

1960

In the Matter of the General Determination of All The Rights to the Use of Water, Both Surface and Underground, Within the Drainage Area of the Green River Above the Confluence of, but including, Pot Creek, in Daggett, Summit, and Uintah Counties, Utah : Brief of Respondents

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILE

IN THE MATTER OF THE GENERAL DETERMINATION OF ALL THE RIGHTS TO THE USE OF WATER, BOTH SURFACE AND UNDERGROUND WITHIN THE DRAINAGE AREA OF THE GREEN RIVER ABOVE THE CONFLUENCE OF, BUT INCLUDING, POT CREEK, IN DAGGETT, SUMMIT, AND UINTAH COUNTIES, UTAH.

NOV 7 - 1960

Clerk, Supreme Court, Utah

Case
No. 9218

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
STATEMENT OF FACTS.....	1
STATEMENT OF POINTS.....	1
ARGUMENT	2
POINT I.	
THE DECREE OF THE TRIAL COURT IS FULLY SUPPORTED BY FINDINGS OF FACT AND CONCLU- SIONS OF LAW	2
POINT II.	
THE AWARD OF WATER RIGHTS WAS SUPPORTED BY COMPETENT EVIDENCE	7
POINT III.	
ADVERSE USE TO CERTAIN RIGHTS WAS COM- PLETELY ESTABLISHED BY THE EVIDENCE.....	7
CONCLUSION	20

Cases Cited

American Fork Irrigation Company, et al. v. Linke, et al., 121 Utah 90, 233 Pac. 188.....	19
Garrison v. Davis, 88 Utah 358, 64 P. 2d 439.....	18
Huntsville Irrigation Association, et al. v. The District Court of Weber County, et al., 72 Utah 431, 270 Pac. 1089.....	6
Jackson v. Spanish Fork West Field Irrigation Company, 223 P. 2d 827.....	13
Mayer v. Criddle, U. 2d, 355 P. 2d 64.....	7
Mitchell v. Spanish Fork West Field Irrigation Company, 1 U. 2d 313, 265 P. 2d 1016.....	13
Plain City Irrigation Company v. Hooper Irrigation Company, et al., 87 Utah 545, 51 P. 2d 1069.....	5
Sowards v. Meagher, 37 Utah 212.....	10

Statutes Cited

Utah Code Annotated, 1953:	
Title 73, Chapter 4.....	2, 3, 4, 6
Utah Rules of Civil Procedure:	
Rule 1	2
Rule 52	2, 3
Rule 81A	2, 3, 5

IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE GENERAL DETERMINATION OF ALL THE RIGHTS TO THE USE OF WATER, BOTH SURFACE AND UNDERGROUND WITHIN THE DRAINAGE AREA OF THE GREEN RIVER ABOVE THE CONFLUENCE OF, BUT INCLUDING, POT CREEK, IN DAGGETT, SUMMIT, AND UINTAH COUNTIES, UTAH.

Case
No. 9218

BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT

This brief is submitted on behalf of all respondents, Wayne D. Criddle, State Engineer of the State of Utah, the “Olsen Rights” and the “Bullock Rights.”

STATEMENT OF FACTS

Except as specifically hereinafter noted, respondents generally agree with appellants’ Statement of Facts.

STATEMENT OF POINTS

POINT I

THE DECREE OF THE TRIAL COURT IS FULLY SUPPORTED BY FINDINGS OF FACT AND CONCLUSIONS OF LAW.

POINT II
THE AWARD OF WATER RIGHTS WAS SUP-
PORTED BY COMPETENT EVIDENCE.

POINT III
ADVERSE USE TO CERTAIN RIGHTS WAS
COMPLETELY ESTABLISHED BY THE
EVIDENCE.

ARGUMENT

POINT I
THE DECREE OF THE TRIAL COURT IS FULLY
SUPPORTED BY FINDINGS OF FACT AND
CONCLUSIONS OF LAW.

We would first like to invite the court's attention to certain rules contained in the Utah Rules of Civil Procedure which qualify Rule 52 as relied upon by appellant.

