1996

Ruby W. Hicken, Thomas F. Hicken, John T. Hicken v. North Ditch Irrigation Company, Clayton Gardner, Robert Gappmayer : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

RUBY W. HICKEN, THOMAS F. HICKEN and JOHN T. HICKEN, Plaintiffs/Appellants, vs. NORTH DITCH IRRIGATION COMPANY, CLAYTON GARDNER and ROBERT GAPPMAYER, Defendants/Appellees.	Case No. 960360-CA Priority No. 15

BRIEF OF APPELLEES
NORTH DITCH IRRIGATION COMPANY

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT
FOR WASATCH COUNTY, UTAH, THE HONORABLE
GUY R. BURNINGHAM, DISTRICT JUDGE, PRESIDING

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NORTH DITCH IRRIGATION COMPANY

Defendants-appellees, North Ditch Irrigation Company, Clayton Gardner and Robert Gappmayer (collectively "North Ditch") respectfully submit this Brief of Appellees.

JURISDICTION

This Court has appellate jurisdiction of this appeal by plaintiffs-appellants Ruby W. Hicken, Thomas F. Hicken and John T. Hicken (collectively the "Hickens") pursuant to Utah Code Ann. § 78-2a-3(2)(j) (Supp. 1996).

STATEMENT OF THE ISSUE

One issue is presented for review on this appeal:

Did the district court properly dismiss the Hickens' complaint because the Hickens' claim for a continuous diversion of water from a stream is precluded by the doctrine

of res judicata under a 1960 judgment and decree that allowed the Hickens' predecessor only to divert intermittently water from the stream?

The District Court's dismissal is subject to a correction of error standard. See Commercial Union Assocs. v. Clayton, 863 P.2d 29, 36 (Utah Ct. App. 1993); Hansen v. Department of Fin. Insts., 858 P.2d 184, 186 (Utah Ct. App. 1993) (applying correction of error standard to dismissal pursuant to Rule 12(b)(6) of the Utah Rules of Civil Procedure).

DETERMINATIVE STATUTES

The issue here can be decided without resorting to any statute or regulation. To the extent such authority may be determinative, the text of Utah Code Ann. §§ 73-4-1 to -24 (1989 & Supp. 1996) is set forth in the addendum to the Hickens' opening brief.

STATEMENT OF THE CASE

A. Nature of the Case.

This appeal involves the Hickens' claim to a continuous diversion of water from a stream. The district court rules that the Hickens' claim is barred because it was already the subject of a judgment and decree ("1960 Judgment") entered by Judge Joseph E. Nelson 36 years ago. By diverting water from the stream at any time and in any desired quantity, the Hickens' predecessor disrupted North Ditch's distribution of water from the stream to its shareholders. The 1960 Judgment restricted the Hickens' predecessor to divert intermittently one-half of the flow of water from the stream for a period of two hours every ten days. The Hickens now claim that they are not subject to the 1960 Judgment and may divert continuously from the stream every day to water livestock.

B. Course of Proceedings.

On June 24, 1960, North Ditch Irrigation Company filed a complaint against Marvie Wall, the Hickens' predecessor in interest. (R. 20, 63.) An order to show cause and restraining order were entered against Wall. (R. 59.) On July 8, 1960, the court conducted a hearing on the orders. (R. 57.) On July 14, 1960, Judge Joseph E. Nelson entered findings of fact and conclusions of law and the 1960 Judgment. (R. 55.) No appeal was taken.

On August 31, 1994, the Hickens filed a verified complaint against North Ditch in the Fourth Judicial District Court for Wasatch County. (R. 21.) The Hickens simultaneously filed motions for preliminary injunction (R. 36) and temporary restraining order with notice (R. 25). No hearing was conducted on these motions. In April 1995, North Ditch moved to dismiss the Hickens' complaint (R. 44) and for expedited disposition (R. 46).

The court granted North Ditch expedited disposition (R. 78.), and on June 9, 1995, the court conducted a hearing on the motion to dismiss. (R. 121.) On June 13, 1995, the court granted North Ditch's motion to dismiss. (R. 124.) After considering the Hickens' objections to the proposed orders (R. 128, 145, 157) and North Ditch's responses, (R. 153, 162) the court entered a final order on March 14, 1996 (R. 164, 166), from which the Hickens now appeal. (R. 170.)

C. Disposition of the District Court.

On June 13, 1995, the court ruled that the Hickens' claim to divert continuously for watering livestock was barred under the doctrine of res judicata and granted North Ditch's motion to dismiss. (R. 124.) The court entered an order dismissing with prejudice the causes of action set forth in the Hickens' verified complaint. (R. 166.)

STATEMENT OF FACTS

A. 1960 Judgment.

This case involves a dispute over the diversion of water from a stream called "Spring Creek" located in Wallsburg, Wasatch County, Utah. Over three decades ago, the Hickens' predecessor, Marvie Wall (R. 20), claimed he could divert from Spring Creek any quantity of water, any time he wanted, sufficient for his needs. (R. 56, 59.) Wall's diversions significantly disrupted North Ditch's distribution of Spring Creek water to its stockholders. (R. 56.)

