

1988

# William Averett and Marie A. Averett v. Utah County Drainage District No.1 : Brief of Respondent

Utah Supreme Court

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**BRIEF**

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DOCKET NO. 88-0239-CA IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM AVERETT and MARIE  
A. AVERETT,

Plaintiffs-Appellants,

vs.

UTAH COUNTY DRAINAGE DISTRICT  
NO. 1, a corporation

Defendant-Respondent

INTERMOUNTAIN POWER AGENCY,

Intervenor.

**88-0239-CA**

Case No. 86-0133

**BRIEF OF RESPONDENT**

Appeal from Judgment, February 6, 1985,  
Fourth Judicial District Court, Utah County  
Honorable George E. Ballif, District Judge

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**FILED**  
APR 28 1987

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

_____	)	
WILLIAM AVERETT and MARIE	)	
A. AVERETT,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
vs.	)	
	)	
UTAH COUNTY DRAINAGE DISTRICT	)	
NO. 1, a corporation	)	Case No. 86-0133
	)	
Defendant-Respondent	)	
	)	
INTERMOUNTAIN POWER AGENCY,	)	
	)	
Intervenor.	)	
_____	)	

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**STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

- I. AVERETTS CANNOT ADVERSELY POSSESS THE PROPERTY OF THE DRAINAGE DISTRICT BECAUSE IT WAS HELD FOR PUBLIC USE AND HAD NOT BEEN ABANDONED**
- II. AVERETTS DID NOT ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT THEY ADVERSELY POSSESSED THE DRAINAGE DISTRICT'S PROPERTY**

STATUTES WHOSE APPLICATION IS DETERMINATIVE

§78-12-13      No person shall be allowed to acquire any right or title in or to any lands held by any town, city or county, or the corporate authorities thereof, designated for public use as streets, lanes, avenues, alleys, parks or public squares, or for any other public purpose, by adverse possession thereof for any length of time whatsoever, . . .

§19-4-4        The use of any canal, ditch, or the like, created under the provisions of this act, shall be deemed a public use and for a public benefit.  
. . .



IN THE SUPREME COURT OF THE STATE OF UTAH

WILLIAM AVERETT and MARIE	)	
A. AVERETT,	)	
	)	
Plaintiffs-Appellants,	)	
	)	
vs.	)	
	)	
UTAH COUNTY DRAINAGE DISTRICT	)	
NO. 1, a corporation	)	Case No. 86-0133
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Defendant-Respondent	)	
	)	
INTERMOUNTAIN POWER AGENCY,	)	
	)	
Intervenor.	)	
	)	

NATURE OF THE CASE

Plaintiffs-appellants, William and Marie A. Averett (hereinafter "Averetts"), brought an action to quiet title by adverse possession of approximately two acres of real property west of Springville, Utah County, against the claim of defendant-respondent, Utah County Drainage District No. 1 (hereinafter "Drainage District"). Drainage District counterclaimed against Averetts seeking to quiet title to the same two acres by virtue of its Warranty Deed. After a trial to the Court, the Honorable George E. Ballif, District Judge of the Fourth Judicial District, dismissed the Averetts' complaint for adverse possession, and quieted title to the said real property in the Drainage District and awarded the Drainage District all funds tendered to the Court by the intervenor,

Intermountain Power Agency (hereinafter "IPA"). Averetts thereafter appealed from the judgment of the Court.

#### STATEMENT OF FACTS

Drainage District was organized on November 4, 1918 as a drainage district under a statutory predecessor to Title 19, Utah Code Annotated (Finding of Fact No. 1, R. 213). During the years of 1919 through 1920, Drainage District commenced and completed construction of an open drainage ditch which included the open drain on the property which is the subject of this action (hereinafter "subject property") (Finding of Fact No. 2, R. 213). Since that time, the Drainage District has owned, used and maintained the open drainage ditch on the subject property (Finding of Fact No. 11, R. 215).

It is unclear from the evidence whether the Drainage District constructed the ditch on the subject property under a statutory right of entry or with the consent and permission of the then property owner (R. 455, 474-476, 495). However, the Court found that there was no evidence of the grant of an easement to Drainage District nor the establishment by the Drainage District of a prescriptive easement on the subject property prior to 1934 when it received its deed from the Packards (Finding of Fact No. 6, R. 214).

On the 31st day of July, 1934, Chillian F. and Phoebe S. Packard executed a deed to Drainage District which deed was

recorded April 3, 1935 as Entry No. 3091, Book 316, Page 50 of the records of the Utah County Recorder. Said deed recited a consideration of \$100.00 and conveyed to the Drainage District, among other parcels, the property which is the subject matter of this action (Findings of Fact Nos. 3 and 4, R. 213, Defendant's Ex. 17). On the 30th day of April, 1968, Joseph C. Williamson and Nada R. Williamson conveyed a certain parcel of real property to plaintiff, Marie A. Averett, which deed was recorded May 1, 1968. Although the description contained in the deed included the subject property, the deed also contained the following exclusion:

Less that portion of the above described property sold to Utah County Drainage District No. 1, a corporation by Warranty Deed dated July 31, 1934 executed by Chillian F. Packard and Phoebe S. Packard, his wife, recorded April 3, 1935 as Entry No. 3091, Book 316, Page 50 records of Utah County, Utah.

(Findings of Fact Nos. 7 and 8, R. 214).

The property retained by Averetts until condemnation by IPA was an approximately square parcel. The property described in the deed from the Packards to the Drainage District was a 66 foot wide strip which, in the vicinity of the Averett property, runs in an inverted L shape generally, on the East and the North of the Averett property (Exhibits 11 and 17). The open drainage ditch is located on part of this 66 foot wide strip. It was constructed by the use of a drag-line with the ditch material being dumped on either side of

the ditch to form a hump or berm (R. 484). An illustrative cross-section of the ditch is contained in Exhibit 12. This shows a channel of water which rises to a bank and then on up from the bank to the top of the crest or berm. The testimony varied as to the width of the channel of water at the bottom of the ditch from four to five feet up to ten feet (R. 330, 482). Near the top of the ditch, the width ranged from 20 to 30 feet (R. 485, 503). There was also an additional distance on each side of the ditch from the edge of the bank to the top of the berm which would be from five to eight feet (R. 374). The depth of the ditch was from eight to ten feet (R. 373).

When Averetts purchased their property, there were fences already located on the property (R. 303). The subject property was included within those fences (Exhibit 11). Mr. Averett asserted, inconsistently with his prior deposition, that he had constructed a portion of the fence on the North (R. 353, 357-358). However, the Court found that the fence on the East of the subject property had been constructed by the railroad and the fence on the North of the subject property had been constructed by a Mr. Forbush (Finding of Fact No. 21, R.216).

There was conflicting evidence as to whether or not these two fences were maintained by Averetts and the adequacy of any such maintenance (R. 322, 324, 328, 357, 491, 492, 524, 526, 528-529, 533, 537, 544). The Court found that the Averetts did not adequately maintain the fence on the East of

the subject property nor the fence on the North of the subject property to the extent that animals were adequately confined or retained within the fences and, as such, they were not a substantial inclosure of the subject property (Finding of Fact No. 22, R. 16).

