

1951

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 Respondents

Utah Supreme Court

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Recommended Citation

Brief of Respondent, *McNaughton v. Eaton*, No. 7646 (Utah Supreme Court, 1951).
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IN THE SUPREME COURT OF THE STATE OF UTAH

JOHN E. McNAUGHTON and
HENRIETTA McNAUGHTON,
Plaintiffs and Respondents,

— vs. —

JOHN B. EATON, et al.,
Defendants and Appellants.

Respondents Brief

FILED

Aug 1 - 1931

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Clerk, Supreme Court, Utah

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NATURE OF CASE

Respondents brought this suit to quiet title to water which arises in the McNaughton Gulch between two specified points. The appellants claim the right to divert water from the McNaughton Gulch at points downstream. This appeal was taken from a decree in favor of the respondents.

ISSUES ON APPEAL

Before turning to a detailed statement of the facts, we set forth in general the basic contentions of the appellants and in general describe our answer thereto. It

is thought that this general statement of our respective positions will be helpful to the court in reading the statement of facts which follows immediately below. The appellants make four basic contentions:

1. That they were deprived of a fair trial by the fact that the trial court decided the case on the theory that the waters in question were private waters.

The appellants had a fair trial. The pleadings claim only general ownership of the water; the trial produced evidence which would be immaterial if the theory of prior appropriation were the only claim; the record shows at page 201 that the plaintiff asserted ownership of the water because it arose on his land, and counsel for the plaintiff objected to the characterization of the McNaughton Gulch as a water course. Nearly three full months transpired after the judge made his memorandum decision, yet the appellants failed to produce a single affidavit or to make any showing that there was additional evidence which they could produce if given a chance. They thus completely disregarded Rule 59, Utah Rules of Civil Procedure, and have failed to show any prejudice.

2. Appellants complain that the court erred in failing to conclude that these waters were public waters subject to public appropriation. We contend that the court did not so err. Further, the court found as a matter of fact that the respondents under the doctrine of prior appropriation, which appellants argue for, were prior

in time and in right to the appellants. Therefore, had the court concluded as a matter of law that the waters in question were public waters, it would have been compelled under its findings of fact to enter judgment for respondents.

3. That the court's findings on all facts necessary to show a prior appropriation were immaterial and should be disregarded here because the trial court could have reached its present decision without making those findings. The authorities hold that the Supreme Court will not assume that the trial court made findings without having considered all the evidence. These findings are therefore controlling in the event this court decides that the waters are subject to appropriation.

4. That the evidence does not support the various findings of the trial court. We will make appropriate record citations to show that the record amply supports each challenged finding.

THE FACTS

The respondents have not even purported to give a complete statement of the facts. It will, therefore, be necessary for the respondents to do so. Found in the very sketchy statement of facts set forth by the appellants are numerous misstatements. To take each misstatement and show wherein it disregards the record would require a rather lengthy section in this brief and yet would not present the facts in a logical order.

In addition to the numerous misstatements of the record, appellants challenge the trial court's findings in nine particulars. There are only 12 findings and it seems to us that the best way to bring the facts to the attention of this court is for us to quote the findings, one by one, and cite the record to support each of them.

THE FINDINGS

Finding Number One is a formal recital of the residence of the parties.

Number Two recites that additional parties were added to the suit (R. 227-8).

Number Three is a recital that John McNaughton is the owner of 80 acres of land. (This is supported by R. 141 and ownership plat Exhibit B). It is then found that the lands are by nature arid, but with irrigation will produce crops. Carroll testified that for 50 years McNaughtons have raised crops on these lands (R. 45); McNaughton testified that all the gulch water was necessary to irrigate the lands (R. 152. See also 101, 221, 29); and that practically the entire 80 acres are irrigated (R. 149).

Number Four: "That there is a natural depression or wash which runs in a general Southeasterly direction across the lands described; that said depression is commonly known as the McNaughton Gulch;" (The location of the gulch is shown on a map (traced from aerial photo) Exhibit A; and on Exhibit 1, (drawn to scale

by an engineer), and the gulch is described by numerous witnesses (See, for example, R. 40). The court continues: “that said gulch in its natural condition prior to 1885 was dry and no water flowed therein;” Gardner testified at R. 4 that in 1885 the McNaughton Gulch was “a dry gulch.” (See also R. 16). The court then found: “that said gulch is intersected about one mile to the west of the McNaughton property by the Ashley Upper Canal, (R. 40, and Exhibit A), that said canal was constructed in about 1885 (R. 4) and has been used since said date to convey irrigation water for use on lands adjacent to and above the described gulch and on other lands;” (R. 11, 40, 158), “that said gulch runs from the Ashley Upper Canal Southeasterly through Section 20, Township 4 South, Range 21 East, S. L. B. & M., crosses the highway to Maeser and enters the West 40 acre tract of the McNaughton property” described above and goes Southeasterly to Ashley Central Canal. (Plaintiff’s Exhibit A, which was stipulated to be a tracing from an aerial photograph, shows the location of the gulch and the two canals referred to in the finding. Defendant’s Exhibit 1 prepared by a licensed engineer shows the same general area drawn to scale.)

