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John E. McNaughton and Henrietta McNaughton  
v. John B. Eaton, Myrtle Ross, James H. Fisher,  
Cuna Fisher, Rich Cooper, Edith R. Lawrence  
Cooper, Lee Murray, Theda Murray, W. S. Ross, and  
Fern Ross Fawcett : Brief of Defendants and  
Appellants

Utah Supreme Court

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Case No. 7646

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**IN THE SUPREME COURT  
of the  
STATE OF UTAH**

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JOHN E. McNAUGHTON and HENRIETTA  
McNAUGHTON, his wife,

*Plaintiffs and Respondents,*

vs.

JOHN B. EATON, an unmarried man;  
MYRTLE ROSS; JAMES H. FISHER and  
CUNA FISHER, husband and wife;  
RICE COOPER and EDITH R. LAW-  
RENCE COOPER, husband and wife;  
LEE MURRAY and THEDA MURRAY,  
husband and wife; W. S. ROSS; and  
FERN ROSS FAWCETT,

*Defendants and Appellants.*

**FILED**

JUN 16 1951

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Clerk, Supreme Court, Utah

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**BRIEF OF DEFENDANTS AND APPELLANTS**

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ON APPEAL FROM THE DISTRICT COURT OF THE FOURTH  
JUDICIAL DISTRICT OF THE STATE OF UTAH,  
IN AND FOR UTAH COUNTY,  
HON. WM. STANLEY DUNFORD, *Judge*

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COLTON AND HAMMOND  
and

EDWARD W. CLYDE      ELIAS HANSEN

*Attorney for Plaintiffs  
and Respondents.*

*Attorneys for Defendants  
and Appellants*

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husband and wife; W. S. ROSS; and  
FERN ROSS FAWCETT,

*Defendants and Appellants.*

Case No. 7646

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## BRIEF OF DEFENDANTS AND APPELLANTS

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### STATEMENT OF CASE

This is an action brought by plaintiffs, John E. McNaughton and Henrietta E. McNaughton, his wife, against the defendants to quiet title in plaintiffs to the water of a gulch commonly known as McNaughton Gulch running in a Southeasterly direction across plaintiffs' property situated in Uintah County, State of Utah.

Plaintiffs base their claim on prior appropriation of the waters of McNaughton Gulch flowing above and to an alleged permanent dam located midway in plaintiffs' property on the West line of the Northeast quarter of the Southwest quarter of Section 21, Township 4 South, Range 21 East, Salt Lake Meridian. (R. 26)

To the Amended Complaint the defendants filed an Answer in which they denied generally the allegations of the Complaint and asserted that they were the owners of all waters flowing in the McNaughton Gulch, the same having been adjudicated to them and their predecessors in interest in 1920 in an action wherein Thomas Mantle et al were plaintiffs and John B. Eaton et al were defendants, Civil Case No. 960, Uintah County, Utah, which rights were prior and superior to any right claimed by the plaintiffs and that defendants further claim said waters by virtue of prior appropriation. (R. 38-39)

There were no further pleadings filed and upon the issues thus raised a trial was had to the court, sitting without a jury, and on the 9th day of September, 1950, the trial court made and entered its Memorandum Decision (R. 48-65) and upon the 26th day of October, 1950, signed its Findings of Fact and Conclusions of Law and Decree, and the same were filed October 30, 1950. (R. 66-73)

By its Findings of Fact and Conclusions of Law and Decree, the trial court found against defendants and awarded the water in controversy to the plaintiffs.

In its Memorandum Decision, the court held that both parties to this cause had taken the position that the waters in question were public waters and subject to appropriation, each claiming "the right to their use by diversion and application to beneficial use during the period when such processes were all that were required to effect lawful appropriation." (R. 50.)

After making this observation, however, the court determined the case on the theory that the waters were not public waters but were diffused, seepage and percolating waters not subject to appropriation. (R. 50, 54, 65)

The defendants then filed a motion for a new trial upon the grounds that both plaintiffs and defendants had prosecuted the case on the theory that the waters involved were public waters subject to appropriation and for that reason defendants did not submit evidence on that point and requested permission to present evidence showing such waters to be public waters and on the further ground that the Findings of Fact and Conclusions of Law and Decree were not supported by the evidence. (R. 75) This motion was denied by the Court. (R. 82)

The defendants jointly and severally prosecute this appeal from the Decree entered against them on both questions of law and of fact. (R. 83)

The following statements of fact are established without conflict in the evidence:



The plaintiffs own land referred to in the record as the "East 40" and the "West 40" and which is particularly described in their Amended Complaint. There is a wash or gulch, know as McNaughton Gulch, which heads at a considerable distance Northwest from plaintiffs' land and which crosses plaintiffs' property running in a Southeasterly direction as shown on Def. Exh. No. 1 and Plaintiffs' Exhibit A, extending beyond plaintiffs' lands into and across and beyond lands of some of the defendants. Where the gulch ends does not appear from the record. It has existed from time immemorial with well defined course, bank and stream bed. The trial court so found in its Memorandum Decision. (R. 48)

In 1885 there was constructed an irrigation canal known as the Ashley Upper Canal which crossed the McNaughton Gulch approximately a mile Northwest of plaintiffs' property. Beginning in 1886 the portion of the gulch just below the canal was and still is used as a lateral of the Upper Canal system for a considerable distance down to the Carroll dam at which point all water in the gulch is diverted into what is referred to in the record as the Middle Ditch. (R. 48)

The defendants divert water from the gulch in a series of three dams, the upper one being located on the plaintiffs' property just inside the East boundary and the other two being situated below and to the East of plaintiffs' property. See defendants' Exhibit 1.