Rule No. 1 states that the rules set out shall govern all suits of a civil nature, whether cognizable at law or in equity, and all special statutory procedures, except as stated in Rule 81. Rule 81-A states:

“These rules shall apply to all special statutory procedures except in so far as such rules are by their nature clearly inapplicable. * * *”

The subject matter with which we are concerned in this appeal arose within the context of Title 73, Chapter 4, U.C.A. 1953, wherein is provided the entire procedure for the statutory determination of water rights among various users. This action was initiated as a general determination of all the rights to the use of water within the Green River Drainage, above the confluence of, but including Pot Creek in Daggett, Summit, and Uintah Counties, in Utah.

We contend that the action from which this appeal arose is precisely the type of statutory procedure which was contemplated by Rule 81A and that Rule 52 does not apply to this action as it would in a normal lawsuit, and further we earnestly contend that the trial court made the necessary findings upon which to base its decree according to the provisions of Title 73, Chapter 4, U. C. A. 1953.

It should be noted that 73-4 et seq. provides for all facets of adjudication of water rights from the initial stages, through to a final judgment by the court.

We contend that the State Engineer's Office has substantially complied with the provisions of this statutory proceeding and would urge that the Trial Court action conforms to the procedure required by the statute and that appellant may not now attack the decree of the court as being a nullity. To substantiate this claim, we would direct the court's attention to certain provisions of Title 73, Chapter 4, wherein the steps of an adjudication law suit are outlined wherein the Legislature made all necessary provisions for a court to render a valid judgment within the context of this act.

Section 73-4-14, U.C.A. 1953 provides that the statements filed by the claimant shall stand in place of pleadings and issues may be framed thereon.

After the State Engineer's Office has complied with the preliminary requirements of the statute, as set out in Section 73-4-3, U. C. A. 1953, wherein provisions are

made for notice to all claimants, and survey of the water sources and the diverting works is provided for, the State Engineer submits to the court a report of his findings, based upon the facts that he has gathered from the survey, the statements of the water users, and other sources of information. From this material is drafted a proposed determination of water rights, and a copy thereof, is mailed to each user of water within the particular system in question and any claimants dissatisfied with this proposed determination may file objections with the court, Sec. 73-4-11, U. C. A. 1953. The court then hears these objections, Sec. 73-4-13, U. C. A. 1953, and enters judgment which determines and establishes the rights of the several claimants to the use of water within the source in question, Sec. 73-4-15, U. C. A. 1953.

Section 73-4-12, specifically provides for those elements of the water right which shall be contained in the judgment of the court. These include the name and address of the claimant; the quantity of water claimed in acre-feet or the flow water in second-feet; and the time during which the water is to be used each year; the name of the stream or other source where the water is diverted; the priority date of the right; and such other matters as will fully and completely define the rights of said claimants to the use of the water.

It is apparent that those items set out by the statute are designed to clearly define the water right of the person involved. What more would applicant have the court find? If the court complies with the requirements of

this statute, as was done in this case, there is no element of doubt as to any ingredient of the water right of a claimant, since the court by adoption of the above findings of the State Engineer and incorporated thereof into its judgment has found specifically those facts which compose the water rights.

We urge that the procedure briefly outlined above comes within the meaning and intent of Rule 81A. If this were not the case the court would be forced to duplicate both the action of the State Engineer, and the elements necessary to the judgment noted above. This point is forcefully brought home when one realizes the great quantity of material and facts contained in the proposed determination of water rights filed by the State Engineer. This proposal is literally a volume and is prepared in book form. Should the court be forced to reiterate this voluminous work twice in order to satisfy a rule which does not apply to this controversy? We strongly contend that it should not.

We believe the present controversy comes within the rule announced in the *Plain City Irrigation Company v. Hooper Irrigation Company, et al.*, 87 Ut. 545, 51 P. 2d 1069. In that case, a suit instituted under the General Determination Statute, the appellant raised the same objection on appeal as has been raised in this case; and the Supreme Court found against him on this point, using the following language:

“As to assignments 3, 4, 5, 6 and 7, they are directed to the alleged failure of the court to sepa-

rately state findings of fact and conclusions of law and that the evidence is insufficient to show appropriations, quantities, beneficial use, priorities, and other particulars, all of which go to questions of the sufficiency of the evidence, and that the judgment is against the law. However, it appears that the trial court had before it all the witnesses, heard them testify, and had the benefit of personal observation and was in better position to weigh conflicting evidence than are we, being limited to the record only. Assignments 9, 10, 11 and 12, attack the sufficiency of the evidence and assert the decree is against the law. These assignments are not well taken.”

