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Louis Wayman, Mark Bailey and Mildred Bailey, Edward Hobbs, W.J. Norton, Cleone Norton, Frank Larocco and Carol Larocco v. Murray City Corp and Wayne D. Criddle : Amicus Brief

Utah Supreme Court

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BRIEF

IN THE SUPREME COURT
OF THE
STATE OF UTAH

LOUIS WAYMAN; MARK BAILEY and MILDRED BAILEY, his wife; EDWARD HOBBS; W. J. NORTON and CLEONE NORTON, his wife; FRANK LAROCCO and CAROL LAROCCO, his wife,

Plaintiffs-Respondents,

vs.

MURRAY CITY CORPORATION, a municipal corporation of the State of Utah and WAYNE D. CRIDDLE, State Engineer, State of Utah,

Defendants-Appellants.

Case No.
11211

BRIEF OF AMICUS CURIAE

Appeal from the Judgment of the Honorable Alden J. Anderson, Judge of the Third District Court for Salt Lake County

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IN THE

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STATEMENT CONCERNING INTEREST OF AMICUS CURIAE IN ISSUES BEFORE THE COURT.

"Underground water in the United States is a significant source of an increasingly precious commodity; nearly one-fifth of the country's withdrawal needs were met from underground supplies in 1963, and the proportion is expected to reach one-half in the foreseeable future. In 1960, six and one-third billion gallons were taken each day from sub-

> surface sources, a consumption double that of a scant fifteen years ago." University of Colorado Law Review, Volume 40, Number One, Page 133.

It is axiomatic that underground water is important to the development and growth of Utah, to Salt Lake County, to those who reside therein, and to the industries and other operations which maintain our modern economy.

Kennecott Copper Corporation, but one example, is a corporate resident of Salt Lake County, where it has an integrated copper mining industry. To accomplish the necessary mining, leaching, concentrating, smelting and refining, Kennecott uses about 72,000 gallons of water per minute. There are a number of sources for this water, but approximately 44 percent comes from the underground water basin of Salt Lake County.

A few years ago, Kennecott processed 90,000 tons of ore per day. Now it is treating 18,000 tons more of ore per day. With this increased expansion came a need for more water. The surface waters of Salt Lake County had been fully appropriated, but one significant available source for additional water was the ground water basin. If Kennecott and all others desiring to utilize the available underground water are to do so efficiently, filing proper applications to appropriate or Change Applications with the State Engineer, the State Engineer should not be frustrated in his administration of the water source in the general public interest by court decisions which seem to hold that those who have rights to divert water from a ground water basin are also entitled to the absolute right to have the hydro-

static pressure that happened to be present at the time of the original appropriation maintained regardless of the reasonableness or efficiency of his diversion.

STATEMENT OF POINTS TO BE DISCUSSED

When the Amicus Curiae Petition was filed seeking permission to appear before the Supreme Court in this case, three questions were to be discussed as follows:

(1) Do owners of rights to the use of underground water by means of flowing wells have a vested right to the hydrostatic pressure in their wells such that they can enjoin other owners of rights from the same sources from improving their methods of diversion if the effect of such improvement is to lower the hydrostatic pressure in other wells?

(2) Does the owner of a right to divert and use underground water by means of wells have the right under Section 73-3-3, Utah Code Annotated 1953 to alter and change his means or method of diversion by equipping the same with pumps, if necessary, to continue the full use of his water right even though as a result of such alteration or change the hydrostatic pressure in other wells might be lowered thereby?

(3) Does an established right to divert water from an underground source entitle the owner thereof to an unqualified right to the continued artesian

> pressure as his means of diversion, or is such right limited to a means or method of diversion which is reasonable and consistent with the state of development in the area in which he obtains his water?

An examination of those questions makes it clear that there is really but one fundamental question which evolves from the three noted above:

> Does an established vested right to divert water from an underground source entitle the owner thereof to an unqualified right to the continued artesian pressure as his means of diversion, or is such right limited to a means or method of diversion which is reasonable and consistent with the state of development in the area in which he obtains his water?