Following Averetts' acquisition of their property, they built a corral in the Southeast corner of the above described fence and connected to the railroad fence on the East, and another fence on the South. Within this corral, Averett also had a corn silage pit built on the edge of the drainage ditch, and also built a loading chute and shed. Both the corral and the silage pit contained within it were located partially on the subject property (R. 316-317, 321, 363). The evidence was inconclusive and conflicting as to the size of the silage pit and corral and the extent to which they were on the subject property (R. 319, 321, 527, 532, 543). The Court found that although the corral was a substantial inclosure and the silage pit within it was an improvement to the property contained in the corral, Averetts had failed to establish by a preponderance of the evidence the extent to which they enclosed the subject Drainage District property (Findings of Fact Nos. 19 and 20, R. 216).

Although Averetts' claim is based upon adverse possession of the subject property (R. 2) and their brief asserts that they indicated their ownership, there is almost no evidence of the adverse nature of their possession of the pro-

perty. Averetts never disputed the use of the drainage ditch and never prevented access to or use of the ditch by the agents of the Drainage District (R. 321, 489). The agents of the Drainage District likewise never asked permission to enter the property (R. 489). The only testimony of Averetts' exclusive possession of the property was the posting of certain no trespassing or hunting by permission signs and a request that one individual leave the premises (R. 336-337). When asked about keeping others off the property, Mr. Averett answered as follows:

Q: During your occupancy of the property from 1968 until 1983, or late '83, did you keep others off the property near the drain ditch area?

A: No sir, I did not.

(R. 336:19-22)

Based upon the evidence presented, the Court found that:

24. Any possession of the subject property by the plaintiffs was not exclusive in that other persons, including particularly the agents and employees of the defendant made use of the subject property. Further, any possession of the subject property by plaintiffs was not of sufficiently open, notorious, hostile and adverse nature as to bring such possession to the knowledge of the agents and employees of defendant.

(Finding of Fact No. 24, R. 217)

This finding of the Court is consistent with its finding that neither the Averetts nor the surviving agents and employees of the Drainage District had actual knowledge of the

Drainage District's ownership of the subject property until the IPA offered to purchase the property (Finding of Fact Nos. 9 and 10, R. 214-215, 308, 322-324, 479-485, 512, 528, 529, 533). Averetts did have constructive notice, both by the deed to their property and the recording statute, of the Drainage District's ownership of the subject property (Finding of Fact Nos. 8 and 9, R. 214). The recitation of \$100.00 consideration in the 1934 deed to the Drainage District as well as the language contained in the exclusion from both the Averetts' warranty deed and the warranty deed of their predecessor, which described the property as having been "sold" to the Drainage District, are evidence that prior officers and agents may have known of said ownership (Exhibits 2, 16, 17; Finding of Fact No. 10; R. 215, 428-430).

Although other areas of the ditch had required the use of machinery such as a dragline to clean the ditch, since the Averetts' acquisition of their property, the maintenance of the ditch in the area of the Averetts' property had principally consisted of the removal, by shovel, of watercress and debris from the ditch (R. 457-459, 477-478, 487). However, on two or three occasions Arthur Boyer, a prior president of the Drainage District, hauled in loads of rocks to build up the ditch banks (R. 481, 521), and had to put hard pan on the North side of the ditch to build that up as well (R. 486-487). Raphael Palfreyman, president of the Drainage District in 1983 and at the time of trial, indicated that a

backhoe had not been used in the ditch near Averetts' property although it should have been done because the Drainage District did not have sufficient money. He further indicated that had not IPA acquired the property, it would have been necessary to use either a backhoe or dragline to clean the ditch (R. 522-523). The Court found, due to the size and width of the ditch and its needs for maintenance, that the entire subject property was reasonably necessary for the use and maintenance of the open drainage ditch (Finding of Fact No. 13, R. 215).

Until the acquisition of the subject property by the IPA, the Drainage District intended to continue using the ditch to drain water from the properties contained within the district and to clean and otherwise maintain the drainage ditches, including the ditch on the subject property (R. 468). The Drainage District had never offered to sell the property to anyone (R. 523). The Court found that the Drainage District had not intended to abandon, nor had it abandoned, any of the subject property and it has not sold nor intended to sell any of the subject property prior to the time IPA sought condemnation of the subject property (Findings of Fact No. 12, R. 215).



## SUMMARY OF THE ARGUMENT

Drainage District is a municipal corporation which owns, uses and maintains a drainage system including an open drain on the subject property. Under the provisions of §19-4-4, the use of its ditch constitutes a public use and is for a public benefit. Under the provisions of §78-12-13, Utah Code Annotated, as amended, neither Averetts nor any other person may adversely possess property which is held for a public use.

The case of Pioneer Investment & Trust Company v. Board of Education of Salt Lake City, 35 Utah 1, 99 P. 150 (1909), states that property which is not held for a public use may be adversely possessed. It found that school property which had been abandoned for ten to fifteen years for school purposes and was offered for sale was not held for a public use. Van Wagoner v. Whitmore, 58 Utah 418, 199 P. 670 (1921), identified the abandonment of the school purpose and the intention to sell the property were significant factors. The trial court found that the Drainage District had not abandoned or intended to abandon the public use of the subject property, nor had it ever sold or intended to sell the subject property. The most that can be said is that the officers and agents of the Drainage District had no actual knowledge of ownership.

The trial court further found that the entire subject property was reasonably necessary for the use and maintenance of the drainage ditch. No cases have been cited which permit the adverse possession of property in excess of the amount reasonably necessary for the public use and purpose of the Drainage District. By comparison, the cases of Commercial Waterway Dist. v. Permanente Cement Co., 379 P.2d 178 (Wash. 1963), and Martin v. City of Stockton, 39 Cal.App.552, 179 P. 894 (1919), held that one could not adversely possess a portion within a defined waterway even though it was not part of the main channel.

If the Court determines that some or all of the subject property was not public property held for public use, Averetts are still not entitled to adversely possess the subject property. The trial court found that Averetts had failed to establish by a preponderance of the evidence their adverse possession of the subject property as against the claim of the Drainage District. The case of Bennion v. Hansen, 699 P.2d 757 (Utah, 1985), provides that the findings of the trial court will not be disturbed, when all the evidence is viewed in the light most favorable to the trial court's decision, unless there is no substantial evidence to support such findings. Scharf v. BMG Corp., 700 P.2d 1068, 1070 (Utah, 1985) requires the appellant "to marshal all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable

to the court below, the evidence is insufficient to support the finding." Averetts have failed to meet the requirements set by these cases.

Scott v. Hansen, 18 Utah 2d 303, 422 P.2d 525 (1966), requires that the adverse claimant's possession be sufficient to reasonably notify the owner of the adverse claim to the property. Because Averetts did not construct the fences on the North and East and because of their failure to adequately maintain the fences or to prevent or restrict the access of the agents of the Drainage District or other persons to the subject property, the possession of Averetts was not sufficient to notify the Drainage District of their adverse claim. It likewise was not sufficiently exclusive or continuous to satisfy the requirements of adverse possession.