We urge that the findings made in this case by the trial court, as set forth in the adoption by the court of the proposed determination of the State Engineer, were fully sufficient to meet the requirements of the statute for a statutory adjudication of the water rights and obviated the preparation of separate findings by the court.

The Supreme Court of the State has expressed its confidence in this method of statutory adjudication of water rights in previous cases. In *Huntsville Irrigation Association, et al. v. The District Court of Weber County, et al.*, 72 Utah, 431, 270 Pac. 1089, the court in addressing itself to certain aspects of the predecessor of the present statute, Chapter 4, Title 73, Utah Code Annotated 1953, stated:

“Every facility seems to have been provided for a thorough adjudication of the rights of each claimant as against every other claimant as well as against the state. There is nothing in any previous

decision of this court involving the statute in conflict with these views.”

We believe that the confidence which the Supreme Court has expressed in this method of determining water rights is well founded and there are no defects within this statute which would render a judgment rendered thereunder void.

Indeed this Court has often stated that decisions of lower courts will not be lightly upset. Most recently in *Mayer v. Criddle*, Utah 2d, 355 P. 2d 64, it was stated:

“The trial court having heard the evidence and viewed the scene in question was in a better position to correctly determine the facts than are we, so in accordance with the rule in equity cases we will not disturb its findings unless we conclude that they are contrary to the clear preponderance of the evidence.”

POINT II

THE AWARD OF WATER RIGHTS WAS SUPPORTED BY COMPETENT EVIDENCE.

POINT III

ADVERSE USE TO CERTAIN RIGHTS WAS COMPLETELY ESTABLISHED BY THE EVIDENCE.

a. *As to the Olsen Rights:*

This portion of the Brief deals with the water rights of J. Alden Olsen and Snell Olsen, owners of what is also referred to as the “Alan Bullock” or “Clyde Ranch,” and the pertinent parts of which are situated in Sections

18 and 19 in Wyoming. We, of course, speak in support of the engineers' determination.

Appellants state in their brief that our award was based solely on adverse use. We submit that the award is also based on adequate evidence of diligence use. They brush past the testimony of Edgar Donahoo which we feel is extremely important.

His deposition concerning the Whipple Ditch is found in Exhibit H-12, beginning at page 6. He states that the ditch was built around 1900, when he was about ten years old. He points out (Dep. 8) that Whipple's son-in-law, Olsen, homesteaded the Knute Bullock land (Northeast quarter of Section 19 in Wyoming) about the time the Whipple Ditch was dug, and that water from it was placed on that land at that time. When Olsen left Jack Stone took over and later Knute Bullock took over from him. All of them watered from the ditch.

Testimony at the trial indicated that the Wyoming lands in this area had not been surveyed when their settlement was commenced, so this explains why there were several owners before the first homestead filings were made.

Various witnesses were called to contradict the above, but they disagreed among themselves and furthermore had a most restricted opportunity to observe.

Claude Bullock and Elsie Bullock both testified that there was no lateral from the Whipple Ditch to the Alan

Bullock place till 1930 or 1932. Yet even Harry Buckley admitted in both his deposition, Exhibit H-12, page 21, and T. 25, that there have been signs of a ditch going North from the Whipple Ditch to the Knute Bullock place even since he moved into the area in 1919.

Even Mrs. Langendorf in her interrogatories (Ex. H-13), set the start of use of Whipple Ditch water on this place as early as 1910.

It is worthy to note that two of the three people who fixed the start of use in the 1930's even irrigate the farm, and Claude Bullock did not irrigate it after 1924. In his deposition Ex. H-12, page 21, 22 he said,

“I don't think it was used on the place when Knute had it.” When asked again if it was used then he said, “No, not to my knowledge.” Since he was only a youngster most of this time it is easy to see why his recollection was so vague.

