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John E. McNaughton and Henrietta McNaughton v. John B. Eaton et al : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN E. McNAUGHTON and
HENRIETTA McNAUGHTON,
his wife,

Appellants and Plaintiffs,

vs.

JOHN B. EATON, an unmarried
man; MYRTLE ROSS; JAMES H.
FISHER and CUNA FISHER,
husband and wife; RICE COOPER
and EDITH R. LAWRENCE
COOPER, husband and wife; W.
S. ROSS; and FERN ROSS FAW-
CETT; JACK TURNER and
MARIE TURNER, his wife, and
MYRON PERRY,

Respondents and Defendants

Case No.
8277

RESPONDENT'S BRIEF

COLTON & HAMMOND
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Attorneys for Respondents.

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8277

RESPONDENT'S BRIEF

PRELIMINARY STATEMENT

This case was previously before the Supreme Court where the question of whether or not the waters here involved were public waters and subject

to appropriation and the rules applicable to such public waters was decided. The Supreme Court ruled that they were public waters, and remanded the case with directions. The present appeal by the plaintiffs stems from the further proceedings as directed by this court.

ADDITIONAL STATEMENT OF FACTS

The factual picture so far as this case is concerned is before the court in the form of the prior decision in the case together with the record therein, and in the form of a transcript of the proceedings upon the further hearing after the remand. Since the appeal raises questions concerning the sufficiency of evidence, these matters can best be considered from a factual standpoint in connection with the arguments on such points.

However, it might be appropriate at the outset to point out that this court in remanding the case pointed out very significantly what was expected of the trial court in the further proceedings. First it reaffirmed certain well-defined principles of water law as follows: (242 P. 2d 570 at p. 572)

“Beneficial use is the basis, the measure and the limit of all right to the use of water in this state. Such has been the law both under and before we had a statute to that effect. No one can acquire the right to use more water

than is necessary, with reasonable efficiency, to satisfy his beneficial requirements, even strangers have been allowed to make improvements to water systems which would save water and thereby acquire the right to beneficially use the water saved. And water reduced to possession may not lawfully, in bad faith, be wasted and thereby deprive others of its beneficial use.”

and concluded the decision as follows:

“ . . . It is clear that all of *these waters are subject to appropriation and the only right that can be acquired to their use is a reasonably efficient beneficial use, and defendants as subsequent appropriators are entitled to the use of all of such waters not necessary to satisfy* such requirements of plaintiffs.”

STATEMENT OF POINTS

I

Appellants correctly assert that the pronouncements of the court on the original appeal are the law of the case.

II

The Court properly limited plaintiffs' use of water to 2 C.F.S. upon a fixed time schedule.

III

The trial court fixed the irrigation season at 150 days at the instance of the appellant who cannot now be heard to attack the determination.

IV

The trial court properly restricted the plaintiffs from interfering with the balance of the waters of McNaughton Gulch.

V

The evidence justifies the award of 3.5 feet of water per acre.

VI

The decree in no way affects the McNaughton Canal waters.

VII

The court properly determined the irrigated acreage to be 66.03 acres on the basis of the evidence available to him.

ARGUMENT

POINT I

Appellants correctly assert that the pronouncements of this Court on the original appeal are the law of the case.

Respondents have no quarrel with Point I of Appellants' Brief insofar as it states the above entitled proposition. Respondents do however, feel that the Appellants lose sight of this proposition of law elsewhere in their brief, and particularly at Point IV, as will hereinafter be more particularly pointed out under Respondents' argument on that point.

Respondents feel that the Trial Court had this principle well in mind in analyzing the extent to which he was required to re-open the case under the Supreme Court's former decision.

In his Memorandum Decision (P. 2) the Trial Court reviewed the decision of the Supreme Court, and then said:

“Restating the above so that it is more directly pointed to the present query, the court simply and directly states that the plaintiffs have the right to use all of the water of the McNaughton Gulch which, when used with

reasonable efficiency, is sufficient 'to satisfy *the* beneficial use of *their* (plaintiffs') *appropriation*.' "

Elsewhere in his Memorandum Decision (P. 5) the court restates the problem as follows:

"Thus under the mandate, we are to determine how much of the gulch water is reasonably necessary for plaintiff to use in a reasonably efficient manner in order to produce his crops upon 66.03 acres of land which must be watered by diversion from the gulch."

and again, at P. 6:

"Thus, the quantity of gulch water which the plaintiffs and their predecessors in interest had diverted from the gulch and applied to beneficial use prior to 1903, is the amount of water that he now has the right to divert and use. It is our problem to find out what that was."