This controversy arose over the waters arising from springs along the bank and bottom of the gulch and flowing down the gulch, which flow steadily increases from approximately 1 C.F.S. in the distance of one mile from just inside the West boundary of the plaintiffs' land to from 3 to 7 C.F.S. (Tr. 64 and 126) flowing into the Ashley Central Canal where this canal crosses the gulch just below the diversion points of the defendants. This flow is constant and year round and varies only as do other creeks and streams in response to wet or dry season. (Tr. 22, 66, 67, 126). There is no evidence of surface waste waters running into the gulch. The bottom and sides of the gulch are covered with water cress, succulent grasses and willows, the former being indicative of a year round flow of clear, cold spring water. (Tr. 291). The court so found in its Memorandum Decision. (R. 50)

## ASSIGNMENTS OF ERROR

The defendants jointly and severally assign the following errors upon which they, and each of them, rely for a reversal of the Decree and judgment appealed from and for the judgment of this court directing the trial court to make and enter judgment in favor of the defendants and against the plaintiffs.

### POINT ONE

That the trial court erred in deciding and disposing of the case on the theory that the waters involved were

diffused, waste, seepage and percolating waters and as such not subject to appropriation.

## POINT TWO

That the trial court erred in denying defendants' motion to reopen the case for the purpose of introducing evidence showing that McNaughton Gulch is a natural water course, that the waters flowing therein are in a well-defined channel, flow constantly throughout the year, and are public waters subject to appropriation, as they were considered by both parties at the trial.

## POINT THREE

The trial court erred in admitting in evidence over defendants' objection the Deposition of J. P. Rudy. (Tr. 225-6)

## POINT FOUR

The trial court erred in making numerous of its Findings of Fact in the following particulars:

a. The trial court erred in making that part of finding numbered 4 wherein it found: "that said gulch in its natural condition prior to 1885 was dry and no water flowed therein." That such finding is based upon the testimony of one witness, John A. Gardner, (Tr. 8) which testimony was not confined to any particular point on the gulch, and which testimony was not material to

any issue in the case for the reason that both parties were proceeding on the theory that McNaughton gulch was a natural water course. (R. 67)

b. The trial court erred in making that part of finding numbered 5 wherein it found: "that through the irrigation of these adjacent lands seepage and waste waters find their way by percolation, seepage and surface run-off to the McNaughton Gulch." That there is no evidence in the record of surface waste water running into the gulch and that such finding is not supported by the evidence. (R. 68)

c. The trial court erred in making that part of finding numbered 5 wherein it found: "that the amount of water thus finding its way into the McNaughton Gulch varies from day to day and from season to season, depending upon the irrigation practices prevailing on these adjacent lands; that the amount of water available for diversion from the gulch on to the McNaughton lands is not measurable; that in 1885 the amount of land surrounding the McNaughton Gulch which was being irrigated was not sufficient to produce any showing of drainage water from that source, either surface or subterranean, in the McNaughton Gulch." That such finding is contrary to the evidence and not supported thereby. (R. 68)

d. The trial court erred in making that part of finding numbered 6 wherein it found: "That the volume of seepage or waste water flowing into the McNaughton

Gulch has increased with the increase irrigation within its drainage area, but the flow at its lowest ebb is of a negligible amount.” That such finding is contrary to the clear preponderance of the evidence. (R. 68)

e. The trial court erred in making that part of finding numbered 6 wherein it found: “and all of the water thus finding its way into the McNaughton Gulch has its origin originally in the Ashley Upper Canal.” That this finding is not supported by the evidence. (R. 69)

f. The trial court erred in making that part of finding No. 8 where it found that the plaintiffs’ predecessors diverted water through one ditch running to the South and another ditch running to the North of said dam for the irrigation of the above described lands now owned by the plaintiffs.” That such finding is without support in the evidence and is contrary to the clear preponderance of the evidence. (R. 69)

g. The trial court erred in making that part of finding numbered 9 wherein it found: “That prior to 1900 a network of ditches was constructed on the McNaughton properties described above from the Carroll Dam and the McNaughton Dam located near the Southeast corner of the West 40 acre tract, which dam has been mentioned above; that water could and can be diverted from the McNaughton Gulch and could and can be applied to all of the McNaughton lands described above, except approximately three acres in the Northwest corner of the West 40 acre tract, and approximately four acres located South of the McNaughton Gulch on the West 40 acre

tract and the waters from the gulch have been used on said lands since the two dams referred to were first constructed.” That such finding is contrary to the evidence. (R. 70)

h. The trial court erred in making that part of finding numbered 11 wherein it found: “There is no evidence that any of these conditions (cresses, grasses and willows) pertained prior to 1886 before canal water was first applied in the drainage area, but the evidence is and the court finds that the gulch was dry prior to said time.” That there is no evidence to support this finding. (R. 70)

i. The trial court erred in making that part of finding numbered 12 wherein it found: “that all of said dams used by the defendants to divert water from the McNaughton Gulch were constructed after the dam maintained by the McNaughtons near the Southeast corner of the West 40 acre tract.” That such finding is without support in the evidence, and is contrary to the clear preponderance thereof. (R. 71)

