

1977

# Salt Lake City Corporation v. Utah Wool Pulling Co. : Brief of Respondent in Answer to Petition for Rehearing

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE STATE OF UTAH

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SALT LAKE CITY CORPORATION, :  
a municipal corporation of :  
the State of Utah, :

Plaintiff- Appellant, :

Case No. 14659

vs. :

UTAH WOOL PULLING COMPANY, :  
a Utah corporation, :

Defendant-Respondent :  
:

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RESPONDENT'S BRIEF IN ANSWER  
TO PETITION FOR REHEARING

---

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RESPONDENT'S BRIEF IN ANSWER  
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INTRODUCTION

Appellant's Petition for Rehearing challenges the opinion of this Court under an approach which respondent contends to be based upon a misconception of the basic legal and factual issue underlying the litigation and a distortion of a portion of the evidence which was introduced to support the fair market value of the water rights acquired in the proceedings. Accordingly, the following points of argument are submitted for the purpose of covering appellant's contentions raised in its brief seeking a rehearing.



## ARGUMENT

### POINT I

#### APPELLANT ACQUIRED RESPONDENT'S APPURTENANT WATER RIGHTS AS PART AND PARCEL OF THE CONDEMNATION ACTION.

In both briefs filed by appellant with this Court in this matter the contention has been advanced repeatedly that "... the value of the water right itself, standing alone, was .... to be valued separate and apart from everything else, " Further, this was the position taken by appellant at the trial level.

This Court's opinion recognized that under applicable law the water rights necessarily had to be valued as part and parcel of the total property and that the use to which the water was put in contributing to that value was the critical factor to which a valuation expert would direct his analysis in determining the value of those rights. It is not necessary to quote extensively the large body of law which has developed in the field of eminent domain supporting this basic rule; however, respondent would again quote paragraph 7 of the Stipulation between the parties:

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. ( Italics added.)



Appellant contends that the value of the water rights should be determined " separate and apart" from the other properties and that "... the value of the right should not be confused with ... the use to which it had been put... ". To the contrary, the Stipulation followed eminent domain law to the letter and it was appellant's refusal to follow the law and the Stipulation which distorted its approach to this action.

There is yet another difficulty arising from an examination of appellant's position in its re-hearing brief wherein the claim is made that it did not condemn the water right. Although the argument has not been previously advanced, an examination of paragraph 7 of the Stipulation, in its entirety as set forth on page 4 of appellant's re-hearing brief, should make it abundantly clear to this Court that the entire paragraph was premised upon the underlying assumption and implicit agreement of both litigants that the water rights were in fact taken in the condemnation action. A careful reading of the entire paragraph will clearly negate any thought that either party felt that those rights were not being condemned. Surely, if appellant at that time had entertained any thought that the water rights were not being condemned ( or, in any event, completely destroyed as a result of the condemnation), appellant could have either ( 1) secured a proper court ruling as to the legal issue involved, or (2) covered its position with a suitable reference in the Stipulation itself.

If this Court will again read both sub-paragraphs of paragraph 7 of the Stipulation, viewed in the light of respondent's argument that the water



rights were not to be valued separate and apart from their contribution to the total property and that appellant's claim that it did not acquire the water rights was simply a convenient after thought, it is believed that this matter will be finally laid to rest.

Appellant again raises its previous argument that water rights can be separated from the lands to which they are appurtenant and that they can be separately conveyed. No quarrel with this proposition is had; however, before such a procedure can be undertaken it is necessary that a Change Application be filed with the State Engineer setting forth all of the details concerning the proposed use, place of use and point of diversion of the waters. Subsequently, proper hearings and necessary legal proceedings implement the transfer. However, the argument that this procedure might be followed completely begs the question as applied to this case, as the Court's opinion recognizes.