Wall's diversions from Spring Creek forced North Ditch to file a lawsuit in 1960 (R. 63), and the Fourth Judicial District Court for Wasatch County issued an order to show cause and restraining order against Wall (R. 59). The court determined that unless a restraining order was issued immediately, without notice, Wall would use Spring Creek water "any time he wants for as long as he wants,'" and as such, the shareholders of North Ditch "will suffer immediate and irreparable damage to their crops." (R. 59.)

On July 8, 1960, Judge Nelson conducted a hearing on the order to show cause. (R. 57.) Both North Ditch and Wall were represented by counsel. (R. 57.) Judge Nelson heard testimony and a stipulation entered into orally before the Court by the parties. (R. 57.) The parties submitted the matter to Judge Nelson for decision. (R. 57.)

On July 14, 1960, Judge Nelson made the following findings of fact:

> 1. [North Ditch] has appropriated two-thirds of the flow of Spring Creek, said Spring Creek being located in Wallsburg, Wasatch County, State of Utah.
>
> 2. [Wall] and his predecessors in interest have used since before 1900 water out of said Spring Creek in the amounts they thought necessary and at

the times they desired to irrigate lawn, garden and pasture on the premises presently occupied by the defendant.

3. The defendant can beneficially use on said premises one-half of the flow of said Spring Creek for a period of two hours every 10 days.

4. At the taking of water by defendant from said Spring Creek in the amounts he desires and at the time he desires creates a very difficult situation for [North Ditch] in attempting to regulate the water turns of its stockholders.

(R. 57.)

In addition to these findings of fact, Judge Nelson made the following conclusions of law:

1. The defendant, Marvie Wall, is entitled to one-half of the flow of said Spring Creek for a period of two hours every 10 days.

2. The defendant, Marvie Wall, should take his water in turns compatible with water turns of the stockholders of [North Ditch], defendant's first turn to commence in the afternoon of July 8, 1960.

3. That with the entering of a decree based on these conclusions of law, the plaintiff's complaint should be dismissed.

(R. 56.)

On July 14, 1960, Judge Nelson entered the 1960 Judgment based upon these findings of fact and conclusions of law. (R. 55.) No appeal followed.

B. Diligence Claim.

Two days before Judge Nelson's July 8, 1960 hearing, Wall filed with the Utah state engineer's office a Statement of Water User's Claim to Diligence Rights ("Diligence Claim").[1] (R. 15.) Wall's Diligence Claim purported to describe his right to divert from

[1] A diligence claim is a water right established by diverting water from its natural channel and putting it to beneficial use since before 1903. See, e.g., Eskelsen v. Town of Perry, 819 P.2d 770, 771 n.1, 773, 773 n.8 (Utah 1991).

Spring Creek (i) 1.28 cubic feet per second during the period from April 1 to October 31 each year for irrigation purposes and (ii) .50 cubic feet per second for stock watering year-round. (R. 15.)

C. Water User's Claim.

On September 1, 1944, the Third District Court ordered the state engineer to determine and adjudicate all rights to the use of water of Utah Lake and the Jordan River in Utah County. (R. 2.) On June 21, 1972, the court ordered the state engineer to expand the general adjudication to include tributaries located in Wasatch County. (R. 2.)

On February 25, 1982, plaintiff Ruby Wall Hicken filed with the state engineer a Statement of Water User's Claim No. 55-1403 ("Water User's Claim").[2] (R. 4-5.) In the Water User's Claim, Ms. Hicken specifically referenced the 1960 Judgment (i.e., "Civil No. 2348") and acknowledged that she was claiming a court "decreed right."[3] (R. 5.) Ms. Hicken claimed only a "2/240 interest" in 3.0 cubic feet per second from Spring Creek for both irrigation and year-round stock watering. (R. 5.)

The state engineer completed a Proposed Determination[4] of numerous water user's claims asserting rights to use water from sources located in that portion of Wasatch County which drained into Main Creek, a tributary within the Utah Lake and Jordan River drainage. (R. 2.) The Proposed Determination covered water claims to use water from

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[2] To preserve water rights being adjudicated in a general adjudication, water users must file timely statements of water user's claims. See Utah Code Ann. § 73-4-5.

[3] A decreed right is a water right established by a judgment entered by a court.

[4] See Proposed Determination of Water Rights in Utah Lake & Jordan River Drainage Area, Provo River Division, Round Valley Subdivision, Code No. 55, Book No. 1 (hereinafter "Proposed Determination") (R. 1-3.)

Spring Creek, including Ms. Hicken's Water User's Claim and the water user's claims of North Ditch. (R. 1.) On May 1, 1984, the state engineer filed the Proposed Determination with the Third Judicial District Court for Salt Lake County. The state engineer provided notice that all water claimants dissatisfied with the Proposed Determination must file written objections thereto within 90 days from the date of service of the Proposed Determination. (R. 2.) The Hickens did not file an objection.