## POINT FIVE

The trial court erred in making its conclusions of law in the following particulars.

a. The trial court erred in its conclusions of law contained in paragraph 1 thereof in so far as it concludes: “That none of the defendants have any rights in any of the waters flowing in the McNaughton Gulch above the dam maintained by the McNaughtons near the South-

east corner of the West 40 acre tract, and they and each of them should be enjoined from attempting to divert or use said water or from claiming any right or ownership thereto." That such conclusion of law is without support in either the evidence or findings of fact, and the same is contrary to law. (R. 71)

b. The trial court erred in its conclusions of law contained in paragraph 2 thereof in so far as it concludes: "That the water flowing into the McNaughton Gulch above the last mentioned dam at the Southeast corner of the West 40 acre tract is owned by the plaintiffs." That such conclusions of law is without support in either the evidence or the findings of fact, and the same is contrary to law. (R. 71).

## POINT SIX

The trial court erred in making its decree in the following particulars:

a. That the trial court erred in its Decree in the third paragraph thereof insofar as its decrees: "That the natural depression (the McNaughton Gulch) which runs in a Southeasterly direction across the above described lands as is set forth fully in the Findings of Fact, is by nature a dry wash; that the waters accumulating therein, which are the subject matter of this dispute, have their origin in irrigated lands adjacent to said wash, and that said waters are seepage or waste waters which find their way through percolation into said

natural wash or depression which is commonly known as the McNaughton Gulch.” That such is without support in the evidence. (R. 72-73)

b. That the trial court erred in its Decree in the fourth paragraph thereof insofar as it decrees: “That the plaintiffs are the owners of the right to use all of the water accumulating in the McNaughton Gulch between the diversion dam located on property now owned by Roy Carroll immediately West of the above described McNaughton property as described in the Findings of Fact, and the McNaughton Dam which is located immediately North of the Southeast corner of the West 40 acre tract described above, which said McNaughton Dam is more fully described in the Findings of Fact, and also to use the water from the Gulch on the McNaughton land located to the North of the McNaughton Gulch, and that none of the defendants have any right to use any of the said water, and plaintiffs’ title to said water is hereby quieted, and the defendants and each of them is hereby enjoined from using said water or attempting to use the same, or from claiming any interest of any kind therein.” That such decree is without support in either the evidence of the Findings of Fact and is contrary to law. (R. 73)

c. That the trial court erred in its Decree in the fifth paragraph thereof wherein the court decreed: “That the plaintiff, John E. McNaughton, is the owner of the right to use all the water thus accumulating in the channel between the Roy Carrol Dam and the Mc-



Naughton Dam for the irrigation of the lands described above, and are decreed to have the right to maintain a tight diverting dam across the channel of the McNaughton Gulch at the point where the McNaughton Dam is now maintained immediately North of the Southeast corner of the West 40 acre tract described above, and to divert and use all of said water from the McNaughton Gulch at that or any other point on the McNaughton property above the said McNaughton Dam." That such decree is without support in either the evidence of the Findings of Fact and is contrary to law. (R. 73)

## A R G U M E N T

### POINT ONE

THE TRIAL COURT ERRED IN DECIDING AND DISPOSING OF THE CASE ON THE THEORY THAT THE WATERS INVOLVED WERE DIFFUSED, WASTE, SEEPAGE AND PERCOLATING WATERS AND AS SUCH NOT SUBJECT TO APPROPRIATION.

While the written memorandum decision made by the court below may not take the place of or serve to modify or contradict the Findings of Fact, yet such opinion may be looked to to interpret and explain the Findings. *Christensen v. Nelson*, 73 Utah 603, 613; 276 Pac. 645. It will be seen from a reading of the court's memorandum opinion that the trial court based its written memorandum opinion solely upon the assumption that the waters involved in this controversy were diffused, percolating and seepage waters and as such not subject to appropriation. It is also made to appear

that all of the parties to this proceeding directed their evidence to the use that had been made of the water since before 1900. In making this statement we have not overlooked the fact that John A. Gardner testified to the effect that in 1885 the McNaughton Gulch was dry. (T. 24) Mr. Gardner, however, does not state what time of the year it was when he observed the gulch was dry, what kind of a year it was as to precipitation or any other fact that would enable one to determine whether the condition of the gulch at the time it was observed by Mr. Gardner was a temporary or a permanent condition. In its written opinion the court below recognized the fact that it was deciding the case on a theory other than that upon which the case was tried. In justification for doing so the court cites the cases of *Gladhill et al v. Malouf*, 58 Utah 105, 197 Pac. 725 and *Nelson et al v. Sanpete County* 40 Utah 560; 123 Pac. 334.