The case then so far as the further proceedings were concerned, was addressed to the inquiry, "What water rights do the plaintiffs have based upon beneficial use thereof as fixed prior to 1903? And with the recognition of the rights of the defendants to any waters in excess of those rights as indicated by the quote from the Supreme Court's original opinion as set out heretofore in Respondents' Additional Statement of Facts, P. 2.

POINT II

The Court properly limited plaintiffs' use of water to 2 C.F.S. upon a fixed time schedule.

Appellants assertion of error stemming from the 2 C.F.S. award which the court made for a fixed period of 92 hours and 24 minutes each 10-day period appears to be predicated upon the theory that because the flow was not constant that plaintiffs should not be bound by any limitation. This does violence to the evidence upon which the trial court found the facts, both at the original trial and at the retrial.

The impression apparently sought to be created in appellants' brief, by the undue emphasis upon the findings of the trial court as to variation from day to day and season to season, and from a flow of several cubic feet to a low ebb when the flow is negligible, is that a great deal of the time the flow is negligible. Let us therefore, analyze the evidence to allay such a misconception.

On the 23rd day of February, 1954, four months after all irrigation had ceased on surrounding lands, their own witness, David Gardner, found 1½ second feet of water in the Gulch at Dam No. 3, plaintiff's only dam on his own premises (Retrial R. 30-31). Ed Tyzach, for plaintiffs, testified of visiting the Gulch to fish, swim or catch muskrats sometime near

but after 1900 (R. 22). Asher Merkley for plaintiffs stated that he had never seen the Gulch dry and that for the past 40 years there has always been from three to seven cubic feet second flow into Ashley Central Canal from McNaughton Gulch (R. 63-64). He continued to say that he knew the only water defendants had to irrigate their lands came from McNaughton Gulch and that they had always raised a crop (R. 66-67-68). Ed Hoeft had never seen the Gulch dry and always irrigated 30 acres himself from the Gulch (R. 108). Ernest Johnson later owned the Hoeft place and always had plenty of water to irrigate 30 acres and never had to go up stream (R. 121, 125). McNaughton can only remember one year when water did not run through his east fence (R. 202) and during water time he turns water out on pasture and then it drains and goes back down the Gulch (R. 206-207). L. P. Christensen found $1\frac{1}{2}$ cubic feet second being diverted to North from vicinity of lower McNaughton Dam and $\frac{1}{2}$ cubic feet second to the South during time of first trial in July and forepart of August, 1950. (R. 244, 253). On August 1st, 1950, James Fisher estimated 2 feet in diversion to the North of McNaughton No. 3 (R. 282). W. Simpson Ross remembers only one year that water did not flow in Gulch (R. 322). It is admitted by all that until 1948 all parties had and used water from McNaughton Gulch and apparently had sufficient to mature their crops without incident.

The record then, definitely established that there is always a considerable flow in McNaughton Gulch. That it flows year round. That its constant flow varies from season to season only as other streams may vary because of wet years or extreme drought conditions. That irrigation practices effect the flow only by adding to the already constant flow of the Gulch. The trial court, after considering all evidence, determined that the variations of the Gulch were not of such a nature which would prevent McNaughton from obtaining the irrigation head necessary to properly irrigate his land if he followed the irrigation practices he had used in the past by taking all water of the Gulch not to exceed 2 cubic feet second and adding it to his canal water for a period of 92 hours 24 minutes each ten days. McNaughton's own testimony substantiates this determination. McNaughton stated he needed a stream of 1 to 1½ feet to get over his ground (R. 157) which he repeated as being the desired flow and volumn to cover his land (R. 200). He added that if the Gulch didn't flow that much he supplemented it with canal water (R. 155, 157) but that some summers it wasn't necessary to use canal water at all.

