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Claude Bullock, John Carlile, Glen Wadsworth,  
Francis Gregory, Joe Hickey v. Reed Hanks, W. W.  
Smith, M. R. Wilde, Charles A. Meeks, Orson N.  
Behunin and Hubert C. Lambert, State Engineer of  
the State of Utah : Brief of Appellants

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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CLAUDE BULLOCK, JOHN CAR-  
LILE, GLEN WADSWORTH,  
FRANCIS GREGORY, JOE  
HICKEY,  
*Plaintiffs and Appellants,*

vs.

REED HANKS, W. W. SMITH,  
M. R. WILDE, CHARLES A.  
MEEKS, ORSON N. BEHUNIN  
and HUBERT C. LAMBERT,  
State Engineer of the State of Utah,  
*Defendants and Respondents.*

Case No.  
11189

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## BRIEF OF APPELLANTS

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**Appeal from the Decree of the Third Judicial  
District Court for Summit County  
Honorable Bryant H. Croft, Judge**

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Clerk, Supreme Court, Utah

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11189

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## BRIEF OF APPELLANTS

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### STATEMENT OF KIND OF CASE

This is an appeal from a decree of the District Court of Summit County affirming the decision of the State Engineer approving a water application.

## DISPOSITION IN LOWER COURT

The trial court found that there was unappropriated water in the proposed source, that the water storage project was physically and economically feasible and that the application was properly approved.

## RELIEF SOUGHT ON APPEAL

We seek to reverse the decree and to obtain an order directing the rejection of such application.

## STATEMENT OF FACTS

Application No. 34965 was filed by the defendants Hanks, Smith, Wilde, Meeks and Behunin, hereinafter referred to as the "defendants," to appropriate 1700 acre-feet of water from East Beaver Creek and Middle Beaver Creek, tributaries of Henry's Fork River, for storage in an off-channel reservoir in the Burnt Fork Creek drainage area and for release for irrigation use by the applicants. It is proposed by the applicants to convey water from the two creeks by means of existing ditches, some nine miles long, and to store it in a reservoir to be formed by construction of a dam 30 feet high and 300 feet long. The maps, Exhibits D 1, D 2, and D 3, show the two creeks, the ditches, the proposed reservoir site and the location of the plaintiffs' lands in Utah and Wyoming. The plaintiffs and others

are owners of decreed water rights for irrigation and stockwatering purposes in both states aggregating 49.43 second feet in Wyoming and 26.68 second feet in Utah. The period of use for irrigation is May 15 to October 15 of each year and the stockwatering right is for the entire year.

The plaintiffs protested the approval of application No. 34965 upon the grounds that there is no unappropriated water in the proposed sources, that the prior rights would be impaired, and that the project is not feasible. The state engineer decided that:

“From our examination of this matter and the records of the flow of Henry’s Fork and its tributaries, it appears that there are times when there is water available in excess of established water rights.”

The pre-trial order (R. 31) states the issues as follows:

- “1. Whether there is probable cause to believe that there is unappropriated water in East Beaver Creek and Middle Beaver Creek, tributaries of Henry’s Fork River, available for diversion, storage and use as proposed in application No. 34965.
2. Whether water can be so diverted, stored and used without injury to or conflict with the prior rights of the plaintiffs.
3. Whether the plan proposed by the above numbered application is physically and economically feasible.”

At the trial de novo, the defendants assumed the burden of going forward with the evidence. The acting state engineer, Mr. Lambert, testified as to (1) the physical facts, (2) the decree adjudicating the Utah water rights, Exhibit D 9, (3) the duty of water, (4) requirements for feasibility of the proposed project, and (5) problems of distribution of water. (Tr. 11-31). On cross-examination he testified that he had last been in the area involved in the suit 10 or 12 years ago, had last walked along the Gregory ditch "14 or maybe 15 years ago," had made no measurements of the ditch, didn't know how long it is, did not know what proportion of the total length of the ditch runs along side hills, and did not know the capacities of the ditches. (Tr. 31-33). He testified that the Gregory ditch could be enlarged but had no idea as to the expense of enlarging it. (Tr. 40). He had had no report from his subordinates in the file and did not recall any oral report of a study of economic and physical feasibility of the project. (Tr. 43-44).

