

1986

First Interstate Bank of Utah v. City of Corinne, Glade Deverele Wells, Beulah Fae Wells, Richard Alan Asay, and Jan W. Asay : Reply Brief

Utah Supreme Court

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APPEAL COURT
BRIEF

MENT

KET NO. 860362-CA
IN THE SUPREME COURT OF THE STATE OF UTAH

FIRST INTERSTATE BANK OF	:	
UTAH, N.A.,	:	
	:	
Plaintiff and	:	APPELLANT'S REPLY BRIEF
Appellant,	:	
	:	
vs.	:	<i>860362-CA</i>
	:	
CITY OF CORINNE, GLADE	:	No. 860354
DEVERELE WELLS, BEULAH FAE	:	
WELLS, RICHARD ALAN ASAY,	:	
and JAN W. ASAY,	:	
	:	
Defendants and	:	
Respondents.	:	
	:	
	:	

Appeal from the First Judicial District
Court of Box Elder County,
The Honorable Omer J. Call

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STATEMENT OF ISSUES PRESENTED ON APPEAL

The legal issue presented in this appeal is whether the paragraph in a Trust Deed pertaining to the security as including "rights, appurtenances...water rights, and water stock..." combined with Utah Code sections governing Trust Deeds, acted to entitle the plaintiff to culinary tap water rights for the Trustor's residence following the foreclosure of the Trust Deed.

STATEMENT OF FACTS

Appellant refers the court to the Statement of Facts in appellants' original brief. Additional facts are presented herewith to correct misconceptions which may be obtained by referring to respondent's statement of facts.

Respondents state that they were the owners of a 4 acre parcel at the time the first request for a tap water connection was made to Corinne city. This may be correct, but it is also the case that the purpose for the water connection was to service the home covered by First Interstate Bank's Trust Deed.

Both the minutes of the Corinne City council meeting at which the connection was granted (R. at 80.) and Corinne

City's Answers to Interrogatories (R. at 60.) reflect that Corinne city intended all along that the tap water right be used at the residence located on the Trust property later foreclosed on by First Interstate Bank. Mr. and Mrs. Wells also admit in their answers to plaintiff's interrogatories that the water connection was indeed intended for this same residence (R. at 88.).

In the argument portion of Respondent's Brief, counsel for Mr. and Mrs. Wells states that "...the rights obtained by Mr. Wells under the Water Users Agreement were never used for the benefit of the property identified in the Trust Deed." This statement is absolutely incorrect. While it is true that the water line brought to the residence was not actually stubbed through the foundation to serve the residence (R. at 86), a line was also run to a shed located next to the residence also on the subject property, and use was made at that location of tap water supplied by Corinne City. (R. at 86.)

Respondents imply that somehow, the defendant Corinne City gave permission to the Wells to move the meter from the subject property to another location and to hook up Asays who purchased property from Wells in 1981. The record clearly reflects that Corinne City was unaware that the meter had been moved (R. at 61) and in fact it was not until a week after the moving of the meter that Mr. Wells alleges that he told the mayor of Corinne that he had moved the

meter and the line. (R. at 86.) Corinne City's answers to plaintiff's interrogatories very clearly state that at no time did Mr. or Mrs. Wells obtain permission from Corinne City to move the meter. (R. at 61.) In fact, the Water User's Agreement prohibited any hookups without written permission from Corinne City. (R. at 74) No written permission was sought or obtained. (R. at 62.)

SUMMARY OF ARGUMENT

First Interstate Bank asserts that the culinary water connection right attached to the real estate much as a fixture attaches.

ARGUMENT

THE CULINARY WATER CONNECTION WAS APPURTENANT TO THE SECURED REAL ESTATE AND WAS TRANSFERRED UPON THE TRUSTEES SALE OF THE PROPERTY.

A culinary water connection may be compared to other types of utility services to residences. Surely no one would question that electrical service is appurtenant to the house it serves.

The logical test for determining whether the water connection was appurtenant or not is that used to determine

if fixtures are appurtenant. A good recitation of that test is given in the case of City of Phoenix v. Linsenmeyer, 280 P.2d 698 (Ariz. 1955). The Arizona Supreme Court stated that:

The rule is that for a chattel to become a fixture and be considered as real estate, three requisites must unite: There must be an annexation to the realty or something thereto; the chattel must have adaptability or application as affixed to the use for which the real estate is appropriated, and there must be an intention of the party to make the chattel a permanent accession to the freehold.

This same basic test was stated by this court in the case of State By and Through Road Commission v. Papanikolas, 427 P.2d 749 (Utah, 1967).

The above test may easily be applied to the present situation. The connection was annexed to the realty in that it was granted for the home and a line actually run to the property and used there. The connection has natural application to residential real estate and was obviously intended to be a permanent accession since a line was run and buried.

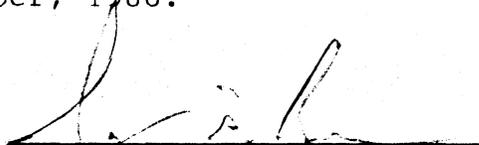
Respondents would have this court adopt the rules used to determine whether irrigation water rights have become appurtenant to real estate and in what amount. This test simply does not make sense when applied to culinary water connections for residential real estate. Respondents would

have us look to the amount of water used on the land and whether it is necessary and essential to the beneficial use and enjoyment of the land. The key to culinary water is not the volume since that is usually minimal compared to irrigation standards, but is rather its purity and suitability for use in a residential environment. What does it matter if ten gallons or one hundred gallons is used as to whether the connection is appurtenant or not. Additionally, the possible availability of water from another source is not relevant to whether a culinary connection is appurtenant to real estate. Would anyone say that a residential electrical connection is not appurtenant to the home it serves if the resident owns an electrical generator? Generators may fail, shallow wells may dry up or be impure. None of the cases cited by respondents have any relevance to the present case since none deal with culinary connections, but instead, with irrigation water rights.