Finding Number Five: “That there are lands lying both to the North and to the South of the McNaughton Gulch which are irrigated from the Ashley Upper Canal; that the natural slope of said lands is toward the gulch (R. 40, 261); that through the irrigation of these adjacent lands seepage and waste waters find their way by percolation, seepage and surface run-off to the McNaugh-

ton Gulch.” Carroll testified at Page 41 of transcript that:

“I have seen seepage water in the gulch; it is according to the year. Dry years there would be no water at all between the Carroll diversion (McNaughton’s first diversion point) and the canal; wet years there would be seepage water between those points.”

At Page 40, Carroll said that slope of the lands on each side of the gulch is toward the gulch; the lands on each side are irrigated from the Ashley Upper Canal. At Page 52 he was asked:

“Q. Do the upper irrigators permit their waste water to run into the gulch?

A. Yes, sir.”

John McNaughton testified on this point at Page 158:

“It (variation of water in the gulch) is caused by the amount of irrigation on each side of the gulch; that is one of the causes. And, of course, from the use of the water by the neighbors above. Sometimes they are not so careful about their water, they let it run through, and return waste water, so the gulch fluctuates from waste water as well as the seepage water.”

John Gardner testified at Page 16:

That in 1886 the gulch was dry above the Carroll dam except for water from the canal.

“Q. But if they shut the water off at the canal, would water come into the gulch anyway?

A. There was no water coming into the gulch; there was no land farmed above there.”

Of course Gardner was testifying concerning conditions back in 1886 and the remark that there was no water in the gulch except canal water because there were no lands being irrigated along the gulch is important in supporting the court's conclusion that the water in the gulch had its origin in upper irrigation.

The defendants also called an engineer who prepared Exhibit 1 and who checked the ground rather carefully. He testified at Page 261 that the slope of the land is toward the gulch and at Page 260 that water was running into the gulch as surface run-off from upper irrigation. There is other like evidence from other witnesses, but the above certainly would support the challenged finding.

The court in finding Number Five proceeds: "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." Appellants say (Page 29) that the court "will look in vain" for any evidence to support this finding. Two witnesses testified in accordance with the court's finding in almost the words used by the court. Carroll testified at Page 52:

"Q. Is the amount which flows therein consistent from day to day, and season to season?

A. Varies all the time.

Q. Does it vary day to day in the same season?

A. Yes, because we have irrigation on each side, and sometimes the waste water runs in and

it will raise, and the next day somebody shuts their water off and there won't be as much in there.

Q. Do the upper irrigators permit their waste water to run into the gulch?

A. Yes, sir."

John McNaughton testified (R. 158):

"Well, I have observed the gulch for all these years, and I find that the gulch fluctuates from year to year and day to day, and it is pretty hard to tell just how much water you are going to have, . . .

Q. Do you know what causes it to fluctuate from day to day?

A. It is caused by the amount of irrigation on each side of the gulch; that is one of the causes. And, of course, from the use of the water by the neighbors above. Sometimes they are not so careful about their water, they let it run through and return waste water, so the gulch fluctuates from waste water as well as the seepage water."

The court in finding Number Five proceeds: "that the amount of water available for diversion from the gulch on to the McNaughton lands is not measureable; (Carroll so testified, R. 53, 55) 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. (Gardner so testified, R. 16) that in 1886 seepage waters began to appear in the McNaughton Gulch and a dam was constructed in that year in the McNaughton Gulch by the predecessors in interest of the plaintiff, (and others

whose identity is not material to this litigation) in Section 20, Range 21 East, Township 4 South, SLB&M, at a point located on properties now owned by Roy Carroll, and located in said gulch about 500 yards west of the aforementioned road to Maeser.” Gardner so testified (R. 5; See also Exhibit A) “that the water was diverted at said point into an artificial ditch which is now commonly called the ‘middle ditch’ across the Carroll property to the plaintiffs’ land and the land of others; that said dam has been continuously used and water has been diverted at said point from 1886 to the present time for the irrigation of the lands of the plaintiff John E. McNaughton described above.” Several witnesses so testified: Gardner, R. 6, 7; Carroll, remembers use of Carroll diversion for 52 years, R. 42; McNaughton, 159).

