IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF TEXAS

LUBBOCK DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. THE TEXAS EDUCATION AGENCY, et al. (Lubbock ISD), Defendants.	)	CIVIL ACTION NO. 5-806

PLAINTIFF UNITED STATES' RESPONSE TO DEFENDANTS' SUBMISSION OF MARCH 13, 1978

This Court's order of January 27, 1978, required the defendants to prepare and submit to the Court a student assignment plan to desegregate nine named schools in the Lubbock Independent School District. Pursuant to the Court's January 27 order the defendants formally presented a desegregation proposal at the hearing on March 13, 1978. Because we believe parts of the school board's plans are legally inadequate and factually unsupported, we respectfully submit this response and objection to the desegregation proposal submitted on March 13.

I. Defendants' March 13, 1978 Submission

In its January 27, 1978 Order the Court cautioned against the imposition of a disproportionate share of any burden

of the desegregation process on any ethnic group, established the current district-wide ethnic enrollment ratio as the starting point for determining whether a particular school is desegregated, required that any plan submitted demonstrate a promise of continued success, and directed that the desegregation of the named schools not cause segregation elsewhere in the school district. The Court also required the preparation of a study by the defendants of the effect of proposed school construction on the ethnic makeup of district schools and the submission of a report to the Court reflecting the impact of the district's desegregation/construction plan on segregation in the school system.

The defendants have submitted a desegregation plan adopted by the school district Board of Trustees on March 10. At the elementary level the plan involves school closings, a laboratory or magnet school, and the cross-assignment of pupils between all majority and five minority schools for limited periods. The remainder of the plan is based essentially on construction of a new junior high school and implementation of a magnet school program for one high school.

A. Elementary Schools

Under the board's elementary plan one half of a particular grade in each majority school would be assigned to a minority school for the first half of each school year. During the second half of that school year the remaining half of the designated grade at each majority school would be assigned to the minority school in question. At the same time, each minority school to be desegregated would have one half of its 3rd, 4th, 5th, and 6th grade students assigned to a

majority school for one year at two grade levels. */

We object to the high degree of educational instability and to the transportation requirements which minority students would bear under the board's proposal. It is apparent that the defendants have suggested this complex method of student assignment in an attempt to increase public acceptance and support of the plan by involving a substantial portion of the anglo community. Nevertheless, the plan proposed places the burden of desegregation disproportionately on minority children. For example, the anglo elementary student as a rule would be assigned away from his "home" school for only four and a half months during his entire elementary career, and would remain at the same school with essentially the same peers for five and a half school years. The minority student, however, would never be at the same location for more than a year during the last four years of elementary school. Moreover, during the 3rd, 4th, 5th, and 6th grades the minority child would be forced to adjust to as many as four new groups of anglo peers who would be assigned to his "home" school, plus another group of white students who would be his peers at the majority school to which he was assigned.

The resulting stacatto pattern of school experiences for minority students violates the rule that the burden of school desegregation must be borne equitably. The Fifth Circuit consistently has disallowed implementation of desegregation plans which place the total or near total share of the burden of

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*/ Only 4th, 5th, and 6th grade pupils would be reassigned from Westley, Ilas, and Mahon. At those schools minority pupils would be assigned to a majority school for one year at one grade level (4th or 5th) with the option of assignment to a majority school for one half or one full year during grade 6. The Sunset and Southeast schools are paired under the plan, and Ilas elementary school is to become an exploratory or magnet school.

desegregation on minorities. E.g., United States v. Texas Education Agency (Austin I.S.D.), 467 F.2d 848 (5th Cir. 1972); Mims v. Duval County School Board, 447 F.2d 1330 (5th Cir. 1971). When formulating plans for desegregation "the school board and district court must avoid invidious discrimination on the basis of race or national origin through the imposition of the burden of desegregation on one or both of the minority groups." Cisneros v. Corpus Christi Independent School District, 467 F.2d 142, 153 (5th Cir. 1972) (en banc); Arvizu v. Waco Independent School District, 495 F.2d 449, 504 (5th Cir. 1974). Although the board's proposal for the seven named elementary schools promises to achieve school enrollments within the Court's guidelines */, it places a substantially disproportionate burden with respect to educational programs and transportation on minority students. We, therefore, cannot agree to this aspect of the board's desegregation proposal as it stands now. Objective, non-racial reasons may necessitate a desegregation plan which imposes a greater burden on minorities. The board's reasons for its elementary plan, however well-intentioned they may be, are not objective, educational considerations which can support a desegregation alternative that places so great a disproportionate burden on minorities.

In addition, the Court specifically found seven

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*/ No enrollment projection is included in defendants' plan for the Iles laboratory school, although testimony was presented that it would be operated with an enrollment less than seventy percent minority. Sanders is, of course, to be closed under the plan.

elementary schools in the Lubbock district to be de jure segregated, and we do not believe that the law in this circuit or the facts of this case permit the defendants' exclusion of grades from the desegregation program. */ The result of defendants' plan is, at a minimum, completely segregated grades 1 through 3 at Wheatley and 1 through 2 at Martin, Posey, Guadalupe, and Mahon. **/ The objective of a remedial plan is desegregated education, not interracial experience through part-time desegregation. Part-time desegregation does not meet constitutional standards. See Flax v. Potts, 464 F.2d 865, 869 (5th Cir. 1972); Arvizu v. Waco Independent School District, 495 F.2d 449,503-4 (5th Cir. 1974). In this circuit it is axiomatic that "classrooms which are segregated by race are proscribed regardless of the degree of overall schoolwide desegregation achieved." McNeal v. Tate County School District, 508 F.2d 1017, 1019 (5th Cir. 1975). Although we believe the evidence presented by the defendants on March 13, 1978, in support of the automatic exclusion of primary grades from their desegregation plan is irrelevant, we point out that there is substantial evidence that significant educational benefits from desegregated education

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*/ The Court of Appeals has permitted the exclusion of kindergarten students from certain remedial plans due to special considerations of age. We, therefore, have no objection to the board's elimination of kindergarten pupils from its desegregation proposals. See Flax v. Potts, supra, and Arvizu v. Waco Independent School District, supra.

**/ The 4th grade of Mahon also is not desegregated, although at Mahon 4th and 3rd grade pupils apparently participate together in an ungraded grouping known as Level II.

accrue during the primary grades. */ If the Court believes that substantive evidence concerning the automatic exclusion of grades from the desegregation plan should be considered we respectfully request the opportunity to present documentary evidence and expert testimony concerning this issue.

