

1988

# Lucky Seven Rodeo Corporation, a Utah corporation v. Pat Clark : Brief of Appellant

Utah Supreme Court

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UTAH COURT OF APPEALS  
BRIEF

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880079-CA

IN THE SUPREME COURT OF THE  
STATE OF UTAH

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LUCKY SEVEN RODEO CORPORATION,	:	
a Utah corporation,	:	APPEAL FROM THE JUDGMENT
	:	OF THE DISTRICT COURT,
Appellant,	:	FIFTH JUDICIAL DISTRICT,
	:	WASHINGTON COUNTY
vs.	:	
	:	
PAT CLARK,	:	Case No. 860067
	:	Classification: 13b
Respondent.	:	

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88-0079-CA

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### GUIDE TO ABBREVIATIONS

1. "R" refers to the record of compiled District Court Pleadings.
2. "RT" refers to the Reporter's Transcript of Trial.
3. "TH" refers to a Transcript of a hearing. There were hearings on the Summary Judgment Motion and Motion for Findings on September 10, 1985, November 13, 1985, and December 10, 1985.
4. Citation Form. References in a citation to the record or a transcript sequentially indicate page and line. References to pages and lines are separated by a colon, subsequent pages are separated by a semi-colon. (eq. RT. 45:1-5; 47:10-12 indicates Reporter's Transcript, Page 45, lines 1 through 5, and Page 47, line 10 through 12.)

### LIST OF PARTIES

1. Lucky Seven Rodeo Corporation, a Utah corporation, Plaintiff and Appellant.
2. Pat Clark, an individual Defendant, Respondent and Defendant.

TABLE OF CONTENTS

	<u>Page</u>
Guide to Abbreviations	1
List of Parties	1
Table of Contents	2
Table of Authorities	3
Statement of Issues	5
Statement of Facts	6
Summary of Argument	16
Argument	19
I.    THE CLEAR PROVISIONS OF THE STIPULATION AND CONSENT JUDGMENT ALLOWING ALTERNATIVE USES OF THE EASEMENT SHOULD BE GIVEN EFFECT AND THE SUMMARY JUDGMENT REVERSED.	19
II.   THE DISTRICT COURT ERRED IN CONSTRUING THE ORDER AND JUDGMENT.	22
A.  THE LOWER COURT HAD NO POWER TO CONSTRUE AN UNAMBIGUOUS JUDGMENT.	22
B.  THE TRIAL COURT'S CONSTRUCTION OF THE JUDGMENT AND ORDER IS NOT SUPPORTED BY THE RECORD.	23
C.  THE DISTRICT COURT HAD NO DISCRETION OR AUTHORITY TO ALTER OR AMEND THE CONSENT JUDGMENT.	25
III.  THE AFFIDAVIT OF RUSSEL J. WALTER RAISES MATERIAL ISSUES OF FACT, THUS PRECLUDING SUMMARY JUDGMENT AS A MATTER OF LAW.	27
IV.  SUPPOSED AMBIGUITIES IN ORDER AND JUDGMENT COULD NOT LAWFULLY BE RESOLVED BY SUMMARY JUDGMENT.	30

V.	THE DISTRICT COURT ERRED IN FAILING TO CONSIDER THE REASONABLE INFERENCES FROM THE ADMITTED FACTS IN A LIGHT MOST FAVORABLE TO LUCKY SEVEN.	32
VI.	THE DISTRICT COURT'S FINDINGS THAT THE APPELLANT ABANDONED THE EASEMENT IS NOT SUPPORTED BY ANY CLEAR OR UNEQUIVOCAL EVIDENCE OF AN INTENT TO ABANDON.	33
	Conclusion	35
	Addendum	

TABLE OF AUTHORITIES

	Authority	Page
1.	<u>Amjacs Interwest, Inc. v. Design Associates</u> , 635 P.2d 53 (Utah 1981).	31
2.	<u>Bean v. Carlos</u> , 21 Utah 2d 309, 445 P.2d (1968).	21
3.	<u>Bowen v. Riverton City</u> , 656 P.2d 434 (Utah 1982).	29, 32
4.	<u>Bowen v. W. H. Westerhaus</u> , 224 Kan. 42, 578 P.2d 1102 (1978).	29, 32
5.	<u>Faulkner v. Farnsworth</u> , 665 P.2d 1292 (Utah 1983).	31
6.	<u>Grow v. Marwick Development Inc.</u> , 621 P.2d 1249 (Utah 1980).	31
7.	<u>Goodpaster v. Pfizer, Inc.</u> , 35 Wash. App. 199, 665 P.2d 414 (1983).	32
8.	<u>Hamada v. Valley National Bank</u> , 27 Ariz. App. 433, 555 P.2d 1121 (1976).	31
9.	<u>Hustead v. Bendix Corp.</u> , 233 Kan. 870, 666 P.2d 1175 (1983).	32
10.	<u>Kishner v. Kishner</u> , 562 P.2d 493 (Nev. 1977).	22

11.	<u>Lynch v. Spillman</u> , 62 Cal. Rptr. 12, 431 P.2d 636, (Cal. 1967).	31
12.	<u>Meuse-Rhine-Ijssel Cattle Breeders of Canada Ltd. v. Y-TEX Corp.</u> , 590 P.2d 1306 (Wyo. 1979).	31
13.	<u>Mobile Acres, Inc. v. Kurata</u> , 508 P.2d, 889 (Kan. 1973).	30
14.	<u>Owen v. Burn Construction Company</u> , 563 P.2d 91 (N.M. 1977).	21, 25
15.	<u>Payton v. Magleby</u> , 30 Utah 2d 236, 516 P.2d 344 (1973).	21, 25, 32
16.	<u>Park City Utah Corporation v. Ensign Company</u> , 586 P.2d 446 (Utah 1978).	20, 22, 23, 31
17.	<u>Parks v. Parks</u> , 91 N.M. 369, 574 P.2d 588 (1978).	21, 24
18.	<u>Pennington v. Employer's Liability Assurance Corp.</u> , 520 P.2d 96 (Alaska 1974).	31
19.	<u>Sandberg v. Klein</u> , 576 P.2d 1291 (Utah 1978).	27
20.	<u>Southside Tabernacle v. Pentecostal Church of God, Pacific Northwest District, Inc.</u> , 32 Wash. App. 814, 650 P.2d 231 (1982).	32
21.	<u>Spomer v. Spomer</u> , 580 P.2d 1146 (Wyo. 1978).	22
22.	<u>State Highway Commission v. B. J. Clark</u> , 439 P.2d 537 (N.M. 1968).	21
23.	<u>State of Arizona v. Ashton Co., Inc.</u> , 4 Ariz. App. 599, 422 P.2d 727 (1967).	32
24.	<u>Timpanogas Highland, Inc. v. Harper</u> , 544 P.2d 481 (Utah 1975).	33
25.	<u>Thermo-Kinetic, Inc., v. Allen</u> , 16 Ariz. App. 341, 493 P.2d 508 (1972).	33
26.	<u>W. M. Barnes Co. v. Sohio Natural Resources Co.</u> , 627 P.2d 56 (Utah 1981).	31
27.	<u>Washington Hydroculture, Inc. v. Payne</u> , 96 Wash. 2d 322, 635 P.2d 138 (1981).	31



28.	<u>Weaver v. Blue Cross-Blue Shield of Wyoming,</u> 609 P.2d 984 (Wyo. 1980).	32
29.	<u>Wells v. Valley National Bank of Arizona,</u> 109 Ariz. 345, 509 P.2d 615 (1973).	22
30.	<u>Westbrook v. Lea General Hospital,</u> 85 N.M. 191, 510 P.2d 515 (N.M. App. 1973).	30

### STATEMENT OF ISSUES

1. Whether the trial court erred in failing to give effect to the clear and unambiguous language of the Consent Order and Judgment which permits an agricultural use of the easement.
2. Whether the trial court's construction of the Consent Order and Judgment is supported by the record.
3. Whether there were material issues of fact precluding Summary Judgment as a matter of law.
4. Whether the Order and Judgment is ambiguous, and if so, whether the Court erred in resolving the ambiguity on Summary Judgment.
5. Whether the trial court failed to resolve inferences from admitted facts in a light most favorable to appellant.
6. Whether the trial court's finding of abandonment of the easement is supported by clear and unequivocal evidence of an intent to abandon.