D. Hickens' 1994 Lawsuit.

On August 31, 1994, the Hickens filed a verified complaint against North Ditch in the Fourth Judicial District Court for Wasatch County claiming a right to divert continuously .50 cubic feet per second of water from the flow of Spring Creek for watering livestock. (R. 29, 19-20 ¶¶ 8 and 10; 26-27.) The Hickens are the successors in interest to Marvie Wall, defendant in the 1960 Judgment. (R. 20.)[5]

On June 13, 1995, the district court granted North Ditch's motion to dismiss and ruled that the Hickens' claim was barred under the doctrine of res judicata as applied in Logan, Hyde Park & Smithfield Canal Co. v. Logan City, 72 Utah 221, 269 P. 776 (1928). (R. 125.) The court reasoned as follows:

> 'It is of no consequence whatever that the claims of [the plaintiff] for [livestock] purposes were not referred to in the pleadings or the judgment.' Logan [P.] at 778. The fact that the plaintiff's predecessor in interest already contemplated their alleged rights to the use of water in Spring Creek in 1960 and received a Judgment on the merits is sufficient for this Court to sustain that Judgment. It is evident from the language of Judge Nelson's Judgment and Decree that the Plaintiffs' predecessor in interest was 'awarded one-half of the

[5] Ruby Wall Hicken alleged that she is the successor in interest to Marvie Wall. (R. 20.) She alleged that she leased her water rights to her two sons, Thomas F. Hicken and John T. Hicken. (R. 20.)

> flow of Spring Creek for a period of two hours every ten days.' Such use could be for any purpose, including watering stock (or storing it for that purpose). Daily use was not allowed under Judge Nelson's Decree, said use thereby being precluded.

(R. 123-24.)

SUMMARY OF ARGUMENT

The district court properly dismissed the Hickens' verified complaint. The Hickens' claim to divert continuously from Spring Creek is barred under the doctrine of res judicata. Hickens' claim involves the same issue previously litigated and resolved by the 1960 Judgment. The Hickens' predecessor, Marvie Wall, could have and should have claimed a right to divert continuously from Spring Creek for watering livestock. The 1960 Judgment is a final decision on the merits that is subject to res judicata; it is not a "general adjudication" of water rights.

The 1960 Judgment unambiguously prohibits the Hickens from diverting continuously from Spring Creek for watering livestock. The term "turns" used in the 1960 Judgment does not render the decision ambiguous and bars the Hickens' claim to a continuous diversion for watering livestock. The district court properly rejected the Hickens' assertions that they have diverted continuously from Spring Creek for watering livestock since before 1960 to the present. By their own admission, the Hickens have not diverted continuously from Spring Creek for stock watering since the 1960 Judgment. Moreover, the court correctly determined that the Hickens' livestock will not be threatened if the Hickens are precluded from diverting continuously for stock watering.

Enforcing the 1960 Judgment to bar the Hickens' claimed right to divert continuously will preserve vital public interests permitting justified reliance on prior

judgments, preventing inconsistent decisions, relieving the parties of the cost and vexation of seemingly endless, multiple lawsuits over the same stream and the same claims, and preserving judicial resources.

Finally, the Hickens' claim is barred for their failure to protest the Proposed Determination which awarded the Hickens a right to divert only intermittently from Spring Creek for a period of two hours every 240 hours (ten days). This determination reflected the Hickens' Water User's Claim which specifically referenced the 1960 Judgment and acknowledged the intermittent diversion for both irrigation and stock watering. The Hickens' failure to object bars their claim.

ARGUMENT

I. THE 1960 JUDGMENT IS RES JUDICATA AS TO THE HICKENS' CLAIM FOR A CONTINUOUS DIVERSION AND BARS THEIR CLAIM

Res judicata bars relitigation by the same parties or their privies of an issue that was litigated before and resolved in a final judgment on the merits. See Madsen v. Borthick, 769 P.2d 245, 247 (Utah 1988); Penrod v. Nu Creation Creme, Inc., 669 P.2d 873, 875 (Utah 1983); Office of Recovery Services v. V.G.P., 845 P.2d 944, 946 (Utah Ct. App. 1992); Copper State Thrift & Loan v. Bruno, 735 P.2d 387, 389 (Utah Ct. App. 1987). Moreover, claim preclusion under the doctrine of res judicata "also prevents the litigation of claims that could and should have been litigated in the prior action, but were not." Recovery Services, 845 P.2d at 946 and cases cited therein (emphasis added).

Without question the 1960 Judgment and the Hickens' 1994 lawsuit against North Ditch involve the same parties or their privies. Plaintiffs admit they are successors in interest to Marvie Wall, the defendant in the 1960 lawsuit brought by North Ditch. (R. 20.)

A. The Hickens' Claim is the Same Issue Resolved by the 1960 Judgment

The 1960 litigation and the present lawsuit involve the same issues (i.e., when and what quantity of water may the Hickens and their predecessor divert from Spring Creek?). As a result, this case is governed by Logan, Hyde Park & Smithfield Canal Co. v. Logan City, 72 Utah 221, 268 P. 776 (1928),[6] where a prior water rights decree precluded Logan City from raising a claim to a particular water use different from that decreed. In 1922, the Logan district court entered a judgment and decree establishing the rights of various parties to use water from Logan River. Logan City claimed a right to divert water for culinary, domestic and municipal purposes but failed to assert any right to use such water for generating power. In a subsequent lawsuit, Logan City asserted a right to use Logan River water to generate power, a right not alleged in the 1922 pleadings and not mentioned in the 1922 decree.

