

1948

# Lehi Irrigation Company v. Clarence T. Jones and Ed H. Watson : Brief of Respondent

Utah Supreme Court

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Edward W. Clyde; and Mulliner, Prince & Mulliner; Attorneys for Respondents;

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**In the Supreme Court  
of the State of Utah**

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LEHI IRRIGATION COMPANY,  
*Plaintiff and Appellant,*

**vs.**

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

*Defendants and Respondents.*

**Case No.  
7189**

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**BRIEF OF RESPONDENT**

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**FILED** EDWARD W. CLYDE, and  
AUG 6 - 1948 MULLINER, PRINCE & MULLINER  
*Attorneys for Respondents.*

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CLERK, SUPREME COURT, UTAH

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vs.

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*Defendants and Respondents.*

Case No.  
7189

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## BRIEF OF RESPONDENT

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### STATEMENT

We do not disagree with the brief opening statement of Appellant, as far as it goes. While technically, the appeal is from the District Court, the action of the State Engineer in granting the applications and permitting us to try to acquire water rights, presents the controlling question here. His findings, which are not modified or changed by the Court below, will be used as the basis for our brief.

Appellant has the burden of establishing error in his conclusions. We will cite the record in case 14645, as it appears to be complete. It also contains some documents belonging to the files in cases 14646 and 14647. We will cite pages from this record with the letter "R" and pages of the transcript of evidence with the letter "T."

### THE ISSUES

The only point briefed and relief upon is that the original source of the waters involved was Weber River, and that the waters are covered by filings made by the United States, through the Bureau of Reclamation, or assigned to it. That under these, the department has the right to, and may claim repossession of the waters involved.

These filings were not admitted in evidence. And no point of error is argued on the ruling excluding them. Appellant makes, and appears to rely entirely upon, the statement (P. 5), that: "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."

We do not know as to this, or as to how far it may go. However, it seems unnecessary to contest it at any length.

It is true, that there is evidence, and a finding as to each spring, by the State Engineer (R. 14) that: "However, with the increased application of irrigation waters

on the higher lands and, in particular, the use of Deer Creek waters thereon, the flow from the spring has in the past few years, materially increased so that it now yields more water than would have been available to the protestant were it not for the increased irrigation of upper lands.

The trial Court's finding supports this (R. 26). The Appellant claims only a diligence right to the water of Dry Creek available to it prior to 1903, since which time statutes have required that applications be made by filing with the State Engineer. The finding (R. 25) that they have only this right and that they "make no claim of, or any claim under any filing since 1903," is not challenged.

Thus, and by reason, of the abandonment in the Brief of any contention that their right will be interfered with by the granting of this application, or even the perfection of a water right thereunder, they have eliminated any such issue from the case. The claim here is merely that some one foreign to the case, might have objected, or could object, to our use of the water attempted to be filed on.

We come, therefore, to the consideration of the single point briefed and to the question as to whether (1) that point can be now raised here, for the first time, or (2) raised by this Appellant at all and, if so, (3) whether it has merit.

## BRIEF AND ARGUMENT

### General Rules Applicable:

The State Engineer's decision (R. 15) was: "Fol-

lowing the rule laid down by our Supreme Court in cases like *Little Cottonwood Water Company v. Kimball*, it would appear that there is a reasonable likelihood that the applicant can perfect this application. The application is therefore granted, subject to prior rights."

This is in harmony with the decisions of this Court establishing the policy of promoting the greatest possible use of water. Also with the decisions that the granting of the application does not effect an appropriation. It merely affords an opportunity for the Engineer to see if proper appropriation by the applicant to a beneficial use can be effected, without interference with objector's rights, or subject thereto. He is charged with the duty of general administration, the duty to bring about the largest use possible, and the duty to prevent waste. (100-2-1)

*Little Cottonwood v. Kimball*, 76 U 243, 289 P. 116.

*Eardley v. Terry*, 94 U 367, 77 P. (2) 362.

In the former case it was said that it is the duty of the Engineer to grant the application if there "is or may be" water available for appropriation.