### STATEMENT OF FACTS

On or about March 13, 1981, Lucky Seven Rodeo Corporation, hereinafter "Lucky Seven", filed suit against Pat Clark to quiet title to a 5.815 acre parcel of real property located on the borders of their respective properties in rural Washington County. (R. 1) At the time of trial, a dike and small reservoir were located on a portion of the acreage. For convenience, this parcel was referred to as the "dike area." After two days of trial the parties entered into a stipulation by which Lucky Seven was granted a perpetual easement to use the 5.815 acre parcel.

Lucky Seven appeals from a Summary Judgment entered by the Fifth Judicial District Court on January 23, 1986, terminating the easement for alleged inappropriate use and abandonment of the easement property. (R. 220-222)

The primary issue in this appeal is whether Lucky Seven's use of the easement property constitutes an abandonment or warrants a termination of the easement.

A substantial portion of the trial testimony focused on the issue of Lucky Seven's historical use of the disputed property over the years of an alleged adverse possession. Russel J. Walter, president of Lucky Seven Rodeo Corporation, testified that the 5.815 acre parcel had multiple uses.

Q. Now, the portion of the ranch referred to generally as the "pond" and "dike" area, what did you use that for?

A. The pond area and the dike area I used to store water to irrigate the fields on the south side of the pond, fruit trees and so forth, and I used it for pasture and water storage. . . .

Q. Now, while you are there, Mr. Walter, are there any improvements on that property that you placed there-you or your family placed there, that you were aware of?

A. Yes. We decided a well right here where it went down - when we bought the place, there was a well. It was down, I believe, like 150 feet, or something, and we drilled it on down right here (indicating) right on the dike and then we put in recreation area, basketball court here (indicating) then we done the smaller dike, pond work inside the big major pond. . . .

Q. Now, did you ever make any improvements on the pond area itself?

A. Yes.

Q. And what did you do?

A. We cleaned out the pond and built a smaller pond in the middle, and the well and the court.

Q. And what did you-

A. Then, of course, that fencing there too. We planted in there, we planted.

Q. I didn't hear you.

A. We planted, but it didn't grow very good.

Q. With respect to animals, did you have animals inside that pond-dike area?

A. Yes.

(RT. 32:19-25; 33:9-19; 34:10-20; 38:2-23)

Patricia Walter also testified regarding the use of the 5.815 acre parcel.

Q. Could you explain to the ladies and gentlemen of the jury and the Court what uses the pond and dike areas were put to during the period of time that you lived there?

A. Well, it was an area where we collected our irrigation water that came down a ditch from Central and it was a place we occasionally kept horses and some calves, sometimes. It was kind of a playground for the kids. Well, we had a boat on there and they played with the neighborhood kids on the pond and we maintained the area like you would. We had a basketball court. . . . It was an area where we often kept livestock of different kinds, horses or cattle. I painted it and that's why it shows so good, because I painted it. Then a little bit to the south of the dike is where there is a basketball court, and we also had a volleyball net and badmitton, there is a horseshoe pit there and it was quite a gathering place for the neighbors ranch kids because there was a lot of things to do, a lot of fun. And we used the water, of course, to irrigate these fields and these orchards to the south and west of the pond area....we used this for so many different-

(RT. 119: 22-25; 120:1-4, 16-25; 121: 9-10).

When the respondent Pat Clark was asked whether he had observed the Appellant's use of the disputed parcel, he responded: "I never have, sir." (RT 208: 11-15). Otherwise, Mr. Clark gave no testimony regarding any past or future intended use of the disputed property.

At trial, counsel for respondent Pat Clark attempted to minimize the frequency and importance of the appellant's use of the pond for irrigation purposes. For example, the cross-examination of Russel J. Walter proceeded as follows:

Q. You testified, as I recall, on direct examination, that you used the water from this subject pond or reservoir to irrigate the ranch fields. Was that your testimony?

A. Yes.

Q. Now it's true that a goodly share of the time the reservoir is dry, isn't it?

A. A portion of the time it is dry.

Q. And isn't it true that actually the reservoir is not the primary source of water to irrigate those fields, that you have other sources to irrigate them?

A. At the time we purchased the ranch, it was the primary source. At the present time, it is not.

Q. There are other sources of water there, aren't there?

A. Yes. There are some.

Q. And you don't necessarily rely upon water from the reservoir to irrigate the ranch, do you?

A. Well, not entirely, no.

(RT. 127:2-19)

It is apparent from the following portion of the transcript of the trial that after hearing testimony regarding the multiple uses of the disputed property, the Court became increasingly disinterested in testimony regarding multiple uses of the disputed area, and discouraged additional testimony on use of the easement area.

Mr. Anderson: Your Honor, I would offer in evidence what has been offered as Plaintiff's Exhibit 31.

The Court: What is the purpose of this, counsel?

Mr. Anderson: Well, from another point of view, showing the utilization of the pond to the ranch.

The Court: What does utilization of the pond probe?

Mr. Anderson: Well, its use in relationship to the ranch.

The Court: Well, there's no issue that it has use to the ranch, is there Mr. Foremaster? There is an issue as to who owns it, isn't that it?

(RT. 46:6-18)

It is clear from the record that Lucky Seven had made many uses of the property, including stock corralling, holding irrigation water, planting, and various recreational uses. There is no record that any one use was dependant, contingent or predicated upon another use.

On the third day of trial, the parties negotiated a settlement. The parties' oral stipulation was reduced to writing and signed by the parties and their counsel. (R. 152-155) Counsel submitted the form of an Order and Judgment consistent with the oral and written stipulation which was signed by the District Court Judge on February 13, 1984. (R. 156)

Paragraph three (3) of the Order and Judgment entered by the District Court states that Lucky Seven is to have

an exclusive and perpetual easement to use, maintain and operate the reservoir and dike are [sic] which are described in paragraph 2 above for irrigation, stock watering, corralling of animals and agricultural purposes, together with the obligation that plaintiff shall maintain the fences enclosing the area hereinabove described. (R 157, ¶ 3)

Paragraph five (5) of the Court's Order and Judgment grants Lucky Seven an easement across the Defendant's land for a "ditch" presently running from the town of Central to the reservoir. Lucky Seven was further granted the right to improve said ditch by installation of a pipeline and all necessary rights of ingress and egress to maintain the same. (R. 157, ¶ 5)

In Paragraph 6 of the Order and Judgment, the parties provided for termination of the easement as follows:

In the event the reservoir and dike area described in paragraph 2 above were to fall into non-use for a period of ten (10) consecutive years, the easement granted in paragraph 3 above would expire automatically without notice. (R. 158, ¶ 6)

In 1985, Lucky Seven removed from the easement a portion of a dike located on the property, and began to level the ground in preparation for planting. (R. 188, ¶ 8)

The fee owner, Pat Clark, filed a motion for Summary Judgment. (R. 180) Pat Clark filed an affidavit in support of Summary Judgment, alleging that the purpose of the easement was to use and maintain a dike and reservoir and that Lucky Seven's voluntary removal of the reservoir and dike in 1985 destroyed the need and purpose for the easement, thus, destroying the easement itself. (R. 182-184)

Lucky Seven responded by filing the affidavit of its president, Russel J. Walter, who testified that he understood and intended that the easement granted alternative uses of the 5.815 acre parcel, including "agricultural purposes." Russel Walter's affidavit further stated that Lucky Seven had elected to use the easement for agricultural purposes, rather than a reservoir and dike. (R. 188, ¶ 11) Walter denied any intent to abandon the easement and stated that he believed that Lucky Seven's removal of the dike and reservoir for agricultural purposes was consistent with the language of the easement and intent of the parties. (R. 188, ¶ 11)

