

1996

William Turner, and John Does 1-120 a class  
composed of landowners located in the Hi  
Country Estates Subdivision v. Salt Lake County  
Water Conservancy District, a Utah corporation  
and special service district : Reply Brief

Utah Court of Appeals

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**COURT OF APPEALS**

**WILLIAM TURNER, and John Does 1-120  
a class composed of landowners located in  
The Hi Country Estates Subdivision**

**-VS-**

**Defendant. and Appellee**

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### Priority # 15

**APPEAL FROM JUDGMENT ON THE PLEADINGS DISMISSING  
PLAINTIFF/APPELLANTS COMPLAINT WITH PREJUDICE BY  
THE THIRD DISTRICT COURT, JUDGE LESLIE A. LEWIS**

## **TABLE OF CONTENTS**

<b>STATEMENT OF ISSUES PRESENTED ON APPEAL</b>	<b>Page 5</b>
<b>STANDARD OF REVIEW</b>	<b>Page 5</b>
<b>REPLY ARGUMENT OF APPELLANT</b>	
<b>I. SECTION 63-30-22 DOES NOT BAR CLAIMS FOR PUNITIVE DAMAGES AGAINST THE SALT LAKE WATER CONSERVANCY DISTRICT</b>	<b>Page 6</b>
<b>II. THE DISTRICT COURT DID NOT AFFIRM THE BENEFIT BUT ORDERED THE DISTRICT TO BENEFIT THE APPELLANTS</b>	<b>Page 8</b>
<b>III. THE FUNDS COLLECTED BY THE COUNTY FOR THE BENEFIT OF THE APPELLEE WATER CONSERVANCY DISTRICT IS NOT A TAX AS NORMALLY CONSIDERED</b>	<b>Page 10</b>
<b>IV. THE STATUTE OF LIMITATIONS DOES NOT PREVENT THE APPELLANTS' CLAIMS</b>	<b>Page 12</b>
<b>CONCLUSION</b>	<b>Page 13</b>
<b>CERTIFICATION OF MAILING</b>	<b>Page 14</b>

## **STATUTES CITED**

<b>Utah Code Annotated</b>	<b>73-109-1(2) pg 6,7</b>
<b>Utah Code Annotated</b>	<b>17A-2-301 pg 6</b>
<b>Utah Code Annotated</b>	<b>17A-2-303 pg 6</b>
<b>Utah Code Annotated</b>	<b>17A-2-304 pg 6</b>
<b>Utah Code Annotated</b>	<b>59-1-301 pg 10</b>
<b>Utah Code Annotated</b>	<b>59-2-1006(1) pg 10</b>
<b>Utah Code Annotated</b>	<b>17A-2-1406 pg 10</b>
<b>Utah Code Annotated</b>	<b>78-2-2-2(3)(e)(ii) pg 10</b>
<b>Utah Code Annotated</b>	<b>59-2-1327 pg 11</b>

## **CASES CITED**

<b>Tygesen v. Magna Water Co.</b>	<b>226 P.2d 127 (Utah 1950)</b>	<b>Pg 7, 14</b>
<b>Patrick vs Carbon Water Conservancy Dist.,</b>	<b>145 P.2d 503 Ut 1944</b>	<b>Pg 6,7</b>
<b>Timpanogos Planning v. Central Utah Water</b>	<b>690 P.2d 562 (Utah 1984)</b>	<b>Pg 9</b>

## **STATEMENT OF ISSUES ARGUED BY THE APPELLEE**

- I. SECTION 63-30-22 DOES NOT BAR CLAIMS FOR PUNITIVE DAMAGES AGAINST THE SALT LAKE WATER CONSERVANCY DISTRICT**
- II. THE DISTRICT COURT DID NOT AFFIRM THE BENEFIT BUT ORDERED THE DISTRICT TO BENEFIT THE APPELLANTS**
- III. THE FUNDS COLLECTED BY THE COUNTY FOR THE BENEFIT OF THE APPELLEE WATER CONSERVANCY DISTRICT IS NOT A TAX AS NORMALLY CONSIDERED**
- IV. THE STATUTE OF LIMITATIONS DOES NOT PREVENT THE APPELLANTS' CLAIMS**