And, in the latter case "if there is probable cause to believe that there is unappropriated waters available or *waters which can be made available for use.*"

The Courts below and here can only determine whether the State Engineer rightly approved the application, as against the protest of an Appellant. And will sustain him where he does not act "arbitrarily or capriciously."



Eardley v. Terry, Supra.

Tanner v. Bacon, 103 U. at 506, 136 P. (2) at 962.

### **Spring Waters — Percolating:**

We briefly point out the reasons for these applications covering waters arising in springs on our own land. We are aware, that under the decisions of this Court, reviewed in Stookey v. Green, 178 P. 586, it has been held: "If it is private land and the water is percolating, as known and understood at common law, then it is not the subject of appropriation as against the owner of the land." The point is now before this Court, however, in Riordan v. Westwood.

Some contention was made in the Court below, that since we apparently already had the water, we couldn't apply to appropriate any part of it. The Court in effect held that this was no concern of the Appellant. That they would not be affected either way. This is not raised here.

And, we are also aware, that such waters when allowed to escape, without indication of present intention of the prior irrigator to reclaim and use them, may become subject to down stream or lower appropriations, and to successive appropriations. The policy is to keep waters working.

Clark v. Nor. Cottonwood Irr. Co., 79 U 425, 11 P. (2) 300.

Smithfield West Bench v. Union Life, 142 P. (2) 866.

So, by placing these applications we may be able to



hold a priority on escaping waters up to the amounts applied for, pending the completion of the expenditures and improvements to enable us to put the same to use. This must all be done before we can make proof for, or complete an appropriation, or receive a certificate.

Rocky Ford Irr. Co. v. Kent Lakes Res. Co., 140 P. (2) 638 at 640.

### Points Argued:

#### I.

**The point now presented is that Appellant cannot here for the first time raise the claim briefed.**

This Court on appeal is restricted to questions, issues and theories presented in the Court below.

U. S. Bldg. & Loan Ass'n v. Midvale Home Fin. Corp., 86 U 522, 46 P. (2) 672.

Huber v. Newman, 145 P. (2) 780, 782.

Woolf v. Gray, 48 U. 239, 158 P. 788.

And, see additional cases cited in Volume 6, 406, UCA 1943.

Appellant's protests to the State Engineer are not in evidence. The issue presented there is, however, recited by the State Engineer (R. 14):

"The protest is based primarily upon the contention that all of the water from the springs in question has been appropriated by the protestant and that there is no unappropriated water \* \* \*.

"But, *as against that Company*, (Appellant) it does appear that this increased flow of the spring caused from

irrigation of higher lands might be unappropriated waters \* \* \* .

“Under the case of Little Cottonwood Water Company v. Kimball, 76 U. 243, and other similar cases, the State Engineer should approve an application, if there is reasonable ground for believing that the applicant might be able to perfect a right.”

It will be noticed that the State Engineer determined the matter “as against” Appellant and as between the parties to the then claimed conflict.

Appellant’s complaint (R. 1) alleges its ownership of all water of Dry Creek and all its springs and sources of supply. It then pleads that there is no unappropriated waters in any contributory springs or within the area of the application, because it all belongs to it, because such “have been, and now are put to a beneficial use by Appellant herein.” They pray (R. 3) that their said rights be decreed to be “prior and superior to any claims and demands of the Defendant.” “Pleadings, practice and procedure” in this case are the same as in equity cases generally. (100-3-15). Thus any claim, as to unappropriated waters, was based upon the claim, that there are none such because the waters involved belong to Appellant.

We offered some evidence to show additional irrigation on the bench land above by respondent and others through the Provo Res. Canal System, commencing when that canal was build in 1913. (T. 27.) There was some testimony that prior to and during and since 1944 there

had been increased irrigation up there, mainly by the use of water from Weber River, and an additional increase in the springs. (T. 68-72.)

There is no allegation as to any right of the United States Reclamation Department to this water, or any claim that it isn't subject to our filing, by reason of the fact that that Department might have the intention of some time recovering it. And nothing as to Respondent's reliance thereon.