Finding Number Six: “The volume of seepage or waste water flowing into the McNaughton Gulch has increased with the increased irrigation (Rudy so testified, R. 234) within its drainage area, until at the high point of flow there may be several cubic feet per second flowing in the gulch (R. 71), but the flow is not constant (R. 52, 171) and the amount at its lowest ebb is of a negligible amount (R. 152, 157). At least at one time the gulch was known to dry up completely during the non-irrigation season; that the seepage water since its first showing has oozed into the sides and the bottom of the gulch throughout its length, but in a number of places along its sides and below the general surface of the ground as the flow has increased it has collected into little channels which have the appearance of springs which flow

varying amounts of water. The so-called springs have the same characteristics as the ooze in response to the flow of the irrigating water upon the surface of the lands surrounding the gulch, and all of the water thus finding its way into the McNaughton Gulch has its origin originally in the Ashley Upper Canal, which secures its water from natural sources many miles distant from the McNaughton Gulch.” Carroll said that in dry years there was no water at all at the Carroll diversion (R. 41). Gardner said it was a dry gulch in 1885 (R. 4); that there was little irrigation in 1886 and the gulch had no water except that from the canal (R. 16); Rudy said that the flow increased from year to year after he built the Rudy Dam (R. 234). Lewis testified that the flow in the gulch would come after they started irrigating the farm lands above (R. 82). Carroll said that there was not much water in the gulch after irrigation stops (R. 56); that livestock owners took their livestock to the Canal in the winter for water (R. 55). Frank Lee said the gulch had seepage water and that there was not much seepage in the winter time (R. 37). The testimony of Carroll and McNaughton that the stream was made up of seepage and irrigation waste water is set forth above. In addition, see the testimony of McNaughton at page 206 where he says the stream is made up of drainage water and surface waste water. McNaughton said (R. 152, 157) that at times there is not much water in the gulch, not enough to irrigate his farm and he has to commingle canal water with it to make up a stream.

Finding Number Seven: "That the canal waters are turned directly from the Ashley Upper Canal into the McNaughton Gulch at the point where said canal and gulch intersect about one mile West of plaintiff's lands, and are permitted to flow down said gulch to the aforementioned Carroll Dam, where they are diverted through the middle ditch and on to the lands of the plaintiffs and others; (See R. 5, 42, 155, 154) that said diversions from the Ashley Upper Canal were made pursuant to rights under stock owned by the McNaughtons and others in the Ashley Upper Canal Company (see R. 154) and from 1886 (R. 5, 42) to the present time the waters which have seeped in the McNaughton Gulch above the Carroll Dam have flowed down to the Carroll Dam sometimes by themselves and sometimes while commingled with canal water being delivered to stockholders and have been used by the plaintiffs and their predecessors and others (whose names and identities are not material herein) for the irrigation of the lands of the plaintiffs described above, and of said other persons; that none of the persons so using said waters were predecessors in interest of any of the defendants (See R. 5)."

Finding Number Eight: "That below the Carroll Dam and above the plaintiffs' lands described above, other waters accumulated in the McNaughton Gulch in the manner above set forth; that in about 1895 the plaintiffs' predecessors in interest constructed a tight dam across the McNaughton Gulch near the Southeast corner of plaintiffs' West 40 acre tract described above, which dam impounded and diverted the waters accumu-

lating in the McNaughton Gulch between said dam and the Carroll Dam. (See Gardner's testimony that in 1896 when he was sixteen years old he went swimming in the big pond formed by this dam and it had been in "a long time before that" (R. 8, Rudy, R. 234.) Every other witness testifying on this point admitted that the dam had been in from the date of his first memory. McNaughton testified that he could remember since 1900 and the dam was in then (R. 139-41). Carroll could remember the dam for about 52 years or back to about 1897 or 98 (R. 42-3). The only witness for defendants who was familiar with the early history of this construction was on the McNaughton place in 1903. He said the dam was in then (R. 88). There is no evidence to the contrary.

The court proceeds with the finding: "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." There is some conflict in the evidence as to whether there was a ditch to the North. Everyone admitted that there was a ditch to the South (R. 44, 62, 74, 116, 140, 232). As to the ditch to the North, the following witnesses testified that it existed: Gardner, R. 8; Carroll, R. 44; Tysack, R. 19; Merkley, R. 62; Lewis, R. 74; McNaughton, R. 140; Rudy, R. 232. Other witnesses denied that the North ditch was in prior to 1912. (See Hazel Hoeft, R. 113). But she admits that the ditch to North was in by 1912 (R. 114); E. Hoeft was on McNaughton property once when he was 8 years old (1903); he was running down

North side of big dam and saw no ditch to the North (R. 89). He knew of diversion to South, however (R. 89). Hoeft admitted that by 1910 or 1911 he saw a ditch to the North (R. 89). Ross, who admitted that he had little familiarity with McNaughton place and in past 48 years had never had an occasion to be on the place (R. 337) although he owned lands now owned by defendants, said that there was no ditch to the North (R. 321). The court could probably have found that the ditch to the North was not constructed until 1910-12, but certainly the overwhelming preponderance of the evidence is to the effect that it was in prior to 1900.

The court then proceeds: "that said dam (McNaughton Dam) consisted of a dirt fill." Everyone so testified and also testified that it was a tight dam which would not bypass water through it (Gardner, R. 12; Tyzack, R. 19; Merkley, R. 63; Lewis, R. 73; E. Hoeft, R. 100; McNaughton, R. 140). The testimony was that no water went through or over the dam and that it was as noted above diverted onto the McNaughton field. On not overflowing, see also two of defendants' witnesses: Ed Hoeft (R. 100), who remembered it in 1903, and H. Hoeft, who remembered it in 1906 (R. 116).