## **STANDARD OF REVIEW**

Judgment on the Pleadings may be confirmed only if as a matter of law, the nonmoving party could not prevail under the facts as alleged by both parties where not in conflict with each other and where in conflict, assuming that the nonmoving parties facts are correct. American Credit Union V McClellan, 854 P 2d 590 The Appellee has wrongly stated the standard They state that the Answer of the Moving Party is assumed to be true The contrary is actually the rule The facts contained in the Complaint must be assumed to be true (the non moving party) where in conflict with the Answer

## **ARGUMENT**

### **Point I**

#### **SECTION 63-30-22 DOES NOT BAR CLAIMS FOR PUNITIVE DAMAGES AGAINST THE SALT LAKE WATER CONSERVANCY DISTRICT**

A Political Subdivision is defined differently depending upon which Chapter the legislature has referenced it to. As an example under 73-10g-1 (2), it is defined " as any county, city, town, improvement district, metropolitan water district, water conservancy district, special service district, drainage district, irrigation district, separate legal or administrative entity created under Title 11, Chapter 13, Interlocal Cooperation Act, or any other entity constituting a political subdivision under the laws of Utah."

A County Improvement Districts for Water may be created by resolution of the County Commissioners. See 17A-2-301, 17A-2- 303, and 17A-2-304 In this instance, the court is not petitioned for the creating of the improvement district but it is the creation of the elected County Commissioners. If 25% of the landowners sign a petition against the creation, then it cannot be created. The Landowners have a right of appeal to the District Court but it is a different animal than the Defendant Water Conservancy District which is a creation of the District Court thus "the proceedings creating a Water Conservancy District is a judicial proceeding Patrick v Carbon Water Conservancy District (145 P 2d 503 Utah 1944).

The Governmental Immunity Act specifically defines the entities it is dealing with and must be strictly construed.. Under Section 63-30-2, Governmental entity is defined as follows: "means the state and its political subdivisions as defined in this chapter."

A Political subdivision is subsequently defined as "any county, city, town, school district, public transit district, redevelopment agency, special improvement or taxing district, or other

governmental subdivision or public corporation." The Water Conservancy District is conspicuous by its absence.

If we compare the definition as defined in under 73-10G-1 (2) which is also for a Political Subdivision, we find that the definition under the Governmental Immunity Act is more restrictive than the definition defined under 73-10G-1 (2). Since the Water Conservancy District is not specifically named as a Political Subdivision under the Governmental Immunity Act, it must be assumed that if the Water Conservancy District is not to be defined as a political subdivision subject to the Act, then it is not included under the Governmental Immunity Act and therefore does not receive the protection of the act.

This is only logical as the Water Conservancy District is a creation of the judicial process through the actions of individual land owners who decide that they want to be a part of the Water Conservancy District and in order to do so petition the Court to be annexed to the District by judicial process. The Water Conservancy District Law is an enabling act. It enables a group of land owners to gather together to form an association whereby they can be self assessed in order to furnish water for the land included in the petition. They are not a creation of government (County) as the County Improvement District mentioned above is. They are not formed by the duly elected County Commissioners; but they are a creation of landowners petition and the judicial process via the Order of the Court forming them into or annexing them to the Water Conservancy District. The Patrick vs. Carbon Water, 145 P.2d 503 (Utah 1944) Court found a Water Conservancy to be a quasi municipality. An entity not quite the same as a city or a municipality. Tygesen v. Magna Water Co. , 226 P.2d 127 (Utah 1950), court further affirms that definition of a water conservancy district where it defines a water conservancy District as an



improvement district which is neither fish nor fowl - it being a quasi municipality which "lay the principle that they who receive the benefits should pay for them"

Simply stated, the Water Conservancy District is not the type of entity defined as a political subdivision under the Governmental Immunity Act and therefore is not protected by that act against punitive damages.

## **Point II**

### **THE DISTRICT COURT DID NOT AFFIRM THE BENEFIT BUT ORDERED THE DISTRICT TO BENEFIT THE APPELLANTS**

The Appellee argues that the Petition is of greater import than the Order of the Court. While it is true that the Petition of the Original Annexing parties was very restrictive in what it expected from the District, the Court Order was very explicit in ordering a benefit to annexation group of land owners.. Rather than stating what was in the Petition which it would have done if it were rubber stamping the responsibilities contain in the petition, the Court Ordered that the District would benefit the annexed landowners.