Mr. Ron A. Proffitt, a civil engineer, testified for the defendants. He said that the cost of constructing an earth-fill dam is about \$1.50 a cubic yard and that a dam 30 feet high and 300 feet long would require between 15,000 and 20,000 cubic yards of dirt. (Tr. 101-102). He had not been to the site and did not know anything about the availability of clay and other suitable material. (Tr. 102-107). He also testified that the cost of enlarging a ditch (which he had seen only in two places) would be \$1,000.00 to \$3,000.00 a mile.

(Tr. 103). On cross-examination Mr. Proffitt admitted his testimony was purely speculative. (Tr. 104-108).

Mr. Lambert and Mr. Proffitt were the only expert witnesses and indeed the only witnesses called on the question of physical and economic feasibility.

The plaintiffs' witness, Glen Wadsworth, testified that his ranch of some 2,800 acres of irrigated pasture and meadow has a high water table, that the only source of water is Beaver Creek, formed by the confluence of Middle and East Beaver Creeks, that the only source of stockwater in the winter is Beaver Creek; that if water is diverted to the proposed reservoir, it will be taken out of the watershed and no return flow will reach his ranch. (Tr. 124). He explained the effect of the approval of the defendants' water application upon his rights as follows:

“Q. Could you state to the Court whether the diversion and use of the water as proposed by the application would impair your rights to use the water of Beaver Creek?

A. Yes, this would make a great deal of difference in my operation.

Q. And explain to the Court why it would make a great deal of difference.

A. On these, if they took the water, especially the flood waters or high water, and diverted it away from Beaver Creek, there would be a lot of that ranchland you wouldn't get wet over, or soaked up, bring up the water table, and being a shallow soil it would just dry out and burn up.

We have to have a lot of water to fill up the ground and get it wet over the first time. That's essential to making a crop in that area.

Q. And would you experience that difficulty in the average year or just occasionally?

A. Well, it's quite a problem on an average year." (Tr. 123-124).

Claude Bullock testified that the approval and exercise of the application would dry up the stockwatering places in the winter. (Tr. 140-141). John B. Carlile testified that the diversion of water into the Gregory ditch in the winter time would cause freeze ups, blocking water in the canal, with resultant topping of the canal and would dry up stockwatering streams. (Tr. 144-148). Similar testimony was given by Joe Hickey. (Tr. 151-156). Keith Smith testified that the proposed diversion through the Gregory ditch would adversely affect his rights, winter and summer. (Tr. 160). Mr. Wadsworth testified that it is infrequent that there is enough water to irrigate his meadow after cutting hay. (Tr. 164).

## STATEMENT OF POINTS

1. The statute requires a showing by the applicant that all of the requirements of section 73-3-8 have been met as a condition to approving an application.
2. There is no competent evidence proving the feasibility of the project.

3. There is no evidence that the applicant has the financial ability to complete the proposed works and filed the application in good faith and not for purposes of speculation and monopoly.

4. The plaintiffs' water rights will be impaired if the application is approved.

## ARGUMENT

### POINT I

**THE STATUTE REQUIRES A SHOWING BY THE APPLICANT THAT ALL OF THE REQUIREMENTS OF SECTION 73-3-8 HAVE BEEN MET AS A CONDITION TO APPROVING AN APPLICATION.**

Prior to 1939, section 100-3-8, Revised Statutes of Utah, 1933, provided as follows:

“All applications which shall comply with the provisions of this chapter and with the regulations of the state engineer's office shall be filed and recorded in a suitable book kept for that purpose; and it shall be the duty of the state engineer, upon the payment of the approval fee, to approve all applications where the proposed use will not impair the value of existing rights, or will not interfere with the more beneficial use of the water . . .”

