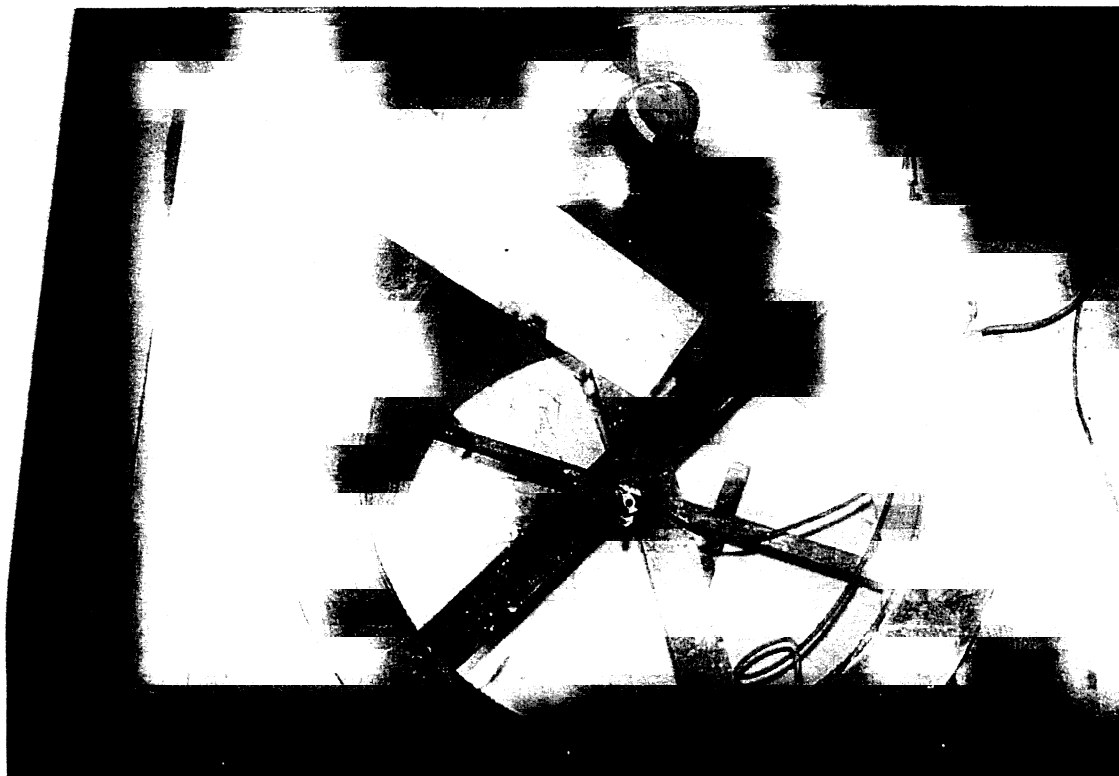
Turbine runner condition prior to 1990. (No. 1 and No. 2 turbine pits)



