

1993

Worth L. And Annette C. Orton v. Collection Division of Utah State Tax Commission : Reply Brief

Utah Court of Appeals

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NET NO.

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1. 11/11/11

WORTH L. and ANNETTE C.
ORTON,

v.

Respondent.

Supreme Court No. 930320-CA
Priority No. 14

Appeal from a Decision of the Utah State Tax Commission

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JURISDICTION

Appellants offer the following response to Respondent's claim that this court lacks jurisdiction because Respondent's claim raises new material not addressed in the appellants' initial brief. Appellants have submitted to this Court a memorandum that sets forth their argument in support of this Court's jurisdiction. Below, that argument is set out in reply to Respondent's argument.

I. THE ORTONS' APPEAL IS NOT UNTIMELY BECAUSE THE PETITION FOR JUDICIAL REVIEW WAS FILED WITHIN THIRTY DAYS OF THE FINAL AGENCY ACTION

The Ortons' appeal to this court is not untimely because their petition for judicial review was filed within thirty days of "the order constituting final agency action." Section 64-46b-14, Utah Code Ann. Section 64-46b-14(3)(a) states:

A party shall file a petition for judicial review of final agency action within 30 days after the date that the order constituting the final agency action is issued or is considered to have been issued under subsection 63-46b-13(3)(b).

Section 63-46b-14, Utah Code Ann.

Respondent contends that the final agency action occurred on October 14, 1992, twenty days after appellants filed their motion for reconsideration. See Brief of Respondent, at 2. The Respondent's position relies on § 63-46b-13 which states:

If the agency head or the person designated for that purpose does not issue an order [granting or denying reconsideration] within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied.

Section 63-46b-13(3)(b), Utah Code Ann.

It is undisputed that no response to appellants' motion for reconsideration was filed within twenty days of their request for reconsideration. Instead, appellant contends that the Commission's order responding to appellants' petition for reconsideration superseded the presumption created by § 63-46b-13. It is this final order, issued December 9, 1992, which amended the Commission's original Findings of Fact, Conclusions of Law, and Final Decision, that appellants appeal from. It is this order that was, in fact, the final agency action. Upon the issuance of this order, appellants had thirty days within which they could file a motion for judicial review. Section 63-46b-14, Utah Code. Ann. See also Silva v. Department of Employment Security, 786 P.2d 246, 247 (Utah Ct. App. 1990) (appeal time commences when "final agency order" issues). Three factors support appellants' claim that the Order issued on December 9, 1992 and not the Final Decision issued by the Commission on September 4, 1992 was the final agency action from which appeal could be taken.

First, the Order denying reconsideration made several amendments to the Commission's earlier Final Decision. While it is true that the amendments affected only the Commission's finding of fact and not its decision, the Order did amend the Commission's earlier action. The Commission made changes to its findings of fact and then reiterated its first decision on the basis of those amended findings of fact. See Order, attached as Exhibit 2. The petition

for reconsideration was, therefore, granted in part and denied in part. Consequently, the Final Decision was superseded by the agency's final order. It was from this Order that the Ortons appealed.

Second, the Commission's final Order is clearly the agency's final formal action as it meets the requirements set by § 63-46b-10 of the Utah Code, for orders and decisions to be issued following formal proceedings. That section states specific items which must be included in an order to be filed by the presiding officer after a formal adjudicative proceeding. The section states that the officer shall sign and issue an order that includes:

- (a) A statement of the presiding officer's findings of fact based exclusively on the evidence of record in the adjudicative proceedings or on facts officially noted;

- (b) A statement of the presiding officer's conclusions of law;

- (c) A statement of the reasons for the presiding officer's decision;

- (d) A statement of any relief ordered by the agency;

- (e) A notice of the right to apply for reconsideration;

(f) A notice of any right to administrative or judicial review of the order available to aggrieved parties; and

(g) The time limits applicable to any reconsideration or review.

Section 63-46b-10, Utah Code Ann.

The order issued by the Commission on December 9, 1992, contains each of these items, with the exception of a notice of the right to apply for reconsideration. See Order, attached as Exhibit 1. The order is therefore not simply a denial of reconsideration, but is an official order issued following a formal adjudicative proceeding and constituting the agency's final action on the parties' petition for review.