On the other hand all those who participated in its use indicate a much earlier origin. Mrs. Albert Jensen, Alan Bullock's widow, in her interrogatories (Ex. H-11), stated that they used half of the Whipple Ditch water from 1924 on, and furthermore, that in negotiations with Newt (Knute) Bullock, he had represented to her husband and her that one-half of the Whipple Ditch water would go with the place. To like effect is the testimony of Keith Bullock (Ex. H-10) and Lee Bullock (Ex. H-9). Rube Ivory, who shared the ditch from 1925 to 1928 with Alan Bullock, testified (T. 90, 91) that the ditch was there when he came and that they split the water. This is en-

tirely consistent with the testimony of Mrs. Jensen and Keith and Lee Bullock and Larry Bullock (T. 60, 61).

The Utah Supreme Court held in the case of *Sowards v. Meagher*, 37 Utah 212, that where an appropriator expects to patent the lands upon which he places the water he can make an effective appropriation. We submit that such right should not be lost where there is a tacking of successive pre-patent interests, but the right should date from the first such use.

It is extremely difficult to obtain living testimony of events which occurred 50 to 60 years ago. The Trial Court reconciled the conflicts and accepted Edgar Donahoo's version. We submit that the record adequately supports the Trial Court in this, and that a diligence priority of 1902 for this interest should be affirmed.

The Trial Court also felt that the facts made out a title by adverse use.

I will consider the elements in the order prescribed by the Utah cases:

(1) Seven years usage: An attempt was made to show by witnesses Harry Buckley and Elsie Bullock that use of Whipple Ditch water on Alan Bullock's land was started in 1932. I have already commented on the fact that they had not participated in the irrigating and had only a very limited opportunity to observe. Claude Bullock set it about 1930, but he, too, had not watered the place since 1924.

On the other hand, Mr. Ivory said it was being so used in 1925, when he took over the neighboring farm to the East and shared the Whipple Ditch with Alan (T. 91, 92), a use he saw continued till 1928, when he sold to Harry Bullock. He took over Alan's place from him in 1938 and continued to run it till 1941 (T. 92). The same use was made of the water. When he sold out then he even gave a deed to a one-half interest in the Whipple Ditch (Ex. H-14).

Keith and Lee Bullock and Mrs. Jensen, in their interrogatories (Exhibit 9, 10 and 11) spell out the use of the ditch in great detail, indicating they took it over with the acquisition of the Knute Bullock place. (By stipulation this is recognized as the autumn of 1924, T. 35.)

(2) Continuous. It is apparent that the waters in the ditch were used every irrigating season from 1925 to 1939, inclusive.

(3) Uninterrupted: Efforts were made by Harry Buckley to stop the use, but these were of no avail. (T. 36)

(4) Under claim of right: Mrs. Jensen testified in her deposition (Ex. H.-11) that when her husband, Alan Bullock, was negotiating with Knute Bullock for the purchase of his place before he died, he told Alan in her presence that they would be entitled to half the Whipple Ditch water.

(5) Open and notorious. The Alan Bullock Ditch was a large, open ditch. It flowed out of the Whipple

Ditch which was even larger. Even Harry Buckley admitted knowing of it for eight growing seasons (1932 to 1939 inclusive). Joe Hickey, in the deposition (Ex. H-12) at page 19 emphasizes his familiarity with the situation. Since the point of diversion of the Whipple Ditch out of Beaver Creek is on Joe Hickey's land (De. H-12, p. 15) and is above part of the diversions of both appellants there can be no question that they were aware of the quantity of water taken into the Whipple Ditch and on the Alan Bullock farm.

(6) Hostile and (7) Adverse. The record fairly bristles with the hostility over this ditch. Appellants claim that we have not shown that we are taking the water when they needed it. We submit that just the contrary must be inferred from all this quarrelling. The testimony is that the use has not greatly changed since the thirties. Therefore, if we are taking water they need now, we were taking it then. The friction over this is spelled out in the testimony of Mrs. Jensen (Ex. H-11), Keith Bullock (Ex. H-10), Lee Bullock (Ex. H-9, and Harry Buckley himself (Dept. Ex. H-12, pps. 30, 31, 32, 33 and 34). I quote from p. 31:

“But this new ditch that's ever taken any water onto the Allen place to amount to anything, was built actually in the late twenties. Now, I can't say the year, but Brig and Allen were good friends of mine. I helped hay that ranch a dozen times, both that and Brig's. We labored together all the time they lived here until a little later on Allen tried to force water through that ditch and water right, and, of course, we ceased to be quite so friendly, and we've fought it ever since.”

