1972

Provo City Corporation, A Municipal Corporation of the State of Utah v. Hubert C. Lambert, As State Engineer of the State of Utah· Provo River Water Users Association, A Corporation; Utah Lake Distributing Company A Corporation; Copper Corporation, A Corporation; Central Utah Water. Conservancy District, A Public Corporation of the State of Utah; Provo Reservoir Water Users Company, A Corporation; Hugh Mckellar As Provo Water Commissioner; United States Of America. Bureau Of Reclamation, Of Interior and Salt Lake City, A Municipal Corporation of the State of Utah : Appellant's Reply Brief

IN THE SUPREME COURT OF THE STATE OF UTAH

PROVO CITY CORPORATION, A Municipal Corporation Of the State of Utah,

Plaintiff & Appellant,

vs.

HUBERT C. LAMBERT, As State Engineer of the State of UTAH; PROVO RIVER WATER USERS ASSOCIATION, A Corporation; UTAH LAKE DISTRIBUTING COMPANY; A Corporation; KENNECOTT COPPER CORPORATION, A Corporation; CENTRAL UTAH WATER CONSERVANCY DISTRICT, A Public Corporation of the State of Utah; PROVO RESERVOIR WATER USERS COMPANY, A Corporation; HUGH McKELLAR, As Provo Water Commissioner; UNITED STATES OF AMERICA, Bureau of Reclamation, Department of Interior and SALT LAKE CITY, A Municipal Corporation of the State of Utah,

Defendants & Respondents.

Case No. 12647

APPELLANT'S REPLY BRIEF

Appeal from a Judgment of the Fourth District Court in and for Utah County The Honorable Allen B. Sorensen

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In order to simplify the consideration of the Appellants' discussion of the points raised in the Respondents' Brief, the points will be discussed by the Appellant in the order in which they are set out in that brief, as far as practical.

POINT I

REPLY TO RESPONENTS STATEMENT OF FACTS.

With the respect to the Respondents' statement of facts, the principle issue with this statement taken by the Appellants' is that in this purpored statement of facts, under the guise of foundational facts, the Appellants' have simply set out matters which they would like to have the Court consider as evidence in support of their claim that paragraph 4(c) of the Provo River Decree is ambiguous. There is nothing in the record to support their statement that the matters set forth by them as foundational facts were the bases of the Summary Judgment entered by the trial Court in the present case, nor that any of the matters referred to were any more than part of the mass of evidence which was before the Court in its consideration of Civil No. 2888 in which the Provo River Decree was originally entered.

At this point it would probably be appropriate to reiterate the Appellants' contention in its original brief that there is no ambiguity in paragraph 4(c) of the Provo River Decree, but that it is a clear and concise award of 16.5 second feet of water to Provo City for both irrigation and power uses, and that for this reason the matters referred to as foundational facts in Respondents' Brief are immaterial in the present action and should not be considered by the Court, as is the case with most of the points set out in Respondents' Brief. However, in the event the Court may feel that some ambiguity

exists in paragraph 4(c), the Appellants will proceed to answer the various points presented, without prejudice to the Appellants' contention that they should not properly be considered by the Court.

In this brief the Appellant will follow the nomenclature suggested by the Respondents in their first paragraph on page three of their brief.

Calling attention to the statements made in the second paragraph of Defendants' brief on page 3, it should be pointed out that the documents referred to therein were nothing more than a proposed method of distribution for the one year, 1917, during the pendency of the proceedings in Civil No. 2888, and should in no way be considered as anything in a nature of a final determination by anyone of the rights ultimately awarded to the various parties. However, contrary to the Defendants' contention that this outline of distribution for the 1917 indicates that Provo City should receive no irrigation rights under the factory race water, the outline in fact does just the opposite, in that it concedes to Provo City a total of 63.17 second feet of water without any restrictions on it whatever. It is also significant that in this outline no mention is made of any of the water to be used for power purposes such as Utah Power and Light Company and Provo Pressed Brick Water nor for any other non-consumptive use. From this it would appear that the clear inference of the outline was that the factory race water was of the same class as all of the rest of the water mentioned in the outline, which was clearly irrigation water.

Further, with respect to the second paragraph of page 3 of the Defendants' brief, referring to the outline of the proposed distribution of water to Provo City for the year 1917 of the factory race, instead of showing, as the Defendants try to imply, that said documents state "with no irrigation thereunder" it would appear that the documents do just the opposite, in that the factory race water was listed with a list of water uses which are all consumptive uses, and the total 288.40 second feet mentioned in that outline was the water available in the river for consumptive use.