Finally, the proposal for operation of Iles elementary school outlined by the defendants must be amplified and made more certain in order to warrant acceptance by the Court. As we understand the proposal, Iles would continue to serve its present attendance zone (pre-k through grade 6), as well as sufficient pupils electing to attend from throughout the district to achieve desegregated classes and a desegregated school. A detailed description of the program is not yet available. There is also no timetable for implementation of the program. And, there is no projection of ethnic enrollment for the program. Without the foregoing information it is not possible to determine that this aspect of defendants' plan has any promise of the initial or continued success mandated by this Court.

B. Junior High Schools

At the junior high school level we believe that the board's proposal to locate the proposed junior high facility more

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*/ We have provided, as one example, a study recently presented to Duke University's National Review Panel on School Desegregation Research, which is appended to the Response.

nearly equidistant between the anglo and minority communities is a decision to be commended. The school will replace, in part, Struggs and predictably will open with an enrollment within the Court's guidelines. Although school officials apparently have not yet selected a specific site for the new school, based on their representations as to the general location we anticipate that the United States would not object to the board's proposal once we are notified of the exact location of the proposed construction. The temporary reassignment of Struggs pupils to other junior high schools until completion of the new junior high school is burdensome, but necessary due to the board's decision to use the Struggs facility as part of the magnet school program for Dunbar high school.

Defendants also have proposed a boundary change for Slaton junior high beginning in 1978-79. Statistics are provided in two parts of the March 13 proposal to demonstrate the effect of the zone change. Because the statistics are inconsistent */ the impact of this change cannot be stated with certainty. The zone change, however, appears to result in a minority enrollment at Slaton and an anglo enrollment at the new junior high school more disparate from the district-wide ratios than otherwise would exist. Until this analysis can be shown to be incorrect we object to the proposed zone change as having a segregative effect.

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*/ Resulting enrollment 778-45% Anglo, 33% Mexican-American, 22% Black (Proposal, p.9); Resulting enrollment 794-43.4% Anglo, 43.2% Mexican-American, 14.4% Black (Proposal, Slaton table)

C. High Schools.

At the high school level the board has presented an idea which, if properly developed and implemented, might result in effective desegregation. As we understand the proposal, Dunbar would retain its current attendance zone, but would have an expanded curriculum designed to attract anglo students. Two special programs (electronics and computer science) would be available only at Dunbar */ and four vocational programs would be transferred from the Coronado and Monterey high schools to the Dunbar campus. **/ All students enrolled in the electronics or computer science programs and all students from the Coronado, Monterey, or Dunbar attendance zones enrolled in one of the four vocational programs would attend Dunbar as full time students. Approximately 340 additional students are projected to attend Dunbar full time, in desegregated classes, achieving a 55 percent minority enrollment.

The achievement of desegregation by magnet school programs is exceptionally difficult. Although defendants project an enrollment for Dunbar within the Court's guidelines, defendants' proposal has not been made with sufficient detail to permit a determination

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*/ The Struggs facility would become part of the Dunbar magnet school complex.

**/ Home Economics Cooperative Education; Distributive Education; Cooperative Health Education; and Industrial Cooperative Training.

of the likelihood of initial and continued success required by the Court. We believe the defendants should state the nature and content of all special programs and courses to be placed on the Dunbar campus, which courses would be available only at Dunbar and which courses available at Dunbar would be availabe elsewhere in the district, */ what steps are to be taken to prevent classroom segregation, what actions would be taken to avoid part time segregation, what indicia the board now has of other than short-term success for their magnet program, and the bases for the projections of anglo students at Dunbar. A time table for creation and implementation of the magnet school proposal is another necessity. Also, in view of the present uncertainty of success with which the board's proposals should realistically be viewed at this stage, we believe the Court should require the defendants to formulate and present an alternative plan at the high school level which can be put into effect for the coming school year if, as the school year approaches, the defendants have not demonstrated to the Court a likelihood of success for their magnet school proposal **/.

D. Construction

Although the March 13, 1978 proposal outlines the

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*/ It would also be helpful for the defendants to address the question of whether their plan is, in reality, one for the construction of a regional vocational school on the Dunbar campus. If the answer is negative, academically oriented aspects of the magnet program should be made clear.

**/ For example, by the results of student pre-registration.

participation of proposed new elementary schools in the school district's desegregation plan, it does not present the report required by the Court to reflect the impact of the district's desegregation/construction plan on segregation in the school system. Until that report is made, making possible a determination that there are no alternatives to the planned elementary construction which promise to further desegregation, we object to the elementary school construction aspect of the plan.

II. Conclusion

The Court has ordered the submission of a completed desegregation plan by April 1, 1978. While we agree with the positive impact of a prompt resolution of the desegregation plan to be implemented for the next school year, we believe that modifications or alternatives to the defendants current plan will be necessary to meet the above-stated legal objections. We believe that the Court should require necessary alternatives or modifications even if a relaxation of the April 1, 1978 deadline is thereby necessitated. Additional time might also provide a further opportunity for that citizen contribution to proposals which is essential to successful implementation of any plan.

If the Court determines that the defendants should continue to work on their desegregation plans in the weeks ahead we will be happy to work closely with them if they desire our input. Although by so doing we do not in any way foreclose our right to appeal on any issue, or withdraw our request that this Court enjoin all construction projects for which the board has sought approval, we will make every effort to cooperate with both the Court and the

defendants in order to develop the best plan possible in compliance with the Court's January 27 order.

Respectfully submitted,

KENNETH J. MIGHELL
United States Attorney

DREW S. DAYS III
Assistant Attorney General

ROBERT B. WILSON
Assistant United States Attorney

STEPHEN P. CLARK
JOHN R. MOORE
GILAH G. GOLDSMITH
Attorneys
Department of Justice
Washington, D. C. 20530
(202) 739-4563

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Plaintiff United States' Response to Defendants' Submission of March 13, 1978 upon the counsel of record listed below by depositing a copy in the United States mail, postage prepaid, addressed as follows:

Thomas Johnson, Esquire
Charles Cobb, Esquire
1502 Avenue Q
Lubbock, Texas 79416

Honorable John Hill
Attorney General
State Capitol Building
Austin, Texas

This the 17th day of March, 1978.