CONCLUSION

Mr. Wells obtaining of a culinary water connection for his home and the installing of such connection makes the actual lines and the right attached thereto appurtenant to the real estate in question. Common sense would say that a culinary water connection obtained and installed to serve a specific residence is appurtenant thereto.

Dated this 23rd day of October, 1986.



Roger F. Baron
Attorney for Appellants

CERTIFICATE OF SERVICE

I hereby certify that I mailed four (4) copies of the foregoing APPELLANT'S REPLY BRIEF to both of the following: Noel S. Hyde, Attorney for Defendants Wells and Asay, at 1100 Beneficial Life Tower, 36 South State Street, Salt Lake City, Utah 84111, and to Jeff R. Thorne, Attorney for Defendant City of Corinne, at 98 North Main, P.O. Box "F", Brigham City, Utah 84302, postage prepaid, this 24th day of October, 1986.



Roger F. Baron
Attorney at Law

CORINNE CITY

CORINNE, UTAH 84307

WATER USERS AGREEMENT

THIS AGREEMENT made and entered into this 3rd day of October 1933, by and between CORINNE CITY, a municipal corporation of the State of Utah, hereinafter referred to as City and DEVERELL WELLS and BEULAH WELLS, his wife, joint tenants, persons desiring to be furnished Corinne City culinary water outside the corporate limits of Corinne City, hereinafter referred to as Water User.

WITNESSETH:

That for an in consideration, of the mutual covenants, promises and conditions herein agreed to be kept by each party hereto, it is agreed that City shall, from water excess to the needs of City and its inhabitants, furnish to Water User, Corinne City culinary water through a 3/4 inch line and tap, subject however to the following conditions:

1. City finding and determining that it has water excess to the needs of City and its inhabitants, and in any event, no sale of Corinne City water or Water Rights is intended nor by these presents made.

2. Water User shall sign an application for a Corinne City water hookup, pay the required fees, charges and assessments plus all costs of materials and labor in running the line from City mains to Water User's point of delivery, and shall thereafter pay to Corinne City promptly when due the monthly water charges or assessments as now or hereafter to be fixed by Corinne City.

3. That Water User by the execution of this agreement grants to Corinne City and its agents the easement or right to come upon and cross over Water User's property in Box Elder County, Utah for the purpose of installing, repairing, replacing, removing, maintaining, reading, shutting off the water meter and accessories, or for such other purpose as may be necessary or incidental to the enforcement or supervision of this contract. Water User's point of delivery and the location of the water meter to be installed shall be north of the Box Elder County Road known as 2600 North.

4. That no hookup to the Corinne City water system shall be made except by written permit from Corinne City and subject to the supervision, inspection and approval by Corinne City of the hookup lines, meters, fittings and incidental items.

20, 1983

Corinne City council met in regular session on September 6, 1983 with Albert C. Gilbert presiding. Present were councilmen Vern Wilkins, Albert, Wesley Hansen, Fred Baltazar and recorder Marian Danielson. Melvin Murphy was excused.

Group from the Corinne Volunteer Fire Department were present to discuss some items with the council. Mrs. Danielson will check to see if the items will be covered by workmen's compensation. Mayor Gilbert recommended Birch be appointed as fire chief. Mr. Baltazar seconded this motion. Hansen was appointed Assistant fire chief and Curtis Marble as secretary. Jim Davis, Jim Bennett, Jef Singh, Johnny Singh, Lynn Wixon, Mark Wilson, Bost as volunteers.

Drain ditch on 8th Street needs to be cleaned. Cello Gonzales was present to see what could be done about the high water on his neighbor's property. They are a potential fire hazard and need to be cleaned. The city men will look into this problem.

was the council's decision that DeVerle Wells is to pay \$1000 for a connection on surplus water to his home. Mrs. Danielson will type up the agreement which he will need to sign.

Bear River Coop would like to run a water line to one of their buildings. Councilman was granted an old unused water connection on the property which they will use.

Excessive amount of water used last month by Mike Forsgren was brought up. He has planted some new lawn and his meter has checked out to be working. The council agreed that no adjustment was justified.

Mayor Gilbert has checked with the city attorney about the old vacated building. If someone gets hurt inside the building the city is liable. It was decided to have the city men board up the doors. There are no spare parts to the sewer grinder. It was decided to check if a grinder is needed and have the parts on hand.

Young turned in a check for \$926.46 that was made at the refreshment stand during the summer months.

Sewer dikes are in need of repair and additional gravel. Mr. Wilkins is working into getting some one to haul some gravel. There is about \$2000 in budget for this project.

Bywater has fenced in a city road and is using it as a corral for livestock. He does not live in the city and said he had permission from the city to use it. He has gone to the Planning Commission about the matter and did not find no record in the city minutes about the matter. They have recommended that he remove the livestock, take out the fences, clean it up and return it to its original condition. The council agreed to these recommendations. Gilbert will send a letter to Mr. Bywater about the council's decision. Danielson has an insulated metal door that he will install and sell to the city. The council agreed that we purchase the door and have him replace the worn out front door. He will also install a door to the ladies restroom which can be entered through the city office. The council agreed to this.

The council adopted the "Contract for Fire Protection" between Box Elder and Corinne City.

Letter has been received from the state department of Health stating that Corinne City is in violation of the State of Utah Public Drinking Water Regulations. Samples were taken at the reservoir by the Bear River District Health Department. They tested bad also. A letter will be sent to all water users in the area stating that the city is taking steps to correct the problem. A pre-check of our system indicates that excessive runoff on the mountain where the reservoir is located could be causing the problem.

Outstanding bills were deemed payable.