Russel Walter's Affidavit states that at the time of entering into a consent Judgment providing for alternative uses of the 5.815 acre parcel, the parties "were aware and intended" that upon installation of the pipeline replacing the ditch, and that Lucky Seven had no obligation to continue using its water to



fill a pond. Lucky Seven also alleged that a portion of the dike was located on Lucky Seven's separate property and that Lucky Seven had determined to remove that portion of the dike on its property, thus creating a breach in the dike and making that portion of the dike located on the easement property useless for holding water. (R. 187, ¶ 7; 188, ¶ 12)

The District Court heard oral argument on Pat Clark's motion for Summary Judgment on the 13th day of November, 1985. The Court stated that it was his "direct impression that the purpose of the lawsuit with respect to the area was for a reservoir and dike," and ordered that the removal of the dike destroyed the easement and directed that a Summary Judgment be prepared. (TH Nov. 13, 1985, P. 2: 18-20)

Counsel for Pat Clark submitted a proposed Summary Judgment to which Lucky Seven filed objections and requested findings. (R. 203-206; R. 207-209) One of Lucky Seven's objections was that at the hearing on November 13, 1985, the trial court had stated that its ruling was based, at least in part, on some ambiguity in the Judgment of February, 1984. The proposed Summary Judgment, however, failed to specify the nature of the ambiguity. (R. 107, ¶ 1)

At a hearing on December 10, 1985, counsel for Lucky Seven objected to the proposed Summary Judgment in part because the proposed Order failed to clarify what ambiguity was in the

February, 1984 Order and Judgment. (TH Dec. 10, 1985, P.4:9-21; P.5:11-20) <sup>1</sup>

On Lucky Seven's request to identify the ambiguous language, the Court ordered that paragraphs 4, 5 and 6 of the original Order of February 13, 1984, be included in the Summary

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<sup>1</sup> It is unclear what ambiguity the Court had in mind. However, it is possible that a typographical error may have caused a potential ambiguity. Paragraph 3 of the Order and Judgment states:

Plaintiff Lucky Seven Rodeo Corporation and its successors and assigns (hereinafter "plaintiff") shall have an exclusive and perpetual easement to use, maintain and operate the reservoir and dyke are which are described in paragraph 2 above . . .

(R. 157, emphasis added)

The word "are" should have been "area". This typographical error may give an impression that Plaintiff was to maintain the dike and reservoir, rather than the "dike and reservoir area". The phrase "reservoir and dike area" is a short hand way of describing the 5.815 acre parcel. This potential ambiguity, however, is clarified by comparing the same phrase in paragraphs 2 and 6 of the same Order and Judgment, which clearly refer to the larger 5.815 acre parcel. Similarly, the Stipulation upon which the Order and Judgment was based consistently refers to maintaining the "reservoir and dyke area" for agricultural and other purposes. (R. 152, ¶1; 153, ¶2; 154, ¶5)

Lucky Seven requested findings. Lucky Seven requested that the Court identify the ambiguity, and questioned whether the trial court understood that the easement covered an area substantially larger than the reservoir and dike and that the words to "maintain the reservoir and dyke are", really meant maintain the reservoir and dike area, which was much larger than the reservoir and did not imply keeping the reservoir intact. (R. 207, ¶ 1; 208, ¶ 6,7)

The Court corrected the potential ambiguity and stated that he understood that the reservoir and dike did not cover the entire 5.8 acres, but that the easement area was larger than the reservoir and dike. (TH. Dec.10, 1985, P.16:4-18)

Judgment because these paragraphs ostensibly created an ambiguity. (TH Dec. 10, 1985, P.5:11-20).

At this same hearing on December 10, 1985, the District Court explained his understanding of the February, 1984 Order and Judgment.

It was my understanding that the settlement was based upon the use of a reservoir and dike for certain property legally in the name of the defendant, Pat Clark.

So long as the reservoir and dike were to continue in use-it being already in place-the easement would continue. I thought that's what you agreed, but that the legal title would remain in the name of the defendant.

It was my understanding at that time at the time of the Summary Judgment and today, that the reservoir and the dike, having been removed, the easement use purpose was extinguished and the legal owner should again have the property.

(TH Dec.10, 1985, P.12:1-13)

Further clarifying the Court's position, the Court said:

"The court does understand and found, and I understood the thrust of the lawsuit to be, that 5.8 acres and the easement was predicated on there being a dike and reservoir there.

The Court finds that the sole purpose of the reservoir and dike, or the easement for the remainder, outside the exact area encompassed by the reservoir and dike was predicated upon there being a reservoir and dike there.

(TH Dec.10, 1985, P.16:7-12, 19:10-14).

The Court entered Summary Judgment and ordered that the easement was abandoned and terminated. Explaining his reasoning,

the Court stated:

The Court being of the opinion that the reason plaintiff was granted such easement under the parties' stipulation upon said real property was to operate and maintain said reservoir and dike for the benefit of the abutting agricultural property owned by and used by the plaintiff and for that purpose only and the reason for the parties' stipulation regarding said easement was to provide said use and benefit to abutting property, and the Court hereby finding that the grant of said easement was for the sole reason to enable the plaintiff to use and maintain the reservoir and dike.

The Court found that the sole reason and purpose for the easement was to operate the reservoir and dike and when these purposes were destroyed, the plaintiff's right to use and maintain the reservoir and dike thereon for any other purpose expressed therein is hereby terminated.

(R. 222-223)

#### SUMMARY OF ARGUMENT

On the third day of trial to quiet title, the parties stipulated that Lucky Seven be granted a perpetual easement to use a 5.815 acre parcel of property. This parcel had historically been used by Lucky Seven for many things, including planting and agricultural purposes. The trial court entered its consent Order and Judgment, which described several uses, including "agricultural purposes".

Lucky Seven argues that the trial court's Summary Judgment that the easement was terminated and abandoned by Lucky Seven's removal of a dike on the property and leveling the ground

in preparation for planting, an agricultural purpose, is contrary to the clear language of the Stipulation and Order and Judgment.

The trial court found that the "sole purpose" of granting the easement was to enable Lucky Seven to maintain and operate a dike and reservoir for the benefit of Lucky Seven's abutting property, and that continued use of the property as a dike and reservoir was a necessary "precedent" to any other use such as an agricultural use.

The trial court's construction of the Order and Judgment is erroneous. Lucky Seven argues that there is no support in the record for the trial court's erroneous "sole purpose" theory of the intent of the parties. The idea that maintenance of a dike was a condition precedent to alternative uses is not found in the record. Further, Lucky Seven argues that the trial court was without power to construe an unambiguous Order and Judgment.

Lucky Seven argues that the Order and Judgment entered by consent is akin to a contract and the Court had no discretion to alter the contract or agreement of the parties by construction.

The Affidavits in support and in opposition to Summary Judgment indicate a clear factual dispute about the intent of the parties regarding use of the easement. Lucky Seven's Affidavit states that the parties knew and understood that the need for a reservoir on the property would be eliminated by construction of a pressurized irrigation pipeline. The parties, therefore, agreed to alternative and multiple uses of the property, includ-

ing agricultural purposes. It was not intended that the dike and reservoir remain on the property.

Pat Clark's Affidavit, on the other hand, states that the parties intended that the easement was granted only to allow Lucky Seven to maintain the dike and reservoir to benefit abutting property. When this purpose was removed, the purpose of the easement was destroyed.

Lucky Seven believes that where the intents of the parties are in such clear dispute, the trial court erred in granting Summary Judgment. The trial court's resort to his unsupported recollections of the intents of the parties to resolve the disputed factual issue was also error.

It is undisputed that Lucky Seven removed a dike on the property and leveled the property in preparation for planting. Except for the language of the Order and Judgment allowing "agricultural" use of the easement, an intent to destroy the easement might be inferred from this conduct. In view of the "agricultural" uses allowed by the Order and Judgment, however, it may be inferred that Lucky Seven intended to use the property consistent with the Order and Agreement of the parties. Of great significance is the fact that the Order and Judgment contain no language of condition that would indicate that an agricultural use was conditioned on continued use of the reservoir. The trial court failed to resolve these inferences in a light most favorable to Lucky Seven and erroneously entered Summary Judgment.