It is the established law that a party in an action may not on appeal change the theory upon which a case is tried in the trial court. *Holman et al v. Christensen*, 73 Utah 389; 274 Pac. 457. The rule precluding a party from changing the theory of his case in the appellate court is recognized by the cases cited by the court below. Doubtless the principal basis for the rule is that if a case is tried upon one theory and then upon a review by the appellate court a different theory is urged, such change in theory may well deprive a party to the action of the opportunity of producing evidence of controlling importance when viewed in the light of the theory ad-

vanced for the first time in the appellate court. If a party to an action is deprived of an opportunity to produce evidence bearing upon the theory finally adopted by the court in disposing of the action, it would make no difference whether such deprivation was brought about by a change of theory after trial, in the trial court or the appellate court.

Thus, this case was tried on the theory that the water in controversy had been public waters subject to appropriation and the evidence of all the parties was directed to the question of their respective priorities in the use of such waters. There was no occasion to offer any evidence touching the question of the water in controversy being subject to appropriation during the course of the trial because there was no issue or controversy about that matter. The defendants were not called upon during the course of the trial to offer such evidence as they had in support of their claim that the water in dispute was such water as might be appropriated where as here throughout the trial no one contented that such waters were not or had not been subject to appropriation. For the court to decide the case on a theory entirely different from that to which all the evidence was directed deprived the defendants of a fair trial. Who can say that if the defendants had been advised that there was some question about the waters in dispute being subject to appropriation, the defendants could not have established such fact beyond controversy.

Moreover, such evidence as was received in this case shows that the waters in dispute were public waters subject to appropriation at the time the same were appropriated by the defendants. The evidence shows and the trial court found that the formation of the McNaughton Gulch was not within the memory of man, heading at the top of a large drainage area, and from its nature, course and direction, it is logical to conclude that it was caused only from storms and seasonal run-off of melting snows. (R. 48) The evidence is that the gulch is still subjected to floods in times of torrential storms. (Tr. 76, 100) It may be inquired: "How else has any natural water course ever been formed?" In its memorandum decision the trial court from the evidence and testimony accurately described the gulch as it crosses plaintiffs' lands, varying from 3 to some 12 to 14 feet in depth and from 3 to 5 rods in width, with precipitous banks of clay and sand which are constantly sluffing off, tending to widen the Gulch. Lands on both sides of the gulch slope towards it so that the natural drainage of considerable acreage is toward the gulch in addition to it forming a collection area for sub-surface waters. (R. 49) The court also noted, as was also described by various witness for both parties, that all along the sides and bottom of the gulch through plaintiffs' property, water is seeping, oozing into the stream channel. That in several places definite springs exist and that grasses, water cress, and willows grow all along the gulch. (R. 30) How else can one more accurately describe the formation, history and existence of a natural water course? It is

unfortunate that there is no evidence as to the head, end, length, type of water and other characteristics which would be helpful in this determination, but this absence can only be attributed to the theory upon which the trial was had and the trial courts denial of defendants' motion for a new trial which was timely made after learning that the court had disregarded the trial theory and made its decision upon the theory that the waters of the gulch were not public waters.

There is no evidence to show that the volume of water flowing in McNaughton Gulch has increased constantly with the increase of cultivation and irrigation in that area. To the contrary, the evidence is that since before 1900 the stream flow has been constant—the defendants testified without contradiction that since that time they and their predecessors in interest have had sufficient water to irrigate their lands, and further that the flow of the gulch has varied only with the flow of other creeks and streams resulting from wet and dry seasons; and that only in 1948 did they ever notice any decrease in the flow of the gulch which aroused their suspicions. An investigation disclosed the reason of the unprecedented variation of the flow was that plaintiff had diverted the water from the gulch. (Tr. 276, 293, 351, 352) The record shows that McNaughton gulch was dry one season but that was during the irrigating season and during a year when the entire area was dry and in need of water. (Tr. 351) That the flow is constant throughout the year indicates that the flow does not vary with the application of irrigation water. (Tr. 61, 63, 322) It is

a known fact that no one can accurately determine the amount of the flow of McNaughton gulch which could be attributed to rain fall, snow, seepage, or percolation from irrigation. In all instances the water would be diffused waters until it formed the flow of the gulch. There is no evidence that surface waste water runs into the gulch at any point.

