

1977

Salt Lake City Corporation v. Utah Wool Pulling Co. : Appellant's Petition for Rehearing

Utah Supreme Court

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Roger F. Cutler; Ray L. Montgomery; Attorneys for Plaintiff-Appellant;
Glen E. Fuller; Attorney for Defendant-Respondent;

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IN THE SUPREME COURT
OF THE STATE OF UTAH

SALT LAKE CITY CORPORATION,)
a municipal corporation of)
the State of Utah,)
)
Plaintiff-Appellant,)
)
vs.)
)
UTAH WOOL PULLING COMPANY,)
a Utah corporation,)
)
Defendant-Respondent.)

Case No. 14659

APPELLANT'S PETITION FOR REHEARING

ROGER F. CUTLER
City Attorney

RAY L. MONTGOMERY
Assistant City Attorney
Attorneys for Plaintiff-Appellant
101 City & County Building
Salt Lake City, Utah 84111
Telephone: 328-7788

GLEN E. FULLER
Attorney for Defendant-Respondent
15 East Fourth South
Salt Lake City, Utah 84111
Telephone: 363-7187

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the State of Utah,)

Plaintiff-Appellant,)

Case No. 14659

vs.)

UTAH WOOL PULLING COMPANY,)

Defendant-Respondent.)

APPELLANT'S PETITION FOR REHEARING

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME
COURT OF THE STATE OF UTAH:

Appellant, Salt Lake City Corporation, respectfully
petitions the Court for a rehearing on its opinion filed in
the above-entitled cause on July 5, 1977. The grounds for this
petition and the points wherein the Appellant alleges this
Court has erred are the following:

1. The controlling opinion erroneously states that
plaintiff contends the value of the defendant's water rights
was the value of the defendant's diversionary facilities.

2. The controlling opinion erred in allowing the valua-
tion of the water rights as part of the property which already

3. The controlling opinion erred in assuming that plaintiff condemned the water rights and received them.

4. The controlling opinion ignores the difference between situations where water rights are valuable and third parties cannot obtain them or similar ones for the reason that they are not sold or cannot be obtained by application, and where the right is so readily available by purchase or application, that no one will buy.

5. The controlling opinion erred in upholding and accepting comparables which were not similar in character, location and other factors.

ARGUMENT

POINT I

THE CONTROLLING OPINION ERRONEOUSLY STATES THAT PLAINTIFF CONTENDS THE VALUE OF THE DEFENDANT'S WATER RIGHTS WAS THE VALUE OF THE DEFENDANT'S DIVERSIONARY FACILITIES.

The controlling opinion is based in part on the statement that the plaintiff contended the value of the defendant's water rights was the value of the defendant's diversionary facility. This is not correct. The plaintiff contends that the defendant's water rights alone had a value which was determinable separate and apart from all other facilities for diversion and use, all of which had been previously paid for by the plaintiff.

It is well settled that a certified water right, riparian or otherwise, is separable from the land and can be separately conveyed and considered. 78 Am Jur 2d, Waters, Section 242, states as follows:

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As a general proposition, subject to statutory or contractual restrictions, all rights to water, riparian or otherwise, may be severed from the lands to which they are attached, and separately conveyed...The right to sell a water right free from the land for which it was appropriated is not cut off by statutes requiring an intending appropriator to apply to state officers for a permit and to describe accurately the land on which the water is to be used.

The sale of a water right separately from the land to which it was first applied is not a sale of the water, but a right to use water. (emphasis added)

It has been the contention of plaintiff throughout this case that the defendant's water right, by stipulation of the parties, was to be valued separately and that the value of the right should not be confused with the sale of the water or the use to which it had been put prior, as the lower court allowed to occur in this case. The value of the water right itself, standing alone, was what was to be valued separate and apart from everything else. The Court's failure to consider the valuation of the water right in this light was error.

POINT II

THE CONTROLLING OPINION ERRED IN ALLOWING THE VALUATION OF THE WATER RIGHTS AS PART OF THE PROPERTY WHICH ALREADY HAD BEEN PAID FOR.

In this case, the parties stipulated that the value of the water rights should be considered separate and apart from the value of the other property condemned; the value the water rights would have by themselves in a sale to a willing third party buyer. However, the defendant changed its position at trial contending that the water right had to be valued with its

alleged special use in connection with the property previously paid for, contrary to the parties' stipulation dated May 8, 1973, and states in Article 7 (R 31-32) as follows:

7. In this action the defendant has made claim that the water rights from which well water was secured for use on the condemned properties had a market value at the time of the taking which would be reflected in the market value of the total properties, as a unit, so as to result in a total fair market value in excess of the aforesaid sum of \$634,694.00; but plaintiff denies that such water right had value as contended by defendant. The value of such rights, if any, has been excluded from this stipulation.