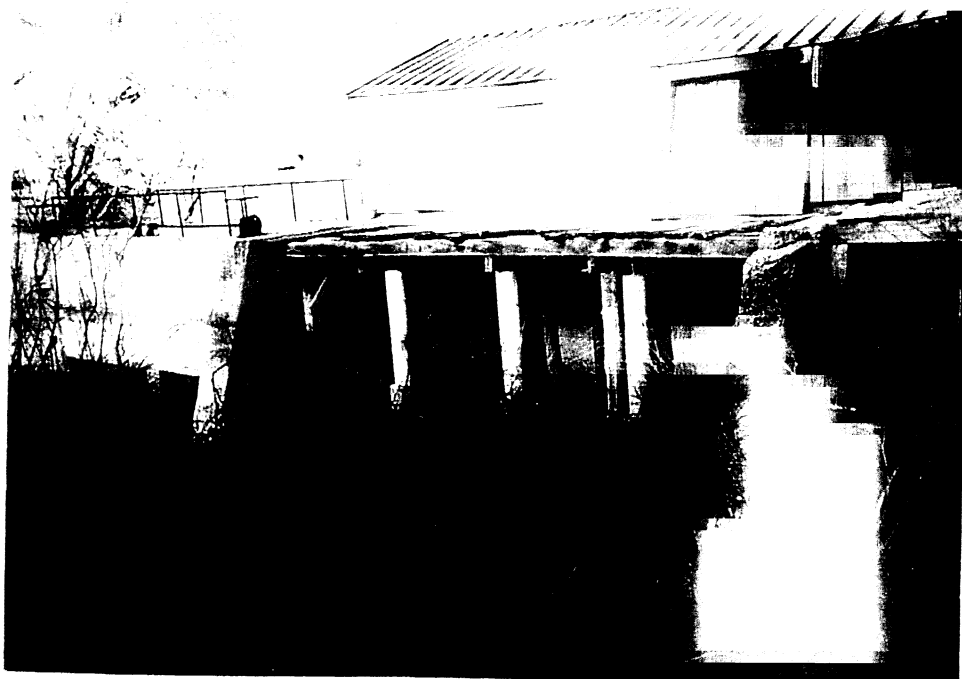
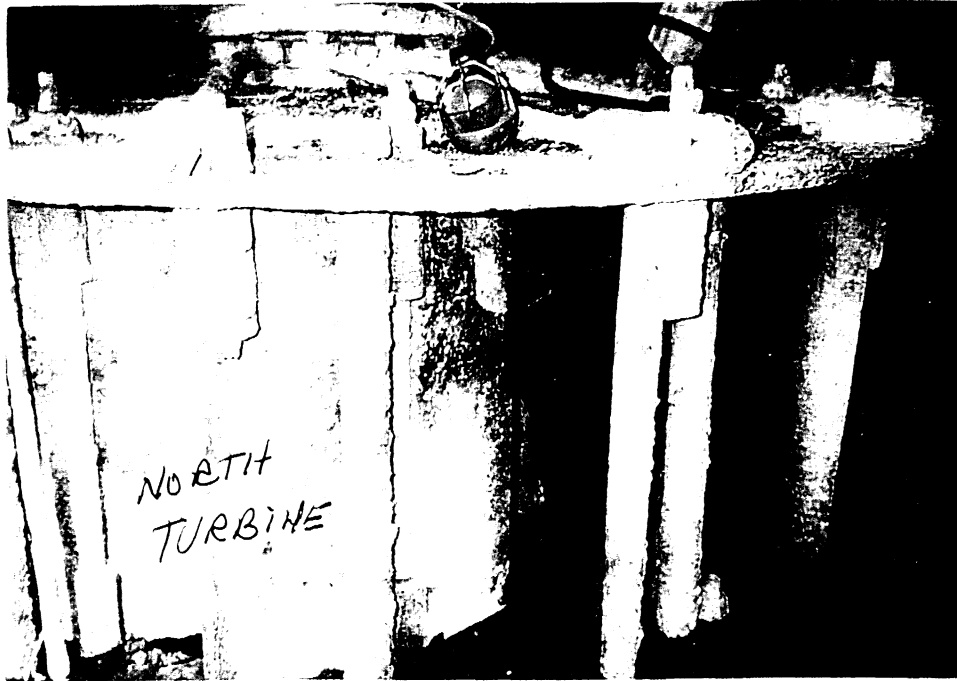


(6)

Above - Turbine shown at left being rebuilt
and fitted with new shaft at shop.
Below - New draft tube being built for
above pictured turbine.