The trial court found that Lucky Seven had abandoned the

easement. In Utah law abandonment of an easement must be shown by clear and unequivocal evidence of an intent to abandon the easement. Since the Order and Judgment clearly states that the property could be used for agricultural purposes, and the property had, in fact, been used for planting in the past, there is no unequivocal evidence of an intent to abandon by Lucky Seven's conduct in determining to plant the area, thus selecting one of the permitted uses over another permitted use.

**ARGUMENT I  
THE CLEAR PROVISIONS OF THE STIPULATION AND  
CONSENT JUDGMENT ALLOWING ALTERNATIVE USES  
OF THE EASEMENT SHOULD BE GIVEN EFFECT AND  
THE SUMMARY JUDGMENT REVERSED.**

The Order and Judgment entered February 13, 1984, states in pertinent part:

Plaintiff, Lucky Seven Rodeo Corporation, and its successors and assigns (hereinafter "plaintiff") shall have an exclusive and perpetual easement to use, maintain and operate the reservoir and dike are [sic] which are described in paragraph 2 above for irrigation, stock watering, corralling of animals and agricultural purposes, together with the obligation that the plaintiff shall maintain the fences enclosing the area hereinafter described. (R. 157, ¶ 3)

There is no dispute that in 1985 the Appellant removed a dike which was located on a portion of easement property and

began to prepare the reservoir area for planting. Lucky Seven urges that this admitted conduct is not contrary to the clear and unambiguous provisions of the stipulation of the parties and the consent Order and Judgment.

Paragraph three (3) of the Court's Order clearly and unambiguously provides alternative uses for the 5.815 acre easement, including "agricultural purposes". The language of the Order and Judgment does not suggest any single use, reason, or purpose for the easement or any portion thereof. Nor does the Order suggest that some uses are predicated or conditional on continuation of other uses. The language of the Order does not suggest that any use of the entire easement or any portion thereof is of any primary or secondary importance.

In spite of the clear language of the Order and Judgment the District Court found, "that the grant of said easement was for the sole reason to enable the plaintiff to use and maintain the reservoir and dike;" (R. 223) Amplifying this idea, the Court said that the use of the 5.85 acres "for agricultural purposes" was "predicated" on there being a reservoir and dike there. (TH, Dec. 10, 1985, 16:8-12). In other words, the property must be used as a reservoir only.

This Court should give effect to the clear provisions of the Order and Judgment. Park City Utah Corporation v. Ensign Company, 586 P.2d 446 (Utah 1978); Westbrook v. Lea General Hospital, 85 N.M. 191, 510 P.2d 515 (N.M. App. 1973). This rule is particularly appropriate in the instant case where the lower



court entered the consent Judgment pursuant to the stipulation of the parties. In Payton v. Magleby, 30 Utah 2d 236, 516 P.2d 344 (1973), this Court held that a consent judgment given pursuant to a stipulation is presumed to be correct in the absence of a showing to the contrary. A consent judgment, therefore, is a contract between the parties, and the Court should give effect to the clear language selected by those parties. Parks v. Parks, 91 N.M. 369, 574 P.2d 588 (1978); Bean v. Carlos, 21 Utah 2d 309, 445 P.2d (Utah 1968); Owen v. Burn Construction Company, 563 P.2d 91 (N.M. 1977); State Highway Commission v. B. J. Clark, 439 P.2d 537 (N.M. 1968).

The clear provisions of the Order and Judgment simply do not support the lower court's "sole reason" theory, nor is there any support in the Order and Judgment, or in the entire record, for the proposition that agricultural uses were predicated on continued use as a reservoir only. The clear language of the consent Judgment to which the parties agreed was that there be alternative or multiple uses of the easement. There is no language of condition. The Summary Judgment cannot be upheld without ignoring or rejecting the clear provisions of the stipulation and consent Judgment.

This Court should reverse the Summary Judgment and direct the District Court to enter an order allowing agricultural uses of the property giving effect to the Stipulation and Order and Judgment.

**ARGUMENT II**  
**THE DISTRICT COURT ERRED IN CONSTRUING**  
**THE ORDER AND JUDGMENT.**

The respondent, Pat Clark, filed a motion requesting the District Court to interpret the Order and Judgment of February, 1984. (R. 171) The District Court undertook to construe the Order and Judgment and thereafter entered its motion for Summary Judgment. (R. 222) Lucky Seven urges that the trial court erred in construing the Order and Judgment.

**A**  
**THE LOWER COURT HAD NO POWER TO CONSTRUE**  
**AN UNAMBIGUOUS JUDGMENT.**

As a general rule, the District Court has inherent power to construe its Judgments. However, this power does not extend to an unambiguous Judgment. Where a Judgment is unambiguous, the Court may not construe it. The Judgment must be enforced as it speaks. Park City Utah Corporation v. Ensign Company, Supra; Kishner v. Kishner, 562 P.2d 493 (Nev. 1977); Spomer v. Spomer, 580 P.2d 1146 (Wyo. 1978); Wells v. Valley National Bank of Arizona, 109 Ariz. 345, 509 P.2d 615 (Ariz. 1973).

Although Pat Clark requested the District Court to construe or interpret the Order and Judgment, he identified no ambiguity in the written Judgment. The District Court initially indicated that there was some unspecified ambiguity in the consent Judgment but failed to identify the ambiguity. Lucky Seven requested that the Court identify any ambiguity in the

Order and Judgment. (R. 207) At a hearing on December 10, 1985, the Court identified paragraphs 3, 4, 5 and 6 of the Order and Judgment as containing some ambiguity, however, the nature of the ambiguity was never articulated. (TH., Dec.10, 1985, P.4:9-21)

In the absence of a finding of ambiguity, this Court should proceed as if the Order and Judgment is not ambiguous and reverse the District Court's Summary Judgment based on the Court's erroneous construction of the unambiguous language of the Order and Judgment which allows agricultural use of the property. The District Court could not construe an unambiguous Order and Judgment.

B

THE TRIAL COURT'S CONSTRUCTION OF THE JUDGMENT AND  
ORDER IS NOT SUPPORTED BY THE RECORD.

The Trial Court construed the Order and Judgment to mean that agricultural purposes were "predicated" on there being a reservoir and dike on the property, and further, that the "sole purpose" of the easement was to allow Lucky Seven to maintain reservoir and dike to benefit adjacent property. (TH., Dec.10, 1985, P.16:8-12)

This Court in Park City Utah Corporation v. Ensign Company, Supra., stated that if the meaning of a judgment is obscure or ambiguous the entire record may be resorted to for the purpose of construing the judgment. Even if the Order and

Judgment in this case were ambiguous, opening the door for judicial construction, the Court's construction of the Order and Judgment is wholly without support in the record. While there is support in the record that a portion of the easement property had historically been used on occasion for a dike and reservoir, there is no indication that this use was to be a predicate or condition to other uses or that the parties intended that this use necessarily be continued. In fact, there is evidence that the parties understood that there were other sources of water to irrigate the fields, that the parties understood that a pressurized irrigation pipeline would be installed, thus eliminating the need for the reservoir, but not terminating the easement. (R.154, ¶ 5; 157, ¶ 5)

The Court in Parks v. Parks, Supra., held that stipulations must be construed to give effect to the intent of the parties, and in seeking the intent of the parties the language used will be not construed so as to give the effect of a waiver of a right not plainly intended to be relinquished. The trial court's construction of the Order and Judgment would waive Lucky Seven's right to elect alternative uses of the property and require it to continue to use the dike and reservoir. Since this is plainly not intended as no language of condition is employed in the Stipulation, this construction is erroneous.

Simply stated, the Court's construction of the easement which cannot be supported by the record, and would work a waiver on Lucky Seven, cannot be upheld.

C  
THE DISTRICT COURT HAD NO DISCRETION  
OR AUTHORITY TO ALTER OR AMEND THE  
CONSENT JUDGMENT.