## ARGUMENT

### POINT I

AVERETTS CANNOT ADVERSELY POSSESS THE PROPERTY OF THE DRAINAGE DISTRICT BECAUSE IT WAS HELD FOR PUBLIC USE AND HAD NOT BEEN ABANDONED

The Drainage District was organized on November 4, 1918 under a statutory predecessor to Title 19, Utah Code Annotated and has existed since that day (Finding of Fact No. 1, R. 213). The Utah Supreme Court has had two occasions to determine what a drainage district is. In the case of Elkins

v. Miller County Drainage District No. 3, 77 Utah 303, 294 P. 307 (1930) at page 318, the Court stated: "A drainage district is one form of municipal corporation." The Court also stated in State by and through State Land Board v. Blake, 88 Utah 584, 20 P.2d 871 (1933), at page 875-876:

The adjudicated cases are all to the effect that a drainage district such as that involved in this litigation is impressed with a public interest. Some courts speak of them as municipal corporations, others as quasi municipal corporations, others as public or quasi public corporations, and still others as governmental agencies of this state. . . . It is sufficient to the purposes of this case to observe the drainage districts under our laws are granted governmental functions. (Emphasis added)

Consistent with these cases, the lower court held that the Drainage District was a municipal corporation (Finding of Fact No. 1, R. 212).

It is well established that the property of municipal corporations which is held for a public use cannot be acquired by adverse possession. This general rule is stated in 3 Am.Jur.2d, Adverse Possession §206, as follows:

As a general rule, property held by municipal and quasi municipal corporations cannot be acquired by adverse possession at least insofar as the property is held by the public and this is true even though the property has not been irrevocably dedicated to public use. This rule has been applied to the property of municipal corporations proper, counties, towns or townships, irrigation districts and school districts.

This general rule has been specifically adopted by Utah in §78-12-13, Utah Code Annotated, as amended, which precludes the adverse possession of property held for public use:

No person shall be allowed to acquire any right or title in or to any lands held by any town, city or county, or the corporate authorities thereof, designated for public use as streets, lanes, avenues, alleys, parks or public squares, or for any other public purpose, by adverse possession thereof for any length of time whatsoever,  
. . .

In the case of Pioneer Investment & Trust Company v. Board of Education of Salt Lake City, 35 Utah 1, 99 P. 150 (1909), the Court had before it the issue as to whether or not property of the Board of Education of Salt Lake City which had not been used as a school for 10 to 15 years and which had been offered for sale, could be adversely possessed. The Supreme Court in Pioneer reiterated the principle that property which is held in a governmental capacity or for a public purpose is not susceptible to adverse possession but that property which is held in a capacity other than a governmental one is susceptible to adverse possession. The Court noted that the property in question was not and had not been used for public school purposes for 10 or 15 years, that the Board of Education had abandoned its use for that purpose and that the properties had been held for sale as business property. Based upon this evidence, the Court found that even though the property had at one time been held for a public use, it had

ceased to be public property and could be adversely possessed.

Following Pioneer, the Court in Van Wagoner v. Whitmore, 58 Utah 418, 199 P. 670 (1921), refused to permit the adverse possession of state school lands. One of the major differences noted by the Van Wagoner Court was the fact that in Pioneer the public use had been abandoned for a long period of time and the property had been held for non-public purposes, namely sale.

The Court in Gibbons v. Salt Lake City Corporation, 6 U.2d 219, 310 P.2d 513 (1957), dealt with the issue of what was required under the provisions of §78-12-13 to "hold" property for public use. The Court there stated at page 225: "In order for the city to hold property under the above statute, it must have some semblance of title, possession or the right to the use thereof." Further, in the case of City of Los Angeles v. City of San Fernando, 537 P.2d 1250 (Cal. 1975), the California court stated that the particular public use for which property is held is immaterial as long as it is held for public use.

There can be no adverse holding of such land [meaning land held for public use] which will deprive the public of the right thereto, or give title to the adverse claimant, or create a title by virtue of the statute of limitations. The rule is universal in its application to all property set apart or reserved for public use, and the public use for which it is appropriated is immaterial. (Emphasis added) Id. at 1306.

Consistent with these principles, the Utah Legislature, by enacting §19-4-4, Utah Code Annotated, as amended, stated that "the use of any canal, ditch or the like created under the provisions of this act, shall be deemed a public use and for a public benefit."

In the instant case, the Drainage District received a deed from Chillian F. and Phoebe S. Packard dated the 31st of July, 1934 which was recorded April 3, 1935 (Finding of Fact No. 3, R. 213). Since that time, until condemnation by IPA, it has had title to all of the subject property. Since the completion of the open drainage ditch in 1920, the Drainage District has owned, used and maintained the open drainage ditch on the subject property (Finding of Fact No. 11, R. 215). Such use, by virtue of §19-4-4, Utah Code Annotated, as amended, is a public use and for a public benefit.

As indicated in the case of Pioneer Investment, property can be changed from a governmental capacity or public use to a proprietary capacity by virtue of an abandonment of the public use and an intention to sell the property. The Court in Van Wagoner noted both this long abandonment and intention to sell as crucial elements as to why adverse possession was permitted in the Pioneer case. Contrary to these factors important to both the Pioneer and Van Wagoner cases, the district court found that Drainage District had neither abandoned, intended to abandon, sold nor intended to sell any of the subject property (Finding of Fact No. 12, R. 215).

The most that can be said is that the surviving agents and officers of the Drainage District did not have actual knowledge of the Drainage District's titled ownership of the subject property (Finding of Fact No. 10, R. 215). Averetts attempt to rely upon this lack of actual knowledge as evidence of an abandonment. This is contrary to the concept of abandonment set forth in Black's Law Dictionary, 4th Ed. There, abandonment is defined at page 9 as: "The voluntary relinquishment of possession of a thing by owner with intention of terminating his ownership, but without vesting it in any other person." See also Hammond v. Johnson, 94 Utah 20, 66 P.2d 894 (1937), at page 899 where the Utah Court stated: "The controlling element in abandonment is a matter of intent. In this connection, the word 'abandon' has been held to mean 'to desert or forsake.'" Drainage District, which had no actual knowledge, cannot have the intent to abandon nor can it make a voluntary relinquishment.

In support of its position that the lack of knowledge of ownership can permit the adverse possession of property, Averetts cite the case of Sisson v. Koelle, 10 Wash.App. 746, 520 P.2d 1380 (1974), in which the Court found that Clallam County had "abandoned and forgotten about and had done nothing to sustain any title, or ownership, or control, of the land in question", and further went on to say that there was "nothing in the record indicating that the property had ever been devoted, reserved or set apart for use as a public right of



way or for any other public use." Id. at page 1383. The district court in the instant case did not make similar findings but instead found that the Drainage District had since 1920 made a public use of the subject property by its ownership, use and maintenance, of the drainage ditch on the subject property (Finding of Fact No. 11, R.215).

Contrary to the apparent position of Sisson, the Court is cited to the case of Triqq v. Allemand, 619 P.2d 573, (N.M. 1980), wherein the Court indicated that public rights should not be lost through the inaction of its agents.

If the land is used for the common good of all, that is for public use, the public is not to lose its right through the negligence of its agents, nor because it did not chose to resist an encroachment by one of its own members, whose duty it was, as much as any other citizen, to protect the State in its right. Id. at 579

See also City of Los Angeles, at page 1306.

Averetts further assert that if the Court holds that the subject property was held for a public purpose, that it is more than the amount of property reasonably necessary for the use and maintenance of the drainage ditch. Such excess property, it is asserted, is not reasonably necessary for the Drainage District's use and maintenance of the drainage ditch and is therefore subject to adverse possession. Averetts request that such matter be returned to the trial court to determine what part of the subject property is not reasonably necessary for the use and maintenance of the ditch and then to

quiet the same in Averetts.