The Defendants refer to the "Decision" of C. W. Morris in an attempt to show that this was power use water only, inasmuch as it refers to the water "for power purposes." It should be pointed out that this was apparently a preliminary decision submitted by the Court in a most informal matter, three and a half years prior to the entry of the final decree, and was not accepted by Provo City with respect to the water available to it through its water works system nor with respect to the water in the factory race. The Defendants own exhibits, as well as the Plaintiffs' copies of the testimony and stipulation, (R. 170, 178, 179, and 182) establish the existence of this controversy, which was settled, changed, and clarified by the entry of the final decree in 1921. These documents show without question that the factory race water, particularly, was the subject of argument, additional testimony, and stipulation between the 1917 preliminary decision and the entry of the 1921 final decree.

Again the Defendants make unwarranted inferences by stating in the first complete paragraph on page 4 of their brief that the stipulation specifically identified the water as the power right water, whereas the stipulation specifically states: "second, that the Court shall find and decree to Provo City 16.5 second feet constant flow of the waters of Provo River, flowing in and through the factory race." (R. 101, 102, 178, and 179) and no mention is made of "the power right water." They also try to support their position by a statement of Jacob Evans in a discussion among Atorneys, in which he referred to the water as "the power right water." (R. 103) This statement by Jacob Evans should be given no weight to support the contention that this water was awarded exclusively for the generation of power. He was not Provo City's Attorney, and in any event the statement was simply a quick identification of the stream to which they were referring. It will be noted in the discourse concerning this water (R. 101, 102, and 103) that at no place is there any inference of any restriction on the Plaintiff's ownership of this water nor the nature of its use. This discourse also indicated clearly that the 16.50 second feet of water was all of the water which was taken from Provo River for use in the factory race.

In interpreting the significance of this, it should be borne in mind that all of the water of the factory race was used for irrigation. (R. 169, 170, 171, 175, 176, 177, 184, 185, 186, 187, 188, 180, 181, 182, and 183) So it follows that all of the 16.50 second feet of water which is in dispute in the present action was used for irrigation as

well as for the generation of power, exactly as is stated in both the Findings and the Decree.

With respect to the second paragraph on page 4 of the Defendants brief the whole proceedings indicate that there was a material dispute with the respect to the amount of water which had been used by Provo City through the factory race, and indications are that attempts were made to prove the amounts of water which had been used in this race by proving the minimum amount which would be required to turn certain wheels. This would, in fact, be a fairly effective and reasonable way to support Provo City's contention concerning the amount of water flowing in that particular stream. It appears that the factory race was the only stream which was used during the irrigation season for both power and irrigation, and this preoccupation with the power uses in the stream and their significance with respect to the volume of its flow, would lend itself to unprecise statements by the parties with respect to the power and irrigation uses in the factory race and to the identification of this particular stream as the "power water." This would particularly be the case if it were assumed by everyone and firmly fixed in their minds that whatever water was used for power purposes in this stream was also used for irrigation. This point was obviously picked up by Provo City's Attorneys between 1917 and 1921, because in the 1921 Findings and Decree this particular water is never referred to without explicit statements to the effect that it had been used for irrigation purposes as well as the generation of power. (R. 160 and 165)

In the third paragraph on page 4 of the Defendants' brief a statement is made that Wentz, the Provo River Water Commissioner, differentiated between the water delivered for irrigation purposes and the water delivered to the factory race for power purposes. Defendants are apparently referring to his answer in about the center of page 4348 (R. 110 A) in which he states "Irrigation purposes and the factory race for power purposes." He had apparently been testifying about the water he had delivered during the year under a tentative decree, and in answer to the question, "for irrigation purposes?", he answered, "irrigation purposes and the factory race for power purposes." This answer was obviously not made for the purpose of eliminating irrigation use from the factory race, but simply to add "power purposes" to those of irrigation. To the previous question Mr. Wentz had indicated that whatever total he was talking about was a total by actual quantity measured to all the users under the tentative decree. His answer to the subsequent questions concerning the portion which had been measured for irrigation, in which he stated that "all of it except the waters to the factory race" is explained by the fact that the factory race water had been treated as a unit of its own and was a fixed pre-determined amount, used for both irrigation and power, which made it unnecessary for him to keep a separate measurement in order to determine how much had been required by the various irrigation users in the other City canals since entry of the tentative decree. This amount was probably determined by the stipulation of the Plaintiff and Provo

City entered into in 1918 at pages 5159 and 5164 volume 9 of the proceedings. (R. 101, 102, 178, and 179)