McNaughton testified that the 12½ shares of stock he owned in Ashley Upper Canal Co. was the same stock his predecessors had used and that the McNaughton land involved in this suit is irrigated

by water from the Ashley Upper Canal Company. (R. 209, 210, 211, 212). He also stated that he now leases his canal stock and also practically all of his 125 shares in Ashley Valley reservoir; that 1 share of Upper Ashley Canal stock is allowed to each 10 acres of land (R. 154, 155).

The trial court very painstakingly reviewed the evidence in his Memorandum Decision on this question of the flow of waters in the Gulch, and has in that Memorandum Decision preserved his analysis for review by the Supreme Court. We call the Court's attention particularly to pages 8 through 16.

It should also be noted that the court granted the plaintiff .5 acre feet more water per acre than he felt the evidence otherwise justified on the basis of existing variables. (See Memorandum Decision (P. 15)).

POINT III

The Trial Court fixed the irrigation season at 150 days at the instance of the appellants, who cannot now be heard to attack that determination.

The court in its Memorandum Decision adopted a growing season of 180 days. There was considerable evidence at the retrial of this matter concerning this precise point, and for convenience of the court we herewith abstract the same:

David I. Gardner, an engineer called by McNaughton testified that growing season for grain was 90 to 100 days and for alfalfa 180 days (Retrial R. 8, 53) but stated his testimony was based on experience in other parts of the state, not Ashley Valley. (Retrial R. 71, 44). After qualifying as an expert he expressed his opinion that McNaughton land would require six acre feet of water per year to mature crops (Retrial R. 20, 75). He freely admitted however that he had never made an experiment in Ashley Valley (Retrial 44, 71); that he had only been *through* Vernal 3 times (Retrial 76); and had only visited the McNaughton property once and that was for approximately one hour just preceeding the trial during which he had walked up and down the Gulch and viewed the premises from an automobile along the highway (Retrial 27, 35, 36).

In contrast, L. P. Christensen, testified that he was a Civil Engineer with 34 years experience in Ashley Valley and in charge of distribution of waters in Ashley Valley since 1920. (Retrial 88). Mr. Christensen stated that 3 acre feet per acre per year would adequately irrigate the McNaughton land (Retrial 93, 95). Mr. Christensen, after taking into consideration water table and type of soil, pointed out that one share of water in Ashley Upper was allotted to each 10 acres and that it would produce on the average 3 acre feet per acre per year. (Retrial 92). One share

of Ashley Valley .2 acre feet per acre per year (Retrial 93). Mr. Christensen repeated that John McNaughton owned 12.5 shares of Ashley Upper and 125 shares Reservoir (R. 254, 255, Retrial R. 89). On the first hearing Mr. Christensen testified that 1 share to 10 acres in Ashley Upper and 1 share to each acre in Ashley Reservoir would in normal years provide a full water right for land in Ashley Valley (R. 260), McNaughtons own only 80 acres of land.

The trial court noted the discrepancy in the testimony of the experts. Which one is in a better position to know? Which one is experienced in Ashley Valley? What is the situation on other lands in the Valley? The court granted plaintiffs 3.5 acre feet per acre per year and the growing season of 180 days. The maximum requested. (Memorandum decision page 15-16). Then upon plaintiffs own Motion for Further Consideration and Memorandum in Support thereof, plaintiffs testimony to the contrary, the court shortened the irrigation season to 150 days (Court order correcting Memorandum Decision). In the face of this record it is difficult to find reason in plaintiffs now charging error with reference to the irrigation season limitation fixed and shortened at their own request.

The court's limitation is only upon the plaintiffs use of Gulch water and is based upon that diverted

and beneficially applied prior to 1903. They have historically had and used the above mentioned canal water upon their lands. The court has determined what use plaintiff made of Gulch water prior to 1903 and awarded that to them. The plaintiff can take that much water from the Gulch whether or not there remains sufficient water for defendants even though they also have historically had sufficient water from the Gulch to irrigate their lands.

The Appellants having importuned the trial court to shorten the season to 150 days, which matter was acceded to by the Respondents and the Trial Court, it would seemingly come with ill grace for the Appellants to predicate error thereon. If their disagreement is both with the length of irrigation season, and with the duty of water, certainly it would seem that they must stand their ground in both respects if they are to be heard on appeal on both matters, rather than affirmatively suggest a shorter season be entered in the findings.