If this were a controversy over the waters percolating through the ground of the plaintiffs before the same emerged from the soil to join the flow of McNaughton Gulch, then the trial court might consider such a question. However, to bring these waters, after forming such a constant flow in a channel of a water course as described by the evidence presented by this case, under the definition of diffused and percolating waters in *Wrathall v. Johnson*, 86 Utah 50, 40 Pac. (2d) 755, is something not contemplated by the decision in that case. The definition in that case cited by the trial court is as follows: "I use the term (percolating waters) as diffused waters in lands privately owned, percolating or seeping through the ground, moving by gravity in any or every direction along a line of least resistance, not forming any part of a stream or other body of water either surface or subterranean, and, as far as known, not contributing or tributary to a flow of any defined stream or body of water. In other words, mere diffused waters in privately owned lands, not flowing in any defined, or known stream, either surface or subterranean, or not forming a part of a body of water, either surface or subterranean."

If the facts described by the evidence in this case preclude the users of such waters from establishing a right to the use of the same, many well-established water rights along water courses similar to the McNaughton gulch will be upset. There was introduced and received in evidence in this case Civil No. 960, Uintah County, *Mantle et al v. Eaton et al* wherein the court found that McNaughton gulch is a natural water course and adjudicated the water among the defendants and their predecessors in interest. That decree was received in evidence (Tr. 301) but the same is not marked as an Exhibit.

The waters of nearly every creek or stream of the State of Utah at one time have been diffused and percolating waters, but once they have emerged from the ground and collected in the form a stream in a natural water course, they no longer can be said to come under the definition of percolating waters as used in the Wrat-hall case.

The question of what are and what are not percolating and surface waters has frequently been before the courts. So far as we have been able to find there has not been a Utah case where water naturally flowing in a well defined natural channel has been held not subject to appropriation. It has been uniformly held so far as we are advised that water which finds its way into a natural channel to augment the flow thereof becomes a part of the stream. Kinney on Irrigation and Water Rights, Vol. 2, page 2164, Sec. 1194 and cases there cited.



In *Golobe v. Shute* 22 Ariz 280, 196 Pac. 1024, the court said "We find no difficulty in holding that a ravine or wash is a natural stream or watercourse, in the sense of the law, where the rains or snows falling on the adjacent hills run down the ravine or wash in a well-defined channel at irregular intervals."

In *Jaquez Ditch Co. v. Garcia*, 17 N. Mex. 160, 124 Pac. 891, the court held that an arroyo is not prevented from being a natural water course merely because water did not run in it during the entire year, and pointed out that surface water originating from rains can form watercourses under some circumstances, that the flow need not be continuous, and classified the arroyo as a watercourse.

The Supreme Court of Oregon dealt with the matter in *Simmons v. Winters*, 21 Oregon 35, 27 Pac. 7, wherein it held that a stream flow is a water course if it originates from rain and melting snow descending through long, deep depressions, upon lower lands, carves out a distinct channel which unmistakably bears the impress of frequent waterflow, and has flowed from time immemorial.

In Wyoming, the Supreme court has dealt with this problem in two cases. The first arose in 1935 in *Wyoming v. Hiber*, 48 Wyo. 172, 44 Pac. 2d 1005, and was concerned with a draw extending for only a short distance which had no well defined banks or stream channel, but was rather a typical grassy swale which could be crossed

in a car at almost any point, was dry most of the time, but drained rainfall from a small watershed of about 300 acres, bore no evidence of washing and did not present the casual appearance of a watercourse. The court held that the waters were not those of a stream, but were ordinary diffused surface waters which could be used by the landowner without first appropriating them under the State law. The second case was decided in 1940, *Binning v. Miller*, 55 Wyo. 451, 102 Pac. 2d 54, in which the same court held that a draw having no regular stream channel and no banks, and having no great flow of water except upon one occasion, was not a natural stream subject to appropriation under such conditions existing in 1906. Those conditions, however, were differentiated from the situation as of the year 1936, 30 years later, at which time the continued seepage from surrounding lands had formed a regular, natural stream at the lower end of the draw, the testimony showing that at that point there were then definite channels and banks. While the supreme court was not altogether satisfied on the point, it was held that the water running in the stream was, commencing at least with 1936, subject to appropriation, subject to the right of the owner of land on which the seepage arose to make beneficial use of the seepage water upon such land. Numerous other cases and authorities will be found and discussed in the foregoing cases from Wyoming.

In *Hoefs v. Short*, 114 Tex 501, 273 S.W. 785, 40 A.L.R. 833, the court held Barilla Creek to be a watercourse, adopting the principal that the existence of bed,

banks, and permanent source of supply is merely evidentiary that a stream can be used for irrigation or water right purposes, and that once the fact of utility has been conceded or established the stream is one to which water rights attach, regardless of variations from the ideal stream of physiographers and meteorologists. The court adopted the view that the distinguishing characteristics of a stream is the fact that it will furnish the advantages usually attendant upon a stream of water.

On the other hand, the waters have been generally held to be diffused surface waters, where the drainage area was so extremely small, or the flow so small or such short duration, or the channel so short, that the situation as a whole, especially when compared with acknowledged streams in the general area in which found, negatived in the mind of the court its idea of what a water course really is. *Gibbs v. Williams* 25 Kans. 214; *Walker v. New Mexico & S.P.R.*, 165 U.S. 593; *Turner v. Big Lake Oil Co.*, 128 Tex. 155, 96 S.W. 2d 221; *Sanguinetti v. Pock*, 136 Calif. 466, 69 Pac. 98.