The court then found: "that said dam has been maintained across the McNaughton Gulch at all times since about 1895, except for short periods of time, less than one year's duration, when the dam has washed out and subsequently been replaced." On the dam being in since 1895 we have already set the evidence forth above (See R. 8, 139-41, 42-43, 88). As to the dam being main-

tained, see R. 15, 71, 100, 207. At page 71 Merkley said he had been on McNaughton lands every year for 40 years and that the dam was always maintained as a tight dam. Gardner said dam was in all the time he was in that area (R. 15). Defendants' witness Hoeft said that dam was washed out occasionally but that it was always replaced (R. 100).

Finding Number Nine: "That prior to 1900 a network of ditches was constructed on the McNaughton properties described above from the Carroll Dam" (R. 5-8, 42, 148, 207) "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." In addition to the evidence of the Carroll ditch cited above and the two ditches to the North and South from the big McNaughton Dam, McNaughton testified that the North ditch went to the extreme North end of the property (R. 143), that the ditches now are as they were in 1900 (R. 207; that except for a small tract in the Northwest corner of the property and small tract in Southwest corner, the entire 80 acre farm could be irrigated by using the Carroll and the McNaughton Dams. He fixed the size of these tracts

at $2\frac{1}{2}$ acres each (R. 144-46). Witness Horrocks corroborated him in this regard (R. 358-9). There is also evidence of a diversion from a third dam near a slaughter house which diverted water to the North many years ago (R. 139, 29, 74).

Finding Number Ten: "That there is also a wash or gulch located on the McNaughton land to the North of the McNaughton Gulch; that said last mentioned gulch has no common name; that it runs more or less parallel to the McNaughton Gulch; that it is not nearly so deep as the McNaughton Gulch and begins on the McNaughton lands near the middle of the West 40 acre tract; that at the lower end of this North gulch there is a drain ditch which commences a few feet North of the North gulch and extends across the East end of the McNaughton property and empties into the McNaughton Gulch; that the slope of the land is from the North gulch to the McNaughton Gulch so that any water flowing into said drain ditch will flow into the McNaughton Gulch; that said drain ditch crosses over the most Westerly ditch used by any of the defendants leading from their upper point of diversion and said drain ditch empties the water into the McNaughton Gulch above all other points of diversion of the defendants from the McNaughton Gulch." (The North gulch is described, R. 142-43, 261. It is also shown on plaintiffs' Exhibit A and on defendants' Exhibit 1). The drain ditch is also shown on the two exhibits. It was so constructed that it will catch all excess waters, if any, placed on McNaughton's lands and return them directly to the McNaughton Gulch (R. 261). This

was noted by the trial court and is noted here because even if there were sufficient water in the McNaughton Gulch at McNaughton's big, permanent dam to more than supply the needs of his lands (which there is not, R. 101, 152, 29, 221) it could not prejudice these defendants. The excess would be returned by the drain ditch directly to the gulch. It would return above all of the defendants' points of diversion except one and it crosses over that one. The court so found and Exhibits A and 1 both show it.

Finding Number Eleven: "Generally throughout the length of the gulch along its sides below the line where the water percolates, there are now cresses and succulent grasses growing, and at the sites where the water issues into the gulch, willows have grown up. There is no evidence that any of these conditions 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." McNaughton said that plants grow in the gulch itself (R. 141); Lewis told of gathering water cress (R. 81); and, of course, the judge viewed the premises after the trial and as a part of the evidence (R. 386) and the court observed the cresses and willows in the gulch. As to it being a dry gulch prior to 1886, see R. 4 and 16 and other discussion set forth above.

Finding Number Twelve: That in about 1920 some of the defendants were involved in a quiet title suit to determine the extent of their rights to the waters of

McNaughton Gulch; that neither the plaintiffs nor their predecessors were parties to that suit; that the defendants divert water from the McNaughton Gulch from three dams located below the last mentioned dam on the McNaughton property; 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 waters percolate and seep into the McNaughton Gulch below the last mentioned dam maintained by the plaintiffs and flow into said McNaughton Gulch along its entire length below said McNaughton Dam and until the McNaughton Gulch empties into the Ashley Central Canal.”