The Court was amply justified in its findings in regard to this point, and what the Court did in effect was to limit one of the rights of the appellants (plaintiffs) at their own request. In this respect, the Trial Court was merely doing what this court has on occasion done, that is, comply with the request of a party where his rights may be greater, but where for

special reasons he does not desire to have them asserted fully. *Wolfe v. White*, Utah, 225 P. 2d 729.

What the appellants really seek to do under this point, however, it appears, is to attack indirectly the finding of the trial court that 3.5 acre feet is the reasonable duty of water in the present instance. The anomaly, if existent, is one created by the appellants, and not one of the court's making. The evidence on the question of duty of water is treated by Respondents elsewhere in this brief, and clearly preponderates in favor of the trial court's ruling.

POINT IV

The Trial Court properly restricted the plaintiffs from interfering with the balance of the waters of McNaughton Gulch.

Appellants are most unrealistic in their claim under point IV of their brief that error exists by reason of the restrictions which the court placed upon them.

The matter of the existence of a right to form the basis for the restrictions appears to be fully and completely disposed of by the factual picture as it developed in this case, and by the opinion of the Supreme Court on the previous appeal. 242 P 2d 570.

The present lawsuit was precipitated by the assertion of the defendants of their rights in the Mc-

Naughton Gulch waters. The plaintiffs as upper stream users are in a position to interfere with the defendants use, and by their actions prior to suit and by bringing suit, they have manifest every intention and desire to completely nullify the rights of lower stream users. This has been the exact nature of their approach to the problem. Obviously then, if the plaintiffs as upper users do not willingly comply with the judgment of the court, the situation is one which is fraught with possibility of serious consequences.

It rather begs the question to say that the court cannot be realistic in its approach to a problem so serious and real as is this one. The history of the West is filled with instances of physical violence engendered by disagreements over water rights and water turns. Certainly the court is not required to close its eyes to just such a problem after having determined that the plaintiff is not entitled to stop all lower users from obtaining water as he began doing in 1948, and as he seeks to do permanently.

Appellants, since they have no rights in the waters in excess of the beneficial use as fixed by the Court are not adversely affected by the restraints imposed upon them, unless they contemplate violation of the decree and continued use of the excess waters.

The appellants cite numerous cases establishing the proposition that the court could not properly impose restraints on behalf of the defendants because it was not established that they had rights. In the case of Dameron Valley Reservoir v. Bleak, 61 Utah 230, 211 P. 974, the facts make the case completely distinguishable. The case commenced by the plaintiff seeking an injunction was unsuccessful when he failed to establish prior rights to those of the defendant.

In the case of Stauffer v. Utah Oil Refining Co., 85 Utah 388, 39 P. 2d 725, the plaintiff sought an injunction based upon rights which he unsuccessfully asserted, because he failed to establish that defendants were using waters in excess of their entitlement. Having failed to establish the rights upon which the injunction was asserted, the rule followed that plaintiff could not obtain the injunction for interference with those rights.

In the principle case the plaintiff commenced the suit and asserted rights against the defendant which they have been partially unsuccessful in maintaining in that they have not been able to establish unqualified right to the waters of McNaughton Gulch. The assertion of the right to all of the waters however makes it clear that their claim does interfere with the rights of the defendant. The suit as com-

menced by the plaintiff was not intended as an adjudication of the specific rights of the various defendants, but was the assertion of the rights of the plaintiffs in derogation of the rights of the defendants in general.

To raise the contention that defendants established no rights to water from the Gulch is highly unrealistic. It flies in the face of the evidence at the trial initially and the retrial, and furthermore, overlooks one of the basic premises upon which the plaintiffs predicate their appeal. That is, that the first decision of the Supreme Court has become the law of the case. In that opinion the court said: (242 P. 2d 570)

“ . . . defendants as subsequent appropriators are entitled to the use of all of such waters not necessary to satisfy such requirements of the plaintiffs.”

It is not necessary for the rights of the defendants as against each other to be fully adjudicated in this proceedings in order that the plaintiffs be restrained from interfering with those rights. It is sufficient that as between the plaintiffs and the defendants generally it be established that the rights do exist. The remand to the District Court establishes this fact, and forecloses the plaintiffs on this point. *Powerine Company v. Zions Savings Bank & Trust Co.*, 106 Utah 384, 148 P. 2d 807.