7



Tab 4



PLAINTIFF'S EXHIBIT

EXHIBIT NO. 108

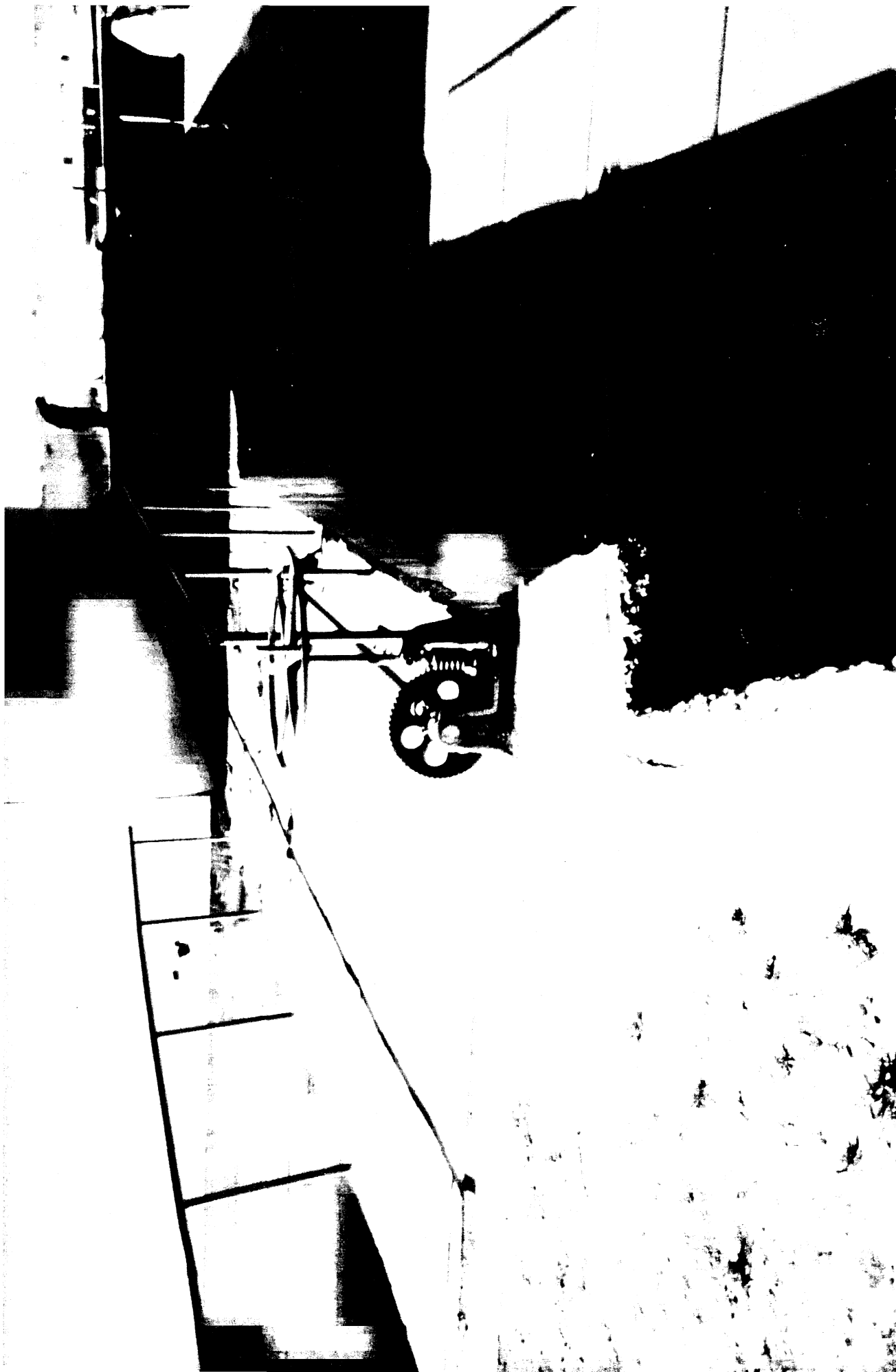
CASE NO. 6174

DATE REC'D
