2001

Provo City v. Hubert C. Lambert : Reply Brief

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

PROVO CITY, a municipal corporation of the State of Utah,

Plaintiff-Respondent,

vs.

HUBERT C. LAMBERT, State Engineer of the State of Utah,

Defendant-Appellant,

vs.

PROVO RIVER WATER USERS ASSOCIATION, a corporation; KENNECOTT COPPER CORPORATION, a corporation; SALT LAKE CITY, a municipal corporation; and CENTRAL UTAH WATER CONSERVANCY DISTRICT, a public corporation of the State of Utah,

Intervenors-Appellants

Case No. 14,023

REPLY BRIEF OF APPELLANTS

AN APPEAL FROM THE JUDGMENT OF THE FOURTH DISTRICT COURT, IN AND FOR UTAH COUNTY, HONORABLE J. ROBERT BULLOCK, JUDGE

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TABLE OF CONTENTS

Cases Cited

Statutes Cited

IN THE SUPREME COURT OF THE STATE OF UTAH

PROVO CITY, a municipal corporation of the State of Utah, Plaintiff-Respondent, vs. HUBERT C. LAMBERT, State Engineer of the State of Utah, Defendant-Appellant, vs. PROVO RIVER WATER USERS ASSOCIATION, a corporation; KENNECOTT COPPER CORPORATION, a corporation; SALT LAKE CITY, a municipal corporation; and CENTRAL UTAH WATER CONSERVANCY DISTRICT, a public corporation of the State of Utah, Intervenors-Appellants	REPLY BRIEF OF APPELLANTS Case No. 14,023

STATEMENT OF THE NATURE OF THE CASE

Although respondent's Amended Complaint is not properly before this Court in this intermediate appeal, it matters not since the principles of law requiring a dismissal of respondent's original Complaint apply with equal force to its Amended Complaint. Respondent's original Complaint contains but one alleged cause of action, and based thereon sought relief in the form of an order

requiring the State Engineer to issue a corrected Certificate of Appropriation for 799 acre feet, or in the alternative to set aside the Certificate of Appropriation issued on May 3, 1949, allow respondent to file a new Proof of Appropriation, and require the State Engineer to issue a new Certificate of Appropriation thereon.

Respondent's Amended Complaint alleges six additional causes of action, with each subsequent cause of action incorporating all preceding causes of action, in a "shotgun blast" approach to pleading. However, the relief sought in the Amended Complaint is identical with that sought in the original Complaint save and except that the quantity of water is reduced from 799 acre feet to 784 acre feet. The relief sought by respondent is still to set aside or modify Certificate of Appropriation No. 3686 issued May 3, 1949 and not to determine the extent of its water rights under said Certificate as stated on page 1 of its Brief. Thus, no matter how respondent attempts to plead its claims in its Amended Complaint, i.e. ministerial error (Second Cause), mutual mistake (Third Cause), estoppel (Fourth Cause), adverse use (Fifth Cause), violation of constitutional due process (Sixth Cause), or mandamus (Seventh Cause), the action still is one to review the Decision of the State Engineer dated May 3, 1949 and was filed twenty-three years and one hundred ninety four days too late.

DISPOSITION IN LOWER COURT

The Order appealed from herein is the Order of the trial court dated February 14, 1975 denying appellant's Motion To Dismiss plaintiff-respondent's original Complaint. Respondent's Motion to

file an Amended Complaint was filed the day after this Petition for intermediate appeal was filed in this Court. Appellants suggest that respondent's Amended Complaint was born out of desperation in an abortive effort by respondent to save itself from a dismissal with prejudice. The reasons why appellants have not answered respondent's Amended Complaint in the lower court become moot when even respondent's Amended Complaint cannot survive the lapse in time of over twenty-three and one-half years.

STATEMENT OF FACTS

Under the guise of judicial notice afforded the records of the State Engineer, respondent goes far afield in stating in its Brief a myriad of irrelevant facts which are not pleaded and in some instances are downright misleading. Neither McGarry v. Thompson, 114 U. 442, 201 P.2d 288 (1948) nor American Fork Irrigation Company v. Linke, 121 U. 90, 239 P.2d 188 (1951) goes so far as to say that what respondent claims to have spent on Lost Lake Reservoir or the substance of a contract between Provo City and Utah Power & Light, or that respondent's engineer had been replaced and was unavailable to counsel the City are the kind of facts which can be judicially noticed from the State Engineer's public records. In McGarry, supra, this Court took judicial notice of the records of the State Engineer showing that an Application had been approved since the record before the Court failed to show that fact. And in American Fork Irrigation Company, supra, the Court took judicial notice of the fact that the Deer Creek Project added to the inflow to Utah Lake and more waters are seeping into the Lake

from distant water sheds, as borne out by the records of the State Engineer.