STEPHEN P. CLARK
Attorney
Department of Justice
Washington, D. C. 20530

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

U. S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUL 7 1978
JOSEPH McELROY, JR., CLERK
BY _____ Deputy

UNITED STATES OF AMERICA, Plaintiff,	)	
v.	)	CIVIL ACTION NO. CA-5-806
LUBBOCK INDEPENDENT SCHOOL DISTRICT, et al., Defendants.	)	

CERTIFICATE OF COMPLIANCE
WITH LOCAL RULE 5.1(a) & (c)

I hereby certify that I spoke by telephone with Charles Cobb, one of the counsel for defendants, on the morning of 7 July 1978. In response to my question, Mr. Cobb stated that defendants would oppose CASS's Motion for Leave to Intervene for the Purpose of Appeal.

Respectfully submitted.

Robert P. Davidow
Attorney for Proposed Intervenor
7710 Louisville Avenue
Lubbock, Texas 79423

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 5.1(a) & (c) were mailed to the following counsel on the 7th day of July, 1978:

Thomas Johnson, Esquire
Charles Cobb, Esquire
1502 Avenue Q
Lubbock, Texas 79416

Honorable John Hill
Attorney General
State Capitol Building
Austin, Texas 78711

Drew S. Days, III
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

Robert P. Davidow
Attorney for Proposed Intervenor
7710 Louisville Avenue
Lubbock, Texas 79423

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

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BY _____ Deputy

UNITED STATES OF AMERICA,

Plaintiff,

v.

LUBBOCK INDEPENDENT SCHOOL DISTRICT, et al.,

Defendants.

CIVIL ACTION NO. CA-5-806

NOTICE OF APPEAL

Notice is hereby given that Citizens' Alliance for Successful Schools (CASS), Proposed Intervenor in the above-captioned case, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the Final Judgment entered in this action on the 8th day of May, 1978.

Respectfully submitted,

Robert P. Davidow
Attorney for Proposed Intervenor
7710 Louisville Avenue
Lubbock, Texas 79423

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing NOTICE OF APPEAL were mailed to the following counsel on the 7th day of July, 1978:

Thomas Johnson, Esquire
Charles Cobb, Esquire
1502 Avenue Q
Lubbock, Texas 79416

Honorable John Hill
Attorney General
State Capitol Building
Austin, Texas 78711

Drew S. Days, III
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

Robert P. Davidow
Attorney for Proposed Intervenor
7710 Louisville Avenue
Lubbock, Texas 79423

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF TEXAS

LUBBOCK DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

LUBBOCK INDEPENDENT SCHOOL DISTRICT, et al.,

Defendants.

CIVIL ACTION NO. CA-5-806

MOTION FOR LEAVE TO INTERVENE FOR THE PURPOSE OF APPEAL

Citizens' Alliance for Successful Schools (CASS) hereby moves for leave to intervene for the purpose of appeal, pursuant to Rule 24(b) of the Federal Rules of Civil Procedure.

Respectfully submitted,

7 July 1978
Date

Robert P. Davidow
Attorney for Citizens' Alliance for
Successful Schools
7710 Louisville Avenue
Lubbock, Texas 79423

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing MOTION FOR LEAVE TO INTERVENE FOR THE PURPOSE OF APPEAL were mailed to the following counsel on the 7TH day of July, 1978:

Thomas Johnson, Esquire
Charles Cobb, Esquire
1502 Avenue Q
Lubbock, Texas 79416

Honorable John Hill
Attorney General
State Capitol Building
Austin, Texas 78711

Drew S. Days, III
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

Robert P. Davidow
Attorney for Citizens' Alliance for
Successful Schools
7710 Louisville Avenue
Lubbock, Texas 79423

IN THE UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF TEXAS

LUBBOCK DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. LUBBOCK INDEPENDENT SCHOOL DISTRICT, et al., Defendants.	CIVIL ACTION NO. CA-5-806

BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE FOR THE PURPOSE OF APPEAL

Rule 24(b) of the Federal Rules of Civil Procedure provides in pertinent part:

> "Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Citizens' Alliance for Successful Schools (hereinafter referred to as CASS) consists of citizens of Lubbock who are taxpayers and who, with few exceptions, are parents of students in the Lubbock Independent School District. Some members of CASS are Blacks who have children enrolled in the Lubbock Independent School District; some members are Chicanos who have children enrolled in the Lubbock Independent School District. Thus, members of CASS include parents of children who are members of a class for whose benefit the Attorney General originally brought suit against the Lubbock Independent School District in 1970 pursuant to 42 U.S.C. Section 2000 c-6 (1970); therefore, the claim of CASS in behalf of minority children in the Lubbock Independent School District is identical, factually and legally, to that presented by the United States in this lawsuit.

This intervention will not involve delay or prejudice to the rights of the original parties. Indeed this Motion for Leave to Intervene is being filed only because of the possibility that the United States, although it has filed a formal Notice of Appeal, will ultimately decide not to pursue the appeal fully. (This possibility, first reported in the local press, was confirmed on 30 June 1978 in a phone conversation between Robert P. Davidow and Mark Gross of the Appellate Division of the Justice Department.) CASS expects to proceed with this appeal only if the United States decides not to appeal fully the judgment entered by the District Court on 8 May 1978. Thus, CASS's intervention would result in no greater delay or prejudice to the rights of the parties than would result from a full appeal by the United States in this case.

A Motion for Leave to Intervene for the Purpose of Appeal is timely when filed before the time for the filing of a Notice of Appeal has elapsed, and when filed on behalf of a member of a class the de facto representative of which has decided not to appeal. United Airlines, Inc. v. McDonald, 432 U.S. 385, 97 S. Ct. 2464, 53 L.Ed.2d 423 (1977).

For the foregoing reasons, CASS respectfully requests that the Court grant the Motion for Leave to Intervene for the Purpose of Appeal.

Respectfully submitted,

Robert P. Davidow
Attorney for Proposed Intervenor
7710 Louisville Avenue
Lubbock, Texas 79423

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing BRIEF IN SUPPORT OF MOTION FOR LEAVE TO INTERVENE FOR THE PURPOSE OF APPEAL were mailed to the following counsel on the 7th day of July, 1978:

Thomas Johnson, Esquire
Charles Cobb, Esquire
1502 Avenue Q
Lubbock, Texas 79416

Honorable John Hill
Attorney General
State Capitol Building
Austin, Texas 78711

Drew S. Days, III
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

Robert P. Davidow
Attorney for Proposed Intervenor
7710 Louisville Avenue
Lubbock, Texas 79423

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

LUBBOCK DIVISION

UNITED STATES OF AMERICA,	§	
Plaintiff	§	
	§	
VS.	§	CIVIL ACTION NO. CA-5-806
	§	
LUBBOCK INDEPENDENT SCHOOL DISTRICT, ET AL,	§	
Defendants.	§	

LUBBOCK INDEPENDENT SCHOOL DISTRICT'S OPPOSITION TO MOTION FOR LEAVE TO INTERVENE

TO THE HONORABLE HALBERT O. WOODWARD, UNITED STATES DISTRICT JUDGE:

Comes now LUBBOCK INDEPENDENT SCHOOL DISTRICT, Defendant in the above case, and expressly subject to its Plea to the Jurisdiction heretofore filed, makes and files this its Opposition to the Motion to Intervene and would show as follows:

I.