The decree between the defendants was offered at R. 300. Plaintiffs objected to it for any purpose except to show defendants’ claims as against each other and defendants’ counsel confessed that it would not be binding as to the McNaughtons. It was admitted in evidence (R. 301) but of course could have had no binding effect on the plaintiffs who were not parties to that decree. The three dams used by the defendants and identified in that decree are the Rudy Dam, the Tyzack Dam and the Mantle Dam (R. 374, Exhibits 1 and A). The dams as they occur on the gulch starting upstream are then as follows: The Carroll Dam, built in 1886 and used by the plaintiffs (R. 5). There was an old dam near the corrals on the McNaughton property which diverted water to the North (R. 139, 29, 74). It was constructed according to McNaughton prior to 1900 (R. 139)

but has not been recently used except for occasional pumping (R. 144). Then comes the big dam which is some 20 feet high, 100 feet long and backs water up as much as 150 yards (R. 20, 218). It had been there a long time in 1896 according to Gardner (R. 8). Other witnesses as noted above remembered it as having been constructed prior to 1900 (R. 19, 43, 74, 139-41, 231). Then came the Rudy Dam, built by witness Rudy. Rudy said that the McNaughton Dam was already in when he built the Rudy Dam (R. 234). Gardner was Rudy's stepson. Gardner also said that the Rudy Dam was built after the McNaughton Dam (R. 10). Ross said that Rudy Dam and Tyzack Dam were built the same year and with reference to his marriage in 1907 he fixed the date of construction as the summer of 1905 (R. 334). Next downstream comes the Tyzack Dam. According to Tyzack, his father constructed the dam about "midway" of the period they lived in that area (R. 19). His testimony was that they moved there in 1900 and left in 1910. At the time he moved there in 1900, the McNaughton Dam was in (R. 19). He remembers that the McNaughton Dam was in place prior to the construction of the Tyzack Dam (R. 19). The Mantle Dam, according to Tyzack, was put in after the Tyzack Dam (R. 21). It is to be remembered that both Rudy and Tyzack were predecessors in interest of the defendants (R. 18, 11, 12).

No one directly connected with the construction of the Mantle Dam testified. However, Tyzack said it was later than the Tyzack Dam (R. 21); Gardner said that the Mantle Dam went in the same season that the Rudy

Dam was constructed (R. 12) and that both the Rudy Dam and the Mantle Dam were constructed before the Tyzack Dam (R. 14). No witness, except Gardner and Rudy could remember back far enough to demember when the McNaughton Dam went in. Gardner said he went swimming in the pond when he was 16 years old (1896) and the dam had been there a long time then (R. 8). Rudy said McNaughtons were using water and that he became acquainted there in about 1890-1895 (R. 231). Several witnesses remembered to about 1900; McNaughton (R. 139); Carroll (R. 43); Lewis (R. 73-74). Hoeft remembers it in 1903 (R. 88). There is no witness who testified that any one of the defendants' three dams was in prior to the Carroll Dam or the big McNaughton Dam. Ross said at Page 333 that McNaughton Dam was not in first, but later admitted that he was not sure (R. 334). In view of all the positive evidence from those who were active in the construction of the dams and the total lack of conflicting evidence, the court could not have found otherwise than that the McNaughton Dam was in first. As to water coming into the gulch below McNaughton Dam, see testimony of Merkley who said 3 to 7 feet flowed into Ashley Central Canal even though McNaughton kept a tight dam (R. 71).

DEFENDANTS' EVIDENCE

The witnesses called by the defendants had very little knowledge of conditions on the gulch. Defendant Fisher had never been on the McNaughton place prior to 1948 when he went looking for the water (R. 292).

Ross lived there and used water for 48 years and never once went upstream to see what McNaughton was doing with the water (R. 337). John B. Eaton had used water from the gulch for 35 years and was never on McNaughton's property until 1948 when they went looking for the water (R. 353). Christensen was an engineer who got his information from an inspection during the trial. Defendants also called Mr. and Mrs. Hoeft. Mr. Hoeft said McNaughton Dam was there in 1903 (R. 88) and that it was a tight dam, not overflowing (R. 100). He was there only once in 1903 and was not there again until 1918. Mrs. Hoeft was there first in 1906 and the McNaughton Dam was seen by her. She remembered it as a tight dam which did not overflow (R. 112, 116). These are defendants' only witnesses.

The record thus not only supports the trial court's findings, but essentially it stands without contradiction. With the evidence printed so that the court can readily refer to it, the appellants can gain little by asserting time, and again throughout their brief that there is no evidence to support the findings.

ARGUMENT

I. APPELLANTS HAD A FAIR TRIAL

Throughout appellants' brief it is asserted that the parties both "proceeded" upon the theory that the waters in the McNaughton Gulch were subject to public appropriation. This simply isn't true, and nothing in the record can be or has been cited by appellants to

demonstrate the correctness of it. Reference to the pleadings will show that the plaintiffs simply pleaded in general terms that they were the owners of the right to use for irrigation and stock watering purposes the water arising in the McNaughton Gulch from seepage, percolation, or otherwise, between the Carroll dam and the big dam described in the Statement of Facts. The pleadings do not state that said claim of ownership was based upon public appropriation. The basis of that claim of ownership was not set forth at all (R. 27). There was no pretrial, no interrogatories were served, and the case went to trial on the plaintiff's general allegation of ownership. Reference to the transcript of the evidence fails to show any opening statement by counsel for the plaintiffs. Therefore, if appellants did rely on the water being public, they did so without having had any right to do so.