It is to be noted from all these cases that there is a general lack of uniformity as to source of supply. Some of the decisions speak of a permanent source while others speak of a definite source. The latter is more accurate in the arid Western States. There is no difficulty in calling a spring a definite source and the flow is generally either continuous or recurs with a measure of regularity, depending on the season. During dry seasons and periods of drought any stream may diminish and in our

own state it is not uncommon for them to cease to flow during one or more seasons or for the latter part of any irrigating season.

It is also evident from the cases that the tendency has been, as it should be, to hold that a water course exists, whatever may be the source of the water, where a sizable stream was found to flow in a waterworn channel of considerable length for several months or even a few weeks of each year, or that was otherwise characteristic of stream flow in the general area, and that was susceptible of substantially valuable and beneficial use.

In the light of the foregoing cases certainly the waters of McNaughton Gulch should not be classified as diffused, seepage and percolating waters. This water is concentrated in a waterworn channel, the banks of which are well defined and have been from time immemorial. The evidence is uncontradicted that somewhere near 1900 the predecessors in interest of the defendants raced to see who could first make an appropriation from McNaughton Gulch, (Tr. 11, 12) and that ever since the first appropriation all the defendants and their predecessors in interest have had and have used sufficient water to irrigate their lands. (Tr. 66, 67, 125, 316, 108).

It should be noted that the plaintiff admitted that the water stock they now own in the Ashley Upper Canal Co. and the Ashley Reservoir Company, which represent a full water right for his acreage under the practice

of the community, was obtained by the beneficial use of such waters upon the very land he now claims to have used the waters of McNaughton Gulch. (Tr. 210, 211, 212, 213) Plaintiff also testified that of recent years he has leased his canal and reservoir water. (Tr. 154)

The facts of the case now before the court remove it from the scope and intent of *Garns v. Robbins*, 41 Utah 260, 125 Pac. 867, Ann. Cas. 1915 C 1159 and *Roberts v. Gribble*, 43 Utah 411, 134 Pac. 1014. Those cases held that percolating water resulting from irrigation of one's own land may be recovered and used by the owner before it leaves his land. There is no evidence in this case that the source of the water in controversy is from the application of water to plaintiffs' land. Neither is this a controversy over the relative rights of adjoining land-owners to construct drains or otherwise recapture diffused, seepage, percolating waters. This is a controversy over waters which have naturally found their way into McNaughton Gulch from over a large drainage area and have formed a constant, considerable flow.

Under the rule of *Rasmussen v. Moroni Irrigation Co.*, 56 Utah 140, 189 Pac. 572, and *Richlands Irrigation Co. v. Westview Irrigation Co.*, 96 Utah 403, 80 Pac. (2d) 458, the plaintiffs should not interfere with the seepage and diffused waters which would otherwise reach the stream. And certainly such plaintiffs cannot appropriate the stream itself. The instant case is not concerned with a recapture of waste and seepage waters. The plaintiff is not contending that he has

made such a recapture. This controversy is over waters that have by natural means found their way into a water course and merged into a stream.

In the case of *Smithfield West Bench Irrigation Co. v. Union Central Life Ins. Co. et al*, 113 Utah 356, 195 Pac. (2d) 249, decided in 1948, this court stated, "It is well established \* \* \* \* that waters diverted from a natural source, applied to irrigation and recaptured before they escape from the original appropriator's control, still belong to the original appropriator." However, in this case, the plaintiffs are not seeking to recapture water appropriated by them, but are seeking to control waters flowing from springs which have formed into a definite stream. The court further states in the *Smithfield* case that even if an original appropriator recaptures his water he may again reuse them only if he has a beneficial use for such waters.

It is the defendants' contention that McNaughton Gulch is and always has been a natural water course and the waters thereof public waters subject to appropriation. However, if this court should find the waters of said gulch to be waste, seepage, diffused and percolating waters the defendants should still be awarded the waters under the doctrine of reasonable and beneficial use.

The case of *Riordan v. Westwood*, Utah, 203 Pac. (2d) 922, decided in 1949 and numerous other cases as well as U.C.A., 1943, 100-1-3 fixes "beneficial use" as



the measure and limit of all rights to the use of water in this state. The adjudicated cases show the courts of this state have uniformly attempted to give effect to the statute regardless of the source of the water and to require the beneficial use of all waters in this arid region. The trend of the courts as well as the Legislature is toward an enlargement of waters which are subject to appropriation.

## POINT TWO

THE TRIAL COURT ERRED IN REFUSING TO PERMIT DEFENDANTS TO REOPEN THE CASE OR GRANT A NEW TRIAL.