The Motion is untimely.

II.

The interests claimed to be represented are already adequately represented by attorneys from the Department of Justice, United States of America.

III.

The proposed Intervenor's Complaint raises no issues which have not already been presented and passed on by the Court.

WHEREFORE, Defendant School District prays that the Motion to Intervene be denied.

Respectfully submitted,

McWHORTER, COBB AND JOHNSON
1502 Avenue Q
Lubbock, Texas 79401

Attorneys for Lubbock Independent School District

By:

Charles L. Cobb, of Counsel

D. Thomas Johnson, of Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Lubbock Independent School District's Opposition to Motion for Leave to Intervene has been served upon the following counsel by mailing the same in the United States Mail, with proper postage affixed, this 28th day of July, 1978:

Mr. Robert P. Davidow
7710 Louisville Avenue
Lubbock, Texas 79423

Attorney for Citizens' Alliance for Successful Schools;

and

Mr. Drew S. Days III
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

Honorable John Hill
Attorney General
State Capitol Building
Austin, Texas 78711

Charles L. Cobb, of Counsel

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

THE TEXAS EDUCATION AGENCY, et al. (Lubbock ISD),

Defendants.

CIVIL ACTION NO. CA-5-806

O R D E R

Pursuant to this Court's order of January 27, 1978, the defendant, Lubbock Independent School District filed on March 10, 1978 its proposed plan to comply with the Court's order. At a hearing held on March 13, 1978, this plan was introduced as Defendant's Exhibit 131.

The Court has now carefully examined the plan in detail as well as the briefs and submissions in support of and in opposition thereto and has determined that the plan is not sufficient to meet the requirements of law. Therefore, to comply with this Court's order, and to fulfill the requirements of the law and the Constitution of the United States it is ORDERED:

I

In the five elementary schools known as court-ordered minority schools[1/], the defendants propose a desegregation plan applicable only to Grades 3 through 6 leaving the enrollment in kindergarten through the second grade as it presently exists. The evidence does not establish any facts that would show any unusual circumstances that would require or justify leaving these lower grades in a completely integrated status.

It would be a frivolous and an unwarranted action of this Court to approve such continued segregation in the face of the clear and unmistakable requirements of the law:

1/ Wheatley Elementary School, Martin Elementary School, Posey Elementary School, Guadalupe Elementary School, and Mahon Elementary School.

EXCERPT FROM SUMMARY AND ORDER REGARDING
SCHOOL DESEGRATION ISSUED BY FEDERAL JUDGE
HALBERT O. WOODWARD, CHIEF JUDGE
NORTHERN DISTRICT OF TEXAS

As to junior high schools, the parties seem to agree that the total number of "vacant seats" is in excess of 600, consequently meaning that there is less enrollment than there is room in the various junior high schools. It is noted, however, that the first junior high school is to be built in the second phase of the LISD proposed building program. Thus, the LISD evidently recognizes that there is no critical need for an additional junior high school at this point.

The decision of whether or not to build additional schools and classrooms is one that should be left to the discretion of the local authorities, that is, the Board of Trustees of the Lubbock Independent School District. The real question before the court is not whether these schools should be and could be built under constitutional guidelines, but whether or not the building and location of said schools will further segregation in the District. In short, who is going to attend the schools when they are built and what will be the effect, if any, on the other schools in the system? This court's order will permit the School District to build these additional buildings when and where they desire, subject only to the submission of a satisfactory plan for desegregation of each school in the District which the court finds is now racially identifiable as a minority school and whose racially identifiable status was caused by segregative intent and the discriminatory acts of the LISD, and provided that such construction will not hinder the integration of other schools. Further, in submitting such a plan, the School District must make a study and report to the court the effect that such new construction, at all locations, will have on the integration or segregation of the school system now and in the future.

ADDITIONAL STATISTICS

With a total school enrollment of 27,265 in the 1961-62 school year, the Anglos constituted 77.10%, Mexican-Americans 13.38%, and Blacks 9.52%. In the 1969-70 school year, with a total enrollment of 33,213, Anglos constituted 67.51%, Mexican-Americans 20.84%, and Blacks 11.50%.

In the current year of 1977-78 the total enrollment is 32,125. Anglo enrollment is 60.18% of this number, the Mexican-Americans 27.27%, and the Blacks constitute 12.55%.

All of the evidence and exhibits in the case indicate that for at least the past 25 years there has been a steady movement of the population patterns in the city of Lubbock. This rapid shift is graphically shown by Government's Exhibits 166 and 167. All witnesses have agreed that it is the southwest portion of Lubbock, which is essentially all Anglo, that is the fastest growing part of the city and has been so for many years. The evidence shows that the minority population in the east and northeast part of Lubbock has increased percentagewise in substantial proportions, and that additionally there is a definite movement of Mexican-Americans to the southwest portion of the city. The movement of the populations, and the racial shifts as shown by these exhibits, are also mirrored in the racial make-up of the schools in the particular areas.

As noted above, some of the schools which the court will order to be integrated have an enrollment far under the capacity of the physical plants at these campuses. As a result these schools, which are substantially under capacity, have been operating at less than the maxumum efficiency which is desired. The ideal elementary school ordinarily has an enrollment of 500 students, in that if enrollment is far below this figure it results in inferior education because of the lack of courses and variety of courses offered. This should be remedied in any plan submitted by the School Board.

SUMMARY

1. The court, by this memorandum opinion, has found that there are 22 schools in the Lubbock Independent School District which are operated and maintained as racially identifiable minortiy schools in that the racial minority enrollment in each of these schools exceeds 70% of the total enrollment at such school.

2. However, the court has found and concluded that only 9 of these schools are racially identifiable as minority schools because of any discriminatory acts or segregative intent on the part of the defendants. These are the same schools, with the addition of Mahon Elementary, that this court found to be maintained and operated unconstitutionally by this court's order in August of 1970.