With reference to the statement made by the Defendants in the first full paragraph on page 5 of their brief, it is obvious that the rights granted under 58(c) of the Findings of Fact and 4(c) of the Decree were separate from and in addition to the rights granted under 58(a) and 58(b) of the Findings and 4(a) and 4(b) of the Decree, and the State Engineer so determined in his directive of May 1, 1970 to the Provo River Water Commissioner, as did the District Court in paragraph 3 of its Summary Judgment in the present action. It was necessary to give it different treatment in this manner because it was the only water which during the irrigation season of the year was used for both irrigation and power purposes by the same owner. The fact that it was used for both of these purposes cannot be refuted because it is clearly stated in paragraph 58(c) of the Findings (R. 165) as follows: "which water has heretofore been used for irrigation purposes by said City and for the generation of power by the Provo Ice and Cold Storage Company, a corporation," etc. This is followed up by the statement in paragraph 4(c) of the Decree (R. 160) as follows: "which water has heretofore been used for irrigation purposes by said City and for the generation of power by Provo Ice and Cold Storage Company, a corporation," etc. No matter what testimony or other proceedings had gone before, the fact remains that the Court found that the 16.5 second feet of water in question had theretofore been used for irrigation purposes.

This coupled with the fact that this finding was reflected in the Decree could leave no doubt as to its previous use. In view of the fact that the Court, in the Provo River Case based its awards on the various rights which had previously been established to the Provo River Waters, as pointed out on pages 12 and 13 of Appellants original brief, it followed without question that Provo City was entitled to be awarded its previously acquired use for irrigation purposes. Thus the only reason for incorporating in 4(c) the statement "which water had heretofore been used for irrigation purposes," etc. would be to make sure that there was no question but that Provo City had the right to use this water for that purpose, because that was one of the uses under which it had been initiated, acquired, and used down through the years.

Commenting on the Defendants' reference to the manner of assessment of the water in the factory race, as set out in the second paragraph of their brief on page 5, Provo City points out that this is the only equitable way in which a reliable, and constant assessment could be made against this water, because there was no fixed acreage of land irrigated by this water to which any other basis of assessment could be applied, and no duty had been assigned to it. Both of these requirements were necessary to apply the formula set out in the first paragraph of section 169 on page 92 of the Findings. (R. 114)

In view of the fact that the factory race water was the only water which was used for both irrigation and power purposes by the same owner, a special formula had

to be worked out for its assessment, and this formula had to avoid any double assessment, such as would have resulted if an attempt had been made to make an assessment for power purposes and also for irrigation purposes. Such a double assessment would not be justified, because the distribution of this water from the Provo River for its dual uses would not be any more expensive than it would have been for an irrigation use alone.

The multiple of 165 used to calculate the assessment against this water was the same as the multiple used for the assessment for the Class A Water Rights in the first paragraph of 196, (R. 114) thus the assessment against the 16.5 second feet of water would be the same as if it were used exclusively for irrigation. It is significant to note that the factory race water is the only water subject to a power use to which this irrigation type assessment formula was applied. All others were assessed a fixed amount in dollars per month, set out in the second paragraph of section 169 of the Findings of Fact. (R. 114).

POINT II

On pages 7 and 8 of their brief, the Defendants contend that statements under Point III of Provo City's brief are contrary to the position taken by Provo City in the trial Court. This is not correct. In the trial Court, as well as before the present Court, Provo City took the position that no ambiguity existed in paragraph 4(c) of the Provo River Decree. However, recognizing the fact

that the Court might not agree with Provo City's contention and might not be satisfied with the City's interpretation of paragraph 4(c) even after reference to the Findings of Fact and Conclusions of Law, the City called the Court's attention to documents and testimony in Civil No. 2888 which supported Provo City's interpretation. This position was at that time, and still is, entirely consistent with the laws of the State of Utah and with decisions previously rendered by the Utah Supreme Court. In Salt Lake City vs. Salt Lake City Water and Electrical Power Company, 54 U 10, 174 P 1134 (1918) the Court at page 1136 stated as follows:

> Counsel for the Applicant have, however, at great length, set forth in their brief and arguments the entire history of the litigation, and all of the circumstances and conditions which, they contend, have a bearing upon the equities of the case and the justice of their contention. Where the meaning of the language of a statute, writing, or document is obscure, ambiguous, or uncertain, it is always proper to have recourse to the surrounding circumstances and conditions for the purpose of determining the meaning of the language, and in that way arrive at the intention of those who used the language to express their purpose. *Where, however, as here, the language of the Decree by which all parties thereto are bound is free from ambiguity and doubt, then the rule is elementary that extraneous circumstances and conditions may not be resorted to if to do that makes the meaning of the language uncertain or ambiguous. Extraneous matters may be invoked to clear up uncertainty and doubts, but not to create them.* (Italics ours.)

Proceeding further on Page 1137 the Court states:

> There is no reason whatever why the natural, obvious, and ordinary meaning of the language used in the Decree should not be followed. If, under such circumstances, the ordinary meaning of the language used is departed from, there is really no limit to which a Court could not go. The exigencies of the particular case would perhaps suggest a limit, but even that could not prove a deterrent in all cases. The only safe and rational rule, therefore, is to abide by the natural and ordinary meaning of the language used, and such rule we feel in duty bound to follow in this as in all other cases.