This court held that it was stated in the negative and that the application should be approved unless it clearly appeared that there was no unappropriated

water in the source. *Little Cottonwood Water Company vs. Kimball*, 76 Utah 243, 289 P. 116.

As a result of the loose and negative language of the statute and the ease of obtaining approval of applications there was a flood of speculative applications to appropriate water, the approval of which encumbered our rivers and streams, which had to be litigated out or purchased before some of our large and meritorious projects could be constructed. See State Engineer's Twenty-Second Biennial Report, pp. 9, 10.

“. . . Section 100-3-8 was entirely rewritten to prevent continued abuse of the law by speculators who in the past have made applications to appropriate water for the primary purpose of holding water rights until they are in demand for use in a large reclamation project or by a municipality, at which time the speculators exact payment, often extortionate, for the relinquishment of their rights. This practice, unwittingly no doubt, was given encouragement by the opinion of the Supreme Court in the case of *Little Cottonwood Water Company v. Kimball*, 76 Utah 243, 289 P. 116, in which it was held that the State Engineer was obliged under the provisions of Section 48, Chapter 67, Compiled Laws of Utah, 1919, to approve applications for the appropriation of water unless it clearly appeared by decree or otherwise that there was no unappropriated water in the source. As amended by the 1939 Legislature, Section 100-3-8 now gives the State Engineer express authority to consider not only the question of whether there is unappropriated water in the source but also whether the proposed use will impair existing rights or interfere with the

more beneficial use of water; whether the proposed plan is physically and economically feasible; whether it would be detrimental to the public welfare; whether the applicant has the financial ability to complete the proposed works; and whether the application was filed in good faith and not for purposes of speculation and monopoly. It is believed that this change in the law will greatly facilitate the construction of United States reclamation projects and will in many instances protect owners of vested rights from unnecessary harassing by speculators . . .”

In 1939 the legislature amended the section, (now 73-3-8) to read as follows:

“It shall be the duty of the state engineer, upon the payment of the approval fee, to approve an application if: 1. There is unappropriated water in the proposed source; 2. The proposed use will not impair existing rights, or interfere with the more beneficial use of the water; 3. The proposed plan is physically and economically feasible . . . and 4. the applicant has the financial ability to complete the proposed works and the application was filed in good faith and not for purposes of speculation or monopoly.”

The present statute imposes on the state engineer *the duty* to determine the physical and economic feasibility of a project and the other requirements before approving an application for the appropriation of water therefor.

In *Shields v. Dry Creek Irrigation Company*, 12 Utah 2d. 98, 363 P.2d 82, this Court held that the requirements of section 73-3-8 are mandatory and the

applicants have the burden of proving all of such requirements. We quote:

“. . . We are not persuaded by the argument that the specific issue of feasibility has not been raised by the defendant's pleadings. The question whether a proposed water diversion is feasible, stated in general language, can involve more than physics and economics: it can reasonably be understood as also encompassing the questions as to whether the other statutory requirements set forth above have been met. The plaintiff is seeking affirmative relief and therefore has the burden of showing that he is entitled to it. The statute expressly provides that unless he proves the requisites therein set forth, the application shall be rejected. It is not necessary that a denial be pleaded in order to put him to the proof required by law. It was both the prerogative and the duty of the trial court to hear all pertinent evidence to determine whether he had established such requirements . . .”

## POINT II

### THERE IS NO COMPETENT EVIDENCE PROVING THE FEASIBILITY OF THE PROJECT.

In this case the state engineer did not know anything about the feasibility of the project. He had not been to the area involved for 10 or 12 years. He walked the Gregory ditch 14 or 15 years ago, but made no measurements. (Tr. 31-32). We quote:

“Q. Well, now did you personally make any study to determine the physical or economical feasibility of this project, this particular one?”