Further, during the course of the trial, on the second day, respondents made it clear that they were not admitting that this was a water course. At Page 201 of the transcript the plaintiff was asked whether or not he claimed to own this water during the wintertime. The plaintiff answered that he claimed it for stock watering purposes and then said, "I don't want to tie myself down on this period when the water arises on our property. It is a different position than where you are out on some other property." Counsel for the appellants then said, "Well, all of the water rising on your property arises in the natural water course of the McNaughton Draw?" Counsel for respondents then made this ob-

jection: "I object to the characterization of it as a water course, to the form of the question, your Honor, as something that is not in evidence." Certainly from this the appellants should have realized that McNaughton was claiming that the water which arose on his property was not governed by the general law of appropriation.

From the beginning of this case, when the complaint was filed, to the end of the trial, there is nothing in the record which can be pointed to as an admission by the respondents that they would not rely upon this being private water. There was a great amount of evidence directed to the question of the source of the water. If we had abandoned the private ownership theory, all of the evidence directed toward the fact that this water had its origin in private irrigation would have been immaterial.

Further, every witness who testified was exhaustively examined concerning his knowledge of the conditions on the gulch as far back as he could remember. No witness called could have added anything to the record in this regard.

At the close of the evidence, when the matter was argued, the trial judge asked counsel for the plaintiffs if he thought the doctrine of private ownership could be sustained. Counsel for the plaintiff confessed that he did not think so in view of the authorities which will be discussed in Section 2 hereof, and particularly in view of the case of *Lehi Irrigation Company v. Jones*, 202 P. (2d) 982. It is because of this confession made *at the*

argument that the trial court noted in its memorandum decision that both parties had taken “the position that the waters in question are public waters and thus subject to appropriation” (R. 40). It should be noted that the court did not find or comment upon the parties having “proceeded” through the trial on that theory. We therefore assert with full assurance that the record does not contradict us, that defendants were not misled.

NO SHOWING ON MOTION FOR NEW TRIAL

Perhaps the most conclusive thing, however, against this argument by appellants that they did not have a fair trial is the fact that upon their filing of a motion for new trial no affidavits were filed to show that appellants could have or would have submitted any new or different evidence. Reference to the record will show that the court handed down its memorandum decision on September 14, 1950 (R. 65). At that time the appellants certainly knew the theory upon which the case had been decided. There was a delay from September 14th to September 28th before the Findings of Fact and Conclusions of Law were prepared and served on the defendants (R. 74). Thereafter, the trial court delayed for nearly a month in signing and entering the findings and the decree (R. 73). The motion for new trial was filed on November 9th (R. 76) which was nearly two full months after the court’s memorandum decision. The motion for new trial was not argued until December 8th (R. 82) so that for nearly three full months the appellants knew that the court had decided the case on the theory that this water had

its origin in private irrigation and that it was private water. They, nevertheless, failed to locate any new evidence of any kind which would have any materiality on that issue and offered no affidavits and made no showing as to how they were prejudiced by the deciding of the case on that theory.

Appellants say at Page 14 of their brief, "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." The law is that the duty is on them to show at the time the motion for new trial is heard that they had new evidence and what it would have been. This court will not presume that such evidence existed, nor will it presume prejudice.

In this regard, it would not be possible to find a stronger case in support of our position than the case of *Beckstead v. Brinton*, 105 Utah 395, 142 P. (2d) 409. There the trial court throughout the trial told the parties that he was following the law of the State of Utah, not the O. P. A. regulations; that he was not interested in the "slightest" in whether the respondent in good faith wanted the premises for his own use. He made the statement not only once but on numerous occasions throughout the trial and thus discouraged counsel from inquiring into that question. Then, without advising counsel of his change in views, the judge made findings that the owner in good faith wanted the premises for his own use. This was claimed to be prejudicial error. No affi-

affidavits were filed in support of the motion for new trial. The Supreme Court said that it must assume that the trial judge, before making the findings, considered the evidence presented. It then said:

“In the absence of a showing on motion for a new trial that appellants were prejudiced by the lack of notification, that the court had experienced a change of mind, we must presume that they were not prejudiced by such failure to be apprized.”

If in the face of such an emphatic declaration during the trial as was made in the *Brinton* case, this court will not assume prejudicial error, certainly it should not make such an assumption in this case. The duty was clearly upon the appellants in arguing their motion for new trial to show the court by affidavit or otherwise wherein they were prejudiced. When a motion is made, as this one was, upon the theory that the court surprised the parties by deciding the case on a theory not argued, the persons making the motion have an absolute duty of advising the court as to the evidence which they would put in if a new trial were granted.

Rule 59(a) sets forth the grounds upon which a motion for new trial may be made. The motion made herein could only conceivably come under grounds 3 or 4. Rule 59(c) expressly requires an application for new trial based upon sections 3 or 4 to be supported by affidavit. It requires that these affidavits be served with the motion, and that time be allowed for the opposing

party to serve opposing affidavits. This rule was completely disregarded by the appellants. They had three full months after having been notified in court by a lengthy memorandum opinion as to the court's theory. They had one month after the findings were served on them within which to object to the findings and they had over one month after the decree was entered within which they could have procured affidavits. They totally ignored Rule 59 and now on appeal their total showing as to prejudice is to ask the question, "Who can say that they would not have been able to find evidence if a new trial had been granted?" Under the holding of *Beckstead v. Brinton*, supra, they have utterly failed to show any prejudice.