Averetts cite no case in which a court has permitted the adverse possession of a portion of property held by a municipal corporation or other governmental entity because it exceeds the amount reasonably necessary for its public use. Drainage District has likewise been unable to find any such case. The Court is cited to the case of Commercial Waterway Dist. v. Permanente Cement Co., 379 P.2d 178 (Wash. 1963). Although it deals with a waterway district, the case is similar in many respects to the instant case. The Commercial Waterway District had acquired by purchase and condemnation a 500 foot right of way for the construction of a waterway and had dredged a channel into that waterway for the purpose of diverting the Duwamish River. Under the subsequent maintenance of the United States Army Corp of Engineers, only 250 feet of the acquired 500 foot channel was dredged. Permanente Cement Company sought adverse possession of property outside the 250 foot dredged channel on which it had constructed certain improvements. Permanente Cement Company claimed that since the property it sought to adversely possess lay outside the dredged channel, it was not being used as part of the regular water highway, the waterway district had performed no work on maintenance on such property, and there were no foreseeable plans by the district to widen the channel, this changed the character from public use to private. The Court there specifically stated that such circumstances do not

change the character of appellant's title which was declared to be for a public purpose. Id. at 180.

The Court in Commercial Waterway District cited the case of Martin v. City of Stockton, 39 Cal.App.552, 179 P. 894 (1919), which similarly held that lands within the boundaries of a waterway and drainage but outside the main channel could not be acquired by adverse possession even though the structures on the land claimed did not interfere with the use and purposes of the main channel.

These cases are consistent with the policy underlying the protection of public property from the claims of adverse possession. If property is being held for a public use, it is for the entity administering or otherwise charged with that public trust to decide what property is to be reasonably devoted to the public use. Such decision should not to be determined for the public by a private individual, particularly one seeking to gain the property by adverse possession. To allow otherwise would permit an individual to assert that school grounds, parks, roads, etc., are excessive and unnecessary and seek to adversely possess such excess.

Not only is there no legal precedent permitting the adverse possession of public property not reasonably necessary for the public use, but the trial court has already made such determination at trial. The trial court found that Drainage District had owned, used and maintained the ditch on the subject property since 1920 and that the entire subject pro-

perty was reasonably necessary for the use and maintenance of the Drainage District's open drainage ditch (Finding of Fact Nos. 11 and 13, R. 215).

In Bennion v. Hansen, 699 P.2d 757, 759 (Utah, 1985), the Court held as follows: "On appeal the findings of the trial court will not be disturbed unless there is no substantial record evidence to support them. In reviewing the evidence we view it in the light most favorable to the trial court."

Finding of Fact No. 11 is supported by substantial evidence. There was testimony that the Drainage District had constructed the open drainage ditch in 1920 on the subject property and that as such, the district was the owner of the ditch (Exhibit 11, R. 453-457, 473-474). There was also testimony that since 1934, Drainage District had owned the subject property (Exhibit 17, R. 428-431).

Finding of Fact No. 13 is also supported by substantial evidence. There was testimony that the ditch was eight to ten feet deep with a main channel which at the bottom was four to ten feet in width. The top of the ditch was 20 to 30 feet wide. There was an additional distance on each side of the ditch from the edge of the bank which rises to the top of a berm or hump. The berm then tapered off from the ditch to the remaining property (R. 330, 373-374, 482, 485, 503). While much of the maintenance for the ditch near the Averetts' property had not required the use of machinery, other areas

had required a dragline or backhoe to clean the ditch (R. 457-459, 477-478, 487). There was testimony of the use of a truck on three or four occasions to haul in rock and hardpan to rebuild the ditch banks (R. 481, 486-487, 521). In addition, there was testimony that the drainage ditch near the Averetts property would require the use of a dragline or backhoe to clean it out (R. 522-523).

Finally, Averetts assert that the Drainage District did not need to own the land and that ownership was not critical to its operation. While it might be true that in certain instances an easement would be sufficient to the purposes of a ditch, the facts established that the Drainage District had acquired, by purchase, fee ownership. Ownership carries with it certain advantages under the law over an easement. Ownership does not have the responsibility or restrictions imposed by the existence of a subservient estate which an easement does. As an example, the Court is referred to §19-4-4, Utah Code Annotated, as amended, where drainage districts are permitted entry to lands for repairs and maintenance but with the restriction that they do "no more damage than the necessity of the occasion may require." By owning the subject property, Drainage District was not burdened with this restriction. Neither this Court, nor Averetts, should substitute their judgment for that of the Drainage District as to what is reasonable or necessary.

## POINT II

### AVERETTS DID NOT ESTABLISH BY A PREPONDERANCE OF THE EVIDENCE THAT THEY ADVERSELY POSSESSED THE DRAINAGE DISTRICT'S PROPERTY

If, contrary to the facts and arguments of Point I, the Court determines that the Averetts are entitled to adversely possess the property of the Drainage District, Averetts failed to establish by a preponderance of the evidence all of the facts necessary to support their claim of adverse possession of the Drainage District's property.

The Averetts' claim of adverse possession of the Drainage District's property is not founded upon a written instrument. As such, it is governed by the provisions of §78-12-10 through §78-12-12. Those sections set forth certain requirements in order to establish a claim of adverse possession. The basic requirements of the sections are that for a period of seven years the party claiming adverse possession: (1) must be in actual occupation of the property, (2) exclusive of any other right, (3) adverse to the right of the owner, (4) continuously, and (5) have paid the taxes.

Specific requirements to be used in determining what land is deemed to be possessed and occupied for purposes of §78-12-10 are contained in §78-12-11. Said section provides that in order for land to be deemed to be possessed and occupied by a person claiming it by adverse possession, the property must (1) have been protected by a substantial in-

closure, (2) have been usually cultivated or improved, or (3) money or labor have been expended for dams, canals, etc. for the purpose of irrigating the properties. These provisions have been established for the purpose of providing reasonable notice to the owner of the property that his property is being adversely possessed. This was explained in Hammond v. Johnson, wherein the Court stated at page 898-9 as follows:

To constitute 'adverse possession' the possession must be actual, for otherwise there is no disseisin, and the real owner remains in possession, actually or constructively. It must be continuous, for upon its cessation or interruption the possession, in contemplation of law, is again in the holder of the legal title. It must be hostile to the real owner, and with the intention to claim the land adversely to him. This claim must be manifest from the nature or circumstances of the possession, so that the owner may be informed of it, and that he shall not be misled into acquiescence in what he might reasonably suppose to be a mere trespass when he would not have acquiesced in the assertion of a right adverse to his own title.

It was the contention of the Drainage District at trial and the trial court so found that the Averetts' had failed to establish by a preponderance of the evidence the requisite elements of adverse possession. Averetts challenge certain of the trial court's Findings of Fact as erroneous.

The Supreme Court has repeatedly refused to disturb the findings of the trial court. In Bennion v. Hansen, 699 P.2d 757 (Utah, 1985), it was held as follows: "On appeal the findings of the trial court will not be disturbed unless there

is no substantial record evidence to support them. In reviewing the evidence we view it in the light most favorable to the trial court." Recently, the Supreme Court in Scharf v. BMG Corp., 700 P.2d 1068 (Utah, 1985), set forth the manner in which a party must prove that there is no substantial evidence to support Findings of Fact. The Court states therein at page 1070:

To mount a successful attack on the trial court's findings of fact, an appellant must marshal all the evidence in support of the trial court's findings and then demonstrate that even viewing it in the light most favorable to the court below, the evidence is insufficient to support the finding. [Citations omitted].