As earlier expressed, a stipulated Judgment is not a judicial determination, but rather, it is a contract between the parties. (Payton v. Magleby, Supra.) As such, a consent judgment is not within the power or discretion of the Court to amend or alter by construction or interpretation. The Court must enforce the contract which the parties made. Owen v. Burn Construction Company, Supra.

If the Court had found an ambiguity in the consent judgment, it would have been justified in judicially interpreting or construing the judgment, with the aid of the record. The Court's subjective understandings, beliefs, or intents, however, are wholly irrelevant since the Court was not a party to the contract.

The District Court in the case at Bar did not consider the language of the stipulation or the record in construing the consent Judgment. Rather, the Court relied on its own recollection of the lawsuit, and without the aid of the record, made findings based on that recollection rather than on the record. The District Court stated:

The Court finds that the sole purpose of the reservoir and dike, or the easement for the remainder, outside the exact area encompassed by the reservoir and dike, was predicated upon their being a reservoir and dike there, and that the area included in the easement is larger than the area encompassing the reservoir and dike. (TH., Dec. 10, 1985, P.19.)

No support for this "sole purpose" theory or the Court's "predicate" theory can be found in the record. While this may be the Court's understanding of the purposes of the easement, there is no evidence that this was the intent or the agreement of the parties, and the Court's understanding is irrelevant.

If the parties intended that the easement would terminate for non-use of the reservoir and dike, they could easily have said as much. Rather, the parties agreed that the easement would terminate if the "reservoir and dike area fell into disuse for a period of 10 years". (It is important to note here that the entire 5.815 acre parcel, only a portion of which had been used as a dike and reservoir, was referred to for convenience as the "reservoir and dike area".) The parties clearly contemplated and provided for a termination as a result of total non-use of the area, but said nothing about termination resulting from a cessation of a particular use of the area.

The District Court, in construing the consent Order and Judgment, apparently assumed that this Judgment, like other non-consent judgments, could be clarified, altered, or tinkered with until the Judgment was consistent with judicial intent. A consent judgment, however, is fundamentally different. As stated before, it is a contract, and as such the Court's intents and understanding are irrelevant since the Court is not a party to the contract. The Court is not entitled to alter or amend a consent judgment and fashion a new agreement to which the parties did not agree, particularly by relying on its own feelings,

recollections, or understanding of other matters, dehors the record. The Court's intrusion into the contract of the parties in this matter is beyond the power and discretion of the Court and the Summary Judgment must be reversed.

**ARGUMENT III  
THE AFFIDAVIT OF RUSSEL J. WALTER RAISES  
MATERIAL ISSUES OF FACT, THUS PRECLUDING  
SUMMARY JUDGMENT AS A MATTER OF LAW.**

It is admitted that a dike was removed from the easement premises. However, the understandings, intentions, and consequences of this fact are vigorously disputed, therefore, this matter could not be properly resolved by Summary Judgment. Sandberg v. Klein, 576 P.2d 1291 (Utah 1978).

The Trial Court entered Summary Judgment because, according to the Court, the parties intended that the easement was granted for the sole reason to enable the Plaintiff to use and maintain the reservoir and dike. The maintenance of the reservoir and dike was a condition precedent or prerequisite to other uses. According the Court, the removal of the dike and reservoir eliminated the intended use and purpose of the easement. (R. 220-223) The supposed intent of the parties regarding the purposes and uses of the easement was the central factual question on Summary Judgment.

The intentions of the parties regarding the use of the easement were placed squarely in dispute by the Affidavits of the parties. The Affidavit of Pat Clark in support of his motion for

Summary Judgment indicates that the intention and purpose of the easement was to maintain the dike and reservoir. Clark's Affidavit states:

3. That Plaintiff has either caused to be removed or has itself removed or allowed to be removed from the real estate described in said Order, the above mentioned reservoir and dike for which said easement was granted, and the same no longer exists and the said real estate has been leveled and is presently being unused as far as your Affiant can determine.

4. That said reservoir and dike have been completely destroyed and removed from the property, and because of the same, said property can no longer be used for the purposes set forth in said easement, and as above set forth and described.

5. That because of the same the said Plaintiff has, in effect, abandoned and forfeited said easement and has destroyed the reason for said easement to exist.

6. That because of said acts of the Plaintiff as aforesaid, the reason for grant of said easement no longer exists.

(R. 183, emphasis added)

In his Affidavit in opposition to the motion for Summary Judgment, Lucky Seven's President, Russel J. Walter, disputed Clark's assertions that the intent, purpose and reason for the easement was to require maintaining the dike and reservoir. Lucky Seven alleged that the intent was to grant alternative uses. Walter's Affidavit states as follows:

6. That the Defendant was aware that a portion of the dike was located on the Plaintiff's property and would be removed. When the necessity for the reservoir was obviated by the construction of a pipeline.



9. The easement was granted for several alternative purposes and uses, including irrigation and stock watering, corralling of animals and agricultural purposes. Plaintiff has elected to use the easement at the present time for agricultural purposes.

10. The easement does not require the property to be used for a reservoir or dike, but grants the Plaintiff an election of alternatives.

(R. 187, 188, emphasis added)

Comparing the two Affidavits, it is clear that Clark claims that the purpose and intent of the easement was to operate a reservoir and dike, while Lucky Seven avers that the intention of the parties was to allow several alternative uses of the easement, not requiring its use as a reservoir and dike. The intentions of the parties are clearly disputed. The Affidavits raise an issue of fact, thus making Summary Judgment inappropriate as a matter of law. Bowen v. Riverton City, 656 P.2d 434 (Utah 1982).

The Kansas Supreme Court in Bowen v. W. H. Westerhaus, 224 Kan. 42, 578 P.2d 1102 (1978) held that courts should be cautious in granting summary judgment when resolution of a dispositive issue necessitates a determination of the state of mind of one or both of the parties.

At hearing on Summary Judgment this factual dispute was emphasized. The District Court erroneously resorted to its own opinion of the intentions and state of mind of the parties to resolve this issue of fact. The Court said:

It was my understanding that the settlement was based upon the use of a reservoir and dike for certain property legally in the name of the Defendant Pat Clark.

So long as the reservoir and dike were to continue in use - it being already in place - the easement would continue. I thought that's what you agreed, but that the legal title would remain in the name of the Defendant.

(TH., Dec. 10, 1985, P.12).

Before granting Summary Judgment, the Court was aware that the alleged intentions of the parties with regard to the use of the reservoir and dike were in dispute by their Affidavits. The Court, nevertheless, relied upon his own recollection to resolve the factual dispute of the state of the minds of the parties on Summary Judgment. If extrinsic evidence, even if it be the Court's own recollections, is necessary to clear up an ambiguity, Summary Judgment should not be entered. Mobile Acres, Inc. v. Kurata, 508 P.2d, 889 (Kan. 1973). The District Court erred in resolving a dispute regarding a material fact by resorting to his own understanding and recollections. Summary Judgment must be reversed.

**ARGUMENT IV  
SUPPOSED AMBIGUITIES IN ORDER AND JUDGMENT  
COULD NOT LAWFULLY BE RESOLVED BY  
SUMMARY JUDGMENT.**

While Lucky Seven does not believe the original Order and Judgment was ambiguous regarding the alternative uses of the easement, nevertheless, the Court indicated there may have been

some ambiguity. The Court, however, declined to specify the nature of the ambiguity. In the event that this Court determines that the Order and Judgment is indeed ambiguous, Lucky Seven posits the proposition of law that Summary Judgment is an inappropriate way to dispose of an ambiguity. This Court held in Faulkner v. Farnsworth, 665 P.2d 1292 (Utah 1983), that where a written contract was determined to be ambiguous, a motion for Summary Judgment may not be granted if the evidence shows an issue of fact regarding what the parties intended. W.M. Barnes Co. v. Ohio Natural Resources Co., 627 P.2d 56 (Utah 1981); Grow v. Marwick Development Inc., 621 P.2d 1249 (Utah 1980); Amjacs Interwest, Inc. v. Design Associates, 635 P.2d 53 (Utah 1981); Meuse-Rhine-Ijssel Cattle Breeders of Canada Ltd. v. Y-TEX Corp., 590 P.2d 1306 (Wyo. 1979); Lynch v. Spillman, 62 Cal. Rptr. 12, 431 P.2d 636, (Cal. 1967); Hamada v. Valley National Bank, 27 Ariz. App. 433, 555 P.2d 1121 (1976); Washington Hydroculture, Inc. v. Payne, 96 Wash. 2d 322, 635 P.2d 138 (1981).