In its Order of April 3, 1973, The Court states that:

**IT IS FURTHER ORDERED that all of said lands will be benefited from inclusion in the District;"**

The Appellee would have us believe that the Court did not understand the difference between a Finding and an Order. While it is true that the Court failed to make a finding that it would benefit the Appellants, which if timely brought might have voided the annexation, the court in its' Order states that the lands will be benefited (a specific duty is given to the Water Conservancy District). The Amended Order of April 3, 1974, reads exactly as the Order of April 3, 1973 except for a description correction. The lands will be benefited from inclusion in the

District. The only logical reason for this type of statement from the Court is that the court wanted to be sure that contrary to the petition, the District had an obligation to do something for the annexed area.

The only way that the annexed area could receive benefit was for a delivery system to be established for their benefit by the Appellee. How else could the annexed property be benefited? Simply because the District obtained water rights to furnish water and built delivery systems to other areas would not benefit a subdivision of Homes. They needed water and the court must be assumed to have known that. Furthermore, at this historical time, the court appointed the Board of Directors of the Conservancy District and therefore had administrative responsibility over the District.

The Supreme Court in *Timpanogos Planning v. Central Utah Water*, 690 P.2d 570 (Utah 1984) found that this administrative responsibility was an infringement of the Executive Branch of the Government and declared it unconstitutional for the Court to appoint the Directors for the District by finding that "the requirement that the court appoint the members of the boards of directors stands out as incongruous and totally unrelated to better perform its duties of offering guidance to the district on legal question which arise in the conduct of its operation." (Emphasis added) That the Court could better "discharge its duty to determine the validity of board actions if it is completely detached from the appoint of the members." At that point, the County Commissions took over the appointment of the Directors for the Water District. But when the District Court issued the above Order, it still appointed Directors and had continuing jurisdiction over the Appellee District as it still has today..

It is obvious then that the Plaintiffs needed to be benefited. They have stated that they

have not been benefited by the Defendant and therefore this fact must be determined by the finder of fact and cannot be determined as a matter of law

### **Point III**

#### **THE FUNDS COLLECTED BY THE COUNTY FOR THE BENEFIT OF THE APPELLEE WATER CONSERVANCY DISTRICT IS NOT A TAX AS NORMALLY CONSIDERED**

Plaintiffs twenty-two year delay in filing this action for contempt of the Court Order does not foreclose their contempt claim. The Order of the Court is a continuing Order. It is not for a specific period of time, but is for all that period of time from when the land is annexed to the District. Under Section 17A-2-1406 "The district court in and for the county in which the petition for the organization of a water conservancy district has been filed, shall thereafter for all purposes of this part, except as hereinafter otherwise provided, maintain and have original and exclusive jurisdiction, xxx xxx, without regard to the usual limits of its jurisdiction."

Considering the complex nature of furnishing water, the great cost, and the large amount of time necessary to construct such a system, the 22 year period is not unreasonable. Plaintiffs patience is to be applauded not condemned. It becomes judgmental as to when the contempt arises. Certainly not within the first year, but certainly by the twenty second year.

Contrary to the Appellee Districts statements, the County Board of Equalization under Section 59-2-1004, the payment of taxes under protest under Section 59-1-301, Section 59-2-1006(10), Section 78-2-2(3)(e)(ii), or section 78-2-2(3)(j) do not apply to the funds levied by the Appellee Water Conservancy District as contemplated under Plaintiffs action.

The funds collected by the County for the Water Conservancy District are not a tax but are an assessment or levy collected not by the Appellee District, who does not have collecting

powers, but are collected by the County under its taxation powers. The county has done nothing more than act as collector for the Water District. It does not spend the monies but simply turns them over to the Water District.

The Court Order was not to the County to benefit the Annexation landowners, the Order was to the Water Conservancy District. They are the ones who are in contempt of that court order. All of the referrals to the various tax or levy remedies pertain to a yearly levy, not to what was to be received from the levy.

As stated to the District Court during the hearing, the Appellants want and have a right for the Appellees to perform. They have a right under the court order for a benefit from the funds they are paying each year. Whether that is by refunding the funds plus interest received over the years which could then reimburse the Appellants for the funds expended in constructing their own delivery system, or purchasing and operating the water delivery system which the Appellants have installed during the interim period or by installing a new delivery system.

The Water Conservancy District was Ordered to benefit the Annexed landowners. It needs to be responsible and fulfill that Order.