Under Point one heretofore discussed, we have briefly referred to the refusal of the court below to permit the defendants to reopen the case or grant a new trial. In addition to what is there said, it may further be observed that a party to an action may be as effectively deprived of a fair trial by a trial court deciding a case on a different theory than that upon which it was tried as if an appellate court should do the same thing. The difference is that if a trial court commits such error there is available to the aggrieved party a motion to reopen the case or for a new trial and thus permit the reception of addition evidence touching any material matters that were not investigated when the case was tried because the parties proceeded on the assumption that there was no controversy about such matters. Certain it is that when



a case is tried on one theory and decided on an entirely different theory which requires different evidence the injustice that may flow from such practice is the same whether followed in a trial court or in an appellate court in the absence of the aggrieved party being given an opportunity to be heard on the theory upon which the case is decided. The trial court has at its disposal the means of affording the party who deems himself prejudiced by a change of theory by the court after the evidence is in of either leave to reopen the case or grant a new trial and thereby afford the parties an opportunity to be fully heard upon the theory which the court deems the proper theory. The functions of reopening a case or the granting of a new trial is to correct just such a miscarriage of justice.

### POINT THREE

#### THE TRIAL COURT WAS IN ERROR IN ADMITTING IN EVIDENCE THE TESTIMONY OF J. P. RUDY

The testimony of J. P. Rudy was taken on August 17, 1948 apparently pursuant to Chapter 52 of Title 104, U.C.A., 1943. Among other matters it is there provided — “The Judge must also designate in his order the clerk of the court to whom the deposition must be returned when taken”. It will be noted that the order of the court in this case contains no such provision.

It will also be observed that the order permitting the taking of the deposition of J. P. Rudy requires that the notice of the hearing be given ten days before

such hearing. There is no competent evidence as to when or where service of the notice of the taking of the testimony of J. P. Rudy was served upon the defendants. It is also made to appear that the so-called notice and deposition were at the time of the trial taken from the files in a criminal case. (Trs. 225-6) The deposition of Mr. Rudy and the proceedings had in connection with the taking of the same is enclosed in an envelope attached to the Judgment Roll.

#### POINT FOUR

#### THE EVIDENCE FAILS TO SUPPORT THE FINDINGS OF FACT IN A NUMBER OF PARTICULARS.

Because the court decided the case on a theory other than that upon which it was tried, the evidence is very meager as to some of the questions which the court below apparently deemed of controlling importance. Thus the court found it is finding numbered four that said gulch (McNaughton Gulch) in its natural condition prior to 1885 was dry and no water flowed therein." (R. 67) The only evidence we can find in the record in support of the finding just quoted is that of John A. Gardner. He testified that the McNaughton Gulch "was a dry gulch" in 1885. (Tr. 4) Mr. Gardner further testified that a dam was placed in the gulch in about 1886 on the Carroll property which is a mile or maybe not more than a half mile west of the Carroll property. (Tr. 5) The fact that a dam was constructed in the gulch in 1886 would seem to be

conclusive proof that there was water in the gulch during that year. Indeed, the fact that there was a gulch with high banks and a bed, as the evidence without conflict shows, is most convincing that at some time in the past there was water therein. The very existence of the Gulch could not well have been brought about by any other means than a stream of water. Numerous witnesses testified that dams were placed in the McNaughton Gulch prior to 1900 and that the defendants, except during dry years, were well supplied with water from that source for the irrigation of their lands. Among such witnesses are: W. Simpson Ross (Tr. 316); Ed Tyzack testified that his Father, along in about 1900, got water to irrigate his farm from the McNaughton Gulch, that he got fish and muskrats from the gulch, and went in swimming above a dam in the gulch. (Tr. 18, 22) As we understand, fish require water to live in and muskrats do not live in dry gulches. Asher Merkley testified that water runs in the McNaughton Gulch most of the irrigation season, and that he had never seen it dry (Tr. 61) There is other evidence to the same effect but as we understand, no claim is or could be made that there has not been water flowing in the Gulch since 1886. Not being so no useful purpose will be served by directing the attention of the Court to such other evidence touching the fact that the Gulch was not dry after 1885.

There is no direct evidence to support that part of findings numbered 5 wherein it is found that seepage and waste waters found their way by percolation,

seepage and surface run off into the McNaughton Gulch. The most that can be said in support of such finding is that when the adjacent lands were irrigated probably some of such water found its way into the Gulch. Even if that is so it by no means follows that the waters of the gulch were not subject to appropriation. As we have heretofore in this brief pointed out the authorities are, so far as we are able to ascertain, uniform to the effect that waters which find their way into a natural water course become a part of the stream and the appropriators of the waters of such stream are entitled to the use of the water so augmenting the stream the same as the other waters thereof.

The court will also look in vain to find any direct evidence to support the finding to the effect that the amount of water that finds its way into the McNaughton Gulch varies from day to day and from season to season depending upon the irrigation practices prevailing on the adjacent lands. Such finding is based solely upon an inference and is at variance with the direct testimony of such witnesses as Asher Merkley (Tr. 61 to 67), Edward Hoeft (Tr. 100 to 106) Ernest Johnson (Tr. 126) and W. Simpson Ross (Tr. 322).