In response to an Application for re-hearing in this same case the Court in the last paragraph on page 1137 makes the following statement:

> How is the meaning and effect of the author's language to be ascertained? There is but one way, and that is by considering the language in the light of the subject-matter and giving the words their usual and ordinary meaning and effect. If, after doing that, the meaning of the language is clear, then the intention must also be clear, and there is no further room for construction. There is nothing to construe when the meaning of the language is acertained.

In the foregoing case the legal situation which existed was, for all practical purposes, the same as that which existed in the present case. While the fact situation was not the same in both cases, the legal issues and the legal principles with respect to the interpretation of the Court's Decree and the circumstances under which consideration may be given to matters outside of the De-

cree, are the same, except that in the case cited above the Supreme Court apparently had before it the entire record, while in the present case it has before it only those portions of the record in Civil No. 2888 which the parties to the present action felt might favor his case, in the light of the various positions the District Court might take in considering the Decree, Findings of Fact, and Conclusions of Law in the Provo River Case, Civil No. 2888.

The law seems well established that if the Court feels that the Decree is not ambiguous there is no justification for resorting to any other material. If the Court feels that any ambiguity exists, it should then resort to the Findings of Fact and Conclusions of Law supporting the Decree, and if this clarifies the Decree there should be no resort to anything further. If, on the other hand, the Court feels that even after resort to the Decree, Findings of Fact and Conclusions of Law, some ambiguity still exists, it can then resort to the *entire record.* (46 Am Jur 2d p. 365 Section 76)

It is still Provo City's contention in the present case that paragraph 4(c) of the Provo River Decree is clear and unambiguous and recognizes the previous use by Provo City of the water in question for irrigation purposes as well as for the generation of power, and therefore awards the 16.5 second feet of water to Provo City for both of those purposes. However, recognizing that Courts do not always agree with what seems clear to one party in the case, the City presented documentation to support its position, in the event the Court

might wish to inquire beyond the Findings and Decrees. This, however, did not at any time, and does not now, in any way amount to an abandonment of the City's contention that the Decree is clear and unambiguous and that no further material should be resorted to for the interpretation.

At the beginning of the last paragraph on page 8 of their brief, the Defendants state that the Trial Court said that 4(c) is ambiguous, and refer to (TR 10), which is part of the transcript of the conversation in the District Court between the Judge and Attorneys for the respective parties. They are undoubtedly referring to the statement in the transcript which appears as follows:

> THE COURT: There is an ambiguity in paragraph 4(c).

This was simply a clarifying remark of the Court at the pre-trial conference. It was certainly no statement of opinion by the Judge. The statement was made by him simply to clarify the previous statement by Mr. Clyde wherein he had said:

> I think we would first have to determine if there is any ambiguity.

It will be noted that Mr. Clyde did not specify what ambiguity he was referring to. When the Judge made this statement he was simply making it clear that Mr. Clyde was referring to an ambiguity in paragraph 4(c). His meaning was the same as if he had made the statement in the following manner: When you state that we

would first have to determine if there is any ambiguity, I assume that you are referring to paragraph 4(c).

In answer to the statements made by the Defendants in the last paragraph of page 8 and the first full paragraph of page 9 of their brief, Provo City will first refer the Court to the statements starting with the third paragraph on page 11 of Provo City's original brief and continuing through to paragraph 'b" on page 12. In addition, Provo City calls the Court's attention to the statements of the Court in paragraph 43 of the Findings of Fact in Civil No. 2888 (R 191) to the following effect:

> That as to quantities of water to which the parties plaintiff and defendants are entitled, as hereinafter found by the Court, the water used upon the lands of the plaintiff and defendants for irrigation, the water used by the defendants for the generation of power; and the water used by the defendants for municipal and domestic purposes *have been used for beneficial purposes*, and are necessary and that the said uses *have been necessary and beneficial from year to year ever since the same was first diverted and appropriated.* (Italics ours.)

and to paragraph 45 of the same Findings of Fact (R. 192) in which the Court includes the following statement:

> That the plaintiff's grantors and predecessors in interest, and the defendants and their grantors and predecessors in interests, many years ago, when the waters of said river was unappropriated entered upon the said river and constructed dams therein and canals and waterways extending

> therefrom to their lands, Cities, power plants, and places of use of the said waters, and then and there diverted from the said river and its tributaries the waters thereof, and conveyed the same through their canals and waterways to the places of use thereof and ever since have continued to so divert and use the said waters in the amounts, proportions and for the purposes hereinafter more particularly stated, and during all of the said time, the parties hereto, their grantors and predecessors in interests have continued to be and the parties hereto are now entitled to the use of the waters of said river at the places and to the extent and for the purposes hereinafter stated.