Should defendant contend, after any further meetings with plaintiff and/or additional research and investigation, that said water rights did have value at the time of the taking, and should plaintiff continue to contend that such rights had no value, or if the parties cannot otherwise resolve the issue, defendant may request that the matter of the value of such water rights, if any, be set for trial for rulings on such legal and factual issues as shall be pertinent to the matter, including such values, if any, for which defendant may be entitled to receive additional compensation in this action.

By this stipulation, the defendant agreed that the value of the water rights should be determined separate and apart from the properties that had already been paid for. Pursuant to this stipulation, the water rights, that is the right to remove water from under ground - not the use to which it had been placed - was the value to be determined.

These water rights had a determinable value and that value was zero. As testified by Mr. C. Francis Solomon, Jr., M.A.I., and uncontested by defendant, a willing buyer could have obtained his own water rights for the same quantity and quality of water merely by applying for such rights to the State Engineer and drilling a well. According to the well drillers Mr. Solomon con-

tacted, which testimony was also uncontested, for \$8,000 a single new eight inch well could be drilled and water obtained of like quality and quantity within a mile west, anywhere east, at least one mile north, and anywhere south of where the defendant's wells were located. Why then would a willing buyer pay anything solely for the defendant's right to remove water from underground. The City had already paid for the wells and diversion facilities and there was no value in the defendant's water rights.

Mr. Jay Bingham, a local and well respected water engineer, testified that he had been employed by A. K. Properties prior to the trial and that under his supervision a sixteen inch well was drilled on A. K.'s property approximately one mile northwest of the defendant's property. The well was drilled to a level of 600 feet; however, Mr. Bingham testified that water down to the 300 foot level was of the same quality or better as that produced by the defendant's wells. He stated further that such water could have been produced in much greater quantities than that produced by the wells of defendant, proving that the water produced by defendant's wells was not unique and that it could have been obtained in the same area by others merely through applying to the State Engineer and drilling their own well. He too testified that defendant's water rights had no value for these reasons. (R 308-310).

Mr. Dee C. Hansen, State Engineer, Division of Water Rights for the State of Utah, stated in the lower court case that defendant's water rights had no value because the area where the wells were located was open to application for and drilling

of wells to obtain water under the same type or water rights as those owned by defendant-respondent merely by drilling a well (R 319-321). He also stated that there was no charge for the water used under such water rights (R 323). He stated further that water rights such as those held by defendant-respondent would have great value in aquifer basins where all surface rights and drilling rights were closed (\$ 332).

The testimony of these three witnesses has been completely ignored.

POINT III

THE CONTROLLING OPINION ERRED IN ASSUMING THAT PLAINTIFF CONDEMNED THE WATER RIGHTS AND RECEIVED THEM.

Plaintiff, Salt Lake City Corporation, did not condemn the water right and in fact offered before and during trial (however the defendant refused for good reason) to allow defendants to sell the water rights on the open market. The reason for the refusal was that they knew full well the water rights had no value and that they could not be sold to anyone in this aquifer basin and that the rights could not be transferred to another aquifer basin. Instead, they produced testimony to the effect that water rights located in other basins, where the State Engineer, Dee Hansen, has prohibited issuance of further drilling water rights and all of the surface water rights had been appropriated, had a value which was then assigned to the defendant's water rights in the Salt Lake City aquifer basin. Such water rights have no value in the Salt Lake City aquifer basin for the reason that they are so readily attainable by any-

one applying to the State Engineer and drilling for the water in this basin. The three aquifer basins referred to by the plaintiff in Heber, Corrinne, and Weber County are all closed to drilling and the surface water rights have been totally appropriated. Therefore, the sales used by the defendants in showing the value of water rights in those basins are inappropriate and inapplicable in the Salt Lake City basin and it was a travesty of justice and error to allow such into evidence. The plaintiff should not be forced to pay for something it did not get and cannot use. The certified water rights of the defendant have not been conveyed to the plaintiff nor were they sought in the complaint nor asked for in the action. The City should not be obliged to pay for something it did not want or receive.

POINT IV

THE CONTROLLING OPINION IGNORES THE DIFFERENCE BETWEEN SITUATIONS WHERE WATER RIGHTS ARE VALUABLE AND THIRD PARTIES CANNOT OBTAIN THEM OR SIMILAR ONES FOR THE REASON THAT THEY ARE NOT SOLD OR CANNOT BE OBTAINED BY APPLICATION, AND WHERE THE RIGHT IS SO READILY AVAILABLE BY PURCHASE OR APPLICATION, THAT NO ONE WILL BUY.