This general rule applies to judgments on stipulation as well as contracts and documents. The Supreme Court in Park City Utah Corp. v. Ensign Co., Supra, stated that "an ambiguous judgment on stipulation is subject to all the rules that apply to written instruments." Pennington v. Employer's Liability Assurance Corp., 520 P.2d 96 (Alaska 1974). The application of the general rule above-stated in the present case is particularly appropriate where the parties stipulated and consented to the Judgment. This consent Judgment should be viewed and treated as

a contract between the parties. (Payton v. Magleby, Supra.) If there is an ambiguity in the writing and the intentions of the parties are disputed, Summary Judgment is inappropriate.

**ARGUMENT V  
THE DISTRICT COURT ERRED IN FAILING TO  
CONSIDER THE REASONABLE INFERENCES FROM  
THE ADMITTED FACTS IN A LIGHT MOST  
FAVORABLE TO LUCKY SEVEN.**

When ruling on a motion for Summary Judgment, a trial court should consider all conflicting inferences arising from admitted facts in a light most favorable to the non-moving party. Bowen v. Riverton City, 656 P.2d 434 (Utah 1982); Hustead v. Bendix Corp., 233 Kan. 870, 666 P.2d 1175 (1983); Southside Tabernacle v. Pentecostal Church of God, Pacific Northwest District, Inc., 32 Wash. App. 814, 650 P.2d 231 (1982); Goodpaster v. Pfizer, Inc., 35 Wash. App. 199, 665 P.2d 414 (1983); Bowen v. W. H. Westerhaus, Supra.; State of Arizona v. Ashton Co., Inc., 4 Ariz. App. 599, 422 P.2d 727 (1967); Weaver v. Blue Cross-Blue Shield of Wyoming, 609 P.2d 984 (Wyo. 1980).

In the instant case, the easement states that the easement area may be used for "irrigation, stockwatering, corralling of animals and agricultural purposes". (R. 157, ¶ 3) The record indicates a history of multiple uses of this property. The Affidavit of Russel J. Walter states his understanding that there were "alternative uses" of the easement property. (R. 188, ¶ 9) The Affidavit also indicates that the parties understood and agreed that the dike and reservoir would ultimately be removed

when Lucky Seven installed the pressurized irrigation system, thus giving an additional reason for the stated alternative uses of the easement property. (R. 187, ¶ 5) In light of these understandings and intents, as well as the history of multiple uses of the property, the Appellant admittedly removed the dike and reservoir and began preparing the easement for agricultural use.

The admitted facts raise conflicting inferences. It can be inferred from these facts that Lucky Seven reasonably believed that it could elect an alternative use of the property and remove the dike without injuring or abandoning the easement, and therefore, did not have the requisite intent to abandon the easement. When the conflicting inferences raised by the admitted facts are properly viewed in a light most favorable to Lucky Seven, it becomes clear that the District Court should have determined for purposes of Summary Judgment that there was no clear or unequivocal intent to abandon the easement as required by law, and Summary Judgment should have been denied.

**ARGUMENT VI**  
**THE DISTRICT COURT'S FINDING THAT THE APPELLANT**  
**ABANDONED THE EASEMENT IS NOT SUPPORTED BY**  
**ANY CLEAR OR UNEQUIVOCAL EVIDENCE OF**  
**AN INTENT TO ABANDON.**

This Court in Timpanogas Highland, Inc. v. Harper, 544 P.2d 481 (Utah 1975), stated that an abandonment must be proved by clear and unequivocal evidence of an intentional relinquishment of a right. Thermo-Kinetic, Inc., v. Allen, 16 Ariz. App.

341, 493 P.2d 508 (1972). In the instant case, there is no direct or express evidence of an intent to abandon the easement. In fact, Lucky Seven expressly denied any intent to do so. (R. 188, ¶ 11) Thus, any evidence of the Appellant's intent to abandon the easement must be inferred from the circumstances and the Appellant's conduct.

In the present case, Lucky Seven's conduct is consistent with the intent to elect an alternative use of the property as permitted by the literal language of the easement. Therefore, the Appellant's conduct in removing the reservoir and dike standing alone is not unequivocal evidence of an intent to abandon. There is simply insufficient evidence to support the finding of abandonment.

The District Court purported to interpret and construe the consent Order and Judgment. As previously stated, a District Court may not construe an order or judgment unless said judgment or order is ambiguous. Having interpreted or construed an unidentified and unarticulated ambiguity in the Order and Judgment, the District Court set about to punish Lucky Seven for failing to properly construe the ambiguity and act in accordance with the proper construction thereof. It is difficult to understand how a party can formulate an intent to abandon an easement when the easement had to be interpreted and construed by the trial court to establish which uses were permitted and which were not. It seems equitable that if a provision of an easement or judgment is

capable of two meanings and a party, before a judicial construction or interpretation of the ambiguity, conducts itself consistent with one of the possible meanings, that no intent to relinquish a right or abandon should be inferred from said conduct. Under these circumstances, if the Court properly found Lucky Seven's earlier conduct to be contrary to the clarified Judgment, the appropriate relief was to issue an injunction or to award damages, if appropriate. A finding of abandonment, however, is wholly inappropriate and inequitable.

#### CONCLUSION

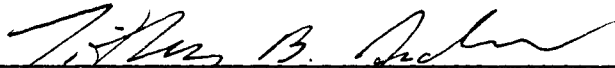
The conduct of Lucky Seven in removing the dike and preparing the easement for planting is an appropriate use of the easement property. This Court should make a denovo review of the language of the easement and determine that Lucky Seven's conduct was appropriate. The Summary Judgment should be reversed, and an opinion entered that Lucky Seven's conduct was proper pursuant to the clear language of the easement.


In the event that this Court finds an ambiguity in the Stipulation of the parties or the Order and Judgment, which constitutes the easement, then this Court should reverse the Summary Judgment finding that the trial court's construction is erroneous and remanding the matter to District Court, with instructions to set the matter for trial on the issue of the intent of the parties regarding use of the easement.

In the event this Court determines that the Order and Judgment was ambiguous but should be construed against Lucky Seven, then this Court should reverse Summary Judgment for the reason that there is no unequivocal evidence of an intent to abandon the easement, and remand to the District Court for trial on the issue of Lucky Seven's breach of the easement and damages.

Respectfully submitted, November 4, 1986.

JONES, WALDO, HOLBROOK & McDONOUGH

  
\_\_\_\_\_  
Timothy B. Anderson

  
\_\_\_\_\_  
Dale R. Chamberlain



**ADDENDUM**  
**TO**  
**BRIEF FOR APPELLANT**

November 4, 1986

**CONTENTS**

Stipulation and Settlement Agreement,  
Entered February 13, 1984

Order and Judgment  
Entered February 13, 1984

Summary Judgment on Supplemental Proceedings  
Entered January 23, 1986

FEB 13 1984

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Timothy B. Anderson CLERK  
DEPUTY

IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR  
WASHINGTON COUNTY, STATE OF UTAH

---oooOooo---

LUCKY SEVEN RODEO CORPORATION	:	
a Utah corporation,	:	STIPULATION AND
	:	SETTLEMENT AGREEMENT
Plaintiff,	:	
vs.	:	Civil No. 7917
PAT CLARK, an individual,	:	
Defendant.	:	

---oooOooo---

The parties above named appeared before the above entitled Court for Jury Trial on the 14th, 15th, and 16th days of December, 1983 at the Washington County Hall of Justice and on December 16, 1983 entered into a Stipulation and Settlement of all issues in the above numbered case as follows:

1. Title to the reservoir and dike area shall remain in the name of Pat (Chas.) R. Clark and Tex Gates. Said parcel comprises that area used by Plaintiff Lucky Seven Ranch within the fence lines and within the NW1/4 NW1/4 Sec. 28, T39S, R16W and more specifically described as follows:

Beginning at the Southwest Corner of the Northwest 1/4 of the Northwest 1/4 of Section 28, Township 39

South, Range 16 West, Salt Lake Base and Meridian, said point being S 0° 36' W 1299.425 feet along the Section line from the Northwest Corner of said Section 28 and running thence N 0° 36' E 339.00 feet to a point on an old fence line; thence along an old fence line as follows: N 79° 21' 30" E 543.00 feet; thence S 82° 30' E 30.01 feet; thence S 18° 50' E 261.00 feet; thence S 7° 40' 30" E 200.00 feet to a point on the South line of the Northwest 1/4 of said Section 28; thence leaving said old fence line and running N 89° 09' 50" W 678.00 feet along the 1/16 line to the point of beginning.