I quote also from T. 35:

“Q. As a matter of fact, you and Alan did not get along very well after he got the Newt place?

“A. That’s right. After he started coming up there and taking that water, it took it away from my old water rights in the creek.”

See also T. 36 and Dep. 19.

We submit there is ample evidence to bring us within the principles laid down in the Utah cases cited by Appellants. Our Court has also dealt with the problem in *Jackson v. Spanish Fork Westfield Irrigation Company*, 223 Pac. 2d 827 and *Mitchell v. Spanish Fork Westfield Irrigation Co.*, 1 Utah 2d 313, 265 P. 2d 1016.

We certainly differ with Appellants’ claim that we only took the water when it was not required by other users of the stream.

The interrogatories of Keith and Lee Bullock establish that they used the water throughout the season and the proportions were generally preserved even in the lowest water.

The quotation from Larry Bullock’s testimony on page 27 of Appellants’ brief is obviously quoted out of context. A reading of the full record will make it plain he was referring to the spring high water. As the flow reduced he no longer was able to take all his ditches would hold.

Ivory's testimony on the same page really amounts to this: "We got enough water." It can't be inferred from this that what they took Buckley and Hickey were not interested in, otherwise why was Buckley constantly arguing over it, and why did he say "... it took it away from my old water rights in the creek."

Appellants claim much for the doctrine that one cannot ordinarily adverse an upstream user.

This principle might apply where the upstream user was merely wasting his water, but certainly this is not the case here. In the first place a large portion of Appellants' diversions are below ours. Joe Hickey has only the Parley Madsen Ditch (also referred to as the New Hickey Ditch) and the East Hickey Ditch which are diverted above (Ex. P-1), and the Parley Madsen Ditch is flumed across the Whipple Ditch. (Ex. P-1 Square P-Q-12-13.)

In the second place they have constantly disputed the amount to be diverted, which would certainly negate any mere wasting of the water.

On page 29 of their brief Appellants ask what priority will our adverse use establish. I think that is answered by the way the water was used. According to Lee and Keith Bullock it was divided so that one-half of the stream went into the Bullock Ditch and one-half came on downstream; one-half of this was put into the Whipple Ditch and that was divided equally between our ranch and the ranch immediately east of it.

We submit we then gained priorities equal to those of each person or persons with whom we divided the stream. A right by adverse use would mean nothing unless the priority acquired were that of the right taken from the first owner.

We feel the judgment of the District Court should be affirmed.

b. *As to the Bullock Rights:*

Respondent is the owner of property described in the various testimonies as the Larry Bullock Ranch and, on occasion, referred to as the HARRY BULLOCK property.

The Ranch consists of 763 acres. (R. 59)

The Ranch is made up of three old ranches:

The old Whipple Place, the old Carter Place, and the Briggs Meeks place.

In 1953, the State Engineer's crew measured the ranch and accurately determined the number of acres which were irrigated out of the Whipple Ditch. Their Measurement revealed that there was 474.80 acres of the Larry Bullock property which was so irrigated. (R. 55) In determining the number of acres which were irrigated out of the Whipple Ditch, the State Engineer eliminated from the total acreage of the Bullock ranch all

lands which were not irrigated and lands which were irrigated from sources other than the Whipple ditch. (R. 55)

Witness Edgar Donahue, in his Deposition, at page 7, fixed the date of construction of the Whipple Ditch at around 1900 or better, that is, or before. Mr. Donahue also testified that the ditch was about as large then as it is now (Donahue Deposition, page 9).

The priority schedule on West Fork of Beaver Creek as proposed by the State Engineer awarded to respondent under date of July 6, 1899, of 2 c.f.s. for the period of May 15th to October 15th. The Water Users Claim number is 1951. This claim is supported by an Affidavit from Whipple, one of the original owners and shows use of 2 c.f.s. prior to 1900 on the Bullock Ranch. No filing was required to appropriate water prior to 1903. This water irrigates a part of the measured acres of irrigated ground as revealed by Donaldson's testimony heretofore cited. Respondent was awarded a priority of 1900 is 2 c. f. s. from May 15th to October 15th, covering the same land as the 1899 priority which is Claim No. 1534.