3. Although the remaining 13 schools are racially identifiable as minority schools, the court has found and concluded that they are not being operated and maintained in violation of the Fourteenth Amendment or any other provision of the Constitution of The United States.

The defendants have proved by a preponderance of the evidence that with respect to these 13 schools, their present as well as any past status as minority schools did not result in any degree from any discriminatory act or segregative intent on the part of the defendants. Although the proof on this point is borne out by many of the facts in evidence, it is most conclusively proved by the statistics showing that for a period of years each of these schools was operated and maintained with fully integrated student bodies. The fact that this integrated status was changed to a minority or segregated school at a later date resulted solely from a changing population for which the school authorities were not in any way responsible.

In the case of Bozeman, the court has found that although segregative intent was present in the operation of this school at one time, it subsequently became fully integrated. However, the effects of such acts with segregative intent at Bozeman are no longer present, and Bozeman changed from an integrated to a racially identifiable minority school at present without any action of the School Board being responsible therefor. This change resulted from the same shifts in population as caused the change in the other schools in this category.

4. Although the defendants complied with the specific order of the court in August of 1970 with respect to the eight schools then found to be operated in violation of the Constitution, the court retained continuing jurisdiction and now finds that the previous order did not in actual fact remedy the constitutional violations then existing. Not only did the actual Anglo enrollment at Struggs and Dunbar commencing in 1970, fall far short of integrating these two schools, but also under the previous plan the students at the elementary schools then in question were not and would not be given an opportunity, in junior and senior high achool, to attend a fully integreted school. Further, and especially under these circumstances as well as subsequent appellate decisions, the court is of the opinoin that the holding of Hightower v. West, 430 F. 2d 552 (5th Cir. 1970), is no longer applicable to the facts of this case.

O R D E R

It is the function and duty of this court to determine and identify any constitutional violations of the defendants in the operation and maintenance of the Lubbock school system, and it is the court's further function and duty to order the responsible authorities to submit a plan which will remedy and eradicate the violation and the remaining vestiges of unconstitutional actions by the defendants, and their predecessors in office. But this does not include the power of the court or of the plaintiff. The United States of America, to order local school authorities to take any other steps or actions other than

those necessary to remedy and eradicate the effects of any present or past unconstitutional acts by defendants. Austin Independent School District v. United States, 429 U. S. 990, 995 (1976).

Likewise, local school authorities and their administrative staffs are much better equipped and qualified than the court to prepare, and submit to the court for approval, the details of any remedial plan necessary to correct any constitutional violations now existing.

Therefore, it is here ordered:

1. That the defendants will prepare and submit for the court's approval, on or before April 1, 1978, a plan of student attendance for the Lubbock Independent School District which will eradicate all vestiges of segregation at Dunbar High School, Struggs Junior High School and the following elementary schools: Wheatley, Iles, Martin, Posey, Sanders, Guadalupe and Mahon.

2. Only as a matter of suggesting general guidelines to the defendants, the court advises that defendants will be permitted to use any reasonable tool, device or plan that will reasonably accomplish the desired integration including, but not exclusively: the pairing and clustering of schools, changes in attendance boundary lines, the utilization of space in schools now under capacity, the closing of schools, the full use and implementation of a majority to minority transfer policy or any other plan that is reasonable and necessary to accomplish the objectives of this order.

However, as a matter of caution, care should be taken by the school authorities that the burden of carrying out any plan will not be a disproportionate burden on any race. The starting point, which is an impossible ideal to accomplish, in determining if a school is fully integrated, would be an enrollment that would reflect the racial make-up of the entire school population of the district, but this is a starting point only. Also, the court will not necessarily approve a plan where the affected schools will have no more than 70%, or near thereto, of minority enrollment; and this fugure of 70% will not necessarily be the exact dividing line to determine if a school has or has not been integrated under the proposed plan. Care should be taken that any plan will have some reasonable assurance of continued as well as initial success and a school having just under 70% minority enrollment might not comply with this admonition.

It is also recognized that the plan will directly affect only certain named schools, but every precaution should be taken that there will be no indirect effect on other schools in the district whereby these other schools would be directed toward segregation.

3. The court will not at this time rule finally on the School's motion with respect to construction under the bond issue. But the defendants will be required to make further study of the effect of such construction on the racial make-up in the Lubbock school system. In this connection it may very well be that this new construction will be a useful "tool" for the defendants in implementing desegregation of the schools in question. Following the completion of the above ordered study, the defendants shall submit to the court a report from such study reflecting the projected segregative and integrative effects that the defendants' proposed desegregation/construction plan will have on the school system.

It is so ordered.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this _____ day of January A.D. 1978.

HALBERT O. WOODWARD

CHIEF JUDGE

NORTHERN DISTRICT OF TEXAS

In Margaret M. Johnson, et al. v. Jackson Parish School Board, et al., 423 F.2d 1055 (5th Cir. 1970), it was explicitly held:

> "We think that it was manifestly clear that the decisions of the Supreme Court and this Court required the elimination of not only segregated schools, but also segregated classes within the schools. . . ."

Again, in Kelly McNeal, et al. v. Tate County School District, et al., 508 F.2d 1017 (5th Cir. 1975), this same Circuit held:

> "An analysis of today's issue should begin with articulation of the basic rule that classrooms which are segregated by race are proscribed regardless of the degree of overall schoolwide desegregation achieved. . . ." (emphasis added).

Therefore, it is ORDERED that the defendants shall either submit a new plan or modify the previous submission to the extent that full integration will be accomplished in Grades 1 through 6 in these five court-ordered minority elementary schools. The kindergarten grade will be excepted from this order.

II

Opponents of the plan submitted by the School Board have alleged that the plan places a disproportionate burden on the minority races as compared with the burden on the majority Anglo race. Such a position is premised upon the fact that under the proposed plan Anglos will be transported to a school away from their regularly assigned neighborhood school for approximately four and one-half months, or one semester, during their elementary education. This no doubt will be increased to some extent when Grades 1 and 2 are included in the plan. On the other hand members of minority races will be required to be transported in excess of one year during their elementary education, and this also will be increased when the plan is modified. The School Board concedes that this is correct as to any one individual in the elementary grades, but points out that of

the total number of students estimated to be bused during the first year of the plan (1313 students), twice as many will be Anglos (875) as compared with 438 minority students to be bused. There does not appear to be any material discrepancy in the time for busing a student from one school to another or in the distance traveled insofar as the plan is applied to Anglos, Blacks or Mexican-Americans.