In view of these Findings by the Court and the fact that the Court in the Provo River Decree was simply making a determination of the rights which had been previously acquired by the various parties, the Court's statement in 4(c) to the effect that the 16.50 second feet of water had theretofore been used for irrigation purposes by the City, as well as for the generation of power, etc., constitutes a clear award for that purpose, particularly where the right is restricted to the irrigation season of each year, as was done in the first sentence of paragraph 4(c).

In their last paragraph on page 9, continuing over on to page 10 of their brief, the Defendants indicate that they feel there is some point to be made of the fact that an acre duty would have been specified if the water had been intended for irrigation. The mere fact that this was done in paragraph 4(a) and 4(b) does not indicate that there is anything wrong with not

ascribing an acre duty to the water referred to in 4(c). This was an entirely different type of award than was the case with respect to the water in 4(a) and 4(b). The water in 4(c) was the only water in the entire decree which was awarded for the dual use of both irrigation and power by the same owner. Furthermore, the water in 4(c) was a fixed amount, without any variation throughout the whole irrigation season, which was necessary because of its dual use for power as well as irrigation.

The Defendants in attempting to make some point of the fact that no duty was ascribed to this water, and that if it had been intended to be used for irrigation, a duty would have been ascribed to it along with the number of acres to be irrigated, go so far as to state that this was done under all of the other class A irrigation rights except with John D. Dixon and John C. Whiting. This position cannot be supported. In the first place the entire decree in Civil No. 2888 is not before the Court and it cannot therefore be determined how many class A rights have been awarded for irrigation purposes without any acreage or duty being affixed thereto. In fact there were several class A irrigation awards of this kind. Some of them appear on pages 25, 26, and 27 of the decree, which are before the Court at this time. (R 193, 194, and 195)

It must be kept in mind that once acquired, irrigation water could be owned and could be transferred without any attachment to or relationship to any particular land; as had been done in the case of the John

D. Dixon water right cited by the Defendants. (R. 194) This 16.50 second feet of water was obviously water in which the irrigation rights had been acquired by use on lands which were in addition to the 2,558 acres of land referred to in paragraphs 4(a) and 4(b), because both the State Engineer and the Court here found and decreed that it was not the same water as that which was associated with this land. The awards in 4(a) and 4(b) were likely for specific areas of the City, for they total only 2,558 acres, probably far less than the area of the City at that time, and certainly less than the present total area of the City, which is approximately 13,190 acres; a matter of which the Court should take judicial notice. It is not the responsibility of the City at this time to show in what manner this water was acquired, nor is it the prerogative of any party to require such a showing by the City. Having once acquired the water, Provo City would be subject to no limitation upon where it could use the water for irrigation purposes, nor the amount which it would be required to use upon any particular land. This being the case, it would be impossible for the Court to assign such water any duty whatever.

In connection with this, it would probably be well to keep in mind the Judge's statement in Civil No. 2888, set out below, to the effect that he was not concerned with what Provo City was now using, but with what it had previously used and *now owned.*

> The principle question that the Court wants to be determined is what water rights the City owns.

> My view is, I will say gentlemen, that the city is not only—has the right to make some provisions for future uses, but it is the duty of the city to do that. If they have an ownership of the water and acquire a right to it, why it is not of as much importance to show they have a present necessity for it as it is the ordinary user of water because the court takes judicial notice and it is well settiled by the cases, as I remember, that it is the duty of the city to make provision for the future to some extent, so that this matter of just what their present necessities are I don't think is of as much importance as it is for you to establish what water you own. That is the view I have of it, that your water rights, how you acquired them and whether you have them is more important than just the question than whether you have a present necessity every month in a year for the full quantity of water that you have the right to use. (**R. 189, 190**)

Also significant in arriving at an understanding of Provo's unique position in the Provo River lawsuit, was the Judge's statement to the effect that it was not only the right of the City, but was the duty of the City to make provision for a reasonable margin for the future, as set out below:

> but I am inclined to think that the city where it is shown the size of Provo City, growing city, situated as it is, that it is not limited to the quantity of water that it has a necessity for today. That is, in other words, it would not hold that it had no beneficial use for a reasonable excess of water above that because of the fact it is not only the right of the city, but it is the duty of the city to make provision for a reasonable margin for future, but the

important question in this case is what water you have.

Mr. Thomas: We own.

The Court: You own, and how you got it. I think, in other words, I am of the opinion you have shown a necessity and beneficial use for the quantity of water that you are claiming. Now, if you own that water, if you have that water and have the right to it, I am inclined to think by proving that fact you have made a prima facie case. I will listen to any suggestion you have along that line. (R. 190)

Replying to the statement in the paragraph in the center of page 10 of the Defendant's brief, it seems obvious that the last sentence in paragraph 4(c) was intended to make clear the fact that the power rights, as well as the irrigation rights were owned by Provo City even though the power rights had been used by other parties.