The Utah Supreme Court determined from the record that the issue decided by the 1922 decree was the quantity of water that could be used by each claimant and the particular use to which such water could be placed. See id. at 227, 268 P. at 778. The legal effect of the 1922 decree was to "forever bar any of the other parties to the decree from asserting any adverse claim" to the water quantity or water use established by the decree. Id., 268 P. at 778. Therefore, the Court reasoned that Logan City was precluded from asserting a

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[6] The Hickens imply that Logan should be ignored because its legal strength has somehow weakened with age; however, they cite to no "younger" authority overruling or even questioning Logan's solid, time-proven holding and rationale. The maturity of that decision, along with numerous other Utah water rights decisions, demonstrates the strength of the precedent.

right to use water that was not specified in the decree; otherwise, the decree would be a "futile proceeding." Id. at 228, 268 P. at 778. Moreover, the Logan court stated that

> it is of no consequence whatever that the claims of Logan City for power purposes were not referred to in the pleadings or the judgment. The action itself was a challenge to Logan City to assert any claim it had, of any nature or kind, which was adverse to or inconsistent with the rights claimed in the pleadings.

Id. at 227-28, 268 P. at 778 (emphasis added).

Like the claim in Logan, the Hickens' claim to divert continuously from Spring Creek was resolved by the 1960 Judgment. Wall was diverting water any time and in any amount he wanted. These diversions disrupted North Ditch's water distribution to its stockholders. As in the first determination in Logan, here Judge Nelson in 1960 determined from Wall's evidence of water use (i) the maximum quantity of water Wall could divert; and (ii) how often Wall needed to divert from Spring Creek.
(R. 56-57.) Both conclusions hinged on how Wall had used Spring Creek water. Judge Nelson ruled that the Hickens' predecessor could divert only one-half of the flow of Spring Creek for a period of two hours every ten days. (R. 56-57.) This resolution restored order by establishing the maximum quantity of water that each party could divert and schedule of diversions from Spring Creek. (R. 56-57.)

The legal effect of the 1960 Decree forever bars the Hickens' claim to a diversion other than for one-half the flow of Spring Creek for a period of two hours every ten days. Any other result would render the 1960 Judgment futile and a nullity. As in Logan, the res judicata bar applies even though neither the pleadings nor the 1960 Judgment expressly referenced a claim to divert continuously for "watering livestock." Under Logan,

which applies as much now as in 1960, Wall was required in the 1960 litigation to assert any right to divert continuously from Spring Creek for watering livestock or any other use. See Logan, 72 Utah at 227-28, 268 P. at 778. The Hickens' claim is barred because they are raising an issue that the 1960 Judgment resolved.

B. The Hickens' Predecessor Could Have and Should Have Claimed a Right to Divert Continuously for Watering Livestock.

To the extent the Hickens assert that their claim was not already litigated, their claim is barred by claim preclusion. Wall could and should have claimed a right to divert continuously for watering stock. The Hickens argue that the 1960 Judgment determined only Wall's right to divert water from Spring Creek for irrigating his property. (Hickens' Brief at 10.) They suggest that the 1960 Judgment did not determine a claim to divert continuously from Spring Creek for watering livestock. However, not only would this theory prevent final resolution of anyone's rights (water users in years to come could raise new uses not expressly mentioned before), but the Hickens' claim to divert continuously is barred because their predecessor could and should have raised it in 1960.

The Utah Supreme Court explained in Bradshaw v. Kershaw, 627 P.2d 528 (Utah 1981), that claim preclusion

> is equally applicable to a defense which might have been but was not asserted in connection with an earlier proceeding (which terminated in a final judgment) in what is essentially a single and continuing controversy over the appropriate relief to give for a single wrong or a closely related group of wrongs.

Id. at 531.

The Supreme Court has applied this principle to bar an irrigation company's effort to change a prior water rights decree in Warren Irrigation Co. v. Brown, 28 Utah 2d

103, 498 P.2d 667 (1972). There, the irrigation company sought to decrease the quantity of water awarded to the defendants' predecessors in a 1914 decree. The defendants' rights were defined in a stipulation between the irrigation company and the defendants' predecessors. The stipulation was incorporated into the 1914 decree. In 1972, the irrigation company filed a lawsuit claiming defendants were entitled to less water than what was decreed in 1914 because of the legal effect of a 1903 deed. The irrigation company challenged the 1914 decree and a subsequent 1938 decree affirming the 1914 decree. The trial court applied principles of claim preclusion and

> found that the rights and obligations of the parties had been determined by the [1914 and 1938] decrees, and the matter was now res judicata. The court observed that after living with these decrees for nearly 50 years, plaintiff was not in a position to raise issues, which were or could have been previously settled.

Id. at 106, 498 P.2d at 669 (emphasis added). The Utah Supreme Court agreed and affirmed. See id. at 107, 498 P.2d at 670.

The Hickens' claim to divert continuously from Spring Creek is no different. After living with the 1960 Judgment for 35 years, the Hickens cannot raise their claim now; it could have or should have been litigated in 1960. Wall claimed that he could divert from Spring Creek any quantity of water, any time he wanted, and thereby disrupted North Ditch's distribution of water for its shareholders. Obviously Wall's boundless claim would have included continuous diversions for watering livestock, if he had such a right. To preserve his rights, Wall was forced to present evidence of his diversions and use of Spring Creek water. (R. 56-57.) From the evidence and stipulation of the parties, Wall was found to have a right to divert one-half of the flow of Spring Creek for two hours every ten days.

