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7189

Case No. 7189

IN THE SUPREME COURT
of the State of Utah

LEHI IRRIGATION COMPANY,
Plaintiff and Appellant

vs.

CLARENCE T. JONES and
ED H. WATSON, State Engineer
of the State of Utah
Defendants and Respondents.

APPELLANT'S BRIEF

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SKEEN, THURMAN & WORSLEY
Attorneys for Appellant

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STATEMENT

This appeal involves the decision of the District Court for Utah County in three separate actions filed by the same plaintiff against the same defendants. The cases were numbered in the District Court as Numbers 14615, 14646 and 14647, and all three cases were, by stipulation, tried and submitted and decided together on the same evidnce. Separate findings and decrees were entered, but all cases are brought up on this appeal for review on the one record.

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The actions are purely statutory, authorized to test the legality of the action of the State Engineer in approving an application to appropriate water.

The applications were filed and noticed and protests to their granting were filed. Hearings were had by the State Engineer, the protests denied and the application in each instance was granted. This appeal challenges the correctness of the action by the defendant State Engineer.

STATEMENT OF ERRORS

1. The Court erred in making and entering its findings of fact that the water sought by said application, and each of them, was unappropriated water.

2. The Court erred in entering judgment in favor of the applicant and defendants and against the plaintiff, sustaining the action of the defendant, State Engineer, and authorizing the applicant to proceed, under the said application to establish and perfect water rights thereunder.

3. The Court erred in overruling and denying the plaintiff's offer and refusing to receive in evidence, in support of plaintiff's complaint in each case, the exhibits CC, DD, EE, and FF (Tr. 119).

ARGUMENT

All of the errors assigned go to the one point that under the evidence presented there was no unappro-

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priated public waters to which the applicant's claims could apply.

The actions were brought pursuant to Utah Code Annotated, 1943, 100-3-14 and 100-3-15.

By the statement of Counsel in the record (Tr. 5) it is made clear that the applicant in each instance is not seeking or claiming new water rights but predicates his claim solely on the fact that the water claimed "arises upon our own land, * * * and also by reason of the fact that the water rises from irrigation on the high table lands above, and that that irrigation—that is, there has been a substantial increase to irrigation there from an outside supply of water through Deer Creek."

Again at transcript 110:

> "Mr. Mulliner: I am here entirely on the question of simply claiming water that has arisen on our ground and also on the ground that it is new water that has arisen there since 1903.
>
> "The Court: And there is no contention or dispute about the old water. Neither one of you is fussing over the water that came down the creek at the time of this decree?"

The Court, by its finding number 3, finds:

> "That the plaintiff and its stockholders acquired by diligence rights prior to 1903 the use of the waters flowing in Dry Creek, located in Utah County, Utah, and including the tributaries thereto, for irrigation purposes upon their lands. Such rights are subject to the rights of owners of adjacent lands to the use of seepage waters

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> arising thereon, and which waters might be allowed to contribute to Dry Creek. Plaintiff makes no claim of, or any claim under, any filing since 1903.''

Exhibits AA and BB point to the fact that all of the waters in this area were appropriated and recognized as appropriated prior to 1903. They add little, however, to the statement of Counsel for the defendant, quoted above, that no claim is made by the applicant in each instance (the defendant here) except to waters that arise from irrigation under Government appropriations made in connection with the Deer Creek Reservoir and used in irrigation from water stored in the Deer Creek Reservoir under these appropriations, and then used for irrigation on lands higher than those of the plaintiff, Lehi Irrigation Company, and in such a way that when so used on higher levels, the waters have risen during approximately the last three years on the lands of the Lehi Irrigation Company. This is made clear by findings numbers 4, 5, 6 and 7 in each of the cases.

The record then in each case is perfectly clear that the sole claim of the applicant under each application is the right to appropriate unappropriated waters of the State of Utah. The statement of Counsel further definitely fixes the claim of the applicant that these sought *unappropriated* waters are waters which were once appropriated under the Government applications. (Exhibits CC, DD, EE, and FF).

> The applications produced, and appearing as Exhibits 3, 4 and 5, are on the specified form to

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appropriate water and simply describe the origin of the water as unnamed springs and the point of origin, and this statement with the statements of Counsel above quoted herein, and Finding No. 6, tie these springs as originating in and fed by the water taken out of the Deer Creek Reservoir and spread over the Provo Bench at a higher level than that of the springs.

Exhibits CC, DD, EE, and FF are applications prior in time to those of the defendant Jones involved in these cases, and those applications cover appropriations of water from various sources under what is known and referred to in the findings as the Weber River Irrigation System and the Deer Creek Reservoir. The project known as the Deer Creek Reservoir and the Weber River Irrigation System is so well known that we think the Court will judicially notice the same and the details with respect thereto. The exhibits last referred to, however, and particularly Exhibit EE, give in quite detail the extent and scope of these prior applications to appropriate water made by the Department of Interior, Bureau of Reclamation of the United States of America. We make the following statement as an aid to the Court in considering the extent of the prior appropriations as covering all water brought on to this area from which the defendant claims the springs come, as a part of the Deer Creek Reservoir and the Weber River Irrigation System.