As in the Scharf case above, Averetts have cited various parts of the record which favor their version of the case. Averetts have failed to marshal the evidence in support of the trial court's findings, to view it in the light most favorable to the trial court and then show that it is insufficient to support the finding. Having failed to satisfy the requirements of Scharf, this Court should refuse to overturn any of the Findings of Fact of the trial court.

The Court is nonetheless referred to the following parts of the record which show that the Findings of Fact are supported by substantial evidence. Findings of Fact Nos. 19 and 20 are as follows:

19. Plaintiffs have improved a portion of the subject property by the construction of a silage pit. Plaintiffs have failed to establish by a preponderance of the evidence the size of such silage pit and the extent to which it lies on the subject property.



20. Plaintiffs have protected by a substantial inclosure a portion of the subject property contained within the corral fence. Plaintiffs have failed to establish by a preponderance of the evidence the size of such corral and the extent to which such corral encloses the subject property.

There was testimony from Mr. Averett that he built a corral in the southeast corner of his property by connecting onto the Robertson fence on the South and the railroad fence on the East. The testimony was conflicting as to whether the corral was 100 feet by 200 feet, 40 feet by 100 feet or (R. 317, 319, 363). Within said corral area, Averetts built a shed and had built a silage pit. There was conflicting evidence as to the size of the silage pit: 40 x 100 (R. 321), 25 x 100 (R. 527) to 20 x 50 (R. 532).

Other than testimony that the shed and silage pit were in the corral and that the silage pit was "along the edge of the ditch" (R. 321), the only evidence of the location of said improvements was Mr. Averett's sketch in Exhibit 10. Because of the irregular edge to the drainage ditch, this location is crucial in determining how much of the subject property was inclosed or improved by the corral and silage pit. Due to these deficiencies in the evidence and the proof by Averetts, Averetts failed to establish by a preponderance of the evidence how much of the subject property was contained within said corrals and fence or the extent to which the silage pit lies on the subject property. Findings of Fact Nos. 19 and 20 are supported by substantial evidence.

Finding of Fact No. 21 is as follows:

21. The fence on the east of the subject property was constructed by the railroad. The fence on the north of the property was constructed by a Mr. Forbush.

Mr. Averett acknowledged that the fences on the north and on the east of the subject property were in existence at the time he purchased the property (R. 307). The fence on the east was constructed by the railroad (R. 322, 525, 534). Although Mr. Averett asserted that he had rebuilt a portion of the Forbush fence (R. 353), a portion of Mr. Averett's deposition was admitted into court in which he stated that he did not construct the Forbush fence (R. 357-358). Finding of Fact No. 21 is also supported by substantial evidence.

There was likewise substantial evidence to support Findings of Fact No. 22 and 23, which are as follows:

22. Plaintiffs did not adequately maintain the fence on the east of the subject property nor the fence on the north of the subject property to the extent that animals were adequately confined or retained within the fences and as such the fences were not a substantial inclosure.

23. Plaintiffs have failed to establish by a preponderance of the evidence that they have protected the subject property by a substantial inclosure.

Mr. Averett claimed that he maintained the fences when necessary. "We don't go around fixing gaps. If the cow gets out, we find out where the cow gets out and go fix it." (R. 322, 357). Mr. Averett acknowledged that the fence on the north was "in less than a desirable condition" (R. 308). Mr. Arthur

Boyer and Mr. Raphael Palfreyman stated that the fence on the east was maintained by the railroad and that he never saw Mr. Averett or anybody else maintain the north fence (R. 491, 525). Mr. Palfreyman stated that the fence on the East wasn't much of a fence, that the fence on the North was down most of the time, and that cattle were passing back and forth through it (R. 524-528). There was other testimony that cattle got through the fence and that the fences were not adequate to contain them (Exhibits 28 and 30).

The first sentence of Finding of Fact No. 24 states as follows:

24. Any possession of the subject property by the plaintiffs was not exclusive in that other persons, including particularly the agents and employees of the defendant made use of the subject property.

Averetts do not assert any error in Finding of Fact No. 24. Instead, Averetts rely upon case law outside the State of Utah to the effect that one can have exclusive possession for purposes of adverse possession despite the existence of private easements. Averetts have cited no Utah cases holding possession to be exclusive despite the existence of a private easement. Averetts do refer the Court to Kouri v. Burnett, 415 P.2d 963 (Okla. 1966), and to Stark v. Stanhope, 206 Kan. 428, 480 P.2d 72 (1971). Both cases are distinguishable from the instant case.

In Kouri v. Burnett, Burnett sought to quiet title to certain property and Kouri resisted on the basis that he had

used the property as an easement to other property. Kouri did not claim to be the owner of the property. The Court there permitted the adverse possession by Burnett despite the use of the easement by Kouri. The Court then cited with approval the following:

Possession may be exclusive notwithstanding the land is subject to rights which are mere easements and not things in possession. 2 C.J.S. Adverse Possession, p. 568, §51; Barker v. Publishers' Paper Co., et al., 78 N.H. 160, 97 A. 749.

Likewise, in Stark v. Stanhope, the Court permitted the adverse possession of certain property despite evidence of public use of a roadway. The Court there cited 3 Am.Jur.2d Adverse Possession, §53, p. 143, as follows:

As a general rule, any use of premises by the public which indicates a claim of common or public right will prevent the acquisition of title by adverse possession of the premises by any person; in such a case, the possession is not exclusive. The rule is held not to apply, however, where the use and occupation by the claimant and the public are not common uses. The permissive use of land by the public does not affect the acquisition of title by adverse possession, since such a use acknowledges the possession of the person holding the land, and is subordinate thereto. The same is true of casual use by the public. (Emphasis supplied). Id. at 77

The Court in Stark went on to state as follows:

We are of the opinion the infrequent passing of the public on the roadway amounted to nothing more than mere casual entries on the land made without any intention of asserting a right of entry and possession, and was not sufficient to break the continuity of the appellants' exclusive possession and use of the remainder of the tract. Id. at 78

In both cases, the party trying to defeat the claim of adverse possession merely had an easement across the property. In the instant case, the Drainage District did not merely have an easement or, as described by Averetts, "a statutory right to enter the property". Since 1934 it was the fee owner of the subject property. Furthermore, the Drainage District's use of the subject property could not be described as "casual use by the public".

During the entire time of Averetts ownership of the property, Drainage District maintained the ditches on the subject property. Arthur Boyer testified that he examined and maintained the drains at least once or twice a week and had to haul rocks and hardpan in to fix the ditch banks (R. 470, 487-488, 520). Raphel Palfreyman also regularly examined and maintained the ditch (R. 485-459, 519). Drainage District personnel never asked Averetts for permission to enter the property but entered upon their owned property (R. 489). Averetts never disputed the use of the subject property as a drainage ditch, nor prevented the access to or use of it by the Drainage District personnel (R. 321, 489).

As noted in Hammond v. Johnson, any interruption in possession will serve to defeat a claim of adverse possession. As noted above, Drainage District regularly went onto the subject property to maintain the ditch and did so without seeking or receiving permission from Averetts. This interruption in possession serves to defeat Averetts' claim of adverse possession.