The foregoing evidence also refutes that part of finding No. 6 wherein the court found that the volume of seepage or waste water flowing into the McNaughton Gulch has increased with the increased irrigation within its drainage area, but the flow at its lowest ebb is of a negligible amount.

So also is there an absence of evidence to support that part of finding numbered 6 wherein it is found that the water thus finding its way into the McNaughton Gulch has its origin originally in the Ashley upper canal. The fact is and the evidence shows that the Gulch was in existence from a time whereof the memory of man runneth not to the contrary and the Ashley Canal is of recent origin.

In their assignment of errors attacking the trial court findings, the defendants have subdivided such assignment. We do not find any evidence whatsoever which supports a number of the findings so attacked and therefore nothing more can be said as to such assignments, that is to say, if there is no evidence to support a finding, nothing more can be said as to why the trial court erred in making the finding so attacked.

Moreover, in the light of the trial courts conclusion that the waters in controversy were not subject to appropriation, no useful purpose can be served by the findings of fact other than or in addition to the findings of such facts as are necessary to establish the conclusion that the water is not subject to appropriation. In other words if the defendants or their predecessors in interest have not acquired a right to the waters of McNaughton Gulch they can not be heard to complain because the plaintiff has impounded the same and deprived the defendants of the use thereof.

## POINT FIVE

## THE TRIAL COURT ERRED IN MAKING ITS CONCLUSIONS OF LAW.

It will be noted that in its Conclusions of Law the court below awarded to the plaintiffs not only the water which finds its way into the McNaughton Gulch on plaintiffs' land, but also all water that finds its way into the McNaughton Gulch above plaintiffs' land. Not only that, but the court concludes that the defendants should be enjoined from attempting to divert any waters that find their way into the McNaughton Gulch above plaintiffs' land. Thus, if any of the defendants own or should acquire a tract of land above plaintiffs' land through which the McNaughton Gulch extends they should, according to the conclusions of law of the trial court, be enjoined from using the same. Obviously if the defendants by the use made by them of the waters of McNaughton Gulch cannot acquire any right to any waters that arise on plaintiffs' land, by the same token the plaintiffs' may not by use acquire any right to the use of water that arises on lands not owned by them.

## POINT SIX

## THE TRIAL COURT ERRED IN MAKING AND ENTERING ITS DECREE.

The trial court also by its decree awarded to the plaintiffs not only the water which finds its way into the McNaughton Gulch on plaintiffs' land, but also to

all water which finds its way into the McNaughton Gulch at or above the Carroll property. Here again by its decree the court refuses to award water which throughout the years has, under claim of right, been beneficially used by the defendants on their lands because, as the court finds, the same arises on plaintiffs' lands and at the same time awards to the plaintiffs, without competent proof of beneficial use, water which has a similar source of supply on lands owned by persons other than the plaintiffs. If the plaintiffs may acquire by mere use a right to water finding its way into the McNaughton Gulch on lands not owned by them, we can conceive of no reason why the same right should not be accorded the defendants.

## CONCLUSION

It is the contention of the Defendants that the trial court committed the following fundamental errors in the trial and disposition of this case. Such errors being:

1. That the defendants were denied a fair trial because the court below decided and disposed of the case on the theory that the waters involved were diffused, waste, seepage and percolating waters while all of the parties tried the case on the theory that the



waters involved have been public waters and as such subject to appropriation and the same have been appropriated by the defendants.

2. That the evidence shows that the waters in dispute were public waters, subject to appropriation and the same have been lawfully appropriated by the defendants.

3. That if it should be held that the evidence fails to show that the waters in dispute were subject to appropriation, the court erred in refusing the request of the defendants to reopen the case or to grant a new trial to the dependants and thereby afford the defendants an opportunity to offer further proof that the waters in dispute were such waters as might lawfully be appropriated.

4. That if the waters in controversy are such waters as are subject to appropriation neither the evidence, the findings of fact, nor the conclusions of law are sufficient to sustain the decree awarding the water here involved to the plaintiffs.

WHEREFORE, defendants pray that the water in dispute or the major part thereof be awarded to the defendants or if that may not be done that the cause be remanded to the court below with the direction to

such court to grant a new trial or permit the reopening of the case for the reception of such further evidence as the parties may desire to offer.

Respectfully submitted,

COLTON AND HAMMOND

and

ELIAS HANSEN

*Attorneys for Defendants  
and Appellants*

STATE OF UTAH )  
 : SS  
COUNTY OF SALT LAKE)

I, Elias Hansen, hereby certify that

I am one of the attorneys for the defendant in the case of McNaughton, et al vs. Eaton, et al, Case No. 7646; that on June 14, 1951 I deposited in the United States Post Office, postage pre-paid thereon, two copies of the Brief which is hereto attached and that said Brief so deposited in the Post Office was addressed to Edward W. Clyde, attorney at law, 351 South State Street,, Salt Lake City, Utah.

Elias Hansen

Subscribed and sworn to before me this 15<sup>th</sup>  
day of June, 1951.

Macl P. Thurmond

NOTARY PUBLIC

Residing in Salt Lake City, Ut.

My Commission  
Expires:

5-4-55