This project comprises Deer Creek and the Deer Creek division includes Deer Creek Reservoir, Duchesne Tunnel and enlargements of the Provo River and Weber River diversion canals. The purpose, under the applications, is to develop the available water resources of the Weber,

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> Duchesne and Provo Rivers by storing in the Deer Creek Reservoir up to 100,000 acre feet of water. This water is appropriated for use on some 50,000 acres of improved land in Utah and Salt Lake Counties, which includes what is known as the Provo Bench to the east and above the point of issuance of the springs being claimed under the application for appropriation by the defendant Jones. In addition the facilities for storing and transporting all of the water in the Deer Creek Reservoir extend to serving large areas and supplying domestic uses in Salt Lake County. There can be no question under the evidence but that the water which the defendant seeks to appropriate now is water which is covered by these prior appropriations and, as elsewhere stated, has not been released or abandoned by the prior appropriator.

In determining whether or not there is any unappropriated water, we start then with the original priority rights of the Lehi Irrigation Company conceded. This leaves the applicant in the position of asserting that this water once appropriated under the Deer Creek system by the Government applications is once used and, as it arises on lower lands, becomes subject to appropriation or re-appropriation by the applicant as unappropriated water. From the statement of Counsel set forth in the brief this is too clear to be controverted.

The question then presented by this appeal is when once the appropriation of water is conceded, does not an applicant seeking to appropriate the same water have to carry the burden of showing that the water has been abandoned by the appropriator or that in some way the

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original appropriator has given up the right to recapture and reuse the water?

This matter has never been considered from this aspect by this Court. It is generally conceded, we think, that the applicant carries the burden of showing that there is unappropriated water. We contend that when he shows or concedes that water has been appropriated he must then carry the burden further of showing its abandonment or some facts which brings it into the category of unappropriated water again. The mere appearance of this water on lower levels by its arising in springs or otherwise, is not sufficient because the original appropriator still has the right beyond question to recapture and to reuse the water so arising for beneficial purposes under his original application.

This matter has been thoroughly considered and decided by the Supreme Court of the United States in the case of Ide vs. United States, 263 U. S. Supreme Court Reports 497, 68 L. Ed. 407. We believe this decision gives the answer to the question presented by this appeal. Justice Van Devanter wrote the opinion, and we quote briefly from it:

Page 412:

> "The seepage producing the artificial flow is part of the water which the plaintiff, in virtue of its appropriation, takes from the Shoshone river and conducts to the project lands in the vicinity of the ravine, for use in their irrigation. The defendants insist that when water is once used under the appropriation it cannot be used again,—that

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the right to use it is exhausted. But we perceive no ground for thinking the appropriation is thus restricted. According to the record, it is intended to cover, and does cover, the reclamation and cultivation of all the lands within the project. A second use in accomplishing that object is as much within the scope of the appropriation as a first use is. The state law and the National Reclamation Act both contemplate that the water shall be so conserved that it may be subjected to the largest practicable use. A further contention is that the plaintiff sells the water before it is used, and therefore, has no right in the seepage. But the water is not sold. In disposing of the lands in small parcels, the plaintiff invests each purchaser with a right to have enough water supplied from the project canals to irrigate his land, but it does not give up all control over the water, or do more than pass to the purchaser a right to use the water so far as may be necessary in properly cultivating his land. Beyond this all rights incident to the appropriation are retained by the plaintiff. Its right in the seepage is well illustrated by the following excerpt from the opinion of District Judge Dietrich in the United States v. Haga, 276 Fed. 41, 43:

"'One who, by the expenditure of money and labor, diverts appropriable water from a stream, and thus makes it available for fruitful purposes, is entitled to its exclusive control so long as he is able and willing to apply it to beneficial uses, and such right extends to what is commonly known as wastage from surface run-off and deep percolation, necessarily incident to practical irrigation. Considerations of both public policy and natural justice strongly support such a rule. Nor is it essential to his control that the appropriator main-

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> tain continuous actual possession of such water. So long as he does not abandon it or forfeit it by failure to use, he may assert his rights. It is not necessary that he confine it upon his own land or convey it in an artificial conduit. It is requisite, of course, that he be able to identify it but, subject to that limitation, he may conduct it through natural channels and may even commingle it or suffer it to commingle with other waters. In short, the rights of an appropriator in these respects are not affected by the fact that the water has once been used.' * * * "In these circumstances it is very plain that the plaintiff's right in the seepage was not abandoned."

We respectfully submit that the judgment in each case should be reversed and set aside and the applications to appropriate water in each case denied. We urge in further support of this contention that those in possession of water under appropriations and using it, as is the position of appellant in this case, should not be called upon to defend and resist applications freely and frequently made where there is no water subject to appropriation. Much expense and litigation could be saved by requiring strict proof of the existence of unappropriated water before the applicant is given permission to go ahead.

Respectfully submitted,

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Attorneys for Appellant

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