The question of the extent and nature of the rights as between the various defendants was never litigated in this suit, although there is a finding as to a previous decree as between some of the defendants, and based upon the introduction thereof in evidence. (R. 300-301)

POINT V

The evidence justifies the award of 3.5 acre feet of water.

The principles upon which the duty of water is to be determined are clear, and sufficiently well established as to make a discussion of them herein perhaps more academic than helpful from a practical standpoint. Wiel, *Water Rights in the Western States*, quoted by Appellants commencing at page 522; Kinney on *Irrigation and Water Rights*, page 1591, quoted by appellants, set forth basic principles with which the Utah Courts have come into contact at various times.

As a result of application of fundamental principles to particular factual situations, this court has approved a wide variety of water duty ratios. Perhaps one of the highest is to be found in the case of *Jackson v. Spanish Fork & West Field Irrigation Co. Utah*, 223 P. 2d 827. The rule, however, which

that case and each water case involving duty of water teaches, is that every case must necessarily be based upon its own facts, and that the trial court must conclude from the best evidence it has before it what a proper duty is for the particular case. For this reason, other cases are of help only in determining principles generally. Such a case is that of *Sharp v. Whitmore*, 51 Utah 14, 168 P. 273 relied upon heavily by the appellants. As stated by Kinney on Irrigation and water rights, p. 1595, in summarizing his prior discussion:

“From the above it can readily be seen that no hard fast rule can be made as to the duty of water which will apply to all cases. Therefore, the proper duty of water can only be determined from all the facts surrounding each particular case.”

The very best evidence upon which a court can base its determination is not a forced parallel between the case at bar and another decided case, but upon an analysis of the evidence in the particular case.

Using this approach, let us review the evidence upon which the court based its decision of 3.5 acre feet in the present case, and particularly the evidence of the experts therein involved.

Two experts testified concerning the duty of

water. Gardner for the plaintiff testified that in his opinion six acre feet was necessary (Retrial 20). The basis of his opinion appeared to be two fold: One the assertion that the entire area was sandy loam (Retrial 15-16) which statement he could not sustain and later qualified (Retrial 66) on cross examination; and an assertion that this high duty was because of the topography of the tract, that is, it was uneven with a number of swales and high spots. (Retrial 16). He conceded, however, that the application of six acre feet would result in a large flow of waste water. (Retrial 22). Mr. Gardner was not a resident of the area, and had made no tests of any kind in the area, and in fact was almost completely unfamiliar with the area except for having gone over a portion of the ground on the day in question.

On the other hand, Leon P. Christenson, a civil engineer who is also Secretary for the Ashley Upper Canal Co., and who had 34 years of experience in the Ashley Valley area including experience as a farmer, testified that he was familiar with the soil on the McNaughton place, that it was not excessively sandy, and that if handled properly three acre feet would be a proper duty of water (Retrial 93). He also indicated that the McNaughton land had suffered in the past in certain parts because of over application of water (Retrial 98, 100). He also was able to state from experience and first hand knowl-

edge that the duty of water as figured under the Ashley Upper Canal Co. was on the basis of 3 acre feet per acre.

Here then was a witness with the benefit both of qualification as a civil engineer, and experience of 34 years in that capacity and as a farmer, and a person with a direct working knowledge of the land involved, who was able to state with certainty what the duty of water should be in the area, based upon the soil, the area and first hand knowledge of all of the factors. Christenson also indicated that the McNaughton ground was only average in the area as to unevenness (Retrial 100, 101), and that this did not require that a higher duty of water be imposed, but rather that a different application be made. (Retrial 101).

J. Ferron Hacking, a farmer, in Ashley Valley irrigates corn and other grains 3 times a season, pasture every 2 weeks, (Retrial R. 111, 114, 116) and states that every 10 days is too often for alfalfa. (Retrial 115). Hacking adds that his land requires more water than McNaughton's. (Retrial 114).

Jack C. Turner who adjoins McNaughton on the East, testified that in a year drier than usual he applied water every two weeks, and irrigated corn twice during the entire year (Retrial 103-104).