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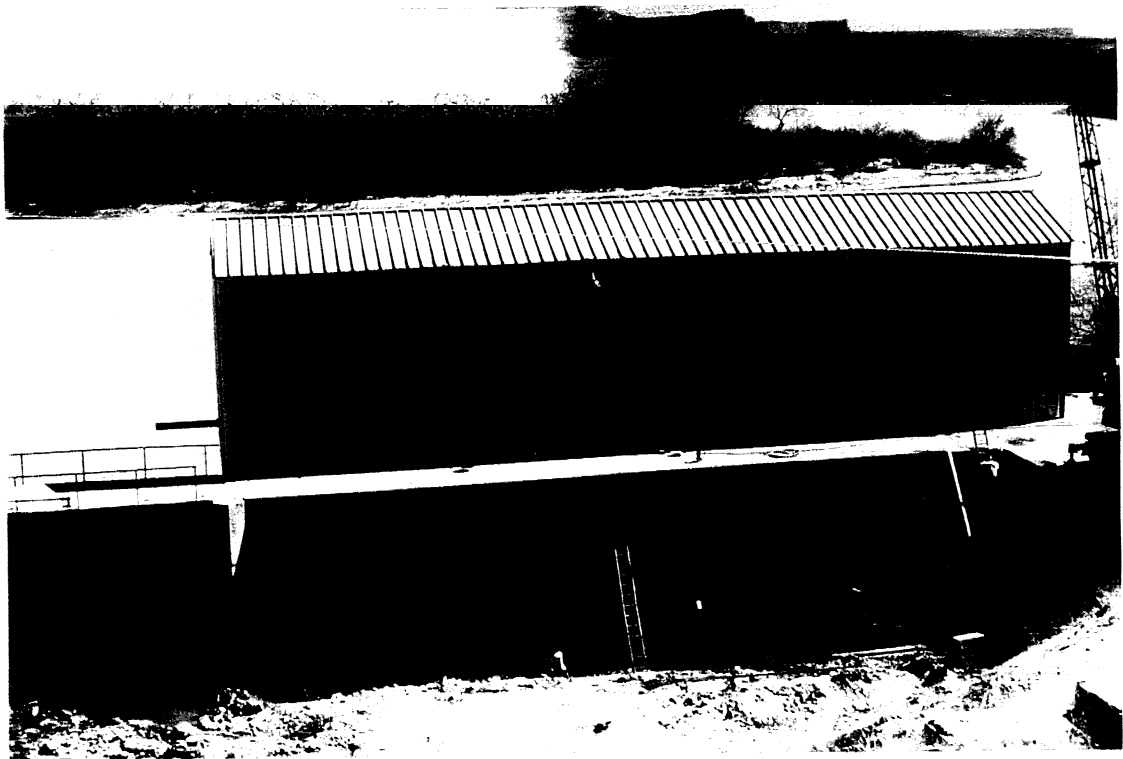
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Tab 5