Again under the guise of judicial notice, respondent sets forth the quantities of water allegedly stored in Lost Lake Reservoir from 1932 to 1973, with footnotes and the like. Such figures are misleading since the quantities of water diverted from Bridal Veil Falls and Lost Creek into the Provo City municipal system are controlling here and not what has been stored in Lost Lake Reservoir. The quantities of water available for diversion from Bridal Veil Falls and Lost Creek into the Provo City municipal system were the limiting factors in the quantity of water for which respondent could prove beneficial use. The waters stored in Lost Lake Reservoir are not delivered into the Provo City municipal system. The only significance of the storage in Lost Lake Reservoir is that such waters are released by respondent to concurrently replace in the Provo River system those quantities of water which respondent can divert from Bridal Veil Falls and Lost Creek. (See Certificate No. 3686 attached as Appendix A to Brief of Appellants).

What is even more misleading about those figures is that during most of those years respondent did not use those waters in its system. However, to so demonstrate, appellants must go beyond the record in this case, but feel compelled to do so in order that this Court will not be misled by the quantities of water set forth on pages 3 and 4 of Respondent's Brief nor by the arguments of respondent based thereon. Accordingly, appellants have attached hereto as Appendix "1" a summary of storage in Lost Lake Reservoir

by Provo City from 1949 to 1969 under Certificate No. 3686, as shown by the records of the State Engineer. Thus, from 1949 to 1960, inclusive, respondent sold the entire 784 acre feet stored in Lost Lake Reservoir to Washington Irrigation Company and Extension Irrigation Company. In 1961, 1962, and 1964 respondent used by exchange only a portion of the waters stored, and sold the balance thereof. In 1965 none of the water was used. Again in 1966 all of the water was sold. It was not until 1967 and 1968 that respondent used by exchange in its system the total quantities of water stored in Lost Lake Reservoir, less conveyance losses, and that was when the present controversy erupted. Thus it becomes readily apparent that the statement (argument) of respondent on page 6 of its Brief that the State Engineer continued to deliver 784 acre feet of water to Provo City, contrary to Certificate No. 3686, or on page 7 of its Brief that the State Engineer waited over twenty years before he, himself, recognized Certificate No. 3686 simply are not true. The same can be said for the repeated arguments of respondent based thereon throughout its Brief.

Furthermore, appellants are at a loss to understand respondent's statement on page 7 of its Brief that none of the intervenors claim that the water is theirs or that they have a use for it, and that they (intervenors) are only arguing a technicality of the law. Suffice it to say that the records of the State Engineer show that intervenor Provo River Water Users Association is entitled to the use of the waters developed by the Deer Creek Division of the Provo River Project from Provo River and/or Utah Lake evidenced by

Certificates Nos. a-432, 6850, 6881, 6963, 7755 and Application No. 12144; that intervenor Kennecott Copper Corporation is the owner of rights to the use of the waters of Utah Lake and Jordan River evidenced by the 1901 Morse Decree, Certificates Nos. 2072, 2073, 2074, 884, 1134, a-110, a-115, and a-637; and that intervenor Central Utah Water Conservancy District will be entitled to the use of the waters developed by the Central Utah Project from Provo River, Utah Lake and Jordan River initiated by Applications Nos. 38519, 37093, 40523, 40524, Exchange Applications Nos. 398, 399, and 400, all in accordance with their respective priorities. These are the public records of which this Court can properly take judicial notice. Lehi Irrigation Company v. Jones, 115 U. 136, 202 P.2d 892 (1949).

Likewise the Provo River is a natural tributary to Utah Lake and Jordan River, which is a fact of such generalized knowledge that it cannot reasonably be the subject of dispute and can be properly judicially noticed under Rule 9(1), Utah Rules of Evidence.

Intervenors allege in their Motion To Intervene that they are the owners of rights to the use of the waters of Provo River and/or Utah Lake, to which the Provo River is a natural tributary (R. 11), and that the taking of water by respondent from Lost Creek and Bridal Veil Falls, both tributary to the Provo River, in excess of the 321.78 acre feet will deprive intervenors of water to which they are entitled under their vested rights in accordance with their respective priorities (R. 12). And so respondent's statement that intervenors make no claim to the waters involved is simply not true.

What is even more shocking is respondent's statement on pages 7 and 8 of its Brief to the effect that it made costly repairs to the dam at Lost Lake Reservoir in 1974, with the implied consent of the State Engineer's office and the understanding that an agreement would be reached to permit Provo City to use the full 784 acre feet. Not only is such statement improper, but respondent is reminded that this litigation was commenced in January of 1973, and both the State Engineer and the intervenors unequivocally deny such spurious charge.