With reference to type of soil the witnesses had this to say. J. Ferron Hacking said that McNaughton soil was of a clay nature (Retrial 114). Jack C. Turner identified it as being similar to his, a heavy soil—a clay (Retrial 106 and Defendants exhibits 1A and 2A received in evidence Retrial 120). Franklin Lewis, a Vernal resident, classified the soil as a heavy clay with sandy loam back further (Retrial 86).

At Point III Respondents have heretofore set out in detail additional evidence with respect to the 3.5 acre feet duty of water.

It appears that the issue here becomes essentially one as to whether or not the evidence is competent and adequate to sustain the Court in its determination with respect to the duty of water, and it is respectfully submitted, that the evidence amply sustains the trial court, and that in fact, a finding based upon witness Gardner's testimony relative to six acre feet could not be sustained under the evidence.

As pointed out by this court in the case of Mitchell v. Spanish Fork West Field Irrigation Co. (Utah 2d 313, 265 P. 2d 1016:

“ . . . it must be kept in mind that the quantity of water acquired is limited to that which is beneficially used upon the land. The evidence was in direct conflict, yet there is adequate support therein for the conclusion that

2½ c.f.s. for 12 hours once a week is all the water that was put to a beneficial use upon the land upon which the use was established.”

POINT VI

The Decree in no way affects the McNaughton Canal Waters

The assertion of the appellants at Point VI of their brief appears to pretty well answer itself. The respondents at no time asserted ownership rights in plaintiffs' canal water. Those waters were not involved in the suit between the parties except as they came in incidentally thereto, and of course, the defendants cannot in any way prevent the plaintiffs from using their canal water as they see fit. This is a matter between the plaintiffs and the canal company.

The trial court properly limited the findings, conclusions and decree to the issues involved between the parties.

POINT VII

The Court properly determined the Irrigated Acreage to be 66.03 acres on the basis of the evidence available to him.

Appellants apparently concede that there is an

area of approximately seven acres lying within the Gulch. There is no evidence that it was irrigated other than by return seepage waters from the upper lands. This seepage, of course, continues, and will continue. Plaintiffs certainly offered no help to the court in presenting the question of use of water on this seven-acre tract. The contention can scarcely be made now that they are entitled to irrigate this strip when they have never done so before. The court went upon the premises and viewed them, and certainly was in a position thereafter to determine whether or not additional waters should be awarded covering that property. Since the run-off must necessarily traverse this area, it does not appear that appellants were entitled to more than the 66.03 acres which the court determined were being irrigated.

Nor is the issue precluded under the doctrine of the law of the case as plaintiffs assert. This, for the reason that the court sent the case back specifically to have the trial court determine how much water was necessary to satisfy the requirements of the plaintiffs. (See last sentence of opinion as heretofore quoted at p. 17, of this brief.)

CONCLUSION

It is respectfully submitted, that the trial court in the present instance adjusted the matter well within the framework of the evidence produced, and achieved a result which will stand the test of a review of the evidence. In the rehearing of the matter, he stayed within the issues which the Supreme Court returned to him for determination.

This is a matter which is made doubly difficult by the fact that the parties were able to administer their various rights on the stream without need of interference by the court until 1948, and the lower users were able to irrigate without interference from the upper user, but having resolved itself into a lawsuit, the situation was one fraught with considerable possibility of additional strife, both legal and physical. Therefore, the court, treating the matter realistically,, saw the solution to be the insertion of restrictions which would have the effect of eliminating this source of friction so far as the parties are concerned. In this he made a wise decision, and one certainly well within the bounds of his discretion.

We feel that the court was more liberal in granting the appellants 3.5 acre feet of water per acre than he might have been, but recognize also that he was considering the matter from all aspects and from the

usual and the unusual situations which might be encountered. Accordingly, we respectfully submit that his determination on this score can and will stand the test of rigid scrutiny.

It is submitted that the trial court pursuant to the mandate of this court reviewed the question of beneficial use of water on the lands in question to determine the proper award to the plaintiffs within the framework of the law, that he, with great care and competence, reviewed the factual picture and weighed the evidence in arriving at his decision, and that the decision thus rendered is accurate and just.

The trial court has given the court the benefit of a Memorandum Decision in the case which illustrates his analysis and sound reasoning.

It is respectfully submitted that the decision herein should be affirmed.

COLTON & HAMMOND

DEAN W. SHEFFIELD

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