ARGUMENT

AN ESTABLISHED VESTED RIGHT TO DIVERT WATER FROM AN UNDERGROUND SOURCE IS LIMITED TO A MEANS OR METHOD OF DIVERSION WHICH IS REASONABLE AND CONSISTENT WITH THE STATE OF DEVELOPMENT IN THE AREA IN WHICH ONE OBTAINS HIS WATER.

Mr. Justice Latimer in the case of *Hanson* v. *Salt Lake City,* 115 Utah 404, 205 P.2d 255 established the point of departure for our argument when he said at page 442:

> "It is my belief that the development of artesian water in this state has reached a point where

> *we should only protect the prior appropriator when his means of diversion are reasonable and consistent with the state of development in the area in which he obtains his water.*"

The thrust of Judge Latimer's opinion was to assert that if a highly developed underground water basin is to be fully and efficiently developed, the prior appropriator should not be entitled absolutely to his hydrostatic pressure.

In the case of *Current Creek Irrigation Co.* v. *Andrews*, 9 U.2d 234, 344 P.2d 528, Mr. Justic Crockett discussed the problem of maximum development of an underground water basin at page 334:

> "The difficulty with preserving to the prior user the absolute right to water and also to the pressure and means of diversion is that projecting its application to basins where there are a great number of users reveals that it does not work to serve the necessary purpose of maximum development and use of water. The evidence indicates and it is a well-known and observable fact, that when the water table of an underground basin is maintained at a high enough level to sustain pressure in flowing wells in the higher areas, there will be water above and near the surface in the lower areas forming ponds, marshes and swamps. This results in wasteful losses from surface evaporation and from consumption by water-loving plants, tules, reeds and rushes, indigenous to such areas, which are of little or no value. There is often further wastage from drainage of the basin by streams or by leakage and seepage out of it."

In the case immediately before the Court, we are concerned with the proper interpretation of Section 73-3-3,

U.C.A. 1953, and more particularly the first sentence which reads as follows:

> "Any person entitled to the use of water may change the place of diversion or use and may use the water for other purposes than those for which it was originally appropriated but no such change shall be made if it impairs any vested right without just compensation."

The term "any vested right" is not defined by statute. However, this Court in three cases (*Justesen* v. *Olsen,* 86 Utah 158, 40 P.2d 802; *Hanson* v. *Salt Lake City, supra;* and *Current Creek Irrigation Co.* v. *Andrews, supra*) has provided guidance as to what a vested right to underground water means. None of those cases involved a Change Application under Section 73-3-3, but those cases cannot be ignored in reaching a conclusion as to disposal of this matter now before the court.

In searching for a definition of "vested right" as it relates to ground water, we must be cognizant that the Utah Legislature has provided that all waters in this state, whether above or under the ground are declared to be the property of the public, subject to all existing rights to the use thereof. Section 73-1-1, U.C.A. 1953. This Court has held that it is contrary to public policy in Utah to permit waste of water (*Wrathall* v. *Johnson,* 86 U. 50, 59, 40 P.2d 755) and that conservation of water is of utmost importance to public welfare in Utah (*Brian* v. *Fremont Irrigation Co.,* 112 U. 220, 186 P.2d 588). In *American Fork Irr. Co., et al.* v. *Linke, et al.,* 121 U. 90, 97, 239 P.2d 188, this Court said:

> "Plaintiff's proposal, if completed without impairing vested rights, contemplates the more beneficial use of water, a most desired result fully consistent with progress and change, and reflecting the established policy of this state."