Containing 5.815 Acres.

2. Plaintiff Lucky Seven Rodeo Corporation and its successors and assigns (hereinafter "Plaintiff") shall have an exclusive and perpetual easement to use, maintain and operate the reservoir and dike area which are described in paragraph 1 above for irrigation, stock watering, corralling of animals and agricultural purposes, together with the obligation that plaintiff shall maintain the fences enclosing the area hereinabove described.

3. In the event defendant is assessed a tax increase as a result of plaintiff's maintenance or improvement of the property described in paragraph 1 above, plaintiff shall reimburse defendant the amount of said increased assessment within thirty (30) days written notice of payment thereof.

4. Defendant grants to plaintiff an easement for plaintiff's ditch presently running from the town of Central to the reservoir wherever said ditch runs across defendant's land, and plaintiff further shall have right to improve said ditch by

installation of a pipeline and have all necessary rights of ingress and egress to maintain the same.

5. In the event the reservoir and dike area described in paragraph 1 above were to fall into non-use for a period of ten (10) consecutive years, the easement granted in paragraph 2 above would expire with thirty (30) days written notice.

6. In the event the ditch described in paragraph 4 above were to fall into non-use for a period of twenty (20) consecutive years, the easement granted herein would expire with thirty (30) days written notice.

7. The public, including plaintiff, shall have a perpetual and continuous easement for use of the present roadway across SE1/4 NW1/4 Sec. 28, T39S, R16W, which consists of the present access roads to the Brookside Estates Subdivision and Brookside Summer Homes.

8. An easement serving as the access road to the Lucky Seven Ranch would continue to exist along the lines of the present road from highway U-18 to the Lucky Seven Ranch, said road being located in NW1/4 NW1/4 Sec. 28 T39S, R16W.

9. Plaintiff shall immediately transfer to defendant underground water rights in an amount sufficient to serve culinary water to three (3) homes, with the exact amount to be determined according to State Division of Water Resources published standards. Defendant shall make use of said water by

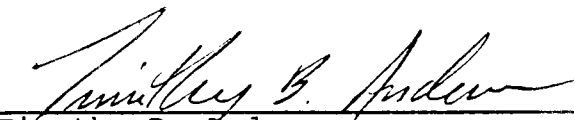
drilling his own well or create his own point of diversion and shall not be entitled to use of the well on plaintiff's property or within the easement area described in paragraph 1 above. If Defendant fails to put the water rights transferred hereunder to beneficial use within a period of five (5) years from the date hereof, said rights shall automatically without notice, revert to plaintiff.

10. Parties hereby dismiss any and all claims arising by virtue of this action one against the other.

DATED this 30<sup>th</sup> day of January, 1984

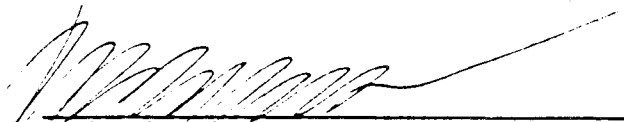
Plaintiff:  
LUCKY 7 RODEO CORPORATION, INC.

  
\_\_\_\_\_  
Russell J. Walter, President

  
\_\_\_\_\_  
Timothy B. Anderson,  
Attorney for Plaintiff

Defendant:

  
\_\_\_\_\_  
Pat (Chas.) R. Clark

  
\_\_\_\_\_  
Phillip Lang Foremaster  
Attorney for Defendant

TBA821

FEB 13 1984

*J. M. Williams*  
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IN THE FIFTH JUDICIAL DISTRICT COURT, IN AND FOR  
WASHINGTON COUNTY, STATE OF UTAH

-----oooOooo-----  
LUCKY SEVEN RODEO CORPORATION :  
a Utah corporation, :  
Plaintiff, :  
vs. :  
PAT CLARK, an individual, :  
Defendant. :

ORDER *and Judgment* *JMS*  
Civil No. 7917

-----oooOooo-----

The Court having reviewed the Stipulation and Settlement Agreement of the parties above named, and good cause therefore showing IT IS HEREBY ORDERED:

1. The claims of the respective parties hereto, one against the other are hereby dismissed with prejudice.
2. Title to the reservoir and dyke area shall remain in the name of Pat (Chas.) R. Clark and Tex Gates. Said parcel comprises that area used by Plaintiff Lucky Seven Ranch within the fence lines and within the NW1/4 NW1/4 Sec. 28, T39S, R16W and more specifically described as follows:

Beginning at the Southwest Corner of the Northwest 1/4 of the Northwest 1/4 of Section 28, Township 39

9-99  
100

South, Range 16 West, Salt Lake Base and Meridian, said point being S 0° 36' W 1299.425 feet along the Section line from the Northwest Corner of said Section 28 and running thence N 0° 36' E 339.00 feet to a point on an old fence line; thence along an old fence line as follows: N 79° 21' 30" E 543.00 feet; thence S 82° 30' E 30.01 feet; thence S 18° 50' E 261.00 feet; thence S 7° 40' 30" E 200.00 feet to a point on the South line of the Northwest 1/4 of said Section 28; thence leaving said old fence line and running N 89° 09' 50" W 678.00 feet along the 1/16 line to the point of beginning.  
Containing 5.815 Acres.

3. Plaintiff Lucky Seven Rodeo Corporation and its successors and assigns (hereinafter "Plaintiff") shall have an exclusive and perpetual easement to use, maintain and operate the reservoir and dyke are which are described in paragraph 2 above for irrigation, stock watering, corralling of animals and agricultural purposes, together with the obligation that plaintiff shall maintain the fences enclosing the area hereinabove described.

4. In the event defendant is assessed a tax increase as a result of plaintiff's maintenance or improvement of the property described in paragraph 2 above, plaintiff shall reimburse defendant the amount of said increased assessment within ten (10) days written notice of payment thereof.

5. Plaintiff shall have an easement across defendants land for its ditch presently running from the town of Central to the reservoir described as existing within the property described in paragraph 2 above, and plaintiff further shall have right to

improve said ditch by installation of a pipeline and have all necessary rights of ingress and egress to maintain the same.

6. In the event the reservoir and dyke area described in paragraph 2 above were to fall into non-use for a period of ten (10) consecutive years, the easement granted in paragraph 3 above would expire automatically without notice.

7. In the event the ditch described in paragraph 5 above were to fall into non-use for a period of twenty (20) consecutive years, the easement granted herein would expire automatically without notice.

8. The public, including plaintiff, shall have a perpetual and continuous easement for use of the present roadway across SE1/4 NW1/4 Sec. 28, T39S, R16W, which consists of the present paved access road to the Brookside Estates Subdivision.

9. An easement serving as the access road to the Lucky Seven Ranch would continue to exist along the lines of the present road from highway U-18 to the Lucky Seven Ranch, said road being located in NW1/4 NW1/4 Sec. 28 T39S, R16W.