The sum and substance of it all is that respondent's Statement Of Facts is impregnated with irrelevant facts beyond the scope of the record in this case, some of which are misleading half-truths or are simply untrue. It is obvious that such Statement is designed to invoke the sympathy of the reader and cast respondent in the role of an appropriator who has been imposed upon. The fact is that this action was commenced twenty three years and one hundred ninety four days too late, and no amount of window dressing can obscure or cover that relevant and crucial fact.

RELIEF SOUGHT ON APPEAL

Respondent has not pleaded a case, either in its original Complaint or its Amended Complaint, to get around the fact that it cannot review a Decision of the State Engineer some twenty three years and two hundred fifty four days after it was issued, and a remand to the District Court to take evidence thereon would be to no avail. Accordingly, respondent's action must be dismissed with prejudice.

REPLY TO POINT I.

Respondent was advised in no uncertain terms on May 3, 1949 when Certificate No. 3686 was issued by the State Engineer that respondent's rights thereunder were limited to a diversion of 321.78 acre feet of water from Bridal Veil Falls and Lost Creek into its municipal system. The paraphrase at the bottom of page 8 of Respondent's Brief approaches the ridiculous. The fact is that respondent did not use any water from Bridal Veil Falls or Lost Creek within its municipal system from 1949 through 1960 under Certificate No. 3686. Thereafter its use thereof was intermittent and limited. It was not until 1967 that it used a quantity approaching its claim asserted herein. Such excessive use precipitated its curtailment in 1969. See attached Appendix "1". Accordingly, respondent's claims of estoppel, either against the State Engineer or the intervenors, have no application to this case. Its exclusive remedy was the judicial review provided for in Sections 73-3-14 and 73-3-15, Utah Code Annotated 1953. The sixty day period provided for therein is jurisdictional, and the failure of respondent to file its action until twenty three years and one hundred ninety four days later cannot be remedied by claims of estoppel and the like.

REPLY TO POINT II.

Sections 73-3-14 and 73-3-15, Utah Code Annotated 1953 specifically provide the means of judicial review for any Decision of the State Engineer. Those Sections do not limit judicial review to the approval or rejection of Applications under Section 73-3-8,

Utah Code Annotated 1953. To say that the issuance of a Certificate of Appropriation is not a Decision within the meaning of those Sections would leave both applicant and protestants without a judicial remedy. The fact that there is no provision for giving protestants notice of the issuance of the Certificate is of no moment. The Utah Rules of Civil Procedure do not require notice of entry of judgment, yet all parties are bound by the one month appeal requirement of Rule 73 thereof, which, as here, is jurisdictional. Any interested protestant can keep himself advised as to the date of the issuance of a Certificate. The key to the question here is that applicant receives notice by the receipt of his Certificate, and if he is dissatisfied therewith he must file his action for judicial review within the sixty day period prescribed by Section 73-3-14, Utah Code Annotated 1953. Otherwise, he is bound by the Certificate, as respondent is here.

REPLY TO POINT III.

Respondent completely misses the point of the prima facie effect of a Certificate of Appropriation. While it is true that a Certificate of Appropriation is only prima facie evidence as against other appropriators, it is conclusive as against the certificate holder. The Certificate is the appropriator's deed; his evidence of title, good, at least as against the State, for all it purports to be. Lake Shore Duck Club v. Lake View Duck Club, et al, 50 U. 76, 166 P. 309 (1917). As such the respondent cannot now impugn its own Certificate. Its exclusive remedy was to file an action to review the Decision of the State Engineer under Section 73-3-14,

Utah Code Annotated 1953 within sixty days after Certificate No. 3686 was issued on May 3, 1949. Having failed to so do, respondent is precluded from challenging its own Certificate some twenty three years and two hundred fifty four days later.

REPLY TO POINT IV.

Again respondent misses the whole point of the cases and authorities cited under its Point IV. The sum and substance of Eardley v. Terry, 94 U. 367, 77 P.2d 362 (1938) is that the approval of an Application gives the applicant permission to proceed with his proposed development, subject to prior rights, and providing he can do so without impairing existing rights. It gives applicant no right or license to proceed to the injury of prior rights, and he can proceed only upon an absence of injury to such rights if he hopes to perfect a right and become immune from liability.

Any interested appropriator who does not file an action to review the Decision of the State Engineer in approving the Application within sixty days from approval is precluded from thereafter challenging the applicant's conditional authority to proceed. However, that appropriator is not thereafter precluded from filing an action to contest or enjoin the diversion of water by the applicant if such diversion interferes with the appropriator's prior rights. That is the sum and substance of United States v. Cappaert, 508 F.2d 313 (1974), cited on pages 17 and 18 of Appellants' Brief.

The gist of it all is that if no appeal is taken from a Decision of the State Engineer within the sixty (60) day period, it is final. Both applicant and protestant are thereafter precluded

from contesting that Decision. Otherwise the Decision of the State Engineer would never become final. To say that a "Decision" of the State Engineer would be subject to judicial review years after the sixty (60) day period had expired is nonsense.