With respect to the other matters set forth on page 10, the matters set forth on page 11 and the first paragraph on page 12 of the Defendants' brief, Provo City feels that most of the arguments stated therein have been covered in other parts of this brief in reply to what the Defendants have termed "foundational facts", and in Provo City's earlier brief.

The Defendants in the first paragraph on page 12 apparently take the position that the diametrically opposite interpretation placed upon paragraph 4(c) by the parties themselves is proof that this paragraph

is ambiguous. If this were the case, the Court would have to automatically assume in all cases that a decree was ambiguous any time parties disagree concerning its interpretation. This obviously is an untenable position.

POINT III

REPLY TO POINT TWO

The matters set forth in point two of the Defendants' brief down to the last paragraph on page 16 have been substantially covered in previous portions of this brief. The City will, however, comment on one or two points.

It should be kept in mind that everything referred to in this portion of Defendants' brief relates to reports, testimony, and preliminary proceedings which took place approximately three and one-half years before the entry of the final decree, and that many substantial changes were made subsequent to that time as a result of additional evidence, stipulations, and arguments of the parties. However, nothing is shown during this period which confines the factory race water to power use only. In fact the outline of proposed distribution (R. 92 and 93), as pointed out earlier, concerns itself only with water which was entirely put to consumptive uses, and includes among those the water of the factory race. It makes no provision whatever for non-consumptive power use water.

Defendants infer that the 4(c) water was not used for irrigation purposes because the acreage and duty are not set out in the outline of proposed distribution for the year 1917 (R. 92 and 93), and that the Provo River Water Commissioner, T. F. Wentz, in one of his statements, did not include in certain measurements the waters delivered through the factory race for power purposes (R. 110 A). However, other testimony shows specifically that this water was used for irrigation purposes and that the stream, for the irrigation season, on the factory race was a fixed amount throughout the season because of the dual use for irrigation and power. The other uses for irrigation varied during the season in the amounts used between June 20 and July 20 and the amounts used from July 20 to September 1 of the year. This would account for the necessity of the River Commissioner to measure the quantities supplied to the other irrigation users under the tentative decree on the dates when their rights decreased, because it would be necessary for him to regulate the several head gates accordingly. However, inasmuch as the factory race remained constant it would not be necessary to measure that stream and re-regulate its diversion gates during the season.

The testimony of Henry J. W. Goddard, City Water Master, wherein he was referring to the lands irrigated under the several canals in the City, clearly shows that the water from the factory race was used for irrigation. His testimony in this respect was as follows: (R. 177)

Q. Now the Factory Race?

A. The Factory Race.

Q. What is the lot acreage water after it leaves that race?

Mr. Jacob Evans: Object to that because it has already been stated.

Mr. Thurman: You have given us this once.

Mr. Corfman: I think not in the same form.

Mr. Thurman: You gave us below the Factory and above the Factory separately. It is confusing our record a little.

Q. Now, taking the Factory Race, *besides the purpose of using the water for that race for irrigation*, it is also used for power? (Italics ours.)

A. Yes, sir.

Mr. Goddard, in indicating how the different water tickets or time notices were given to the irrigators under the several canals throughout the City, testified as follows: (R. 180, 181 and 182)

Q. Forty years. Now, take the next stream or next canal that you have jurisdiction over. Which is the next one down from the East Union?

A. That would be the Factory Race would be the first.

Q. How do you distribute the water under that race?

A. That is given out on time written notice.

Q. Do you have—do you distribute water in the Factory Race in any way different from the manner you distribute from the East Union?

A. Yes, little different, because they have a set time for the whole season.

Q. Do I understand then that you have not a fixed time for the whole season on the East Union?

A. No sir, we cannot have it.

Further down on page 1085 and 1086: (R. 181 and 182)

Q. Now then the disposition of the water on the Factory Race is in a more regular way than that, I understand you to say?

A. Yes, sir.

Q. Is this one of the races to which you give the *farmer written notice?* (Italics ours.)

A. Yes, sir.

Q. Fixing their time from one season end to the other?

A. Yes, sir.

Q. The Factory Race is the race upon which the power users are, is it not.

A. Yes, sir.

Also the testimony of the watermaster Swan at page 735: (R. 169)

down with the Factory Race run and extending as far south as 1st North Street. *That is irrigated from the Factory Race.* (Italics ours.)

Further down on pages 735, 736 and 737: (R. 169, 170 and 171)

Q. Now, take your pointer and show the next

canal that lies nearest the East Union Canal that you have described?

A. The next canal is the Factory Race. It heads near the same point as indicated at the East Union Canal, below the tail race of the Provo Pressed Brick Company's plant, towards the northwest corner of the land that is marked on the plat, Roger Farrar.