It should be evident that it is wholly impractical to expect any plan desegregating these five elementary schools to place an absolutely equal burden on every individual and every race, but the Court is of the opinion that this plan does not place a disproportionate burden on the minorities and that the results which will be accomplished by this plan outbalance any inequities that may result to the individuals.

As an example, this plan disperses minorities throughout many of the all-white elementary schools in the entire District. This is desirable for two reasons. First, it will in all probability prevent any "white-flight" as nearly all of the white elementary schools in the District will be desegregated to a certain extent, and the experience that this School District had in desegregating Dunbar High School some seven years ago, when "white-flight" prevented the accomplishment of the projected integration at that school, will in all likelihood be prevented.

Secondly, the plan in desegregating many of the all-white elementary schools in the District will make available an experience of integrated education to more students than would be involved if only a few all-white schools were included in the plan.

The proposed plan of the defendant School Board, insofar as it integrates Grades 3 through 6 in the five court-ordered minority schools, is approved because it accomplishes the desegregation of these grades in these five schools and it does not place such a disproportionate burden on any one race so as to result in a plan that is unfair or unworkable.

III

The School Board is further ORDERED to amplify and extend its proposal for desegregation in the following particulars:

A. The plan to make Iles Elementary School and the Dunbar-Struggs complex magnet schools is approved by the Court, but it will be necessary that details be given as to the courses to be offered, the plans for transportation of the students to the schools, the projected racial make-up of these schools when the plan is fully operative, and any other details necessary to show exactly how the plan will be fully implemented at these two schools.

B. The proposal to close Struggs as a junior high school and incorporate it into the Dunbar High School campus is approved, but the Court should be advised further as to the transportation that will be furnished to accomplish this plan.

IV

Subject to the final approval of this Court as to the matters ordered, the construction of the junior high school and the two elementary schools south of Loop 289 is approved at the locations previously identified by the defendants. However, the defendants will furnish the Court with statistics showing the manner in which the two new elementary schools will be incorporated into the desegregation plan, the resulting percentages of enrollment as to races, and any details needed concerning proposed transportation.

V

The School Board should submit its proposal and plan as to the manner of reporting to this Court on the progress of its desegregation plan.. It is suggested that the enrollment figures be furnished as quickly as possible following the opening of each school year and quarterly thereafter.

VI

The majority-to-minority transfer policy should be widely publicized and encouraged at all times and places, but

especially in those situations where it appears that the plan for desegregation is not meeting the full expectations as projected.

VII

The supplemental or amended plan here ordered shall be presented to the Court on or before April 24, 1978 and will contain all the necessary details to place the plan into full operation by the opening of the 1978-79 school year. The Court then will enter its final judgment either approving the amended plan or entering such other orders that may be appropriate.

VIII

The Court has examined and considered carefully the amicus curiae brief filed in this case on behalf of persons who are not actual parties to this litigation, and the Court here denies any further hearing on the proposals set forth in such brief.

IX

The parties are advised that this Court will retain jurisdiction of this case for a period of three years, and in the event that the proposals are not accomplishing the intended results and if the racial percentages are not substantially as projected, the Court reserves the right to enter such further orders as may be necessary to comply with the Court's orders and the laws and Constitution of the United States.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 3rd day of April A.D. 1978.

HALBERT O. WOODWARD
Chief Judge
Northern District of Texas

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

LUBBOCK DIVISION

UNITED STATES OF AMERICA,	§	
Plaintiff	§	
	§	
VS.	§	CIVIL ACTION NO. CA-5-806
LUBBOCK INDEPENDENT SCHOOL DISTRICT, ET AL,	§	
Defendants	§	

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO INTERVENE

TO THE HONORABLE HALBERT O. WOODWARD, UNITED STATES DISTRICT JUDGE:

This suit was originally filed in August of 1970. On the 22nd day of August, 1970, this Court entered its original Order and thereafter on the 25th day of August, 1970, issued a Memorandum Opinion. In 1977, Lubbock Independent School District applied to the Court for permission to erect new schools after a bond election had carried. The United States, relying upon cases decided since this Court's 1970 Opinion, sought further hearings in the matter. After a lengthy trial in October and November of 1977, and subsequent hearings on the remedy, the final Judgment was entered on May 8, 1978.

It was not until after the United States filed Notice of Appeal when Intervenor sought to come into the case for the purpose of appeal.

According to Moore's Federal Practice 2d Edition, Volume 3B at page 24-521, an application to intervene must be "timely" and the same authority says at page 24-651 that it is well settled "that intervention will not be allowed for the purpose of impeaching a decree already made". United States v. California Cooperative Canneries, 279 U.S. 553, 49 Sup. Ct. 424, 73 L.Ed. 838.

In United States of America v. Carroll County Board of Education, Court of Appeals, 5th Cir., 427 F.2d 141, motion to intervene was filed after the case had been "churning through the judicial machinery for nearly five years." A plan for desegregation was ordered into effect on May 19, 1969. Petitioners did not seek to intervene until October 16, 1969.

In upholding the District Court, the Fifth Circuit said at page 142 (427 F.2d):

> "This court cannot say that the representation afforded by the United States Attorney General for the black students and parents of Carroll County was inadequate as a matter of law, thus allowing intervention as a matter of right. Fed.R.Civ.P. 24(a).
>
> "Moreover, the finding by the district court that the motion to intervene was not timely filed in view of the present posture of the case does not evidence an abuse of discretion requiring reversal."

Lubbock Independent School District submits that where intervention is sought under Rule 24(b) of the Federal Rules of Civil Procedure, that a great deal of discretion is lodged in the trial court, and that one of the matters to be considered by the trial court is adequacy of representation.

Since the beginning of this litigation in August, 1970, the United States has been represented by competent attorneys. It is indeed presumptious for the proposed Intervenor to now take the position that their rights are and will not be adequately protected. In St. Helena Parish School Board v. Hall (5th Cir.), 287 F.2d 376 (cert. denied, 368 U.S. 830), it was held that the intervenor failed to make a showing that his interest in the litigation was or might be inadequate, and there is certainly no showing by the Intervenor here of any inadequacy on behalf of Government counsel.

In Spangler vs. City Board of Education, U. S. Court of Appeals (9th Cir.), 427 F.2d 1352 (cert. denied, 402 U.S. 943), parents of certain school children were dissatisfied with the district court's desegregation decree and sought to intervene. The school board decided to acquiesce in the decree and adopted a desegregation plan. The 9th Circuit held that under Rule 24 of the Federal Rules of Civil Procedure, there was no "right to intervene

under Rule 24(a)", and that it was a matter of discretion with the district court to permit intervention under Rule 24(b). A decision not to appeal, as found by the 9th Circuit, was made by a board of elective representatives and was a decision within the competence of the board. The court concluded at page 1354 that under the circumstances, the Pasadena School Board was adequately acting in protection of the limited interests of those who sought to intervene.