The State Engineer found: "These waters have escaped the original appropriators and have returned to a natural water channel and issue in the form of springs." There is no claim that their re-use by the Department would add to Appellant's water supply.

## II.

**This point is that Appellant cannot be heard here at all on the claim briefed, that the Reclamation Department might reclaim and re-use the water involved.**

It would see<sup>m</sup> to be elementary that one water user cannot be heard to object because somebody is using or is attempting to appropriate for use water which may be claimed by a third party. We will show that even an owner of right to water cannot object to its use by another unless he is ready and able to put it to a beneficial use himself.

Appellant's point is that prior filings by, and the right or the possibility of the Department repossessing these waters for re-use make them unappropriated waters, as to its claim. "Appropriation" and "unap-

propriated” are terms of very uncertain meaning and application.

Weil Water Rights, page 304.

Wrathall v. Johnson, 86 U. 50, 40 P. (2) 755, held that in addition to the application for use and intent, appropriation requires the actual diversion and the application to a useful and beneficial purpose.

It is certain that the filing of an application and its approval is not an appropriation, whether this is accomplished by the Reclamation Department, or by the respondent.

Duchesne Co. v. Humphreys, 106 U 332, 148 P. (2) 338, 339.

Des. Livestock Co. v. Hooppiana, 66 U. 25, 239 P. 479, and the cases cited above.

In any event the actual or anticipated claims of strangers cannot affect the result here.

Weil Water Right, 3d. ed., Page 682.

“627: *Nor Can Rights of Strangers Affect the Result Between the Parties Litigant.*—Not being bound nor before the court at all, the rights of strangers correspondingly cannot affect the suit; it must be determined upon the relative rights alone of those before the court. It cannot avail one party to say that some stranger to the suit has a better right than his opponent. The supreme court of the United States has said: ‘Neither do we think that the trial court was called upon, at the instance of the defendants, entire strangers in every aspect to other appropriators, to inquire into and pass

upon the question whether appropriators of water below the mouth of the proposed canal would be injured by the construction of the canal. The rights of such persons will not, of course, be injuriously affected by the decree in this cause, and *non constat* but that they may yet intervene for their own protection, if they deem that the construction of the canal will be an invasion of their rights, or that they may be willing to forego objection to the construction of the canal.' ''

The cases cited indicate that this rule applies here and in any similar situation. It would seem to apply with greater reason, where only the initiation of a right is involved, and where the Department may make its own objection, if it has one. This use may be favored by it.

See also *St. George & Washington Canal v. Hurricane Co.*, 93 U. 262, 72 P. (2) 642, at 647, par. 7.

Page 679 (3d ed.) same author.

“625: *Cases Are Governed by the Relative Rights of the Parties Before the Court.*—It is a general principle of law that the court can determine the rights only of the parties to the suit, and only as between themselves. They may both be wrongdoers as against a third person, yet that third person may never set up his right against either of them. It is the office of the court to adjudge only the relative rights in actual controversy of the plaintiffs against the defendants and vice versa. \* \* \* It is too obvious to require elaboration that the parties to a lawsuit must fight it out between themselves, and

at the same time its results affect them alone.”

A party, who is seeking to appropriate water, may do so as against a third party's objection to the appropriation, even though he is attempting to do it by the use of the ditches and over the lands of a third party without the party's consent.

Weil Water Rights, 3rd ed., Page 421.

The same author at page 504 says:

“ ‘When the appropriator is no longer using the water either for the season or any specific time, his right to cut off or interfere with the flow of the stream for the time being lapses.’ \* \* \*

“ ‘And the owner not requiring its use should not be permitted to complain of its application to a beneficial use by others interested. In other words, at all times that the water is not required by one or more, it must be at the disposal of others in the order of their relative rights thereto.’ In an oft-cited opinion by Judge Hawley it is said: ‘In the appropriation of water, there cannot be any “dog in the manger” business by either party, to interfere with the rights of others, when no beneficial use of the water is or can be made by the party causing such interference.’ The same case holds that waste in the use of water is not permissible. \* \* \*

“ ‘Water codes usually contain the provision ‘beneficial use shall be the basis, the measure and the limit of the right.’ And statutes generally enact the same rule in other forms.’ ”

It would seem too absurd to ask this Court on this



record to determine this appeal on anything with reference to any claim on any filing relating to Deer Creek. It is clear that Appellant has not the slightest possible interest in whether this respondent may complete an appropriation on the water covered by the applications, or on any part of it.