Utah's water statutes clearly enjoin upon the State the duty to control the appropriation of the public waters in a manner that will be for the best interests of the public. *Tanner* v. *Bacon,* 103 Utah 494, 506, 136 P.2d 957. What the Legislature obviously desired was full development and beneficial use of the water of Utah with as little waste as possible. That would seem to have been and now is the basic theory followed by this Court. It is respectfully submitted that the Court in this case should now establish clearly the rule of reason applicable to water diversion which would allow the fullest and best use of ground water in the State of Utah. It seems clear that the Court should reject the concept that when one seeks to change his ground water right and make the means of diversion more efficient, as the applicant did here, even though the hydrostatic pressure of others who have water rights is lowered by such a change, the Change Applicant is absolutely responsible for replacing the pressure or ceasing operations, or acquiring the right so affected. While Kennecott economically could meet this requirement, still Utah's basins wil not be fully developed for the general public because few, if any, such applicants would be able to insure those with such vested rights the right to have the same pressure maintained. The better rule would seem to be that a "vested right" to underground water entitles one owning the right to use of the water, but nevertheless, the means of diversion

must continue to be reasonable and consistent with the state of development of water in the area, and not detrimental to the overall purpose of putting all of the usable water in the basin to use.

Hutchins, Selected Problems in the Law of Water Rights in the West, recognized this problem at page 179 when he stated:

> "On the whole, it seems obvious that to accord the first appropriator under a ground-water administrative statute the right to have the water level maintained at the point at which he first pumps it, or damages in lieu thereof, so long as there is an adequate water supply of equivalent quality available at lower depths from which it is feasible to pump, would unduly complicate the administration of water rights in the area and might seriously curtail the fullest utilization of the ground-water supply, for later uses under such a handicap may prove to be economically impracticable. This result would be out of line with the purpose of the statute. Accordingly these factors and implications are worthy of consideration in determining the question of reasonableness of the first appropriator's diversion under such circumstances."

A number of western State Legislatures have attempted to define "vested right" as it applies to underground water and these statutes should be helpful in view of the fact that Utah has no statute defining the term.

Alaska in 1966 adopted Section 46.15.050 which provides:

> "Priority of appropriation gives prior right. Priority of appropriation does not include the right

to prevent changes in the condition of water occurrence, such as the increase or decrease of stream flow, or the lowering of a water table, artesian pressure, or water level, by later appropriators, if the prior appropriator can reasonably acquire his water under the changed conditions."

The State of Colorado:

". . . declared that the traditional policy of the state of Colorado, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the designated ground waters of this state, as said waters are defined in section 148-18-2(3). While the doctrine of prior appropriation is recognized, such doctrine should be modified to permit the full economic development of designated ground water resources. *Prior appropriations of ground water should be protected and reasonable ground water pumping levels maintained, but not to include the maintenance of historical water levels.*" 148-18-1, Colorado Revised Statutes, 1963.

Idaho's Legislature stated in Section 42-226, Idaho Code, as follows:

"It is hereby declared that the traditional policy of the state of Idaho, requiring the water resources of this state to be devoted to beneficial use in reasonable amounts through appropriation, is affirmed with respect to the ground water resources of this state as said term is hereinafter defined: and, *while the doctrine of 'first in time is first in right' is recognized, a reasonable exercise of this right shall not block full economic development of underground water resources, but early appropriators of underground water shall be protected in the maintenance of reasonable ground water pumping*

levels as may be established by the state reclamation engineer as herein provided."

Kansas has a detailed guide for its Chief Engineer; Section 82a-711 provides:

> "With regard to whether a proposed use will impair a use under an existing water right, impairment shall include the unreasonable raising or lowering of the static water level or the unreasonable increase or decrease of the streamflow or the unreasonable deterioration of the water quality at the water user's point of diversion beyond a reasonable economic limit."

Section 82a-711a of the Kansas law contains express conditions for appropriations as follows:

> "It shall be an express condition of each appropriation of surface or ground water that the right of the appropriator shall relate to a specific quantity of water and that such right must allow for a reasonable raising or lowering of the static water level and for the reasonable increase or decrease of the streamflow at the appropriator's point of diversion: *Provided,* That in determining such reasonable raising or lowering of the static water level in a particular area, the chief engineer shall consider the economics of diverting or pumping water for the water uses involved; and nothing herein shall be construed to prevent the granting of permits to applicants later in time on the ground that the diversions under such proposed later appropriations may cause the water level to be raised or lowered at the point of diversion of a prior appropriator, so long as the rights of holders of existing water rights can be satisfied under such express conditions."