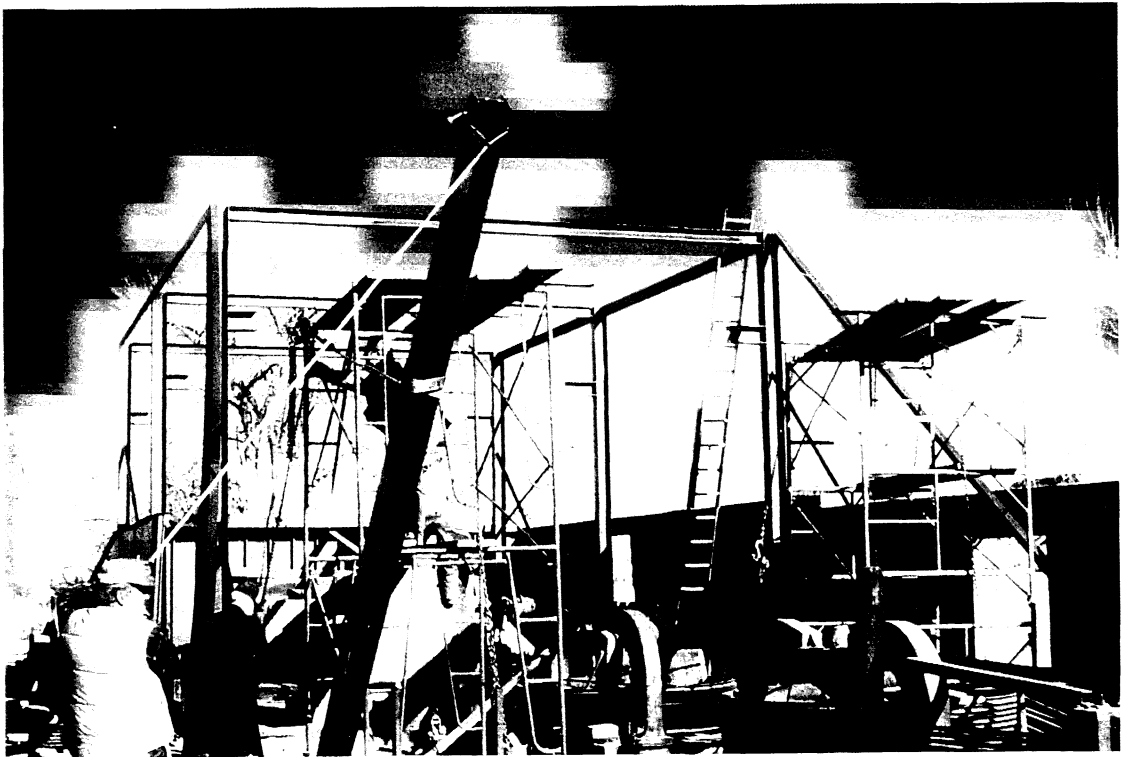


PLAINTIFF'S EXHIBIT			
EXHIBIT NO.	102	CASE NO.	61-741
DATE REC'D		IN EVIDENCE	
CLERK			

Tab 6



Tab 7



Tab 8





Tab 9

Tab 10

STATE OF UTAH
OFFICE OF THE ATTORNEY GENERAL



JAN GRAHAM
ATTORNEY GENERAL

JAMES R. SOPER
Solicitor General

REED RICHARDS
Chief Deputy Attorney General

February 25, 2000

J. Craig Smith
NIELSEN & SENIOR
P.O. Box 11808
SALT LAKE CITY UT 84147

Re: Water User's Claim (WUC) No. 91-294 for
Green River Canal Company

Dear Craig:

I appreciate your patience in awaiting my response to your letter sent last fall. You inquired whether the State Engineer would be willing to amend the proposed determination in the pending Price River general adjudication with regards to WUC No. 91-294. Particularly, would the State Engineer agree to eliminate the footnote which describes the 20 cfs flow for domestic and stockwatering as part of the 60 cfs flow for irrigation.

I have conferred with both Bob Morgan, State Engineer, and Mark Page, Southeastern Regional Engineer. The State Engineer stands by the recommendation made to the court with regards to WUC No. 91-294 as set forth on page 1143 of the Proposed Determination, Area 91, Book No. 5. The State Engineer found that the 20 cfs is part of the 60 cfs flow for irrigation. The 60 cfs flow was sufficient then and is sufficient now for the described beneficial uses and the delivery system. Even at a flow rate of 60 cfs the flow duty is an astronomical 24 acres/cfs.

Moreover, the 60 cfs flow rate was apparently not a problem for the Company when the proposed determination was issued. No objection was filed against the proposed determination by the Company with regards to the 60 cfs flow rate. It was not until the recent litigation between the Company and Lee Thayn that the Company filed an objection to the 60 cfs flow rate in 1999.

EXHIBIT "B"

Letter to J. Craig Smith
February 14, 2000
PAGE TWO

The State Engineer understands that WUC No. 91-294 was looked at by the court in the recent Thayn litigation. But while the right was looked at, it was not adjudicated. It seems the Thayn case is adjudicating private agreements entered into in 1952. One agreement simply recognized that the Company was claiming an 80 cfs flow in its diligence claim. The fact that 80 cfs was claimed in the agreement was admitted to by Thayn. The adjudication of 91-294 did not occur in the Thayn case in which the State Engineer was not a party, but occurred in the general adjudication with the State Engineer after the 1952 private agreements were entered into.

For the above reasons, the State Engineer does not agree that WUC No. 91-294 should be amended in the general adjudication. However, Bob Morgan, Mark Page and I are willing to meet with the Company, Lee Thayn and their designated representatives to further discuss this matter and the associated issues. Should the parties be willing to do so, please let me know so arrangements can be made.

Sincerely,



JOHN H. MABEY, JR.
Assistant Attorney General

cc: Bob Morgan, State Engineer
cc: Mark Page, Southeastern Regional Engineer
cc: Reed L. Martineau, Esq.

JHM/jr

Tab 11

March 26, 1992

Green River Canal Co. Meeting

President, Blaine Silliman called the meeting to order at 2:00 pm at the Oasis Cafe with the following members present:

Blaine Silliman

Jim Vetere

Edward Hansen

Jed Ekker

Bob Just

Judy Scott

Judy read a letter from the county attorney concerning Armando Zamudio's case. Mr. Zamudio had paid \$50 for damages he done to a hedge on the ditch. He still owes \$371 and paid no additional monies in over a year.

Mrs. Scott corresponded with the County Atty's office. They have directed Mr. Zamudio to pay additional \$371.

Board discussed perhaps he could help clean ditch and work off part of monies due.