The Hickens base their claim for a continuous diversion on the Diligence Claim filed with the state engineer's office two days prior to the 1960 hearing. The Hickens' reliance on this Diligence Claim is analogous to the 1903 deed raised in Warren Irrigation. Like the irrigation company's untimely 1903-deed argument, the Hickens' predecessor knew of the Diligence Claim before the 1960 hearing and thus, could have and should have raised it there. The Diligence Claim, also like the 1903-deed, conclusively demonstrates that if Wall had such a right,[7] he could have raised the claim to divert continuously from Spring Creek. Undoubtedly, if he had such right, Wall should have claimed it for stock watering. Because Wall raised no such "right," the Hickens are precluded from claiming one at this late date.

C. The 1960 Judgment is a Final Decision On the Merits.

The 1960 Judgment is res judicata as to the Hickens' claim because it is a final decision on the merits. The Hickens' attempt to evade res judicata by incorrectly casting the 1960 Judgment as just a "general adjudication" of water rights by the state engineer which would not bar a subsequent action. (Hickens' Brief at 11-16.) A general adjudication of water rights is a special proceeding conducted primarily by the state engineer pursuant to Utah statutes. See Utah Code Ann. §§ 73-4-1 to -24 (1989 & Supp. 1996) (addendum to Hickens' Brief); see also Provo River Water User's Ass'n v. Morgan, 857 P.2d 927, 929 & n.1 (Utah 1993).[8] The Hickens cite authorities interpreting general adjudication decrees that do not

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[7] The affidavits attached as support for the Hickens' Diligence Claim never mention water being used for stock watering. (R. 4-11.)

[8] A general adjudication is commenced under the following conditions. The state engineer initiates a general adjudication after (i) a qualified number of water users file a petition; and (ii) an investigation demonstrates a water rights determination is justified. See Utah Code Ann. § 73-4-1. A water user may initiate a general adjudication if (i) the

apply here. See, e.g., Provo River, 857 P.2d at 928-35 (interpreting general adjudication decree); Orderville Irrigation Co. v. Glendale Irrigation Co., 17 Utah 2d 282, 409 P.2d 616 (1965) (same).

In Orderville, the Supreme Court observed that for purposes of res judicata "it is important to keep in mind that we are not here concerned with the usual type of judgment." 17 Utah 2d at 285, 409 P.2d at 619. The Court held that rule of res judicata does not prevent actions over disputed general adjudication decrees. See id., 409 P.2d at 619. However, this rule does not apply to judgments that are not general adjudications of water rights. See Logan, Hyde Park & Smithfield Canal Co. v. Logan City, 72 Utah 221, 268 P. 776 (1928) (applying res judicata to water rights decree that was not a general adjudication); Warren Irrigation Co. v. Brown, 28 Utah 2d 103, 498 P.2d 667 (1972) (same).

The 1960 Judgment is a usual type of judgment that is subject to the principles of res judicata. See, e.g., Little v. Greene & Weed Inv., 839 P.2d 791, 794 (Utah 1992) (recognizing that "[p]rivate suits . . . may be brought to adjudicate water rights") and cases cited therein. The 1960 Judgment is not a general adjudication, and therefore, the principles applied in the Orderville and Provo River decisions do not apply here. North Ditch did not file its 1960 lawsuit, and the same was not conducted, as a general adjudication under Utah Code Ann. §§ 73-4-1 to -24. Rather, a single irrigation company, North Ditch, sued an individual water user, Mr. Wall. Further, the 1960 lawsuit did not involve a major part of

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determination involves the "major part of the water" of a "river system, lake, underground basin, or other natural source of supply" or (ii) the rights of ten or more claimants to water from such source. Id. § 73-4-3. In any lawsuit involving a water rights dispute, district courts have discretion to order the state engineer to investigate and survey all rights to the water source involved. See id. § 73-4-1.

any water source but a small stream, Spring Creek, in Wallsburg, Utah. See Utah Code Ann. § 73-4-3. The then pending general adjudication covered Utah County not Spring Creek or any other water source in Wasatch County. (R. 2.) The pending general adjudication was not expanded to include Spring Creek until 1972, twelve (12) years after the 1960 Judgment. (R. 2.) The 1960 Judgment was completely unrelated to and separate from the pending general adjudication.[9]

D. The 1960 Judgment Unambiguously Prohibits the Hickens From Diverting Continuously.

Regardless of the use to which the Hickens put Spring Creek water, the 1960 Judgment unambiguously restricts their diversions to one-half the flow for a period of two hours every ten days. The Hickens suggest that the 1960 Judgment covered only their "irrigation rights" and not their right to divert continuously from Spring Creek for stock watering. In so characterizing the 1960 Judgment, the Hickens ignore and unfortunately distort Judge Nelson's 1960 findings of fact and conclusions of law.

Judge Nelson found that North Ditch had appropriated two-thirds of the flow of Spring Creek. (R. 57.) Judge Nelson found that Wall and his predecessors "since before 1900" used Spring Creek water "in the amounts they thought necessary and at the times they desired to irrigate lawn, garden and pasture." (R. 57 (emphasis added).) North Ditch was challenging Wall's right to divert unlimited quantities of water whenever he wanted from Spring Creek, not just the quantities he used for irrigation. (R. 56-57, 59.) These findings

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[9] The Hickens incorrectly state that the 1960 Judgment was entered during the pendency of a general adjudication. (Hickens' Brief, at 17-18) In 1960, no pending general adjudication included Spring Creek; as such, Mitchell v. Spanish Fork West Field Irr. Co., 1 Utah 2d 313, 265 P.2d 1016 (1954) does not apply here.

demonstrate that Judge Nelson determined from evidence of Wall's water use the quantity of water that Wall could divert from Spring Creek for all of his uses.