Section 41-141 of the Wyoming Statutes passed in 1957 is also clear in its limiting conditions:

> "It shall be an express condition of each permit and of each appropriation of underground water acquired thereunder that the right of the appropriator does not include the right to have the water level of artesian pressure at the appropriator's point of diversion maintained at any level higher than that required for maximum beneficial use of the water in the source of supply. The state engineer may issue any permit subject to such conditions as he may find to be in the public interest."

In defining a water right in Montana, Section 89-2912 declares that:

> "Appropriative rights shall relate only to quantities of water for beneficial uses and not to water levels, means of use, or ease of withdrawal, . . ."

Nevada has also recognized that an underground water appropriation does not entitle one to the hydrostatic pressure that was present when the water was originally appropriated. Section 534.110, Nevada Revised Statutes, is the one to which we direct the Court's attention:

> "4. It shall be an express condition of each appropriation of ground water acquired under NRS 534.010 to 534.190, inclusive, that the right of the appropriator shall relate to a specific quantity of water and that such right must allow for a reasonable lowering of the static water level at the appropriator's point of diversion. In determining such reasonable lowering of the static water level in a particular area, the state engineer shall consider the economics of pumping water for the general type of crops growing and may also consider the

effect of water use on the economy of the area in general.

"5. Nothing herein shall be so construed as to prevent the granting of permits to applicants later in time on the ground that the diversion under such proposed later appropriations may cause the water level to be lowered at the point of diversion of a prior appropriator, so long as the rights of holders of existing appropriations can be satisfied under such express conditions."

All of the above statutes have been noted because such legislation clearly indicates that the Western States are attempting to provide a rule of reason to achieve full beneficial and efficient development of underground water basins. It is significant that each of those States have adopted the modern ground water concept as espoused by Wells A. Hutchins as far back as 1942.

The majority in *Hanson* v. *Salt Lake City, supra,* at page 422 seemed initially to recognize that the means of diversion must be reasonable when it was said at page 422:

> "We conclude that the water of artesian basins are subject to appropriation in this state and that the first appropriator obtains a prior right to the use of such waters over subsequent appropriators, and *that includes his means of diversion as long as such means are reasonably efficient and do not unreasonably waste water.*"

However, the court then went on to decide that a subsequent appropriator must bear the additional cost of lifting sufficient water to a prior appropriator if the subsequent ground water appropriator reduces the static head pressure.

We submit that the rationale of the judges who concurred only in the result in the case of *Hanson* v. *Salt Lake City, supra,* is more in keeping with maximum development of an underground water basin.

Mr. Justice Wolfe on page 434 commented:

> "I realize that first in time is first in right both as to surface and ground waters. But I agree with Mr. Justice LATIMER that first in right does not mean that antiquated means of diversion is a part of that prior right."

Further on page 436 he said:

> "Prior appropriators by first tapping the basin might reap the benefit of a static head sufficient to bring the water diverted to the surface, but to require all subsequent appropriators to preserve this means of bringing the water to the surface would be to require them to preserve the static head, and thereby prevent the widest use of that underground water, or introduce impractical problems of allocating among numerous subsequent appropriators the amount of impairment each caused to the static head of a prior user or users. I think the tendency is, even in truly artesian basins ('artesian' accurately used applies to water which on being tapped, naturally rises to the surface although the term is loosely used to apply to any area where deep wells are drilled and water is pumped) to require all users to put in pumps in order to prevent waste."

Finally, on page 439, let us look at the last paragraph of Justice Wolfe's opinion:

> "Naturally when supply is depleted in any vessel large or small, static pressure is lowered. But it does not follow that, because the static pressure is

> lowered, the user has been legally injured if he can by reasonable means still obtain the amount of water he appropriated. Under the policy making as much water as possible available for use and encouraging its use, he cannot insist that the static pressure existing at the time of his appropriation be maintained, or that a subsequent appropriator pay the cost of pumping apparatus to take the place of the lost pressure. He must, as Mr. Justice LATIMER states, use that means of transporting water to the surface which serves the above policy if under the circumstances and period, and in view of the rights of other appropriators, both prior and subsequent, it is a reasonable method."