Claim No. 1534 contains an Affidavit filed in April, 1931, showing use of 2 c. f. s. of water for 30 years. This affidavit was signed by numerous people, neighbors to the Bullock Ranch.

Claim number 1423 was awarded a priority of 1906 for 2.50 c. f. s. of water from May 15th to October 15th.

This claim is based on adverse possession and user for more than seven years prior to 1939. The Testimony

of the persons familiar with the Bullock Ranch to the effect that the ranch water courses have not been enlarged since 1900 when interpreted in the light of actual acreage found to be irrigated in 1953 by the State Engineer's Survey forms the basis for the proposed award by the Engineer.

Concerning the Whipple ditch in which the water of this respondent is carried, the evidence of all the witnesses was to the effect that the Whipple Ditch is the same today as it has been since its original construction. It has not been enlarged or expanded in any way. One witness indicated rocks had been removed from the bottom of the ditch, but none of the witnesses testified that the Whipple ditch has in any way been increased in its carrying capacity since its original construction in 1900. The witness Donahue testified about early history. The witness, Larry Bullock, testified that during the years that he has operated the ranch and can remember the condition of the ditches, namely from 1932 until the present time, the Whipple ditch has not been enlarged and the water flow in said ditch not increased.

The determination by the State Engineer of the priority schedules was based primarily on a measurement of land at the time of the actual physical examination and, the records, both at the State Engineer's Office of the various County Recorder's Office, and of the old witnesses who were familiar with the area and the water uses.

It is without dispute that the water which had been used at the diversion points has never been accurately and

consistently measured. No weirs were constructed and no water master or other official charged with measuring the various stream flows has ever been employed. The evidence revealed also that the water flow in the various ditches was high in the spring when snow runoff occurred, dwindled steadily during the summer and was lowest in the fall when the snow run-off had completely dissipated.

Since there was no accurate physical measurement of water flow the amount of water out of the various ditches would be most accurately shown by the amount of land irrigated on a particular farm. The State Engineer's physical examination was the basis of determining what acreage was actually irrigated.

Respondent has searched the record to find evidence which is contradictory to the evidence outlined in this brief. No witness testified that the measurement of actually irrigated land was inaccurate, or that said land, over the years, had not been irrigated out of the Whipple Ditch. As has been indicated the present Larry Bullock Ranch was a result of the consolidation of three ranches, the Whipple Ranch, the Carter Ranch, and the Meek's Ranch, and all three of those ranches are among the oldest ranches in the Lone Tree Area.

The determination and proposal by the State Engineer is entitled to great weight as far as providing evidence for the decision of the Lower Court. This Court so determined in the early case of *Garrison v. Davis*, 88 U.

358, 64 P. 2d 439. It has reaffirmed its holding in the more recent case of *American Fork Irrigation Company, et al. v. Linke, et al.*, 121 U. 90, 233 P. 188, wherein this Court stated as follows:

“Also, that although such findings and decisions administrative in nature merit studied consideration and great weight, nevertheless the Judiciary is the sole arbiter of law and fact in water cases. * * *.” (P. 194)

The claims filed in the State Engineer's Office reveals the appropriation of water on the Larry Bullock ranch since 1899. They show the establishment and maintenance of the Whipple Ditch and continuous beneficial use since 1899.

The evidence is without contradiction that the uses presently made of water out of the Whipple Ditch on the Larry Bullock ranch have extended far beyond the period for establishment of rights by adverse user.

Respondent is unable to discover in the record any evidence of any party who claims that the water allotted to the Respondent is not available and has not been continuously, uninterruptedly, and adversely used since the year 1899. The evidence is conclusive to the contrary.

In conclusion, it is respectfully submitted that the proposed adjudication is supported by evidence; is itself entitled to great weight as evidence and that there is no contrary evidence, and this Court should, therefore, affirm the lower Court's Judgment as to the rights of

the Respondent, Larry Bullock, as set forth in the proposed adjudication of water rights made by the State Engineer.

CONCLUSION

Respondents submit the action taken by the Court below was in all respects proper and fully supported by the evidence and should, therefore, be affirmed.

Respectfully submitted,

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