This suit was brought as a desegregation suit, largely on behalf of the people who now seek intervention.

The Sixth Circuit in Hatton v. County Board of Education of Maury County, Tennessee, 422 F.2d 457, approved the holding of the District Judge refusing intervention and expressly agreed with the order of the District Court which was included as an appendix to the Opinion.

After concluding in Hatton, supra, that petitioners would seem to have a sufficient interest in the suit to intervene, the court said that this was not dispositive of their motion because Rule 24(a) required the applicant to show that his interest was not being adequately protected at the time. The Court concluded that petitioners failed to make this showing of inadequate representation, in these words, at page 462 (422 F.2d):

> "There is nothing in petitioner's motion papers to indicate that their interests as residents of Maury County and parents of children attending the public schools are not being adequately represented by the present defendants. The record indicates that the defendants have advanced every reasonable defense in this action, and petitioners have made no allegation of collusion, bad faith, or gross negligence on the part of the Board of Education in defending the suit."

Another case in point, and where the Fifth Circuit upheld the discretion of the trial court in denying intervention, is that of Horton v. Lawrence County Board of Education v. National Education Association, 425 F.2d 735. The National Education Association, an

association of teachers, sought to intervene assertedly to protect rights of black teachers who might be affected by the district court decree. The District Court denied intervention and Fifth Circuit held that the petition of the proposed intervenors did not show a right to intervene under Rule 24(a) and that the District Judge did not err in denying permissive intervention under Rule 24(b)2.

The "Proposed Intervenor's Complaint" alleges in substance that Defendant District has traditionally operated and continues to operate a dual school system in violation of the Fourteenth Amendment; that the District intends to continue to use a plan of student assignment that perpetuates a dual school system; and that there are alternative methods available to "convert the present system to a unitary non-racial school system". According to the Proposed Complaint, the alternative methods are "geographic zoning, pairing, clustering, or consolidation". Lubbock Independent School District respectfully submits that all of the methods sought to be raised by Intervenor have already been fully and adequately presented to the Court and that the Proposed Complaint would only serve as a "rehash" of matters already considered.

WHEREFORE, Lubbock Independent School District respectfully prays that the Motion for Leave to Intervene be denied.

Respectfully submitted,

McWHORTER, COBB AND JOHNSON
1502 Avenue Q
Lubbock, Texas 79401

Attorneys for Lubbock Independent School District

By: _____
Charles L. Cobb, of Counsel

_____
D. Thomas Johnson, of Counsel

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition to Motion for Leave to Intervene has been served upon the following counsel by mailing the same in the United States Mail, with proper postage affixed, this 28th day of July, 1978:

Mr. Robert P. Davidow
7710 Louisville Avenue
Lubbock, Texas 79423

Attorney for Citizens' Alliance for Successful Schools;

and

Mr. Drew S. Days III
Assistant Attorney General
Department of Justice
Washington, D. C. 20530

Honorable John Hill
Attorney General
State Capitol Building
austin, Texas 78711

Charles L. Cobb, of Counsel

IN THE UNITED STATES DISTRICT COURT FOR T

NORTHERN DISTRICT OF TEXAS

LUBBOCK DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. LUBBOCK INDEPENDENT SCHOOL DISTRICT, et al., Defendants.	CIVIL ACTION NO. CA-5-806

REPLY BRIEF

In its Brief in Support of Plea to the Jurisdiction on Motion for Leave to Intervene, Defendant has alleged that the District Court lacks jurisdiction to entertain Proposed Intervenor's Motion for Leave to Intervene for the Purpose of Appeal. Because this issue was not dealt with in Proposed Intervenor's Brief in Support of Motion for Leave to Intervene for the Purpose of Appeal, Proposed Intervenor deems it appropriate to address the jurisdictional issue in a Reply Brief.

I. EVEN AFTER A FILING OF A NOTICE OF APPEAL, A DISTRICT COURT RETAINS JURISDICTION TO RULE ON A POST-JUDGMENT MOTION FOR LEAVE TO INTERVENE WHEN SUCH INTERVENTION IS NECESSARY TO THE PROSECUTION OF AN APPEAL.

In United Airlines v. McDonald, 432 U.S. 345, 97 S.Ct. 2464, 53 L.Ed.2d 423 (1977), the United States Supreme Court cited with approval a case in which a district court held that it had jurisdiction to entertain a motion for leave to intervene for the purpose of appeal, filed after a notice of appeal had been filed:

> A case closely in point is American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., 3 F.R.D. 162 (S.D.N.Y.). That case involved a plan for reorganization of the Interborough Rapid Transit Company and for its consolidation with the Manhattan Elevated Railway. Mannheim, an owner of a series of bonds in the Manhattan Railway, had participated in the District Court not merely representing his own interests but also acting as "attorney in fact" for other owners of the bonds. After the District Court had approved the plan as fair and equitable, and had subsequently ordered its implementation, Mannheim filed a notice of appeal. He then decided to abandon the appeal and to seek to surrender his bonds pursuant to the terms of the plan. One of the other

> holders of the same series of bonds, for whom Mannheim had been acting as attorney in fact, then moved to intervene for the purpose of prosecuting an appeal on behalf of herself and all other nonsurrendering bondholders. Noting that it is "essential in the administration of our system of justice, that litigants should have their day in court" and that the motion was filed within the time in which an appeal might have been brought, the District Court ruled that the motion to intervene was timely.

97 S.Ct. at 2470 n. 16.

The rationale for the decision in American Brake Shoe & Foundry Co. was explained as follows in a recent district court decision:

> Similarly, in American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., 3 F.R.D. 162 (S.D.N.Y. 1942), a motion to intervene in a class action was granted after the notice of appeal had been filed but before the record had been docketed, where the plaintiff who filed the notice subsequently settled his claim. Again, in that case there would have been no prosecution of the appeal if the motion had not been granted. In both cases [including Hobson v. Hansen, 44 F.R.D. 18 (D.D.C. 1968), previously cited by the district court], therefore, an exception was permitted for the reason that no appeal would otherwise have existed and the district court's decision was necessary to preserve the appeal.

Rolle v. New York City Housing Authority, 294 F. Supp. 574, 576 (S.D.N.Y. 1969).