The second sentence of Finding of Fact No. 24 states:

Further, any possession of the subject property by plaintiffs was not of sufficiently open, notorious, hostile and adverse nature as to bring such possession to the knowledge of the agents and employees of defendant.

Averetts do not claim any error in such finding either. As previously noted, there was no testimony of any time in which Averetts objected to or restricted the access of the agents of the Drainage District to the subject property, nor to any use or maintenance of the ditch. The only evidence presented by Averetts of the exclusive possession of the subject property was the posting of no trespassing or hunting by permission signs. However, when he was asked about keeping others off the property, Mr. Averett answered as follows:

MR. AVERETT: To my knowledge, there was always a "NO TRESPASS" sign on the gate entrance. And during the hunting season my boys would put "NO TRESPASS" signs all the way around the perimeter of our property.

Q: Trespass or "NO TRESPASS" signs?

A: "NO TRESPASS." They were either "NO TRESPASS" or "HUNTING BY PERMISSION."

Q: During your occupancy of the property from 1968 until 1983, or late '83, did you keep others off the property near the drain ditch area?

A: No sir, I did not. On one occasion I told a Mr. Ball--he came on there and asked for permission to fish, and one of my older boys was standing there on the other side of the bank and he hollered, "Hey, kid, get out of there. You're scaring my fish." And I said, "Mr. Ball, you'll have to leave," and he left.

Q: I think you misunderstood my question. Did you allow other people on the property?

A: On occasions, we have had trappers and fishermen come and ask for permission if they could trap the area or go fishing in there, and I gave them permission.

Q: Did anybody ever enter onto the property without your permission?

A: I'm sure they did.

Q: When you weren't there?

A: Yes.

Q: When you were there, what did you do?

A: I really didn't do anything. If I saw somebody going down the ditch, I didn't run over there and holler, "Hey, guy, get out of here." I would just let them go. Some people would ask, and some people didn't.

(Emphasis added) (R. 336:12-25, 337:1-17)

The existence of the railroad fence on the East and the Forbush fence on the North, as well as the maintenance, or rather lack thereof by Averetts, of such fences did not serve to put Drainage District on notice of a claim of adverse possession by Averetts. It should be noted that the substantial inclosure provision under the Idaho adverse possession statute, which is similar to §78-12-11, Utah Code Annotated, as amended, and is included in the appendix, has been interpreted to require that the fence be built by the adverse claimant. See Standall v. Teater, 96 Id. 152, 525 P.2d 347 (1974), and Loomis v. Union Pacific Railroad Company, 97 Id. 341, 544 P.2d 299 (1975). The apparent reasoning behind such

interpretation is that if the fences are not constructed by the adverse claimant, there is nothing by such "inclosure" to give the party against whom such adverse possession is claimed notice that his property is being adversely possessed.

The Court is also referred to 3 Am.Jur.2d, Adverse Possession §36, which states as follows:

Where inclosure is essential or is relied on as the evidence of possession, it must, to be effective, be complete and so open and notorious as to charge the owner with knowledge thereof. The question in such case is whether the inclosure, like other acts of possession, is sufficient 'fly the flag' over the land and put the true owner on notice that the property is held under an adverse claim of ownership.

In Scott v. Hansen, 18 Utah 2d 303, 422 P.2d 525 (1966), the Court reiterated the same principles described above as well as in Hammond:

The pivotal consideration here is that there must be some actual occupation of the property of such character or under such circumstances that the owner knows, or as a man or ordinary prudence should know, that the land was being held as his own by the adverse claimant. Id. at 307-308

It cannot be said that the possession by Averetts was consistent with these principles. Averetts did not construct the fences which around the subject property and failed to adequately maintain them. Averetts never prevented or restricted the access of the agents of Drainage District or, for that matter, any other person. The sole evidence of Averetts' possession was the existence of a No Trespassing sign on the



gate, which the agents of Drainage District ignored, and similar signs during the hunting season. The trial court correctly found that such possession was not of such a character as to apprise the Drainage District that its property was being adversely possessed by Averetts. Averetts have failed to establish by a preponderance of the evidence all of the necessary elements to adversely possess the subject property.

The trial court also found that the Averetts did not have actual knowledge of the ownership by Drainage District, although they perhaps should have had such knowledge, but did have constructive knowledge of such ownership by virtue of Averetts' deed and the recording statute (Finding of Fact No. 9, R. 214). The North Carolina Court of Appeals in Williamson v. Vann, 42 N.C.App. 569, 257 S.E.2d 102, 103-104 (1979), stated: "The unintentional possession of a tract of land or possession under the mistaken belief that it was embraced within the conveyance to the possessor will not constitute adverse possession. [Citations omitted]"

This is supported by the Utah case of Home Owners' Loan Corporation v. Dudley, 105 Utah 208, 141 P.2d 160 (1943), where the Court stated at page 227:

Mrs. Beckstead did not testify to any possession on her part or on the part of her husband being adverse. She stated that at the time of the construction of the new home they did not know any other person claimed title to it, and that she did not hear that any other person claimed title to it until a short time before they moved away. . . . In fact, there is lacking any positive testimony that the possession of

the Becksteads was adverse or that their encroachment onto Tract A by building a house or by any other acts was the result of anything but an honest mistake in judgment as to boundary line of Tract B.

Since Averetts claim they did not know of the ownership of the subject property by the Drainage District, it cannot be said that Averetts intended to or did possess the subject property adversely to the interest of the Drainage District.

While it is true that the Averetts paid all taxes assessed by Utah County, which assessments included the Drainage District property, any such assessments against the Drainage District property were unlawful. As a municipal organization, Drainage District and its assets are not subject to taxation. Averetts are not entitled to any additional benefit under the adverse possession statute by reason of their payment of such unlawful taxes.

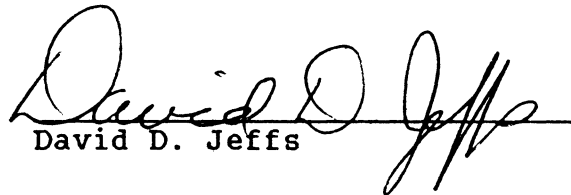
#### CONCLUSION

The Drainage District is the owner of the two acres comprising the subject property and has been since 1934. The Drainage District constructed, used and maintained a drainage ditch on the subject property since 1920. The use of the subject property by the Drainage District constitutes a public use and benefit. The trial court found that all of the subject property was reasonably necessary for the public use of

the Drainage District. Under the statutes and cases of the State of Utah, such public property may not be adversely possessed.

Even if the Court were to determine that some of the subject property was not public property, the trial court found that Averetts had failed to establish by a preponderance of the evidence their adverse possession of the subject property as against the claim of the Drainage District. There is substantial evidence to support the trial court's findings of fact. The Court is respectfully requested to affirm the decision of the trial court.

Respectfully submitted this 27th day of April, 1987.

  
David D. Jeffs

CERTIFICATE OF DELIVERY AND MAILING

I hereby certify that ten copies of the foregoing were hand delivered to the Clerk of the Court, Utah Supreme Court, State Capitol Building, Salt Lake City, Utah, and four copies were mailed to the below named parties by placing same in the United States mails, postage prepaid, this 29th day of April, 1987, addressed as follows:

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## APPENDIX

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FEB 6 1986

LC Deputy

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY  
STATE OF UTAH

WILLIAM AVERETT and  
MARIE A. AVERETT,

Plaintiffs,

FINDINGS OF FACT AND  
CONCLUSIONS OF LAW

vs.