Finally, the Commission acknowledged that the December 9 Order was its final action, by giving notice to appellants that they had 30 days in which to file a request for judicial review. The notice included in the Commission's final order states "You have thirty (30) days after the date of the final order to file with the Supreme Court a petition for judicial review." See Order, attached as Exhibit 2. The Commission then cites § 63-46b-13(1) and § 63-46b-14(2)(a) of the Utah Code. The Commission was obviously aware of the twenty-day presumption provided by § 63-46b-13. Their final order was issued more than twenty days after their original findings of fact, conclusions of law and final decision. The notation quoted above, therefore, can mean only that the court

recognized the order responding to the motion for reconsideration, and amending the earlier decision, to be its final action on the Ortons' case. The Commission believed, as did the Ortons, that a petition for judicial review could follow this final agency action.

The above factors, taken together, clearly indicate that the Commission's final action was to issue an order denying the appellants' motion for reconsideration. As noted above, § 63-46b-14 requires that a petition for judicial review be filed within thirty days of the "final agency action." Therefore, the appellants' petition was timely, being filed twenty-nine days after the issuance of the Commission's order denying reconsideration. This court, therefore, has jurisdiction over the Ortons' appeal from the Tax Commission's decision.

II. EVEN IF THIS COURT FINDS THE COMMISSION'S FINAL DECISION TO BE THE ACTION FROM WHICH APPEAL WAS TO BE TAKEN SECTION 63-46B-13 SHOULD NOT BE APPLIED TO BAR THIS APPEAL WHERE THE AGENCY ACTED ON THE PETITION FOR RECONSIDERATION.

Even if this court finds the Commission's Final Decision to be the action from which appeal was to be taken § 63-46b-13 should not be found to bar this appeal as the Tax Commission acted on the petition for reconsideration. It is not necessary for this court to give § 63-46b-13 a strict interpretation in order to meet the apparent purposes of the twenty-day presumption. A strict interpretation would compel an appellant to file for judicial review before receiving a response from the agency. Such a requirement is not necessary where, as here, the agency would suffer no prejudice as a result of a petitioner waiting for the

agency's final action on their case. In the instant case, the purposes of the twenty-day presumption can best be met by recognizing the right of petitioners to await the agency's action and to bring appeal from that final order.

A. THE COMMISSION WAS NOT PREJUDICED BY THE
ORTONS' DECISION TO WAIT FOR A RESPONSE TO
THEIR MOTION FOR RECONSIDERATION

There is no discussion in the notes to § 63-46b-13 or Utah case law as to the purpose of the twenty-day presumption. That purpose, however, can not and should not be to force an appellant to commence the appeal process without receiving response to their motion. Respondent suggests the presumption of denial was legislatively created in order to insure that the time for filing an appeal could not be indefinitely delayed. See Brief of Respondent, at 2. This conclusion seems reasonable. However, to apply that purpose to bar the Ortons from seeking judicial review is not reasonable. An agency to which a motion for reconsideration has been made may at any time issue an order simply denying that motion, and thereby commence the running of the thirty-day period set by § 63-46b-14. Logically, therefore, the twenty-day presumption can not be for the purpose of aiding the agency, as the agency is solely responsible for taking final action, on a petitioner's motion. Because of this power, the agency may at its discretion deny a motion for reconsideration in less than twenty days. Given the agency's authority to move a case towards judicial review, the presumption must be primarily for the benefit of the

appellant who wishes to seek judicial review following an unfavorable final decision by the agency but who first wants a reconsideration by the agency. The twenty-day presumption allows such a party to file for judicial review without having to wait for the agency to issue an order which does nothing more than deny the petitioner's motion to reconsider the decision. Further, because of the agency's power to issue a denial of reconsideration at any time, the agency cannot be prejudiced by an appellant's decision to wait for the final ruling. In contrast, a strict application of the twenty-day presumption would significantly prejudice petitioners who wait for a final response to their motion for reconsideration and eventually receive one that amends the earlier decision. In light of the disparity in the effect of a strict application of § 63-46b-13 in this case, the court should interpret that section to allow a petitioner to wait for the agency's final action before commencing the appeal process.