The following Utah Water Cases bear on this point:

Mt. Olivet Cemetery v. S. L. City, 65 U. 193, 235 P. 876, 879.

Sigurd City v. State, 105 U. 278, 142 P. (2) 154, 157, Par. 1.

If appellant now desires to proceed, as he does, entirely on the ground that some third party owns this water, then appellant has no right to have the courts review the action of the State Engineer.

Section 100-3-14 provides for a review of the State Engineer's decision. This section gives a right of review in the courts to "any person aggrieved by such decision." On the only theory of the appellant, appellant has not been aggrieved.

### III.

**This point is that the authority cited does not apply here, and does not sustain Appellant's contention.**

In connection with the previous point, it will be noted that in the case cited by Appellant, and in those cited therein, the party seeking to repossess the waters is the immediate owner of the right involved and asserted.

Also, that there, the proceedings were not on the



mere matter of approval of an application to appropriate waters, but on established rights of plaintiffs which embraced the right purpose and intent to re-capture and use the waters involved. The filings on the Weber River by the Department for storage at Deer Creek have no intimation of purpose to re-capture, and there is before the Court no intimation of this, or of any, conflict between *it* and the respondent.

The State Engineer's order approved respondent's applications "subject to prior rights". He suggests no conflict between the Department and the applicant. As stated above, there was no issue on this. He does suggest a possible claim by Utah Lake appropriators, as being a "more serious question" (R. 15), which, he says, if presented, he would be called upon to answer. He refers to the waters here involved as waters, "which have been allowed to escape the control of the original appropriators", and says there "is at least reasonable doubt" that these "are still unappropriated waters". And, concludes that there is a "reasonable likelihood" [probability] that the applicant can perfect an appropriation.

It can't be assumed as probable that the Reclamation Department will ever attempt to repossess, or assert any claim of right to repossess, the waters here involved. If they should, all that can be said, is that Respondent may not be able to complete his appropriation as to some of the waters sought. This is the situation on all applications to appropriate, but this does not seem to be ground for denial.

On this see: *Rocky Ford v. Kent's Lake*, 135 P. (2) 108 and particularly paragraph "5-7" page 113.

In any event, the right to apply to beneficial use the waters of the State cannot be left indefinitely to dangle because some disinterested person may intimate that someone, somewhere, sometime, might claim a right therein.

The case of *Ide v. U. S.* cited (7) by Appellant is quite distinguishable. It does not involve this matter of mere approval of an application, so as to permit an attempted appropriation. We have already pointed out a difference, in that, the parties there were prosecuting their own claims.

We will now point out some other distinguishing features. The opinion shows that there the Government acquired the ownership and control of the use of all the waters involved and also the ownership and control of all the lands in the project, except one school section. This was sold by the State to the Defendants.

The Government was engaged in constructing its storage reservoir and in selling tracts of land, and with each tract, a project water right to use water enough to irrigate it. The project was not yet completed. It was pointed out that by the act and under all the arrangements re-use of the water was contemplated and necessary, in order to have sufficient water to supply the users on all the project lands. That the Government never abandoned or allowed the waters involved to escape, but as soon as sufficient waters seeped into the

ravine from the first division of the project to make a flow, it took immediate steps to repossess it. It was the construction of the channel to carry this water that brought on the conflict.

The Court there was not dealing with State supervision or with the discretion of the statutory administrator of public waters. The whole of the properties, including the waters and lands of the project, had been taken, together, over and into Federal ownership and control. The case simply held that under the particular facts and circumstances involved, the Government was not precluded from re-capture and re-use of its waters.

There is no record here on which that case, under those facts, can be given any application to this one. And if this Court may take judicial knowledge, of facts with relation to Deer Creek, it will see that the entire situation, as well as the nature of the proceedings, are different.