Blaine said Cardell Dumas was the only bid received. Jed made motion to accept his bid of \$600.00. Bob 2nd motion carried unanimously.

Jed said they need to decide on what & when on cleaning ditch. Will need a backhoe up behind Anderson's.

Jim motion to increase labor rate from \$5.00 to \$6.00 per hr. Jed 2nd. Motion carried.

Ted said he had given approximately 2500
lb of used iron from Josh Wilsons. 25¢ per lb
is an adequate rate. Need to send a check
for \$10.00 to Gloria Hampton for iron. Iron
was used to extend blade on cat.

Andy reminded Blaine that Frank Ross
wanted his info passed on to board.
Blaine just said Frank wanted to
advise Board that he wants to build a
lip on East side ditch out in to river.
Will not effect Green River Canal Co.

Ted thinks we need to put a culvert in
on dike from bone hill draw to E.C. pond
where they've been cutting across dike for
a way through. They will go look at it.

Board decided to go meet with Homer Dav
Saturday Mar 28, 1992 at noon. They will
walk through and see if they can come
up with some resolutions. Everyone
but Edward will meet.

Jim will be in charge of checking pits
and lining up a backhoe. There's a
couple of holes to be taken care of.

Election of officers: Ted motion to
retain current officers. Edward 2nd.
Vote unanimous.

There was considerable discussion
on power agreement with Shagnies.

It was agreed, the board needs to meet with them and review agreement.

Meeting adjourned at 8:15 pm
J. Scott, Sec

June 24, 1992 Green River Canal Meeting
Ben's Cafe
Vice President, Jim Vitore called the meeting to order at Ben's Cafe at 8:30 pm with the following present: Edward Hansen, Lee & Jean Thayer, Ted Ekker, Bob Guest and Judy Scott

The meeting called because of the problem of low water in canal due to the amount being taken out by Thayer's Turbos.

Lee & Jean stated they had 600 2nd ft of water for non-consumptive use.

Ted said as far as he could see unless they release water back so the ditch is running full, then we'd have to take alternative action. We must supply water to users.

Lee said they don't feel that shutting the turbo off is the solution, only to the Canal Co.

Bob just ask if an Engineer had done a study on what the impact would be. Lee said they had a 3-4" feasibility study.

Green River Canal Company

The Board of Directors of the Green River Canal Company met at the Oasis Cafe March 14, 1989 7:00 pm for a meeting.

The meeting for the purpose of deciding when to start work on ditch ditchrider and extra work needed at pump house where ditch begins.

Rollie Thompson, ditchrider wanted to begin work immediately and was upset over wages. After a brief discussion Rollie quit.

Dean Thayne came in and made a presentation of the improvements and approx. cost to bridge across canal and in front of building at pump house. Approx 50 yds. concrete (\$3,000) & rebar 3,000 ft (\$540) will do 10' wide deck 1" thick for a total of approx \$3540. Includes bridge & deck plus 2 beams 13' (\$200) across bridge. Labor \$1,000. Total approx. \$4800 - \$5000 ÷ 2 (Canal Co. 1/2)

Jack Erwin asked if they were going to put power in there. Dean said the building was being put in with that capability. If something developed there the Canal Co. would share in power as previously agreed.

Discussion ensued about power. Blaine Sellenman will check with Herald Jensen about particulars

PLAINTIFF'S EXHIBIT

EXHIBIT NO.

41

CASE NO.

6174

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from previous meeting.

Received liability insurance situation again, and possible repercussions of being sued for damages.

Jack made a motion for Canal Co. to assume 50% of cost repair material and labor to fix deck at pump house. Jay Vetere 2nd. Motion carried.

Discussion about ditch rider, advertising versus appointing someone. Leo Dumas might accept job. Bill Caffer called and offered it to him at \$600 month. Leo said he'd accept, includes sloper work, etc.

Much discussion about tree at head of raceway. Decided it needed to be removed. Blaine will try to pull it out with big winch truck.

Discussion about raising service charge from \$10⁰⁰ to \$20 or \$25. Will think about it and vote in Aug. Would increase treasury by approximately \$2,000⁰⁰.

Blaine will check with Therald Jensen about users of water who are delinquent or non-payers. What action can be taken against them.

Discussion about backhoe work will check around about prices. Get the best price.

Meeting adjourned at 9:10 pm.