Finally, to require an appellant to begin the appeal process before the agency issues its final order creates the risk that two actions could be proceeding simultaneously. A strict interpretation of § 63-46b-13 creates the possibility that a motion for reconsideration would be granted after a petition for judicial review had been filed and the appeal process commenced. Such a situation would be duplicative and wasteful of judicial resources.

Using the timesaving presumption created by § 63-46b-13 to bar a party's appeal would thus be inequitable and wasteful. The

inequity of such an application is especially evident in this case. The Ortons filed their motion for reconsideration on September 24, 1992, twenty days after the Tax Commission issued its Findings of Fact, Conclusions of Law, and Final Decision. Having presented specific points in support of their motion for reconsideration, the Ortons then waited for the Commission's response. The Ortons later received a response from the Commission that did more than simply deny reconsideration. The Commission in fact amended its earlier findings and entered a new order although without changing the earlier decision. The Commission thereby granted in part and denied in part the motion for reconsideration. See Order, attached as Exhibit 1. Following the Commission's final action, pursuant to § 63-46b-14 the Ortons filed a petition for judicial review of the Commission's findings and decision.

Dismissal of the Ortons' appeal would give the agency's non-action precedence over its actions in amending the original findings of fact and issuing a final order denying reconsideration. This court should not take such a position. The Ortons filed a timely petition for review when measuring from the date of the agency's last actual action. While the twenty-day presumption is an effective method of facilitating review of agency action, it should not supersede and render moot the agency's later decisions to the detriment of petitioners.

DETERMINATIVE STATUTES AND RULES

Appellants believe there are no constitutional provisions, statutes, ordinances, rules or regulations the application of which would be solely determinative of the outcome of this case. Some statutes and rules are, however, directly relevant to the disposition of appeal.

Statutes

Utah Code Annotated § 59-10-103(1)(j) (1992):

"Resident individual" means:

- (i) an individual who is domiciled in this state for any period of time during the taxable year, but only for the duration of such period; or
- (ii) an individual who is not domiciled in this state but maintains a permanent place of abode in this state and spends in aggregate 183 or more days of the taxable year in this state

Utah Code Annotated § 59-10-543 (1992):

In any proceeding before the Commission under this chapter, the burden of proof shall be upon the petitioner

Utah Code Annotated § 63-46b-16 (1989):

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings

(4) The Appellate Court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:
. . . .

(d) The agency has erroneously interpreted or applied the law;

(g) The agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) The agency action is:

(i) An abuse of the discretion delegated to the agency by statute; . . .

(iv) Otherwise arbitrary or capricious.

Rules

Utah Administrative Code Rule 865-9-2(I)(D) (1992):

"Domicile" means the place where an individual has a true, fixed, permanent home and principal establishment, and to which place he has (whenever he is absent) the intention of returning. It is the place in which a person has voluntarily fixed the habitation of himself and family, not for a mere special or temporary purpose, but with the present intention of making a permanent home. After domicile has been established, two things are necessary to create a new domicile: first, an abandonment of the old domicile; and second, the intention and establishment of a new domicile. The mere intention to abandon a domicile once established is not of itself sufficient to create a new domicile; for before a person can be said to have changed his domicile, a new domicile must be shown.

ARGUMENT

I.

THE FINDING OF THE TAX COMMISSION THAT WORTH ORTON WAS DOMICILED IN UTAH WAS UNREASONABLE AND AN IMPROPER INTERPRETATION OF THE LAW.

Given the established legal definition of the term "domicile" and the entire record presented, the Tax Commission erred in finding Worth Orton remained domiciled in Utah. This court should review the Commission's finding under the correction of error stan-

dard because in light of prior judicial decisions, the Commission erroneously interpreted statutory language. However, if this Court finds that the correction of error standard is not applicable in this case, then the Court should overturn the Commission's decision as an unreasonable finding not supported by substantial evidence.