As cited in Southern Pacific Co. vs. Arthur, 10 Utah 2d 306, 352 P2d 693 (1960), the test for just compensation is as follows:

...The standard of what is 'just compensation' in the ordinary case is market value of the property taken, that is what a willing buyer would pay to a willing seller....

The question is, would any willing buyer pay money for something that is worthless?

The plaintiff-appellant would be the first to concede that if the defendant's property and water rights had been located in Heber, Corrinne, or Weber County, in the areas where defendant obtained its comparables, the water rights would have a high value, probably at or near the value affixed by the defendant's appraiser, Memory Cain. However, the Heber, Corrinne and Weber water rights could not be transferred to any other aquifer basin and neither could the defendant's water rights be transferred to another aquifer basin. The aquifer basin in which the defendant's water rights are located was and is open to drilling to anyone filing an application with the State Engineer. For these reasons, Dee Hansen, the State's Water Engineer (R 319), Jay Bingham, a state water expert and engineer (R 288), and Francis Solomon, M.A.I., the City's expert real estate appraiser (R 246, 251) all testified that the defendant's water rights had no value.

The Defendant stipulated that it could not sell these water rights to anyone in the Salt Lake City aquifer basin for the same reasons (R 177). The court erred in ignoring the foregoing facts.

Kennecott Copper Corporation vs. Salt Lake County, 122 Utah 431, 250 P2d 1938 (1952), cited and relied upon in the controlling opinion, applies only to the situation where property did not have value for one purpose, but did for another. Both Kennecott and the Sigurd v. State case (142 P2d 154) cited in the controlling opinion, addressed the situation where there was no market value because there had been no sales, but

the reason there had been no sales was a high value of the property and no one wanted to part with it. Whereas the reason there were no sales of water rights in the area where defendant's water rights were located was because similar rights could be obtained without cost. The court erred in ignoring this poles-apart difference.

POINT V

THE CONTROLLING OPINION ERRED IN UPHOLDING AND ACCEPTING COMPARABLES WHICH WERE NOT SIMILAR IN CHARACTER, LOCATION AND OTHER FACTORS.

The case of State Road Commission vs. Larken, 27 Utah 2d 295, 495 P2d 817 (1972), states as follows:

...Whether evidence of the value of other property should be admitted depends on whether they are sufficiently similar in character, location and other factors which influence the value that they meet the test of reasonable comparability so they can reasonably be regarded as having probative value as to the worth of the property in question. Because of the responsibility of the trial judge as the authority in charge of the trial, he is allowed considerable latitude in his judgment upon the matter; and his ruling should not be disturbed unless it appears he was clearly in error, and that this redounded to the prejudice of the complaining party. (Emphasis added) (27 Utah 2d 299, quoting from State Road Commission vs. Wood, 22 Utah 2d 317, 320; 452 P2d 872 (1969))

The controlling opinion erred as did the court below in accepting the properties used by defendant-respondent as comparables which were similar in character, location and other factors as the property condemned in this case. The water rights recited as being comparable by the defendant, located in Heber Valley, Corrinne, and Weber County, could not be replaced and similar rights could not be obtained by mere application to

the State Engineer. That is, NO OTHER WATER WAS AVAILABLE, neither surface nor underground, for appropriation in those areas. Therefore, the water rights had great value. Two of these water rights were surface water rights and not well water rights. Nevertheless, these three water rights had great value strictly because of their scarcity and the inability of anyone else to obtain similar water rights without buying them from the owner of the rights.

In the case at bar, the defendant has water rights which allow removal of underground water by drilling in an area open to drilling by anyone who applies to the State Engineer for the same type of water rights which include the right to drill (R 320). Therefore, on this basis alone the three comparable sales cited by the defendant are totally dissimilar. In fact the three comparables are directly opposite to the situation of the water rights owned by the defendant. If such comparable rights were to be obtained at all, they could only be obtained by purchasing the rights from someone who owned them. In the defendant's case, such rights were readily available merely by application to the State Engineer and without cost.

In this case then, the location of the comparable sales is critical because of the location of the aquifer basin in which the water rights are held. They are totally different from the water rights of the defendant and it was error for the lower court to allow such to be considered by the jury, and to be considered as controlling by this court.

There are other points of dissimilarity but I will only mention one other. The comparables were sales of water rights.

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only, not sales of alleged specialty water, as contended by defendant, in connection with the condemnation of a going business.

CONCLUSION

The defendant-respondent should not be given an undeserved windfall of \$50,000, plus interest, for water rights which were and are still worthless. This is what defendant-respondent will receive if the controlling opinion remains unchanged.

Respectfully submitted,

ROGER F. CUTLER
City Attorney

RAY L. MONTGOMERY
Assistant City Attorney
101 City & County Building
Salt Lake City, Utah 84111

Attorneys for Plaintiff-Appellant