We will state from our knowledge, after some experience with Deer Creek, some of the facts involved in this situation. The Government did acquire filings for appropriation of Weber River waters for storage at Deer Creek. And, it entered into a contract with Provo River Water Users Association, a Utah Corporation, to advance money to it to construct the reservoir, — the money so advanced to be re-paid by the latter, upon which re-payment the Government is to release to it all interests in the project including the filings. The Government owns and controls no lands to be irrigated. It does not distribute or regulate or control the distribu-

tion of any waters to the irrigators.

Users buy stock in the Association, and in the case of use for irrigation, and in the instance which we have here, the irrigators form another and separate Irrigation District association. It buys the stock, and then its members in turn subscribe for shares in it, to meet their needs. The water is largely, if not entirely, used for supplemental irrigation, and not for reclamation of new lands.

The water in this bench irrigation district is diverted from Provo River through the Provo Reservoir Canal. This diversion and canal have been there since 1913, but by enlargement since about 1940, additional water has been diverted and used over an upper area of about fifteen miles in length, and of varying widths. It is diverted from the canal by ditches and carried as high up toward the foothills as possible and, of course, the return flow is taken out below again and re-used. Some of it, thus, comes finally to the applicant who had used it on his upper lands for four years (T. 13) prior to the trial.

Now, having in mind the Appellant's case *Ide v. U. S.*, *Supra*, and the quotation therein from a similar case, that even under those circumstances, and as to the repossession by the owner: "It is requisite, of course, that he be able to identify it" as his water. Let us compare what we have her.

Water under filings held by the Government, at least as security, is turned from the Weber to the Provo and mingled with its waters. Water released from storage

there is diverted by the first Association to the District Association and distributed by it to users, as above stated, and the return flows repeatedly re-used. Finally, the Respondent, who has acquired enough shares to double the irrigation of his land (T. 13) applies it on his 125 acres (T. 9). This extends directly above and along the full length of the area in which the spring flows arise (T. 14). The total water used above by him would clearly exceed the total sought by these applications.

Applications of this kind are properly approved on the "probability" that the applicant might be able to complete an appropriation to part, at least, of the waters involved. This Court has used the term "probability" in this connection many times.

Is it then "captious" on the part of the Engineer, to assume it improbable that the holder of the Deer Creek filings will later claim the right to repossess, and attempt to repossess for use by it, this small amount of water so arising on Respondent's own land and which has escaped there for more than four years? Is it probable that such holder would attempt an identification or segregation of such higher supplemental irrigation users' waters, and these spring flows therefrom back to 1913?

Are they going back in this manner as to each individual user to trace out such probable escaped waters, or could they practically, or legally, do so? It is not probable.

It would not seem necessary to pursue this distinc-

tion or this inquiry at any greater length. It would seem to us much more probable, under the Utah decisions, that if such waters could be identified or repossessed, it would have to be by the individual users, and alone in connection with the immediate irrigation on their lands. And it appears they would have to act promptly enough to show an intention not to abandon or treat as escaped water, that which might have left and arisen elsewhere as seepage. And the principal right to so repossess here is in the Respondent, if anywhere. The Government has, and has indicated, no interest in it.

### CONCLUSION

Without repetition, it seems clear, that Appellant is asserting no interest by it in the waters sought by respondent's applications, and is claiming no possible interference with its rights by the order, or by the judgment appealed from.

As an academic matter only, it has suggested that a possible claim by another, who is neither a protestant or a party, may render some portions of the waters sought unavailable. On the record here, the authority cited to support this, their third party claim, can be given no application or effect; and if it could, it is clearly distinguishable as to the nature of action, and on its facts.

That the only claim relied upon here is not available to Appellant, as it has no interest therein and could not be a party thereto, and is in no way affected thereby.

That the theory of the claim relied upon and the

issued tenderd on appeal, is not available because not raised or presented for decision in the lower Court.

From which it would seem to follow that the judgment of the trial Court should be sustained.

Respectfully submitted,  
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MULLINER, PRINCE & MULLINER  
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