It is thus clear that where, as in the instant case, the post-judgment motion for leave to intervene is designed to insure that there will be an appeal by at least one party, that motion is properly entertained by the district court even after the filing of a notice of appeal.

II. THE CASES CITED BY THE DEFENDANT ARE FACTUALLY DISTINGUISHABLE AND ARE THUS NOT CONTROLLING.

Although it is not clear from the very brief recitation of the facts in Evens and Howard Fire Brick Co. v. United States, 236 U.S. 210, 35 S.Ct. 415, 59 L.Ed. 542 (1915), whether the original appellant (the United States) abandoned the appeal or ever contemplated such action while the appeal was pending, this uncertainty is removed when one examines the related case of United States v. St. Louis Terminal, 236 U.S. 194, 35 S.Ct. 408, 59 L.Ed. 535 (1915). In the latter case the Court makes clear that the United States fully prosecuted the appeal in Evens and Howard Fire Brick Co., and there is no suggestion that the United States ever expressed doubts, during the pendency of the appeal, about its intention to prosecute the appeal fully. Thus there is no conflict between Evens and Howard Fire Brick Co. and American Brake Shoe & Foundry Co., since they deal with different factual situations.

Ruby v. Secretary of the United States Navy, 365 F.2d 385 (9th Cir. 1966), cert. denied 386 U.S. 1011 (1967), is totally unrelated to post-judgment

motions for leave to intervene. Even so, the language from the Ruby opinion that is quoted in Defendant's brief supports the view that even after the filing of a notice of appeal, the district court still has jurisdiction to take actions necessary to preserve the appeal:

> "As a general rule, of course, once an appeal has been taken--once notice of appeal has been timely filed--the district court is divested of jurisdiction to take any action except in aid of the appeal."

365 F.2d at 388 (emphasis added).

For the foregoing reasons, Proposed Intervenor reiterates its request that this Court grant the Motion for Leave to Intervene for the Purpose of Appeal.

Respectfully submitted,

Robert P. Davidow
Attorney for Proposed Intervenor
7710 Louisville Avenue
Lubbock, Texas 79423

CERTIFICATE OF SERVICE

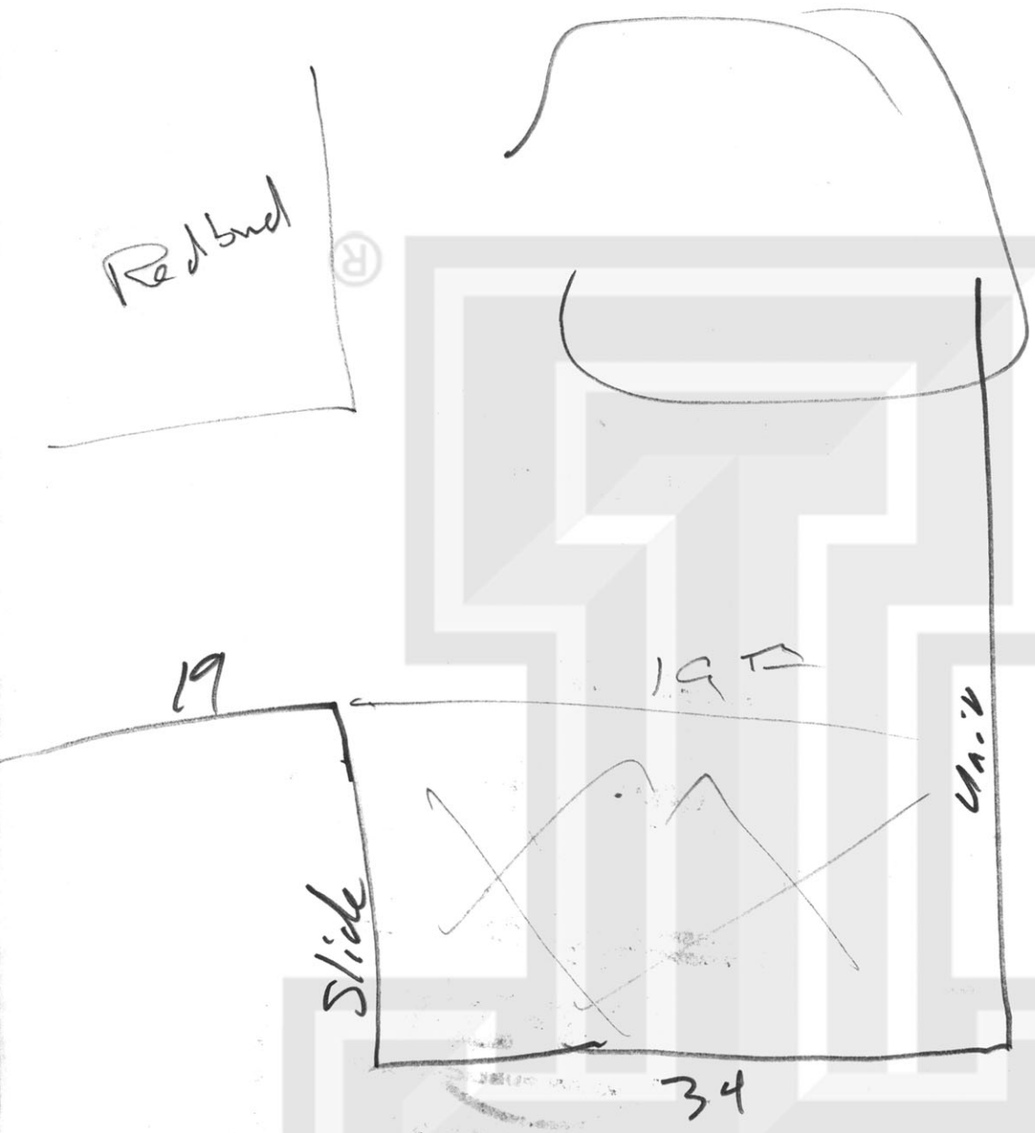
I hereby certify that copies of the foregoing REPLY BRIEF were mailed to the following counsel on the 31st day of July, 1978:

Thomas Johnson, Esquire
Charles Cobb, Esquire
1502 Avenue Q
Lubbock, Texas 79401

Honorable John Hill
Attorney General
State Capitol Building
Austin, Texas 78711

Drew S. Days, III
Assistant Attorney General
Department of Justice
Washington, D.C. 20530

Robert P. Davidow
Attorney for Proposed Intervenor
7710 Louisville Avenue
Lubbock, Texas 79423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