A. The Proper Standard of Review of the Commission's Interpretation of Law is Correction of Error.

In light of the established legal definition of "domicile" the Commission erred in finding Worth Orton had remained domiciled in Utah during the years he lived in Nevada. The term "domicile" has been frequently defined by courts from many jurisdictions. See, e.g., Allen v. Greyhound Lines, 583 P.2d 613, 615 (Utah 1978) (stating and applying common law definition of domicile); Blessley v. Blessley, 577 P.2d 62, 63 (N.M. 1978) (defining two factors to be considered in deciding domicile); Suglove v. Oklahoma Tax Comm'n, 605 P.2d 1315, 1317 (Okla. 1979) (citing and applying "classic definition of domicile"). In fact, the definition relied on by the Tax Commission and set out at Rule 865-9-2(I)(D), Utah Administrative Code (1992) is simply a restatement of the common law definition of that term. See Black's Law Dictionary, 5th ed. (1979), at 435; 28 C.J.S. Domicile, § 1 (1941). The Commission in reaching residence decisions is, therefore, doing no more than applying facts to established law. The proper standard of review for agency decisions interpreting or applying law is the correction of error standard. See King v. Industrial Comm'n, 209 Ut.Adv.Rpts. 33 (Utah Ct. App. 1991); Nucor Corp. v. Tax Comm'n, 832 P.2d 1294,

1296 (Utah 1992); Morton International Inc. v. Tax Comm'n, 814 P.2d 581, 588-89 (Utah 1991).

Appellants recognize that under § 63-46b-16(4)(h)(i), the reviewing court is to provide the agency's decision greater deference if the state legislature has granted an agency discretion in interpreting or administering the statute in question. If such discretion has been granted, the proper standard of review is the abuse of discretion standard. See § 63-46b-16, Utah Code Ann. (1992). Appellants contend, however, that no such grant of discretion has been provided to the Tax Commission for the purpose of interpreting established statutory definitions or prior case law. While the Respondent cites cases and statutes in support of its claim to a grant of discretion, these statutes and decisions are unpersuasive, in view of the fact that the Commission, in reaching decisions regarding domicile, must do so in a manner consistent with the legal definitions established by the courts where the statutory definition is consistent with those decisions. In such circumstances, the court is in as good a position as the agency to determine the meaning of the statutory language. Therefore, this court should review the Commission's decision under a correction of error standard granting no deference to the agency.

Even if this court finds the Commission has been granted discretion in interpreting prior Utah decisions, statutory and administrative law, this Court should find the Commission's decision was not supported by substantial evidence. In light of

the evidence produced, it was not reasonable for the Commission to conclude Worth Orton maintained the state of Utah as his domicile during the time he lived in Nevada.

B. Whatever the Standard of Review Applied by This Court, the Commission's Decision is Not Supported by Substantial Evidence.

The facts in this case are not in dispute. At the hearing on this matter and in its brief, the Respondent made no effort to challenge or rebut the Ortons' statement of the facts concerning the last thirty-one years of their lives. In view of the basic agreement on the facts of this case, it is obvious the parties have simply reached different conclusions as to Worth Orton's state of residency. Appellants contend Respondent has reached an unreasonable conclusion that is not supported by the evidence.

Worth Orton's actions show a pattern of meeting his responsibilities and maintaining contacts with Utah, the state where he lived for many years. The Respondent seems to suggest that Worth Orton should have abandoned these contacts and responsibilities in order to demonstrate that he truly intended to change his state of residence from Utah to Nevada. The Respondent also suggests that Worth Orton should have acquired additional real property in Nevada to indicate that he truly intended to remain in that state, because thirty-one years of residing in the same county in Nevada was insufficient to demonstrate residency in that state.

The facts presented at the hearing on this matter establish Worth Orton continued to provide support for his wife although the

couple lived apart. Despite the uncontradicted evidence concerning the circumstances of the Ortons' marriage, Worth did not obtain a divorce because of family wishes and personal reasons. He did, however, continue to provide support to his wife and to maintain two separate households.

The facts presented at the hearing also indicate that Worth Orton chose to live inexpensively in Nevada so that he could provide support to his wife. He lived in a dormitory style apartment near his place of employment during the entire time that he worked in Mercury, Nevada. Respondent has made the claim that Worth Orton's living accommodation was a dormitory, implying a transitory residence. The facts produced, however, indicate that Worth Orton chose to live in an apartment complex which offered maid service and access to prepared meals and not a "dormitory." Because the rent on his apartment was subsidized, he paid approximately twenty-one dollars per month to live there. The low cost of these living accommodations allowed Worth Orton to provide financial support to himself and his wife and to maintain both households. If Worth Orton had had a larger income or an independent source of wealth, he may very well have purchased a second home. However, in light of his needs and resources, the twenty-one dollars per month dormitory style apartment was appropriate.