Q. That canal runs in a southerly direction?

A. Runs in a southerly direction to 5th North Street in an irregular line and then follows down the east side of 2nd West Street as far as the middle of the block between 4th and 5th South, then it runs southeasterly to 5th South, one branch there running East to 1st West and then in a southeasterly direction across to the Smoot Mill which is located in the southeastern part of Block 1, Plat A, then in a southerly direction down until it reaches the lake.

Q. What land does it irrigate?

A. It irrigates the lands—the lands are irregular, it irrigates a number of blocks laying north of Center Street and west of the canal. It irrigates all of the tier, first tier to the west of the Factory Race, with the exception on one block, Block 113, in Plat A.

Q. Provo City?

A. Of Provo City.

Q. What other uses?

A. And to the southwest where it reaches the south side of 5th South Street there is another branch which does not go through the Smoot Mill, which runs in a southerly direction and then turns

in a southeasterly direction, crossing the other branch. At the lower end of Academy Avenue what is called the pasture lane, crossing over and entering the First Ward pasture.

Q. Does it irrigate land there?

A. It irrigates land in the First Ward pasture and also some of the lands lying to the west of the First Ward pasture, and south of 6th South Street.

Q. What other uses are the waters of the Factory Race put to aside from the irrigation which you just described?

A. The waters of the Factory Race in conjunction with the waters of City Creek, and such waters as are turned to the Dry Creek, Fort Field and Little Dry Creek from the City race, pass through the Provo Pressed Brick Company s wheel which is just above the Factory Race. The Factory Race is utilized for power by the Provo Ice and Cold Storage Company, Hoover's Mill, the Knights Woolen Mill, Ward and Sons Mill and the Smoot Lumber Company Mill.

In the center paragraph on page 17 of Defendants' brief they assert that paragraph 4(a) and 4(b) of the decree awarded a full water right *for all* of Provo City's irrigated land. There is nothing whatever in the record to substantiate this. We have previously in this brief pointed out that undoubtedly the land mentioned in 4(a) and 4(b) represented only a part of the total lands irrigated by Provo City's water rights. We have pointed out also, that even if the Defendants were correct in their contention, it would not be persuasive

with respect to the award of the water in 4(c) because the Court specifically indicated that it felt the City was entitled to own water which was not assigned or attached to any particular land. (R. 189 & 190). Here again, it must be kept in mind, that the Court in Civil No. 2888 is determining the extent of water right which had *previously* been acquired by the various parties and which as a result of such previous ownership they were entitled to have awarded to them in that action. It is not as if they were establishing new rights which had never been acquired previously, they were being awarded those rights which they already owned. (R. 192)

In the paragaph starting on page 17 and ending at the top of page 18 of their brief, the Defendants contend that the foundation of the whole decree was the duty of water. This is not correct. *The foundation of the whole decree was the water rights already owned by the various parties and which had been acquired by them many years prior to the commencent of the action,* as the Court specifically stated in paragraph 45 of the Findings of Fact in Civil No. 2888. (R. 192)

Again, in the middle paragraph on page 18, the Defendants refer to the ground described in paragraphs 4(a) and 4(b) of the decree as being all of Provo City's farm acreage and all of its City lots. There is nothing in the decree to support this statement. It is simply a gratuitous assumption on the part of the Defendants. It should be noted by the Court, in Mr.

Swan's testimony previously set out in this brief, that the Factory Race watered outlying pasture lands and continued on down clear to Utah Lake. (R. 169, 170 and 171).

The hearing (R. 142, 143, 144, and 145) which is the subject of the Defendants' discussions at pages 18 and 19 of their brief appears to be nothing more than a discussion between attorneys and the Court with respect to someone's application to reopen the case with reference to the duty of water assigned to certain land, as is clearly shown in the closing remarks of the Judge (center of R. 145) and simply shows that the Court felt that the acre duty, which was the subject of the motion, was already generous.

In the center paragraph on page 21 of the Defendants' brief, the comment is made by the Defendants that Provo Pressed Brick Company was required to return the water to the stream without substantial diminution in quantity or any deterioration in quality because of the fact that it was to be used by other parties further down the stream. This is obviously the reason for this restriction, as it was in the case of the award to Utah Power and Light Company, (R. 162 and 167) which was the only other award of Class A water for purely power purposes. The point Provo City makes by this is that if the 16.5 second feet of water awarded in paragraph 4(c) of the decree had been intended for purely power uses, the same restriction would have been placed on it, because undoubtedly, irrigation rights in

this water would have been acquired by someone downstream from the power uses, and these irrigation rights would have been given the same protection as the ones below the Utah Power and Light Plant and the Provo Pressed Brick Company Plant.