The tax protest as contemplated under Section 59-2-1327 does not pertain to the matter before us at this time. That pertains to the taxing entity which actually does the collection. This problem is not between the Plaintiffs and the County who is the Tax Collector. This problem is between the Plaintiff and the Defendant Water Conservancy District. An entity which is quasi governmental having only those certain governmental powers as given to it by the Legislature.

The Water Conservancy District is basically a private business which is given some governmental authority in order to facilitate the objectives of the conservation and delivery of

water to the various lands in Salt Lake County. It is kept under close supervision of the District Court by *continuing jurisdiction to insure that it does not abuse its authority and gains its rights* over property by a court judicially authorized annexation. When the Court authorized the annexation in this particular instance, it Ordered that the lands Benefit from the annexation. This has not happened. The lands have not benefited from the annexation but have had to furnish or obtain their water from sources other than the District because the District has refused to furnish that water. The District should be ordered to fulfill the court order by a equitable method and not be allowed to hid behind, this is a tax matter. It is not a tax matter, it is compliance to a court order by the Defendant.

#### **Point IV**

#### **THE STATUTE OF LIMITATIONS DOES NOT PREVENT THE APPELLANTS' CLAIMS**

The date wherein the Statute of Limitations begins to run must be determined by the Court. At what point was the Defendant placed into contempt? At the time the Court determines that fact, then the time of the Statute of Limitation which ever one is used starts to run.

Defendant has tried to tie the Starting of the Clock at the time of the first payment of the assessment collected by the County on behalf of the Defendant District. Certainly, considering the complexity of operating a water system for the Plaintiffs, the contempt did not start at the first levy. Any action brought at that time would not have had a chance of succeeding.

Did it start after 22 years of assessments and the collection thereof through the taxing arm of the county and failing to provide the benefit as Ordered by the Taylor Court?

Did it start when the owners of the land obtained their own water system?

Certainly after 22 years the intent of the Defendant District is discernable. That intent

being to not furnish any benefit to the lands but to continue to require assessments be paid by the land owners of the Plaintiffs for nothing in return.

Although Plaintiff does not admit that the statute of limitations has run on any of the assessments or taxes paid, even if the statute of limitations has canceled out part of the assessment paid, it has not canceled those assessments paid over the last four year.

### **CONCLUSION**

Contrary to the assertions of the Defendant District, the Court in its annexation order ORDERED that the Plaintiff Landowners be BENEFITED by their inclusion in Salt Lake County Water Conservancy District. This was because of the statements contained in the Petition. The restrictions as relates to the Plaintiff were not repeated in the Court Order of annexation but as stated above the Defendant District was ordered to benefit. The District would have one believe that the Plaintiffs have been benefited on the larger scale of things. That is not what was intended by the Court nor was any proof alleged by the Defendant to support that proposition. In the contrary the Plaintiff has alleged in its complaint that it received no Benefit. That must be determined by a finder of fact and is not determinable by a matter of law.

Furthermore, the Defendant District is not protected by the Governmental Immunity act. It is not mentioned in the act as one of those protected as shown from the various cases is considered as a hybrid of sorts. A sort of quasi governmental entity, but certainly not a municipality or city.

The Statute of Limitations does not protect the Defendant District. That only starts to run when the District had time to start and finish the benefits. Certainly, after 22 years of receiving

nothing from the Defendant District and its recent policy of charging for maintenance, it is now conclusive that the District has no intent to furnish water for the Plaintiff landowners.

Finally, the Plaintiff is not seeking a refund of taxes as contemplated under the acts cited by the Defendant. It is not asking for taxes from the County. These funds did not go to the County. They went to a quasi-municipality created by the Legislature to allow those who receive the benefits to pay for the benefits. (Tygensen v. Magna Water Co., 226 P.2d 127, Utah 1950). Said entity being under the direct order of the court to benefit the Plaintiffs.

For the various reasons stated above the Judgment on the Pleadings needs to be reversed by this court so that the trier of facts can determine if a benefit was received by the Plaintiffs as contemplated by the Order of the District Court.

Dated this 17<sup>th</sup> day of March 1997.

  
Wesley F. Sine  
Attorney for Plaintiff

#### CERTIFICATION OF MAILING

I hereby certify that a true and correct copy of the above Reply Memorandum was mailed, postage prepaid this 17<sup>st</sup> day of March 1997 to the Defendants by addressing it to:

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