Judge Latimer's thesis is summarized in the last three paragraphs of his opinion at pages 445 and 446:

> "If we are to protect the prior appropriator under all circumstances, then the prior appropriator can require damages from every subsequent appropriator and each subsequent appropriator in turn, can require damages from all subsequent appropriators, until the last one would have to pay tribute to all. If the waters of the Jordan River Basin are to be utilized to the fullest extent, then it must be recognized that some lowering of the water table or static head will result when each well is drilled; and that such a result cannot be avoided if use is to be made of the water now going to waste. If the present appropriators of artesian water have the right to retain the pressure now present in the basin, then I see no escape from the conclusion that in the future, it will not be economical and feasible to drill wells in this basin.
>
> "Moreover, unless we adopt the principle that prior appropriators must use reasonable means of

diversion, I am unable to determine how the State Engineer can carry out the functions delegated to to him by the 1935 Legislature. He is authorized to permit citizens of this state to appropriate unappropriated waters and under the evidence of Dr. Marsell, there exists a minimum of 165 cubic feet per second of unappropriated water in this basin. If the State Engineer must require subsequent appropriators to pay tribute to all prior appropriators of water in the area, then we cannot reasonably expect newcomers to assume this burden.

"The record does not convince me that the method of diversion used by the plaintiff in this case is reasonable under the facts and circumstances. I, therefore, feel that the cost of making his diversion reasonable should be borne by him and not by the city. He should be protected in the quantity of water he has appropriated and is beneficially using, but I believe that even though his original means of diversion may have been reasonable, it now should be changed to one consistent with the developments in the area, and that he should be required to assume the additional costs imposed on him by virtue of the changed conditions."

In 1959 the Utah Supreme Court in the case of *Current Creek Irrigation Co.* v. *Andrews, supra,* considered the problem of whether or not prior appropriators from an underground basin have a vested right to continue receiving water by artesian pressure and whether subsequent appropriators whose withdrawals of water lower the water table and reduce the flow of prior wells, must restore the pressure or bear the expense of replacing the water of prior appropriators. The majority ruled that a subsequent appropriator of underground water whose withdrawals in-

terfered with prior appropriators would have to cease pumping or replace the water of prior appropriators. In dissenting, Mr. Justice Crockett pointed out that the majority was assuming that a prior user of underground water has an absolute right to have not only the water, but also to have the pressure and means of diversion preserved inviolate. He asserted that inasmuch as water rights are assured and protected by the authority of the state, it is logical and necessary that they be deemed to be held subject to such conditions and limitations as are established by law for the general good. Of particular significance is Justice Crockett's comments with respect to the *Hanson* v. *Salt Lake City, supra,* case at page 337:

> "It is of vital significance, insofar as the authority of the Hanson case is concerned, that Justice Wolfe and Latimer in concurring opinions pointed out that prior appropriators of underground water should not be deemed to get an absolute right to pressure, but only to the water; and that the means of diversion must be reasonable and consistent with the state of development of water in the area and not inimical to the overall purpose of putting all of the usable water in the basin to use. In a special concurrence in the result, Chief Justice Pratt in different words concurred with that conclusion saying, 'The rule as to reasonable and economical use of water applies as well to methods of diversion as it does to the application of the water to the land itself.' These observations were made in apprehension of the very problems that have arisen in this case. As I view it, they are not inconsistent with the statute and are in conformity with the basic objective which must necessarily underlie our water law."