Further, Judge Nelson found that Wall could "beneficially use" on his property "one-half of the flow of Spring Creek for a period of two hours every 10 days." (R. 57.) This finding is critical because beneficial use is the "basis, the measure and the limit of all rights to the use of water in this state." Utah Code Ann. § 73-1-3. Judge Nelson found that Wall had no right to divert any quantity he wanted but was limited to the quantity of water that he and predecessors had put to beneficial use on his property. (R. 56-57) Based on Wall's evidence of his beneficial use, Judge Nelson found that the measure and limit which Wall could divert was solely one-half the flow of Spring Creek for a period of two hours every ten days. (R. 56-57.) This measure and limit applies to any use whether for stock watering or irrigation.

Judge Nelson also found that Wall's diversions of Spring Creek water "in the amounts he desires and at the time he desires creates a very difficult situation for [North Ditch] in attempting to regulate the water turns of its stockholders." (R. 57.) This finding also demonstrates that the 1960 litigation did not exclude Wall's right, if any, to divert continuously for stock watering. When Wall could divert was a critical issue in the 1960 litigation because Wall was disrupting North Ditch's distribution of Spring Creek water to its shareholders. To restore and maintain harmony, Judge Nelson ordered Wall to "take his water in turns compatible with the water turns of the stockholders of North Ditch." (R. 56.) Judge Nelson also determined that Wall's "first turn" would "commence in the afternoon of July 8, 1960." (R. 56.) Obviously, if Wall had a right to divert continuously for stock watering,

Judge Nelson would have had to provide for the same in the 1960 Judgment. Because Wall was not granted a right to divert continuously for stock watering, the Hickens' claim is barred.

1. The Term "Turns" Bars Continuous Diversions for Stock Watering

The 1960 Judgment should be interpreted "in accordance with the ordinary and usual meaning of the words used." Plain City Irr. Co. v. Hooper Irr. Co., 11 Utah 2d 188, 191, 356 P.2d 625, 627 (1960).[10] By using the term "turns," Judge Nelson did not limit the 1960 Judgment to irrigation use. "Turns" inherently precludes a continuous diversion from Spring Creek for any use. The ordinary or usual meaning of "turn" is an "opportunity" afforded in "simple succession or in a scheduled order." Webster's Ninth New Collegiate Dictionary 1273 (1987). Judge Nelson ordered Wall to divert only during his turns to restore harmony between the parties by imposing a scheduled order of diversions from Spring Creek. The 1960 Judgment ensured that harmony would be maintained by ordering Wall to divert only for two hours every ten days, Wall's turn. Continuous diversions would be contrary to this or any diversion schedule. The plain and usual meaning of "turns" requires the Hickens and North Ditch shareholders to divert water "in a scheduled order" just as people must take turns being examined by the same physician.

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[10] The "plain language rule" simply requires that documents be construed and applied according to their plain language. See CIG Exploration, Inc. v. Utah State Tax Comm'n, 897 P.2d 1214, 1216 (Utah 1995), cert. denied, 116 S. Ct. 699 (1996); Archer v. Board of State Lands & Forestry, 907 P.2d 1142, 1145 (Utah 1995); however, the document must be read in its entirety, Hal Taylor Assocs. v. Unionamerica, Inc., 657 P.2d 743, 749 (Utah 1982), so as to harmonize all of its provisions, and all of its provisions must be given effect. See Larrabee v. Royal Dairy Products Co., 614 P.2d 160 (Utah 1980); Jones v. Hinkle, 611 P.2d 733 (Utah 1980).

The Hickens claim "the term 'turns' is generally used only when referring to irrigation water distribution." (Hickens' Brief at 11.) Not only is this not the plain and usual meaning, the decisions the Hickens cite do not support this generalization. One of those decisions confirms that water rights decrees have required users to divert water intermittently on "turns" for both irrigation and stock watering use. The decision cited by the Hickens, Lasson v. Seely, 120 Utah 679, 238 P.2d 418 (1951), and a related case, McKean v. Lasson, 5 Utah 2d 168, 298 P.2d 827 (1956), both address a general adjudication called the Smith Decree. The Smith Decree established rights to divert water intermittently on turns from a stream. See McKean, 5 Utah 2d at 170, 298 P.2d at 828; Seely, 120 Utah at 682, 238 P.2d at 420. However, the parties had to use or store the diverted water during each of their intermittent turns for both irrigation and stock watering. McKean, 5 Utah 2d at 172, 298 P.2d at 830.[11] The Smith Decree did not grant any user a right to divert continuously from the stream for stock watering, contrary to what the Hickens imply.[12]

2. The District Court Correctly Disregarded the Hickens' Assertions of Continuous Diversions Since 1960

The district court did not err in disregarding the Hickens' assertion that they have diverted continuously from Spring Creek for watering stock since before 1960. Once the

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[11] The water users constructed watertight dams to store water for irrigation and stock watering during the drier season. McKean, 5 Utah 2d at 172, 298 P.2d at 830; see also Seely, 120 Utah at 688, 238 P.2d at 422 (recognizing that water users can store diverted water in reservoir for further use).