Those present: Bill Caffer

Blaine Silberman

Jack Erwin

Rollie Thompson

Jay Vetere

Ken Thayer

Submitted by Sec., Judy Ann Scott

January 07, 1992 Annual Stockholders Meeting
Green River Canal Company

The annual stockholders meeting of the Green River Canal Company was called to order on January 07, 1992 7:15 p.m. at the Green River City Hall. President, Blaine Silliman conducted the meeting.

Minutes of the Stockholders meeting on January 08, 1991 were read by Secretary, Judy Scott. Gene Dunham made a motion to accept the minutes as read. Dean King 2nd. Motion carried.

A count of the stock represented was taken. There were 1423 shares present with 955½ shares proxy for a total of 2378½ which made a quorum of stock. (Total stock out 4158/half=2079).

New discussion referring back to old problems referred to in the minutes. Homer Davis questioned what had been done on the leakage problem on his property. Blaine & Tim said they had walked the ditch to check (while water was out of ditch). Ted also checked it as well. At Homer's suggestion to talk with some other people who were somewhat familiar with the property, he talked with Dick Bedier & Tom Hastings. They said they never had a problem with muskrats. Ted suggested to dig a ditch with a backhoe and drain, but at looking at it further thought there must be a spring under the slewy area. Ted doesn't believe it is the canal company's responsibility. Ted suggested closing headgate and putting dye to see if it would come up there. Much discussion by all parties present. Sec. Judy Scott read a letter from Atty. George Hammond dated 7-13-91 to Elaine Coates/Homer Davis regarding problem. Homer did not think this resolved any of the problem. Dean King suggested a backhoe go in and dig along ditch and see if they can find muskratt hole/holes. Ted suggested whole board and any interested stockholders go look at problem and see if they could come up with a solution. Homer asked if they were going to attempt to correct this or wait until spring, then get sued. Appearing to have no resolution or agreement as to the exact cause of the problem or how to solve the situation at this time, the board agreed to go look at the area with Homer at a time designated by him.

There was discussion about the flooding problems which occurred this past summer which affected Don Acerson and others. Ted noted that he and Blaine had tried to get Emery County to include some funds from the Emery County budget, but they did not include any funding. The county had referred them back to the city and the city had also requested some help, but the county did not include any flood money. Ted noted, he'd like to build the bank up on the high side which might help. Adding that if the trees, etc. on the old 92 ditch could be taken out maybe the flood area could be allievated at least to a lesser degree before it gets to the canal. Considerable discussion on the problem and various theories on the resolution of them.

Blaine mentioned that the Financial Statement was being passed around for their review and approval. Homer asked why the usage of Ted's cat versus the canal company's cat. Ted responded saying that they had to cut out some large tress with long roots and the canal company's cat has the sloper and would not have worked as well for what was needed. He had approval of all board members prior to doing work.

Sue Folsom ask about cementing the ditch, wondering if that would be feasible as it would eliminate some of these other problems. Discussion followed. Basicly it would be too costly was the final conclusion.

John Vetere asked about the canal being sprayed for weeds. He said the County man told him the canal co told him not to come and spray. Blaine said he had called them and they told him they would only be able to do 1/3 of it at \$1600, and the canal co. would have to pay the other 2/3's. Additional discussion, John Vetere said they told him they would do it for only \$500. Secretary will write a letter to the County and get costs, dates, etc. in writing.

Blaine called for the election of one three (3) year board memembr to be elected to replace Bill Caffee who goes off the board. Homer Davis nominated Bob Quist, 2nd by Gene Dunham. Gene asked that nominations cease and Bob Quist be placed in office by acclamation. All in favor.

Blaine Asked for approval of the Financial Statement. Gene Dunham made motion to approve. John Powell 2nd. Unanimous.

Ted noted to the stockholders that the cat needs some repairs and he will do in the spring if there is no opposition. Noting that one of the items is a pin. John Vetere said it needs a flapper put on it. Ted said the tailgate needs to be extended. No further discussion.

Gene Dunham asked about the raceway and the status with Thayns' on power plant. Some discussion by stockholders who were there when commitments were made as to canal co.'s status. Need to review previous agreement and update if needed. Judy referred to minutes for the 3/14/89 meeting when Leon Thayn was present. Gene Dunham and Clell Duncan said they had discussed this with Leon at a Soil Conservation Meeting recently and he indicated the first couple of years would be very costly but the 3-5 year period should have some revenue. Indicated that a cent and a half is what UP&L will pay.