UTAH COUNTY DRAINAGE DISTRICT  
NO. 1, a corporation,

Defendant.

INTERMOUNTAIN POWER AGENCY,

Civil No. 65,070

Intervenor.

\_\_\_\_\_ /

This matter came on duly and regularly to be heard on the 17th day of July, 1985, before the Honorable George E. Ballif, Judge, sitting without a jury upon the Complaint of plaintiff and the Counterclaim of defendant. The plaintiffs were present in Court and represented by their attorney, Allen K. Young. The defendant was present in Court and represented by its attorney, David D. Jeffs. The Court having heard the evidence and arguments of counsel, and being fully advised in the premises, now makes and enters the following:

### FINDINGS OF FACT

1. Utah County Drainage District No. 1 (hereinafter defendant) was organized on November 4, 1918 as a drainage district under Title XIX and has existed since that date. The District as such is a municipal corporation.

2. During the years of 1919 through 1920, defendant commenced and completed construction of an open drainage district on the subject property.

3. On the 31st day of July, 1934, a deed from Chillian F. and Phoebe S. Packard was executed to Utah County Drainage District No. 1 which deed was recorded on April 3, 1935 as Entry No. 3091, Book 316, Page 50, on the Records of the Utah County Recorder.

4. The above described deed conveyed to defendant the property which is the subject matter of this dispute (herein subject property) and which is more particularly described as follows:

DP 408-ALSO BEGINNING at a point 1209' South 0°30' West and 385.44 feet North 88°30' West from the Northeast corner of Section 31, Township 7 South, Range 3 East, Salt Lake Base & Meridian; thence North 0°30' East 732 feet; thence North 88°30' West 1287 feet; thence West 0°30' East 480 feet; thence North 88°30' West 66 feet; thence South 0°30' West 515 feet; thence South 66°30' East 660 feet; thence South 0°30' West 27 feet; thence South 88°20' East 627 feet; thence South 0°30' West 627 feet; thence South 88°30' East 66 feet, to point of beginning containing 3.32 acres more or less.

5. The above described deed further conveyed to defendant a strip of land approximately 66 feet wide which ran generally north and west of the subject property to Utah Lake.

6. There is no evidence of the grant of an easement to defendant for construction of the open drainage ditch prior to the above described deed. The evidence fails to establish that defendant had acquired a prescriptive easement prior to delivery of the deed to defendant in 1934.

7. On the 30th day of April, 1968, Joseph C. Williamson and Naida R. Williamson conveyed a certain parcel of property encompassing the subject property to plaintiff, Marie A. Averett. Said deed was recorded May 1, 1968 as Entry No. 4291, Book 1109, Page 365 on the records of Utah County.

8. The said deed from Joseph C Williamson and Naida R. Williamson to Marie A. Averett contained the following exclusion:

LESS that portion of the above described property sold to Utah County Drainage District No. 1, a corporation by Warranty Deed dated July 31, 1934, executed by Chillian F. Packard and Phoebe S. Packard, his wife, recorded April 3, 1935, as Entry No. 3091, in Book 316, Page 50, records of Utah County, Utah.

9. The plaintiffs did not have actual knowledge of the ownership by defendant of the 66 foot wide strip of land including the subject property. Plaintiffs had constructive notice by the recording statute and the deed to their property of the ownership by defendant of the subject property.



10. There is no evidence that the officers and agents of the defendant who are alive had actual knowledge of the ownership of the subject property, although the recitation of \$100.00 consideration for the deed to the defendant in 1934 is evidence that prior officers and agents may have known of said ownership.

11. Since completion of the open drainage ditch in 1920, defendant has owned, used and maintained the open drainage ditch on the subject property.

12. Defendant has not intended to abandon nor has it abandoned any of the subject property. Defendant has not sold nor has it intended to sell any of the subject property prior to the time that Intermountain Power Association sought condemnation of the subject property.

13. The entire subject property was reasonably necessary for the use and maintenance of defendant's open drainage ditch.

14. Utah County has not levied or assessed any real property taxes against the real property of defendant.

15. Plaintiffs have paid all taxes which were levied and assessed against their property which adjoins the subject property. Said tax assessments included the subject property of the defendant.

16. Since defendant is a municipal corporation, its property is exempt from taxation. Any taxes levied and

assessed against its property, wheter assessed in the name of plaintiffs or otherwise, were unlawful.

17. Plaintiffs have not paid any amounts for dams, canals, embankments, aqueducts or otherwise for the purpose of irrigating the subject property amounting to the sum of \$5 per acre.

18. Plaintiffs have not usually cultivated the subject property.

19. Plaintiffs have improved a portion of the subject property by the construction of a sileage pit. Plaintiffs have failed to establish by a preponderance of the evidence the size of such such sileage pit and the extent to which it lies on the subject property.

20. Plaintiffs have protected by a substantial inclosure a portion of the subject property contained within the corral fence. Plaintiffs have failed to establish by a preponderance of the evidence the size of such corral and the extent to which such corral encloses the subject property.

21. The fence on the east of the subject property was constructed by the railroad. The fence on the north of the property was constructed by a Mr. Forbush.

22. Plaintiffs did not adequately maintain the fence on the east of the subject property nor the fence on the north of the subject property to the extent that animals were adequately confined or retained within the fences and as such the fences were not a substantial inclosure.

23. Plaintiffs have failed to establish by a preponderance of the evidence that they have protected the subject property by a substantial inclosure.

24. Any possession of the subject property by the plaintiffs was not exclusive in that other persons, including particularly the agents and employees of the defendant made use of the subject property. Further, any possession of the subject property by plaintiffs was not of sufficiently open, notorious, hostile and adverse nature as to bring such possession to the knowledge of the agents and employees of defendant.

25. Plaintiffs have failed to establish by a preponderance of the evidence all of the elements necessary to permit them to adversely possess the subject property.

26. Defendant assessed plaintiffs a drainage district assessment for the subject property in the amount of \$1.00 or \$1.50 per year for the years 1977 to 1983.

27. Any assessment by defendant is of such a minimal nature that defendant would not be estopped thereby to claim the subject property.

Based upon the foregoing Findings of Fact, the Court now makes and enters the following:

#### CONCLUSIONS OF LAW

1. Plaintiffs may not adversely possess the property of defendant held for public use.

2. All of the subject property constitutes property held for a public use by defendant.

3. Defendant has not abandoned or otherwise given up any claim to the subject property.

4. Defendant is not estopped to assert its rights to the subject property.

5. Plaintiffs have not established by a preponderance of the evidence their claim to the subject property by adverse possession. Plaintiffs' Complaint is dismissed, no cause of action.

6. Defendant is entitled to have the title to the subject property quieted to it free and clear of any and all claims of the plaintiffs by adverse possession or otherwise. The subject property is more particularly described as follows:

DP 408-ALSO BEGINNING at a point 1209' South 0°30' West and 385.44 feet North 88°30' West from the Northeast corner of Section 31, Township 7 South, Range 3 East, Salt Lake Base & Meridian; thence North 0°30' East 732 feet; thence North 88°30' West 1287 feet; thence West 0°30' East 480 feet; thence North 88°30' West 66 feet; thence South 0°30' West 515 feet; thence South 66°30' East 660 feet; thence South 0°30' West 27 feet; thence South 88°20' East 627 feet; thence South 0°30' West 627 feet; thence South 88°30' East 66 feet, to point of beginning containing 3.32 acres more or less.