[12] The decision in Bigler v. Mapleton Irrigation Canal Co., 669 P.2d 434 (Utah 1983) does not state whether the shareholders of the irrigation company had rights for stock watering. However, if they did, they did not have rights to continuously divert because they were limited to divert intermittently on a turn every ten days to three weeks.

1960 Judgment was entered, the Hickens and their predecessors were prohibited from diverting continuously from Spring Creek. Any continuous diversion after July 8, 1960 would have been and remains a violation of the 1960 Judgment. (R. 56.) Assuming the Hickens and their predecessor have diverted continuously since July 8, 1960, they would have been doing so unlawfully and causing exactly what led to the 1960 litigation, i.e., the disruption of North Ditch's distribution of water to its shareholders.

However, by their own admission, the Hickens have not diverted continuously from Spring Creek for stock watering since the 1960 Judgment. Under their Water User's Claim, they claim only a "2/240" interest in the flow of Spring Creek for both irrigation and stock watering. Moreover, they specifically acknowledge that they have a decreed right based on the 1960 Judgment. (R. 5.) The 2/240 interest is simply another way of saying two hours every 240 hours (or ten days) when read in conjunction with the 1960 Judgment. The Hickens, therefore, admit that they did not have a right to divert continuously for stock watering.[13]

Finally, the 1960 Judgment unequivocally prohibits continuous diversions from Spring Creek to ensure an orderly distribution of water for the benefit of all users.[14] The

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[13] If the Hickens have diverted Spring Creek continuously contrary to their Water User's Claim and the 1960 Judgment, they would have unclean hands by having made a sworn false statement in their Water User's Claim.

[14] The Record demonstrates that North Ditch did not acquiesce or otherwise agree to allow the Hickens to divert continuously from Spring Creek in contravention of the 1960 Judgment. The exact opposite is alleged. North Ditch ignored the Hickens' claim to divert continuously. (R. 31.) North Ditch has "repeatedly removed" the Hickens' "diversion structure." (R. 30.) North Ditch denied the Hickens' claim to continuously divert. (R. 30.) North Ditch would not respect the Hickens' right to continuously divert from Spring Creek. (R. 26.) Finally, North Ditch "interfered with" the Hickens' continuous diversions from

Hickens' assertions conclusively demonstrate why their claim should be precluded under the doctrine of res judicata.

3. The Hickens' Livestock are not Threatened if the Hickens are Precluded From Diverting Continuously

The Hickens imply that their cattle will die without a continuous diversion from Spring Creek for stock watering. (Hickens' Brief at 11.) This alarming suggestion is exaggerated and misleading. The District Court correctly observed that the Hickens' use of the intermittently diverted water "could be for any purpose, including watering stock (or storing it for that purpose). Daily use was not allowed under Judge Nelson's Decree, said use thereby being precluded." (R. 123; see also Lasson v. Seely, 120 Utah 679, 688, 238 P.2d 418, 422 (1951) (recognizing that water users can store water in reservoir for further use).) Moreover, the Hickens admit they have a source other than Spring Creek from which they continuously divert for watering livestock. (R. 81; see also R. 11-12 (describing the Hickens' water rights in ditch known as Bull River, Mill Race and Back Ditch.) Accordingly, even if the health of the livestock could alter the 1960 Judgment (and it cannot), the 1960 Judgment is not inequitable or harsh.

E. Barring the Hickens' Claim for a Continuous Diversion will Preserve Vital Public Interests.

The doctrine of res judicata preserves "vital public interests" including "(1) fostering reliance on prior adjudications; (2) preventing inconsistent decisions; (3) relieving parties of the cost and vexation of multiple lawsuits; and (4) preserving judicial resources."

Spring Creek. (R. 19.)

Office of Recovery Services v. V.G.P., 845 P.2d 944, 946 (Utah Ct. App. 1992) and cases cited therein.

For over 36 years North Ditch has relied on the 1960 Judgment which it correctly believed forever established the diversion schedule for Spring Creek water. The state engineer also relied on the 1960 Judgment and specifically incorporated the diversion schedule into the Proposed Determination. (R. 1.) The Proposed Determination restricted the Hickens to an intermittent diversion of two hours every 240 hours (i.e., ten days) for both irrigation and stock watering. (R. 1.) The Hickens also manifested their reliance on the 1960 Judgment by specifically referencing the same and claiming only a right to divert intermittently for both irrigation and stock watering two hours every 240 hours (or ten days). (R. 5.) To permit the Hickens' claim would undermine all reliance on any judgment that restricts water users to a maximum quantity of water and an intermittent diversion schedule. Any party to such a judgment could contrive other water uses not "expressly" referenced in prior judgments in an endless flow of litigation that would preclude any assurance that water users will receive their decreed allotment.

Barring the Hickens' claim advances the other policies underlying principles of res judicata. Inconsistent decisions will be prevented. North Ditch and the Hickens will be relieved of the significant cost and vexation of multiple lawsuits involving the same stream, the same parties and the same claims. Moreover, judicial resources will be preserved by not rehashing the Hickens' claim and those of their successors, all of which were or could have been resolved in 1960.