Separate and apart from such a review action, a prior appropriator has the right to file an independent action for injunctive relief and/or damages for any interference with his prior rights. That cause of action would accrue at the time of the actual interference. Accordingly, the argument of respondent under Point IV of its Brief and the authorities cited therein simply are not in point.

REPLY TO POINT V.

Respondent's allegations of mistake under Point V of its Brief (which appellants deny), even if true, are wholly irrelevant to this case. Again respondent was advised in no uncertain terms on May 3, 1949 when Certificate No. 3686 was issued by the State Engineer that its right evidenced thereby was limited to a diversion of 321.78 acre feet of water from Bridal Veil Falls and Lost Creek into its municipal system. If respondent claimed mistake in the issuance of the Certificate, it was incumbent on respondent to then call the matter to the attention of the State Engineer and obtain an amended certificate or file an action for a judicial review within the sixty day period following the issuance of Certificate of Appropriation No. 3686 on May 3, 1949. Having failed to so do, respondent is barred from claiming mistake in this action filed some twenty three years and two hundred fifty four days later.

REPLY TO POINT VI.

Dispositive of respondent's erroneous contention under Point VI of its Brief is Mosby Irrigation Company v. Criddle, 11 U.2d 41, 354 P.2d 848 (1960) wherein this Court held that until an applicant has made his Proof of Appropriation and has been issued a Certificate by the State Engineer any right that he has to the use of water is only inchoate and, therefore, is not a vested right subject to the protection of the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the Utah Constitution. Likewise, respondent had the right of judicial review which respondent did not exercise. Not having done so, respondent cannot be heard to complain some twenty three years and one hundred ninety four days later.

REPLY TO POINT VII.

Respondent's argument and authorities cited under Point VII of its Brief become meaningless when it is understood that Certificate of Appropriation No. 3686 covers what was unappropriated water on May 3, 1949, and no rights to the use of surface waters already appropriated can be acquired through adverse use after March, 1939. (Section 73-3-1, Utah Code Annotated 1953). Furthermore, the relief sought by respondent in this action is to set aside or modify Certificate No. 3686, and is not to quiet respondent's title to a specific quantity of water based on adverse use as against all appropriators from the Provo River and Utah Lake-Jordan River systems.

REPLY TO POINT VIII.

Respondent's assertions as to its investment in Lost Lake Reservoir and its speculation as to the present worth thereof are beyond the record in this case, wholly irrelevant, and clearly improper. Likewise, respondent's comments relative to appellant Central Utah Water Conservancy District are so absurd that they warrant no further comment.

CONCLUSION

Neither the law nor equity will allow respondent twenty three years and two hundred fifty four days to seek the judicial relief sought in either its original Complaint or Amended Complaint. If respondent was dissatisfied with Certificate No. 3686 issued to it by the State Engineer on May 3, 1949, its exclusive remedy was either to obtain a corrected Certificate or file an action for judicial review within sixty days thereafter. Having failed to so do, respondent cannot now bring an action directly against the State Engineer to modify and/or set aside Certificate No. 3686, as it seeks to do in its original Complaint. Nor can respondent indirectly do so under the guise of claims for equitable relief in its Amended Complaint. The relief sought there is still the same, and no matter how stated such claims are twenty three years and one hundred ninety four days too late. Accordingly, appellants respectfully submit that this action must be dismissed with prejudice.

Respectfully submitted

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Certificate of Mailing

I hereby certify that on the 5th day of December, 1975 I mailed two (2) copies of the foregoing Reply Brief Of Appellants to Jackson Howard, attorney for plaintiff-respondent Provo City, 120 East 300 North, Provo, Utah 84601.

Joseph Novak
Attorney

Summary of Storage in Lost Lake
Reservoir by Provo City from 1949-69 Under
Appl. No. 2077-E-1 (55-47) Cert. 3686

Acre-Feet

Year	Storage	Delivered[1]	Sold[2]	Conveyance[3] Loss (4%)	Balance
1949	784		784		0
1950	784		784		0
1951	784		784		0
1952	784		784		0
1953	784		784		0
1954	784		784		0
1955	784		784		0
1956	784		784		0
1957	784		784		0
1958	784		784		0
1959	784		784		0
1960	784		784		0
1961	456	192	256	8	0
1962	784	350	420	14	0
1963	784		784		0
1964	724	455	250	19	0
1965	711				711
1966	711		696		15
1967	711	683		28	0
1968	711	683		28	0
1969	322	309		13	0

[1] This figure represents water delivered to Provo City

[2] The water was sold to Washington Irrigation Co. and Extension Irrigation Co.

[3] There is a 4% conveyance loss charged to storage at the head of the Provo River.