It is also true that Worth Orton chose to visit family and friends in Utah at various times during each year. It is, however, undisputed that he spent the majority of those visits at a cabin in

Parowan, Utah, which he jointly owned with a long-time friend. Given the infrequency of these trips and the recreational purpose of most of them, it is obvious that Worth Orton did not "commute" from Mercury, Nevada to Parawon, Utah.

It is also agreed that Worth Orton retained ownership of certain properties in Utah during the time he lived in Nevada. However, that he did not maintain any of these properties for residence purposes has been established by the evidence. Testimony provided at the hearing established that Worth Orton's wife lived in the family home and that he rarely visited there. Further, after a number of years in Nevada, he transferred title to her name. Worth Orton also owned two parcels of property he had inherited from his family and one piece of land he had purchased for investment purposes but never developed. The only other real property in which he had an interest was the cabin in Parowan, Utah that he jointly owned with a friend and which he visited during various vacations. These continuing connections do not indicate that Worth Orton intended to retain his Utah domicile. The connections indicate only that Worth Orton retained certain ties to the state of Utah during the time that he resided in Nevada.

The other points Respondent uses to support the Commission's conclusion are minor and prove nothing about his state of domicile. Where one obtains infrequent dental care and where one intends to be interred are not of sufficient importance to counter the plain evidence of Worth Orton's residence for more than twenty years in

Mercury, Nevada. The evidence produced by the parties is, therefore, simply insufficient to support the conclusion that Worth Orton remained a resident of Utah despite his stated intent to abandon his Utah domicile and his more than twenty years of residence in Nevada.

In addition, the Commission's decision is not supported by the case law Respondent cites in defense of the finding that, despite his decades-long residence in Nevada, Worth Orton never established a domicile in that state. The one case cited by Respondent in support of its position on Worth Orton's residency is notably unpersuasive. In Blessley v. Blessley, 577 P.2d 62 (N.M. 1978), the court considered the domicile of a soldier who lived in three different states during his twenty-seven-year military career. In that case, the court stated that the ultimate facts necessary to sustain a conclusion of domicile are physical presence in a state and intention to make that state one's home. Id. at 63. The court also stated the well-established and directly applicable rule that the domicile of Armed Forces personnel is not determined by where they are stationed. Id. The court also expressed its belief that military personnel should be allowed to purchase property where they are stationed without being forced to abandon their former domicile. Id. at 64. Given this belief, the court would not force a domicile change upon plaintiff Blessley who contended he had never intended to change his domicile. Id. at 63. The court's

decision turned primarily on the soldier's stated intention with regard to his state of domicile. Id.

In the present case, no such presumption regarding the effect of re-location is applicable. However, the factors cited by the court--presence in a state and the intention of making that state one's home--are applicable. Worth Orton has stated that his intent was to change his domicile from Utah to Nevada and that he took efforts to make that change. In addition, it is undisputed that he was present in the state of Nevada and had a fixed home there for more than twenty years. The Blessley case is therefore easily distinguishable from the facts of this case and is not supportive of Respondent's position. The Respondent relies on no other case law to support its argument that Worth Orton's presence in Nevada, his stated intention to become a resident of that state, and the testimony provided are not sufficient to demonstrate he established a Nevada domicile. Instead, Respondent relies only on its claim of agency discretion to support the Commission's finding that Worth Orton remained domiciled in Utah despite his presence in Nevada and intent to change his domicile. That conclusion is not, however, supported by the evidence produced by the parties. The Commission's decision, not being supported by substantial evidence, must be overturned.