We, therefore, respectfully submit that the defendants were not misled. The pleadings of general ownership, the evidence relating to the source of the water, and the express comments made (R. 201) certainly put them on notice that the water was claimed to have its origin in upper irrigation, and that it might be decided that the McNaughton Gulch was a private water course. If the court could possibly conclude in the face of the record that they were misled during the trial and that they were thus surprised by the trial judge's opinion, they had a duty to make a showing in support of their motion for new trial, as required by Rule 59. This they utterly failed to do. This court, under the authorities, will not presume that other or different evidence was available, nor that they were prejudiced.

II. DID THE TRIAL COURT ERR IN FINDING THAT THIS WAS A PRIVATE WATER COURSE?

The appellants assert that the evidence shows that this was public water subject to appropriation. They fail to tell the court how such a conclusion, if reached, would help them. We will demonstrate under Point III hereof, that even if this is public water, the evidence conclusively shows and the trial court expressly found that the plaintiffs were prior in time and in right to any of the defendants. We will address ourself first to the correctness of the trial court's conclusion that these waters were private waters, and will then proceed under Point No. III to demonstrate that even if the court did err in its conclusion of law, it nevertheless was correct in its facts and result.

We submit that under the evidence outlined above the court correctly found that prior to 1885 the McNaughton Gulch was a dry gulch (R. 4 and 16). The flow of water in the McNaughton Gulch had its origin in upper irrigation. Gardner testified that in 1885 the gulch was a dry gulch and that in 1886 there was not much land being irrigated along the gulch; and that there was little water in the gulch except canal water (R. 16). Rudy said that the flow of water in the gulch increased from year to year (R. 234). Lewis testified that the flow in the gulch would come after they started irrigating the farm lands above (R. 82). Carroll said that there is not much water in the gulch after irrigation stops (R. 56). Frank Lee said that the gulch carried

seepage water, and that there was not much seepage in the wintertime (R. 37). Both Carroll and McNaughton testified that the stream was made up of seepage water and waste water from upper irrigation (R. 41 and 158). The judge observed the premises and the drainage areas on each side of the McNaughton Gulch. The evidence was conclusive that the drainage from the irrigated lands flows into the gulch both on the North and South side thereof. From this testimony the trial court found that the water in question had its origin in the irrigation of upper lands.

Since this finding is warranted by the evidence, we have the question of law as to whether or not this makes the water private water owned by the person on whose land it arises. In this regard the trial court has written a detailed eighteen-page memorandum decision which analyzes the development of the law in the state of Utah. We refer the court to the record, page 48, for this decision. We will not attempt here to re-present the trial court's reasoning. We note only that in the case of *Smithfield West Bench Irr. Co. v. Union Central Life Ins. Co., et al.*, 105 U. 468, 142 P. (2d) 866, the court was dealing with seepage and waste water much as that involved here. The court refused to decide whether or not waters of this nature were subject to appropriation. Judge Wolfe noted at page 479 that in the absence of statute it is generally held that such waste water and seepage water cannot be appropriated. However, in that case no one had filed on the water after 1903 and there was no showing of a diligence right prior to 1903

when filings with the State Engineer were not necessary. The court simply raised the question as to whether or not these waters could be appropriated.

In the *Wrathall v. Johnson*, 86 Ut. 50, 40 P. (2d) 755, the court did say that waters which have their origin in private irrigation are not subject to the law of appropriation.

The later case of *Riordian v. Westwood*, 203 P. (2d) 922, was dealing with water which had its origin in natural sources, and the trial court here distinguished that case on that ground. Therefore, at least until the case of *Lehi Irrigation Company v. Jones*, 202 P. (2d) 982, this court had never affirmatively stated, as far as my research reveals, that waters having their origin in artificial irrigation were subject to public appropriation.

In the case of *Lehi Irrigation Co. v. Jones*, supra, everyone conceded that the spring in question had increased in flow because of the fact that upper irrigators had applied Deer Creek water on Provo Bench. The waters left Provo Bench and had found an outlet in a spring which arose on the ground of Jones. Jones filed on the water on the theory that it was open to public appropriation. The *Lehi Irrigation Company* protested the filing because it had always used all of the flow from the spring. The court affirmed the State Engineer in approving the application of Jones. In doing this it indicated that such waters were subject to appropriation after they reach a natural source and commingle with other waters.

In view of the *Jones* case, we thought that at least as against everyone except the irrigators who waste the water from their land this court had held that the waters were subject to public appropriation. We, however, note that there is a distinguishing feature between this case and the *Jones* case, in that here the waters found their way to what had been a dry gulch and never lost their identity by commingling with water from natural sources, while in the *Jones* case the waters found their way to a natural water course and commingled with waters which had their origin in natural sources and thus lost their identity. If this distinction is sound, and the trial court argues that it is, then the trial judge should be affirmed upon the basis presented in his memorandum decision.