At no place in the decree is there any indication of the granting of any irrigation right in this water downstream from the power uses if the position is taken that irrigation rights in it were not awarded to Provo City. This would be inconceivable in the light of the needs for irrigation water below these power uses. The only answer to this is that the 4(c) water was an irrigation right as well as a power right, both owned by Provo City.

In their paragraph beginning at the bottom of page 21 and continuing on through the top of page 22 of their brief, the Defendants try to explain the limitation to the irrigation season of the use of the 16.5 second feet of water in the Factory Race by stating that "paragraph 4(c) limited Provo City's power use to 16.5 second feet *when in competition with the irrigation uses in the lower reaches.*" ('Italics ours) What irrigation uses of the Factory Race water in the lower reaches could there possibly have been except irrigation use by Provo City of this water. There is no indication in the record of any irrigation award in the lower reaches of the Factory Race, except to Provo City.

Additionally, it should be noted that the power awards to Utah Power and Light Company and to

Provo Pressed Brick Company, which were strictly power uses, were not limited nor tied to the irrigation season in any respect, but were simply awarded for the full year. (R. 161, 162, 166 and 167)

The remainder of the material on page 22 of Defendants' brief was covered in Provo City's original brief, and will not be dealt with further here.

The statements in the center paragraph on page 23 of Defendants' brief are dealt with earlier in this brief.

Replying to the last paragraph on page 23 of Defendants' brief which has been carried over onto page 24, Provo City does in fact place great importance on the statements in the second sentence of paragraph 4(c) in which the following statement appears in reference to the 16.5 second feet of water: "Which water has heretofore been used for irrigation purposes by said City". In the light of the fact that all of the awards in the decree were based on previous use of the water awarded, on the nature and extent of the use, and on the ownership previously established by the parties, and were awarded because of such earlier use and ownership, it would appear without question that this statement in the decree, supported by a corresponding statement in the Findings would be conclusive in establishing Provo City's irrigation rights in this water.

POINT IV

REPLY TO POINT III

In reply to Point III of the Defendants' brief, both the State Engineer and the District Court, under the guise of interpreting the Decree, exceeded their jurisdiction in that they both unjustifiably took into consideration extraneous materials and actually re-adjudicated a right which had previously been adjudicated. This is contrary to law. (United States v. District Court of Fourth Judicial District in and for Utah County, 121 U 1, 238 T. 2d 1132 (1951); East Bench Irrigation Company v. State, 5 U 2d 235, 300 P 2d 603 (1956); and Orphir Creek Water Company v. Orphir Hill Consol. Mining Company, 61 U 551, 216 P 490 (1923).

CONCLUSION

In conclusion, Provo City reiterates that the crux of this case is the interpretation of paragraph 4(c) of the Provo River Decree, and that inasmuch as there is no ambiguity in it, the Court should inquire no further, but should make its decision upon the natural and ordinary meaning of the wording of the Decree.

In an attempt to get the Court to consider material outside of the Decree in arriving at its interpretation, the Defendants have not shown the existence of any ambiguity in the Decree when read in the light of the subject matter and the basis of the awards and the

ordinary and natural meaning of the language used. Instead they have primarily tried to create uncertainty and ambiguity by the use of extraneous matters, which this Court has previously ruled cannot be done. (Salt Lake City vs. Salt Lake City Water and Electrical Company, 54 U 10, 174 P 1134) The Defendants attempt to show ambiguity in the Decree itself by pointing out that the award in paragraph 4(c) was treated in a different way from those in 4(a) and 4(b), and also because it was not worded the same as most other parts of the Decree. This different treatment is not only understandable, but is logical. It is the only award of its kind (for both irrigation and power purposes to the same owner) in the whole Decree, and required a different treatment. In fact, that is why it was set out in a separate paragraph by itself.

It is the City's contention that only as a last extreme resort should reference be made to statements of witnesses and attorneys during the proceeding. Resort to such material tends to result, in effect, in a retrying of the case, and is particularly unreliable where each party picks out and cites isolated portions of the testimony and statements which were most favorable to their position, as was done in this case. In a case of this kind, which involved thousands of pages of testimony and other proceedings it would be an impossible task to fairly locate and extract from the record everything which would have any bearing on a particular part of the decree. Even if this could be done it could only tend to result in an attempt to retry the case and place

on the evidence an interpretation different from that arrived at by the trial judge. Anything of this kind clearly should be avoided.

The natural and ordinary meaning of the wording of the Provo River Decree, and of paragraph 4(c) of that Decree, particularly when read in the light of the subject matter and of the basis of the awards in the Decree, is to the effect that Provo City had previously used and acquired the 16.5 second feet of water in 4(c) for irrigation purposes as well as power, and was awarded this water for these dual purposes.

Respectfully submitted,

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