The appellants made an expanded argument against the Commission's decision in their initial brief. As no new material has been introduced by Respondents brief, appellants will simply

reiterate their original argument by reference. Appellants contend Worth Orton's actions indicate his intention to establish himself as a Nevada domiciliary. Had Worth Orton been a wealthier man, he might have purchased a Nevada home. Had he been a less responsible man, he might have divorced and abandoned his wife. Partly because he took neither of these actions, Worth Orton is claimed to have remained a Utah resident. That claim, and the Commission's conclusion that followed from it are not supported by the evidence. This Court should, therefore, correct the Commission's error and dismiss the assessment of taxes and interest against the Ortons.

II.

EVEN IF THIS COURT DETERMINES WORTH ORTON WAS DOMICILED IN UTAH, THE COMMISSION ERRED IN DETERMINING IT SHOULD NOT BE ESTOPPED FROM ASSESSING TAXES AGAINST THE ORTONS FOR THE PERIOD IN QUESTION.

In light of the facts produced in this case, the Commission erred in determining it should not be estopped from assessing taxes against the Ortons for the period in question. Worth Orton relied on tax documents produced by the Tax Commission and 1980 representations by auditors in concluding he owed no Utah State taxes. The finding of tax liability and collection from him of back taxes and interest years after the tax was owed is indeed a detriment. Worth Orton has saved for his retirement. He did not save to pay the Tax Commission a debt its employees long ago found he did not owe. Under the facts of this case, estoppel is justified. Beyond these

statements, appellants have nothing more to add to the argument in their initial brief.

III.

THE COMMISSION ERRED IN FAILING TO ABATE ALL PRE-1988 INTEREST ACCRUALS.

The Commission erred in failing to abate all pre-1988 interest accruals. The Respondent claims appellants mis-characterized the facts and law and asked for charity on the issue of interest abatement. As Respondent did not see fit to provide specifics in support of its claim of mischaracterization, appellants cannot answer this claim. Appellants can, however, respond to the claim they are seeking charity by stating that they seek only consistency and fairness in asking for an abatement of the interest that accrued as a result of the Tax Commission's mistakes. Appellant Worth Orton asks only that the Court exercise its equitable powers to free him from the burden now imposed as a result of the Tax Commission's lackadaisical, stumbling collection efforts.

It is not disputed that in 1980, the Tax Commission contacted Worth Orton and told him he owed back taxes. After communications with the Commission, Worth Orton was told that the matter would be looked into and that someone would contact him again about the debt. Worth Orton was not contacted again until 1988. The Commission suggests that during this nearly eight-year hiatus, during which the Commission failed to inform him of his tax liability, Worth Orton should have simply paid resident taxes to a state other than the one in which he lived. Such a suggestion is

not reasonable. No taxpayer can expect the Tax Commission to forego collection of taxes they are owed. Worth Orton knew the Commission had notice of the fact he was not paying Utah State taxes. Consequently, he could reasonably expect that the Commission would inform him if they concluded, upon review, that he should begin paying Utah income taxes. Appellants, therefore, do not ask for charity from the Commission, only for an abatement of interest that accrued as a result of the Commission's faulty follow-up and collection procedures. Appellants contend that such an abatement is proper and should be ordered on the same grounds as the Commission's order abating post-1987 interest accruals.

Beyond these comments, appellants have nothing to add to the argument in their initial brief. All interest accruals prior to January 1, 1988 should be abated. Such an abatement would be fair in light of the facts presented by this case.


CONCLUSION

In light of the above facts, appellants contend this Court should apply a correction of error standard of review and overturn the Commission's decision as an incorrect interpretation of the law. Even if this Court grants deference to the Commission's decision, that decision should be overturned as not supported by substantial evidence. In addition, under the facts of this case, estoppel could properly be applied to bar the Tax Commission's assessment. Finally, even if this court does not grant estoppel in appellants' favor, an abatement of all interest accruals is

justified as Worth Orton relied on the Tax Commission's findings in choosing not to file Utah State tax returns during all the years in question.

Dated this 9th day of June, 1993.

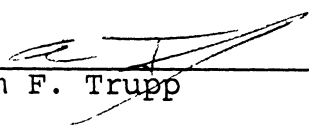
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By 
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CERTIFICATE OF SERVICE

I hereby certify two true and correct copies of the foregoing Reply Brief of Petitioners-Appellants were mailed, first class postage prepaid, this 9th day of June, 1993, to the following:

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