A. The only studies, of course, we make were the studies . . .

Q. Well, I mean that you made.

A. I only would reflect the studies that were made by the appropriation engineer, by the area engineer, who makes more detailed study than I, and they report to me and I either accept their studies or I tell them to go back and do more or reject their studies or something of that nature. Most of the actual study work is not done by me personally. I wouldn't have time.

Q. In this particular case, did you receive a written report from any of your subordinates?

A. We receive the report from the subordinates from the hearing and any field examination that they have made, and in this particular case I don't remember right at the moment whether I examined the field examination report when I signed this approval or not. I don't remember.

Q. Would your file disclose that?

A. I think the file would, if there was a field examination report in the file.

Q. Is the file in the court room?

MR. JENSEN: Yes.

THE WITNESS: Mr. Jensen, did you bring it?

MR. JENSEN: Yes, I have got it. I was just checking if these are the hearing notes or . . .

**THE WITNESS:** If there was no field examination report on that, I'm sure I didn't examine it, because I know it would be in the file if it were present.

**MR. SKEEN:** Mr. Jensen, may the record show there is nothing on the file with regard to field examination?

**MR. JENSEN:** I quickly thumbed through it and didn't see it, but . . .

**MR. SKEEN:** I will hand it to Mr. Lambert (handing file to witness).

**THE WITNESS:** There is no written report. Any report that would have been made from the field examination would have been oral.

**MR. SKEEN:** Q. You recall any . . .

A. I don't recall.

Q. . . . specifically?

A. No."

(Tr. 44-45).

The civil engineer Proffitt had never been to the dam site and had seen the Gregory ditch in only two places and it is about nine miles long! He made computations on assumed facts:

"**MR. SKEEN:** Q. Your estimate on this ditch is very rough, isn't it?

A. It is rough on the quantity of dirt that would have to be moved.

Q. Do you think an engineer can make an estimate of cost of enlarging a ditch he's never seen?

A. He can guess on the cost of moving dirt per yard, yes, sir.

Q. Do you know whether simply removing the dirt would create a canal that would carry water without grading for it?

A. No, there would have to be a grade set for it.

Q. You'd have to — what process would you have to go through to make a real estimate rather than just a guess?

A. Well, you'd have to run a profile down the center of the canal and take cross-sections of it. There would probably be some — and see that you had a sufficient slope in your canal. There would probably be some sections that would have to be — in which more dirt would have to be moved and some probably in which no dirt would have to be moved.

Q. So your figures are purely speculative or a guess, aren't they?

A. Yes. I stated on the amount of dirt that's to be moved I think my figures are conservative.

Q. In other words, it might cost a lot more?

A. No. I don't — it might cost a lot less. I think my figures are high.

Q. Well, do you mean high figures are conservative?

A. They are from an engineer's standpoint. If he estimates high, he is being conservative.

Q. Well, how can you tell whether your figures are conservative or the contrary without even seeing a canal, let alone run a profile?

A. Because I have assumed the minimum probable velocity of flow in that canal, and therefore, I'm assuming you are moving maximum amount of dirt.

Q. What's the present grading of the canal?

A. I don't know.

Q. What is the length of the canal from the Middle Fork to the East Fork?

A. I just know from what has been said here today. Approximately mile and a half to two miles.

Q. What kind of material does the canal run through? I mean what kind of soil?

A. Some places it's gravel soil; not too bad. In others it's real tough. There's big boulders and sidehills and everything else.

Q. How do you know that when you haven't even seen it?

A. Because I have seen the whole area up there. I haven't walked along the canal. The ground doesn't change that much.

Q. You just observed the country up there?

A. That's right, sir.

Q. Do you know what the present capacity of the canal is between the Middle Fork and East Fork?

A. I do not.

Q. And your speculation is entirely on so much per second foot?

A. My — the question was asked me how

much to enlarge the canal by a 10-second feet capacity.