II. THE HICKENS' CLAIM IS BARRED FOR THEIR FAILURE TO OBJECT TO THE PROPOSED DETERMINATION

The Hickens' claim to a continuous diversion for watering livestock also is barred because they failed to object to the Proposed Determination submitted to the Third District Court by the state engineer in 1984. After receiving notice of a proposed determination, a water claimant has 90 days from the date of mailing of such notice to file a written objection. See Utah Code Ann. § 73-4-12. Failure to object timely bars any subsequent claim. See Jensen v. Morgan, 844 P.2d 287, 291-92 (Utah 1992); In re Escalante Valley Drainage Area, 12 Utah 2d 112, 113, 363 P.2d 777, 778 (1961); Green River Adjudication v. United States, 17 Utah 2d 50, 52, 404 P.2d 251, 252 (1965) (to avoid piecemeal litigation and provide "finality and solidarity," untimely objections are barred). Water users who do not object to a proposed determination must "be bound by the result for the same sound reasons that justify the doctrine of res judicata." Id. at 52, 404 P.2d at 252.

The Proposed Determination restricts the Hickens to divert intermittently water from Spring Creek for stock watering. The Proposed Determination is based on the Hickens' Water User's Claim (R. 4-5.) and the 1960 Judgment. The Proposed Determination specifically references and incorporates the 1960 Judgment by limiting the Hickens' stock watering to the diversion schedule ordered by Judge Nelson. The Proposed Determination provides that the Hickens' Water User's Claim is a "court decreed right under civil case 2348" (i.e., Judge Nelson's 1960 Judgment). (R. 1, 57; see also Hickens' Water User's Claim (R. 5.).

As claimed by the Hickens in their Water User's Claim, the Proposed Determination restricts their claim to a "2/240 interest" in a water flow of 3.0 cubic feet per

second. (R. 1.) The Proposed Determination also clarifies that the flow of Spring Creek "is intermittently diverted" pursuant to the Hickens' Water User's Claim and North Ditch's water user's claim number 55-4456 ("WUC 55-4456"). (R. 1. (emphasis added).) Moreover, the Proposed Determination awards North Ditch, in part, a corresponding "238/240 interest" in the 3.0 cubic feet per second flow from Spring Creek "intermittently diverted" by the Hickens. (R. 1, WUC 55-4456 (emphasis added).) The plain meaning of the term "intermittently" is not continuously.[15] The Proposed Determination specifically limits the Hickens to "intermittently" divert from Spring Creek for a period of two hours every 240 hours (i.e., ten days) for both irrigation and stock watering.[16] Hence, the Hickens' year-round stock watering right is expressly restricted to an intermittent not continuous diversion from Spring Creek.

Had they wished to object to the plain limitations of the Proposed Determination, the Hickens should have filed a written objection. The Proposed Determination squarely contradicts the Hickens' claim to a continuous diversion for stock watering. The Hickens, however, could not object because the Proposed Determination reflects their Water User's Claim to an intermittent diversion for stock watering based on the 1960 Judgment. Because the Hickens failed to object, their claim is barred.

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[15] See, e.g., Webster's Ninth New Collegiate Dictionary, 632 (1987) (intermittent means "coming and going at intervals: not continuous" (emphasis added)).

[16] The Proposed Determination provides that the Hickens' Water User's Claim "is limited to 2/240 interest in [3.0 cfs] which is intermittently diverted by" the Hickens' Water User's Claim and North Ditch's water user's claim no. 55-4456. (R. 1.) When read in conjunction with the 1960 Judgment, "2/240" clearly means two hours every 240 hours (240 hours in ten days). This interpretation is supported by Ruby Wall Hickens' admission as set forth in the Hicken's Water User's Claim. (R. 4-5.)

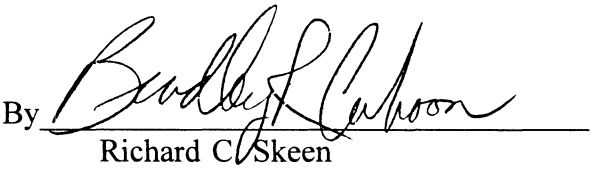
Ironically, the Hickens argue that North Ditch is bound by the Proposed Determination because it awards the Hickens a year-round stock watering right, and North Ditch failed to file a written objection. (Hickens' Brief at 16-18.) However, North Ditch does not dispute that the Hickens may have a right to use Spring Creek for watering stock year-round, as long as the diversion is intermittent as scheduled (not continuous). North Ditch did not need to file an objection because the Proposed Determination incorporates the 1960 Judgment by limiting the Hickens to an intermittent diversion from Spring Creek for all water uses two hours every 240 hours (ten days). In sum, the district court did not err in disregarding the Proposed Determination in dismissing the Hickens' complaint under the doctrine of res judicata.

CONCLUSION

For the foregoing reasons, the decision of the Fourth Judicial District Court for Wasatch County dismissing the verified complaint should be affirmed.

DATED this 19th day of September, 1996.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

By 

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CERTIFICATE OF SERVICE

I hereby certify that I caused two (2) true and correct copies of the within and foregoing BRIEF OF APPELLEES NORTH DITCH IRRIGATION COMPANY to be mailed, postage prepaid, this 19th day of September, 1996 to the following:

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