7. Defendant is entitled to all funds tendered by Intermountain Power Agency.

Dated and signed this 6<sup>th</sup> day of February 1985.

BY THE COURT:

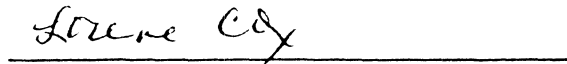
  
George E. Ballif, Judge

CERTIFICATE OF MAILING

I hereby certify that the original of the foregoing was mailed to the Clerk of the Court, Utah County, P. O. Box 49, Provo, Utah 84603, and a copy to the below named parties by placing same in the United States mails, postage prepaid, this 26th day of July, 1985, addressed as follows:

Allen K. Young, Esq.  
Young, Harris & Carter  
Attorney for Plaintiffs  
350 East Center  
Provo, Utah 84601

M. Byron Fisher, Esq.  
Fabian & Clendenin  
Attorneys for Intermountain Power Agency  
800 Continental Bank Building  
Salt Lake City, Utah 84101

  
Secretary

DAVID D. JEFFS  
JEFFS AND JEFFS  
Attorneys at Law, P.C.  
Attorneys for Defendant  
90 North 100 East  
P. O. Box 683  
Provo, Utah 84603  
Telephone: (801) 373-8848

FEB 6 1986

LC  
L.C.

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY  
STATE OF UTAH

WILLIAM AVERETT and  
MARIE A. AVERETT,

Plaintiffs,

J U D G M E N T

vs.

UTAH COUNTY DRAINAGE DISTRICT  
NO. 1, a corporation,

Defendant.

INTERMOUNTAIN POWER AGENCY,

Civil No. 65,070

Intervenor.

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This matter came on duly and regularly to be heard on the 17th day of July, 1985, before the Honorable George E. Ballif, Judge, sitting without a jury upon the Complaint of plaintiff and the Counterclaim of defendant. The plaintiffs were present in Court and represented by their attorney, Allen K. Young. The defendant was present in Court and represented by its attorney, David D. Jeffs. The Court having heard the evidence and arguments of counsel, and being fully advised in the premises, and having heretofore submitted its Findings of

Fact and Conclusions of Law, now makes and enters the following:

J U D G M E N T

1. Plaintiffs' Complaint for adverse possession of the following described real property is dismissed, no cause of action.


2. Defendant is quieted title in and to the following described real property free and clear of any claim of plaintiffs by adverse possession or otherwise:

DP 408-ALSO BEGINNING at a point 1209' South 0°30' West and 385.44 feet North 88°30' West from the Northeast corner of Section 31, Township 7 South, Range 3 East, Salt Lake Base & Meridian; thence North 0°30' East 732 feet; thence North 88°30' West 1287 feet; thence West 0°30' East 480 feet; thence North 88°30' West 66 feet; thence South 0°30' West 515 feet; thence South 66°30' East 660 feet; thence South 0°30' West 27 feet; thence South 88°20' East 627 feet; thence South 0°30' West 627 feet; thence South 88°30' East 66 feet, to point of beginning containing 3.32 acres more or less.

3. Defendant is awarded all funds tendered by Intermountain Power Agency.

Dated and signed this 6<sup>th</sup> day of February, 1985.

BY THE COURT:

  
George E. Ballif, Judge

CERTIFICATE OF MAILING

I hereby certify that the original of the foregoing was mailed to the Clerk of the Court, Utah County, P. O. Box 49, Provo, Utah 84603, and a copy to the below named parties by placing same in the United States mails, postage prepaid, this 26th day of July, 1985, addressed as follows:

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Provo, Utah 84601

M. Byron Fisher, Esq.  
Fabian & Clendenin  
Attorneys for Intermountain Power Agency  
800 Continental Bank Building  
Salt Lake City, Utah 84101

Louise Co  
Secretary



UTAH STATUTES

**78-12-10. Under claim not founded on written instrument or judgment.**—Where it appears that there has been an actual continued occupation of land under claim of title, exclusive of any other right, but not founded upon a written instrument, judgment or decree, the land so actually occupied, and no other, is deemed to have been held adversely.

**78-12-11. What constitutes adverse possession not under written instrument.**—For the purpose of constituting an adverse possession by a person claiming title, not founded upon a written instrument, judgment or decree land is deemed to have been possessed and occupied in the following cases only:

- (1) Where it has been protected by a substantial inclosure.
- (2) Where it has been usually cultivated or improved.
- (3) Where labor or money has been expended upon dams, canals, embankments, aqueducts or otherwise for the purpose of irrigating such lands amounting to the sum of \$5 per acre.

**78-12-12. Possession must be continuous, and taxes paid.**—In no case shall adverse possession be considered established under the provisions of any section of this code, unless it shall be shown that the land has been occupied and claimed for the period of seven years continuously, and that the party, his predecessors and grantors have paid all taxes which have been levied and assessed upon such land according to law.

**78-12-13. Adverse possession of public streets or ways.**—No person shall be allowed to acquire any right or title in or to any lands held by any town, city or county, or the corporate authorities thereof, designated for public use as streets, lanes, avenues, alleys, parks or public squares, or for any other public purpose, by adverse possession thereof for any length of time whatsoever, unless it shall affirmatively appear that such town or city or county or the corporate authorities thereof have sold, or otherwise disposed of, and conveyed such real estate to a purchaser for a valuable consideration, and that for more than seven years subsequent to such conveyance the purchaser, his grantees or successors in interest, have been in the exclusive, continuous and adverse possession of such real estate; in which case an adverse title may be acquired.

**1944. Public uses—Right of entry on lands—Prohibitions.**—The use of any canal, ditch, or the like, created under the provisions of this act, shall be deemed a public use and for a public benefit. The supervisors or their representatives from the time of their appointment may go upon the lands lying within said district for the purpose of examining the same, and making surveys, and after the organization of said district and payment or tender of compensation allowed, may go upon said lands with their servants, teams, tools, instruments, or other equipment, for the purpose of constructing such proposed work, and may forever thereafter enter upon said lands, as aforesaid, for the purpose of maintaining or repairing such proposed work, doing no more damage than the necessity of the occasion may require, any person or persons who shall willfully prevent or prohibit any of such persons from entering such lands for the purposes aforesaid shall be deemed guilty of a misdemeanor and upon conviction be fined any sum not exceeding \$25 per day for each day's hindrance, which sum shall be paid into the county treasury for the use of said district.

## IDAHO STATUTES

**5-210. Oral claim — Possession defined — Payment of taxes.** — For the purpose of constituting an adverse possession, by a person claiming title not founded upon a written instrument, judgment or decree, land is deemed to have been possessed and occupied in the following cases only:

1. Where it has been protected by a substantial inclosure.
2. Where it has been usually cultivated or improved.

Provided, however, that in no case shall adverse possession be considered established under the provisions of any sections of this code unless it shall be shown that the land has been occupied and claimed for the period of five (5) years continuously, and the party or persons, their predecessors and grantors, have paid all the taxes, state, county or municipal, which have been levied and assessed upon such land according to law. [C.C.P. 1881, § 150; R.S., R.C., & C.L., § 4043; C.S., § 6603; I.C.A., § 5-210.]