Q. And what's the present freeboard in the canal? In other words, how high is the water from the top of the existing canal?

A. I don't know.

Q. Now, with respect to this dam, that again is entirely speculative, is it not?

A. I — I informed the Court upon which my calculations were based. It is speculative, that's right.

Q. Would this kind of a dam you're talking about have a clay core in it?

A. Yes.

Q. And do you know where the material is available for that?

A. No.

Q. Do you know where the material is available for the regular fill?

A. On that you could just take it on in and take it from the inside of the reservoir anywhere. It would give you more storage.

Q. Have you ever been to the reservoir site?

A. No.

Q. You don't know what kind of material is in the bottom of it, do you?

A. You could use any kind for just regular fill.

Q. Would you say that this kind of a dam could be built without sorting the material?

A. I'd say you'd have to find a clay deposit

to construct the core, and all the other could be done without sorting the material.

Q. And your estimate is speculative without knowing where you'd get the clay deposit?

A. That's right.

Q. How many yards of clay would it take to put the core — use for the core?

A. I don't know. That would depend entirely on how deep your core trench would have to be plus your capacity inside the dam.

Q. Would you as a civil engineer build a dam like this without going down to bedrock?

A. Um-hum.

Q. How would you tie it into the surrounding terrain?

A. With your core trench plus *carafine* and recompacting the area on which you're going to build the dam.

Q. You've never seen the site so you don't know what kind of a tie-in you would make?

A. I would — that's the only kind I would make on a dam of this size.

Q. How much water would this dam that you're talking about impound?

A. It depends on the terrain behind it. The application says 1,700 acre feet.

Q. And as a civil engineer you wouldn't care in building the dam how much water was going to be impounded, is that right?

A. That doesn't matter. You're going to build the dam to hold the height of water. It

doesn't matter if you have got one foot of depth behind it or 10 miles.

Q. Or the depth of the water behind the dam?

A. Yes. I said the depth but I meant the width of the water behind it doesn't matter.

Q. Where did you study engineering?

A. The University of Wyoming.

Q. Would you as a civil engineer issue any kind of figures that people depended on without seeing a site?

A. No.

Q. And when did you — were you first asked to make these computations for this case?

A. On the dam, the quantity in the dam and the ditch?

Q. Why, yes.

A. Today.

Q. What time today?

A. I don't recall. It was before lunch.

Q. Well, this is a kind of horseback guess, isn't it?

A. Again, I'd be — I am being conservative in that I have gone half again as much per unit cost of material as it would normally cost in the area.

Q. But I say it's a horseback guess as to details and quantities, particularly on the canal?

A. Yes, that's right.

**THE COURT:** I guess I'm supposed to know what a horseback guess is.

**MR. SKEEN:** Well, I'm just assuming that he does. Sounds like a pretty good guess.

**Q.** I guess you haven't seen any report of any test holes dug in the site?

**A.** I have not, sir.

**Q.** And all you know about this is what you've heard in Court today and these figures you based your assumption on?

**A.** That's right." (Tr. 104-108)

He testified as to how an engineer would make estimates of cost. (Tr. 104). But he did none of these things. He admitted several times that his testimony was purely speculative. (Tr. 104-106).

This case raises squarely the question as to whether section 73-3-8 which imposes a solemn burden on the applicant and the state engineer should be lightly regarded or whether it means what it says and should be complied with by the state engineer. We submit that there has not even been a token showing of feasibility of the proposed project. This is especially serious to existing water users when the project, as here, would take water out of one drainage area and transport it to another. That the state engineer ignored the mandate of the statute is proved by his own testimony!

**“Q.** I call your attention to Section 73-3-8 of the Utah Code Annotated, 1953, and under the heading, ‘Approval or rejection: It shall be the duty of the state engineer to approve an applica-

tion if: (1) There is unappropriated water in the proposed source; (2) The proposed use will not impair existing rights, or interfere with the more beneficial use of the water; (3) The proposed plan is physically and economically feasible . . .