The Colorado Supreme Court in the case of the *City of Colorado Springs* v. *Bender,* 366 P.2d 552 (1961) which involved an action by senior appropriators of water from an underground stream to enjoin junior appropriator from withdrawing water, provides guidance at page 555:

> "At his own point of diversion on a natural water course, each diverter must establish some reasonable means of effectuating his diversion. He is not entitled to command the whole or a substantial flow of the stream merely to facilitate his taking the fraction of the whole flow to which he is entitled. *Schodde* v. *Twin Falls Land & Water Co.,* 224 U.S. 107, 119, 32 S.Ct. 470, 56 L.ed. 686. This principle applied to diversion of underflow or underground water means that priority of appropriation does not give a right to an inefficient means of diversion, such as a well which reaches to such a shallow depth into the available water supply that a shortage would occur to such senior even though diversion by others did not deplete the stream below where there would be an adequate supply for the senior's lawful demand."

In discussing what should be done by the trial court on remand, the Colorado Supreme Court at page 556 said:

> "The court must determine what, if anything, the plaintiffs should be required to do to make more efficient the facilities at their point of diversion, due regard being given to the purposes for which the appropriation had been made and the 'economic reach' of plaintiffs. The plaintiffs cannot reasonably 'command the whole' source of supply merely to facilitate the taking by them of the fraction of the entire flow to which their senior appropriation entitles them. On the other hand, plaintiffs cannot

> be required to improve their extraction facilities beyond their economic reach upon a consideration of all the factors involved."

If it is necessary in the decision of this case or in defining what is a "vested right" as it appears in Section 73-3-3, Utah Code Annotated 1953, the Utah Supreme Court should not hesitate on this narrow point to reverse *Current Creek Irrigation Co.* v. *Andrews, supra.* Certainly, the decisions of this Court in the past make it clear that the Utah Court has properly adjusted the rules of law to meet arising problems and modern developments pertaining to use of water in Utah. In the early decisions, the Supreme Court followed the common law concept of absolute ownership of ground water by the overlying landowner. *Willow Creek Irr. Co.* v. *Michaelson,* 21 U. 248, 60 P. 943 (1900). In *Horne* v. *Utah Oil Refining Co.*, 59 Utah 279, 202 P. 815 (1921), the ownership rule was abandoned in favor of the doctrine of correlative rights. Shortly thereafter, in *Glover* v. *Utah Oil Refinery Co.*, 62 Utah 174, 218 P. 955 (1923) the Court modified the correlative right doctrine to allow an owner to transport his proportionate share of the water out of the basin. In 1935, the correlative rights doctrine was rejected by the court in two decisions (*Wrathall* v. *Johnson,* 86 U. 50, 40 P.2d 744 (1935) and *Justesen* v. *Olsen,* 86 U. 158, 40 P.2d 802 (1935)) which adopted in its place the doctrine of prior appropriation.

So we respectfully submit that the Utah Supreme Court should now adopt the rule of law which would define "vested right" in Section 73-3-3 as meaning that while an

appropriator of underground water is entitled to the quantity of water that he diverts and beneficially uses, nevertheless, his means of diversion must continue to be reasonable and consistent with the development of the area. No longer should an appropriator of underground water be entitled absolutely and unreasonably to maintenance of the hydrostatic or artesian pressure that happened to exist at the time of his original appropriation.

CONCLUSION

Maximum beneficial use of available water should be the guiding policy in defining rights to the use thereof. An appropriative, usufructuary right should be defined in terms which would permit further appropriations or change applications for appropriations to the fullest extent possible within the safe yield of an underground source so long as the pumping lift is economically reasonable. Utah Law Review, Vol. 5, No. 2, Page 192.

This Court should now take advantage of the opportunity to adopt the rule of reasonableness in the area here involved which would result in the greatest development of underground water basins in Utah and the most beneficial use of the waters contained therein in the public interest. The State Engineer needs guidance which will allow him to administer the water laws of Utah so as to obtain the highest and best use of the waters of Utah. The rule of reasonableness which is in harmony with the opinions of Justices Crockett, Wolfe and Latimer, as noted above,

should now be adopted by this Court, and the trial court's decision in this matter should be reversed with appropriate instructions.

Respectfully submitted,

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