10. Plaintiff shall immediately transfer to defendant underground water rights in an amount sufficient to serve three (3) homes, with the exact amount to be determined according to State Division of Water Resources published standards. Defendant shall make use of said water by drilling his own well or create his own point of diversion and shall not be entitled to use of

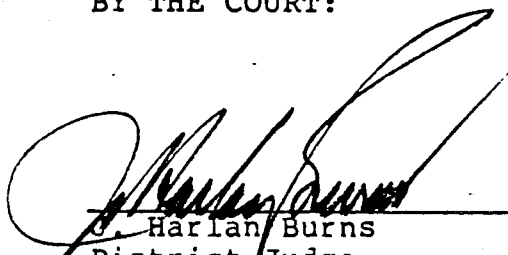


the well on plaintiff's property or within the easement area described in paragraph 1 above. If Defendant fails to put the water rights transferred hereunder to beneficial use within a period of five (5) years from the date hereof, said rights shall automatically without notice, revert to plaintiff.

11. Parties hereby dismiss any and all claims arising by virtue of this action one against the other.

DATED this 7 day of <sup>February</sup> ~~December~~, 198<sup>8</sup>

BY THE COURT:

  
G. Harlan Burns  
District Judge

TBA821C

Philip L. Foremaster  
Attorney at Law  
165 North 100 East, Suite 1  
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St. George, Utah 84770  
Telephone: (801) 673-2209

FIFTH JUDICIAL DIST COURT  
WASHINGTON COUNTY

JAN 23 1986

*Michael Howie* CLERK  
DEPUTY

IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT,  
IN AND FOR THE COUNTY OF WASHINGTON, STATE OF UTAH

LUCKY SEVEN RODEO  
CORPORATION, a Utah  
Corporation,

Plaintiff,

-vs-

PAT CLARK,

Defendant.

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SUMMARY JUDGMENT ON SUPP-  
LEMENTAL PROCEEDINGS

Civil No. 7917

This matter coming on for hearing before the Court sitting without a jury on the 13th day of November, 1985 upon the Motion for Summary Judgment filed herein by Defendant based upon the original Judgment filed herein and upon Defendant's supplemental Motion for Interpretation of Judgment and for Order Terminating Easement and the Plaintiff being represented by its attorney Timothy B. Anderson and the Defendant being present and being represented by his attorney Phillip L. Foremaster and the Court having on the 13th day of February, 1985 caused to be entered herein its Order and Judgment wherein pursuant to stipulation of the parties and after having had trial of the issues between the parties for approximately two days the parties settled the issues existing between them and stated their settlement in open Court and thereupon having requested the Court to enter

its order pursuant to said stipulation, which order, being prepared by counsel for Plaintiff contained in part the following statements:

1. The claims of the respective parties hereto, one against the other are hereby dismissed with prejudice.

2. Title to the reservoir and dyke area shall remain in the name of Pat (Chas.) R. Clark and Tex Gates. Said parcel comprises that area used by Plaintiff Lucky Seven Ranch within the fence lines and with the NW $\frac{1}{4}$  NW $\frac{1}{4}$  Sec. 28, T39S, R16W and more specifically described as follows:

Beginning at the Southwest Corner of the Northwest  $\frac{1}{4}$  of the Northwest  $\frac{1}{4}$  of Section 28, Township 39 South, Range 16 West, Salt Lake Base and Meridian, said point being S 0°36'W 1299.425 feet along the Section line from the Northwest Corner of said Section 28 and running thence N 0°36' E 339.00 feet to a point on an old fence line; thence along an old fence line as follows: N 79°21'30" E 543.00 feet; thence S 82°30' E 30.01 feet; thence S 18°50' E 261.00 feet; thence S 7°40'30" E 200.00 feet to a point on the South line of the Northwest 1/4 of said Section 28; thence leaving said old fence line and running N 89°09'50" W 678.00 feet along the 1/16 line to the point of beginning.

Containing 5.815 acres.

3. Plaintiff Lucky Seven Rodeo Corporation and its successors and assigns (hereinafter "Plaintiff") shall have an exclusive and perpetual easement to use, maintain and operate the reservoir and dyke area which are described in paragraph 2 above for irrigation, stock watering, corralling of animals and agricultural purposes, together with the obligation that plaintiff shall maintain the fences enclosing the area hereinabove described.

4. In the event defendant is assessed a tax increase as a result of plaintiff's maintenance or improvement of the property described in paragraph 2 above, plaintiff shall reimburse defendant the amount of said increased assessment within ten (10) days written notice of payment thereof.

5. Plaintiff shall have an easement across defendant's land for its ditch presently running from the town of Central to the reservoir described as existing with the property described in paragraph 2 above, and plaintiff further shall have right to improve said ditch by installation of a pipeline and have all necessary rights of ingress and egress to maintain same.

in paragraph 2 above were to fall into non-use for a period of Ten (10) consecutive years, the easement granted in paragraph 3 above would expire automatically without notice

And the Defendant having filed herein his Motion for Interpretation of Judgment and for Order Terminating Easement claiming as grounds for termination of said easement that the Plaintiff had voluntarily removed from the above described real property said reservoir and dyke for which said easement was stipulated and granted as aforesaid thereby destroying the reason for the existence of said easement; and

That Plaintiff having answered said Motion for Interpretation of Judgment and for Order Terminating Easement wherein it admitted having voluntarily removed said reservoir and dyke from said real property and for which said easement was granted; and

Plaintiff having further admitted that it had removed a portion of the fencing around said real property that it had agreed to maintain, in violation of the parties stipulation and the order of the Court; and

The Court having been asked to interpret the said previous Order of the Court based upon the parties' stipulation and the same having been prepared by counsel for Plaintiff and therefore to be construed in favor of Defendant and against Plaintiff if any controversy as to its meaning exists; and

The Court having heard the testimony and evidence at trial of the above matter and having heard the verbal stipulation of the parties and the Court being of the opinion that the reason the Plaintiff was granted such easement under the parties' stipulation upon said real property was to operate and

for that purpose only and the reason for the parties' stipulation regarding said easement was to provide said use and benefit to said abutting property; and

The Court hereby finding that the grant of said easement was for the sole reason to enable Plaintiff to use and maintain said reservoir and dyke; and

The Court hereby finding by clear and convincing evidence that at the time of the grant of said easement upon said property there existed a reservoir and dyke thereon and since said time the Plaintiff has voluntarily removed the same from said real property thereby extinguishing the reason for the grant of said easement in the first place; and

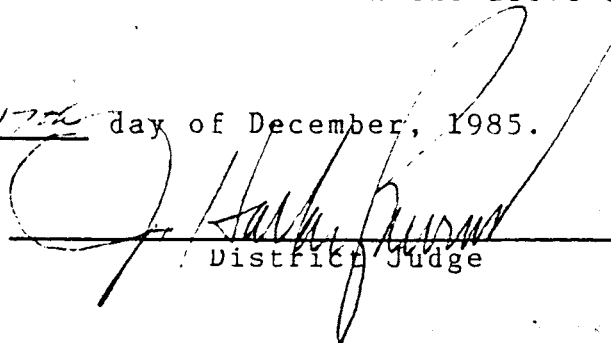
The Plaintiff having in fact destroyed and removed said reservoir and dyke from said real property and further having removed part of the fence thereon thereby voluntarily destroying and reason for said easement to exist and by the destruction and removal of the same having manifested its intent to abandon the same; and

The Plaintiff having further violated the stipulation of the parties and Order of the Court by failing to maintain the fences as provided therein;

NOW THEREFORE, it is hereby ORDERED that the above described easement on the above described real property granting to Plaintiff right to use and maintain the reservoir and dyke thereon and for any other purpose expressed therein is hereby terminated and hereby declared to have no further force and effect and it is hereby declared that the Plaintiff has no

further right, title and interest in the above described real property.

Dated this 17<sup>th</sup> day of December, 1985.

A large, stylized handwritten signature in black ink, written over a horizontal line. The signature is cursive and appears to read "Harold J. ...".

District Judge

CERTIFICATE OF SERVICE

I do hereby certify that on this 5<sup>th</sup> day of November, 1986, I served four copies of the Appellant's Brief in Case No. 860067, Utah Supreme Court, on Phillip L. Foremaster, Counsel for Pat Clark.

JONES, WALDO, HOLBROOK & McDONOUGH

  
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DALE R. CHAMBERLAIN

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