You're aware of that . . .

A. I am aware of that.

Q. . . . provision of the statute?

Now, I will ask you what you did in this particular case to determine whether this proposed plan was physically and economically feasible.

A. Of course, when you talk . . .

**THE COURT:** Is what he does material? Don't I have to do the same thing he was supposed to do? . . ." (Tr. 41-42)

**"MR. SKEEN: Q.** I will ask you now, Mr. Lambert, what examination you made, or what studies you made, in connection with point No. 3, the physical and economical feasibility of the project?

A. We make only . . .

Q. Well, now referring to this particular case, if you will, sir.

A. I will tie this to this specific case. We make general determinations of feasibility relative to water supply, whether this is a possibility of a reservoir site there. At this point we don't go into the mechanics of whether the dam is going to leak, or anything in detail, but if there is a reasonable probability that that dam can be built and that water can be impounded and there is water available to be impounded and it can be

diverted and placed onto lands, if it meets those general requirements, we say it is feasible, and as we examined this particular project in that light, in the general light, we determined that it could be a feasible project. We didn't say it would be a feasible project . . ." (Tr. 43-44).

### POINT III

**THERE IS NO EVIDENCE THAT THE APPLICANT HAS THE FINANCIAL ABILITY TO COMPLETE THE PROPOSED WORKS AND FILED THE APPLICATION IN GOOD FAITH AND NOT FOR THE PURPOSES OF SPECULATION AND MONOPOLY.**

It will be noted that as a condition to approval of an application, the applicant must prove that all of the requirements of Section 73-3-8 have been met. The case of *Shields v. Dry Creek Irr. Co.*, supra, is controlling on this point. Although the plaintiffs filed no pleadings relating to the requirements of item No. 4 quoted in the heading, this Court held in the *Shields* case that despite the lack of pleadings it is necessary for the applicant to prove that all of the statutory requirements have been met.

There is no evidence, in the record, as to the financial ability of the applicants to complete the works. Likewise, there is no proof as to good faith. When as here the evidence shows that Engineer Proffitt was hired to make certain engineering studies while the case

was being tried, and that he made the studies during the noon hour and testified shortly after noon, the good faith of the applicants might well be questioned. (Tr. 108). We submit that under the rule of the Shields case this case must be reversed on this point alone.

#### POINT IV

### THE PLAINTIFFS' WATER RIGHTS WILL BE IMPAIRED IF THE APPLICATION IS APPROVED.

It will be noted that item No. 2 of section 73-3-8 requires the applicant to show “. . . that the proposed use will not impair existing rights . . .” Under the rule in the Shields case, the burden of proof is on the defendants. The only effort to make proof of this point was to introduce water flow records, Exhibits D5 and D6, and records of existing water rights in Utah and Wyoming. This proof would indicate that in some years for part of the irrigation season there would be excess water. It does not, however, meet the complaint of impairment voiced by witnesses Wadsworth, Bullock, Carlile, Hickey and Smith, that the taking of water out of the watershed, would lower the water table and dry up their pasture and meadows upon which the economy of the area depends and in the winter time would result in freezing of stockwater. (Tr. 118, 124, 140, 141, 144-148, 151-156, 160).

This testimony as to the impairment is uncontradicted in the record.

## CONCLUSION

The testimony of Engineer Proffitt on the cost of the proposed works, who had not even been to the proposed dam site, had not measured or even seen the nine-mile Gregory ditch (except in two places) and who admitted several times that his testimony was purely speculative has no probative value, and will not support the findings of the trial court. The state engineer made no study of the physical and economic feasibility of the project and the state engineer's file discloses no report of any subordinate. The requirements of section 73-3-8 were ignored by the state engineer and also by the trial court. This case must be reversed.

Respectfully Submitted,

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