Ted said there was question on cleaning the raceway. Everyone stressed to clean it on the west side.

Judy said she had finally gotten ahold of George Hammond, Atty. from Therald Jensen's office. Therald has retired, all the files for canal co. are in that office and available to him. He will still be on retainer for the \$500 a year fee. Stockholders agree. Judy also noted that Geo had told her the amendment thought to be passed last year at stockholders meeting was not passed. The reason being, the amendment requires a 2/3 majority of the stockholders and not just a majority of the stockholders. The amendment had only a majority and not a 2/3's majority.

The meeting was adjourned at 8:40 p.m.

JA Scott

The following board members present at the meeting 1-07-92
were: Blaine Silliman, Ted Ecker, Edward Hansen, Tim
Vetere and Judy Ann Scott.

*A list of the stockholders present
is attached.*

FILED
UTAH SUPREME COURT

JAN 29 2002

PAT BARTHOLOMEW
CLERK OF THE COURT

J. Craig Smith, 4143
David B. Hartvigsen, 5390
D. Scott Crook, 7495
Scott M. Ellsworth, 7514
NIELSEN & SENIOR
1100 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
Telephone: (801) 532-1900
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Attorneys for Appellee/Cross Appellant
Green River Canal Company

SUPREME COURT OF THE STATE OF UTAH

GREEN RIVER CANAL COMPANY, a Utah :
Mutual Water Company, :

Plaintiff/Appellee/Cross Appellant, :

v. :

LEE THAYN, :

Defendant/Appellant/Cross Appellant. :

Errata Sheet

Utah Supreme Court Number
20010357 SC

Appellee/Cross Appellant, Green River Canal Company, by and through its counsel of
Record, submits the following errata sheet on its Brief of Appellee/Cross Appellant, filed
January 16, 2002, in the Supreme Court of the State of Utah.

<u>Page</u>	<u>Correction</u>¹
23	End of first full paragraph: ". . . to utilize the diversion and conveyance facilities owned by GRCC. It does not convey"

¹ Additions are underscored; deletions are ~~stricken~~.

23	<p>First sentence of the second paragraph:</p> <p>" . . . duties imposed upon him by his predecessor`s contract with GRCC. By so doing, the trial court"</p>
23	<p>Last sentence of the second paragraph:</p> <p>" . . . to learn every particular of the arrangements between Wilsons and GRCC. Thayn, however, admittedly"</p>
23	<p>Blank record citation should read</p> <p>"(R. at 1-2, ¶¶ 2, 5-7; 23-24, ¶¶ 2, 5-7; 1897, 14:24-15:6; 1902, v.4, 70:1-71:16; Addm. F, ¶¶ 2-4.)."</p>
46	<p>In the middle of the sole full paragraph:</p> <p>" ' . . . power generation on a year-around [sic] basis.' (<i>Brief R.</i> at <u>990</u>, ¶ 8.)"</p>
57	<p>First sentence of the final paragraph:</p> <p>" . . . \$9,866.50 of the requested amount be paid to GRCC. It excluded five hours"</p>
57	<p>First sentence of the first full paragraph:</p> <p>"In light of the foregoing, Green River GRCC, pursuant to"</p>
67	<p>Second sentence of the second paragraph:</p> <p>"The raceway and diversion dam are owned by GRCC. The Wilson`s interest in the pump house"</p>
67	<p>First sentence of the last paragraph:</p> <p>"According to the 1952 Agreement, Green River GRCC was to convey"</p>

70	<p>First sentence of the second paragraph:</p> <p>" . . . according to the 1952 Agreement, Green River GRCC was to convey"</p>
76	<p>Signature block:</p> <p>"Attorneys for Appellee/Cross-Appellant, Green River GRCC <u>Canal Company</u>"</p>

DATED this 28th day of January 2002.

NIELSEN & SENIOR, P.C.



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Scott M. Ellsworth

Attorneys for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of January, 2002, two true and correct copies of the foregoing *Errata Sheet* were mailed, by first-class United States mail, to

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