The Certificated water rights of this respondent were clearly appurtenant to its total properties and any transfer by deed of the real properties upon which the waters were used would clearly transfer title to the appurtenant water rights. This is clearly recognized by Section 73-1-11 Utah Code Annotated, 1953:

" 73-1-11 Appurtenant waters- Use as passing under conveyance--  
A right to the use of water appurtenant to land shall pass to the grantee of such land, . . . ; provided, that any such right to the use of water, or any part thereof, may be reserved by the grantor in any such conveyance by making such reservation in express terms in such conveyance, or it may be separately conveyed. "

The case of Cortella v. Salt Lake City, 93 U. 236, 72 P.2d 630,



recognized that a conveyance of land passes an appurtenant water right and, further, held that in dealing with water it was improper to claim that it was personal property since it was not the corpus of the water but rather the right to the use of the water which was to be treated as an incorporeal hereditament; i.e., real property. Further, in Thompson v. McKinney, 91 U. 89, 63 P. 1056, it was held that water becomes appurtenant to land whenever it is used in direct connection with the real estate conveyed. The foregoing principles were recognized in Anderson v. Hamson, 50 U. 151, 167 P. 254, and numerous other cases referenced in the foregoing three cases.

## POINT II

### THE VALUE OF RESPONDENT'S WATER RIGHTS WAS SUPPORTED BY COMPETENT EVIDENCE.

Appellant seeks to re-argue its claim that the subject water rights were worthless, contrary to this Court's opinion. Oftimes the absurdity of an argument can be detected by the form in which it is placed; i.e. the statement on page 4 of its brief that the determinable value of the water rights " was zero". In an area such as Utah, where water constitutes the life blood of our very existence, such a bald assertion is bound to make anyone stop and think. As pointed out in respondent's prior brief in this matter, values are established by various components which are integrated in use to produce an economic



effect which will attract economic activity. Water flowing down a mountain canyon and disappearing in the hot gravel sands of an adjoining desert serves little or no purpose or use to a remote community, but if the same water is located near a populated center and can be utilized in the process of treating pelts, for human consumption, or otherwise, it is sheer folly to claim that its value must be "zero".

Appellant quotes Dee C. Hansen, State Engineer as stating that these water rights had no value, but it persistently ignores Mr. Hansen's to the contrary, which is again reproduced in this brief with apologies of this counsel.

MR. FULLER: Now, let's take the Utah Wool Pulling Company water right, and let's assume that as a result of that right they are taking from flow and through pumps in excess of 8/10th of an acre foot a day. Based on this figure of .41 cubic feet per second, and assume that the water in the operation is so critical that without it the total operation would cease...

(Objection by Mr. Montgomery overruled)

And further assume that this water is being used in this business. Would you, under those conditions, concede that the water being used is very valuable?

A. Sure.

(R. 333, 334)

. . . . .



MR. FULLER: But if he is using it, whether or not it be on a farm, or in a wool pulling business or whatever, and if the water contributes to the operation, then the water does have value, doesn't it?

A. Yes,

( R. 335)

In its final attack on this Court's opinion, appellant again contends in its brief that three- so- called " comparable" sales of water were not similar in character, location and other factors, and that it was error to admit this evidence. The Court's opinion recognized the usefulness of these sales as having probative value, along with other factors, in arriving at the value of the subject water rights. But appellant completely distorts the facts surrounding the three water transactions, notwithstanding that respondent at page 16 of its prior brief in this matter pointed out the error, by claiming that the water transactions were all located in areas in which " NO OTHER WATER WAS AVAILABLE neither surface or underground for appropriation in those areas, "

The foregoing claim is clearly a complete distortion of the facts. The comparable sale involving the purchase by the West Corinne Water Company involved a stream flow a few miles north of Brigham City, but the area was completely open to both surface and underground water filings-- and still is. The availability of water from the Weber Basin Water Conservancy District ,



at a given replacement cost per acre foot, involved piped water which could be secured in the area of Woods Cross and the vicinity of Cudahy Lane and Redwood Road in the southern portion of Davis County-- an area which was and is also open to water filings and, incidentally, is actually located in the northeast portion of the same aquifer water basin where the subject water rights were located.

### CONCLUSION

Respondent submits that its prior brief in the matter, together with this Court's opinion, adequately answers each and every matter raised in this Petition for Rehearing. Accordingly, it is submitted that a re-hearing be denied.

Respectfully submitted,

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