III. EVEN IF THE COURT ERRED IN FINDING THAT THE WATERS WERE PRIVATE WATERS, IT NEVERTHELESS ARRIVED AT A CORRECT RESULT.

It is well established under the Utah cases that a trial court will be affirmed if its decision is right in result, even though the wrong reason is stated for it. There are many cases so holding, but a very recent one is the case of *Tree v. White*, 110 Utah 233, 171 P. (2d) 398. The court says:

“ ‘A decision right in result will not be reversed even though the reason stated for it is wrong. 3 Am. Jur., p. 563.’

‘See also *Rosehill Cemetery Co. v. Chicago*, 352 Ill. 11, 185 N. E. 170, 87 A. L. R. 742 and 3 Am. Jur. p. 367, Sec. 825.’

‘The appellant may not prevail unless there has been error in the result as well as error in the reasoning.’ ”

The appellants here simply argue that the trial court erred in reasoning that the waters in question were private waters. They urge that the court should have found that the waters were public waters subject to appropriation. They then neglect to proceed to tell the court what conclusion the trial court would have been compelled to reach from its findings of fact had it concluded that these were public waters.

The trial court found in favor of plaintiffs on every issue of fact necessary to establish a prior appropriation. The evidence is uncontradicted that the Carroll Dam was the first diversion on the McNaughton Gulch, that the McNaughton Dam was second, and that both were constructed prior to 1895. It is also uncontradicted that both dams were built prior to any of the defendant's dams (R. 10, 19, 21, 43, 74, 139, 234). Plaintiffs diverted all of the water which came down to those dams because the lower dam was a permanent, tight dam (R. 12, 15, 19, 63, 73, 100, 140); all of the waters thus diverted were necessary to irrigate the 80 acre farm (R. 29, 101, 221) and at times it was necessary to augment these waters with canal waters (R. 152). The diversion by plaintiffs was made prior to 1903, when water could be appropriated in Utah simply by diversion and use. See *Wellsville-East Field Irrigation Co. v. Lindsay Land & Livestock*, 104 Utah 448, 137 P. (2d) 634. The court from the evidence so found on each of these issues of fact. This

conclusively shows a prior appropriation by the plaintiffs superior to the right of any of the defendants. It is thus clear that had the court concluded that these waters were subject to prior appropriation, then from its findings on these issues it would have been compelled to enter the decree which was in fact entered. The plaintiffs had made a prior appropriation of all of the water accumulating in the gulch at the Carroll Dam and at the McNaughton Dam. The dams had been maintained continuously since 1895 and all of the defendants admitted, as is shown by the Statement of Facts, that they had never in the 48 years prior to 1948 attempted to interfere with these permanent dams.

It is then obvious that if these waters having their origin in upper artificial irrigation were private waters, they belonged to the McNaughtons because they arose on the McNaughton lands and he used them for 50 years. If the court is wrong in its *conclusion of law* as to the nature of these waters, then the *facts as found*, conclusively show that the McNaughtons made the first valid appropriation. In fact, there is little evidence from which the trial court could have found that any of the defendants, or their predecessors, diverted any water from the gulch prior to 1905. From 1905 forward it has never been possible to appropriate water from surface streams by usage alone and there is no evidence that any of the defendants made filings with the State Engineer. We, therefore, seriously question that these defendants have any water rights. Tyzack placed the construction of the defendants' dams as midway in the

period when he and his family lived in that area. He testified that they moved there in 1900 and moved away in 1910 (R. 19). He also testified that the dams were not constructed until after his parents acquired the land which they farmed, and the record shows without contradiction that Tyzack's Father acquired the land in October of 1905 (R. 355). Mr. Ross testified that the dams were put in just two years before his marriage and he was married in 1907 (R. 334). It is, therefore, extremely doubtful that the defendants have any water rights. They are located downstream from the plaintiff so that they could not have acquired a right by adverse use. (See *Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock*, supra). The evidence does not show a diversion prior to 1903, and certainly after 1903 they would have been required to file to initiate a water right. (See *Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock*, supra, *Duchesne County v. Humphries*, 106 Utah 332, 148 P. (2d) 338, *Smith v. Sanders*, 189 P. (2d) 701.

The appellants assert that the court must disregard the findings of fact made by the trial court which are material only to the theory of prior appropriation. This court will never assume that the trial court made findings without considering the evidence. (See *Beckstead v. Brinton*, 105 Utah 395, 142 P. (2d) 409, *Gordon v. Murray City*, 151 P. (2d) 193, 106 Utah, 583). Thus the court's findings and the evidence both require the affirmance of this decree, regardless of which theory of the law the court adopts as being correct. If it is private

water, plaintiffs win because it arises on their lands. If it is public water, they made the only valid appropriation and have used the water, unmolested, for half a century.

IV. THE APPELLANTS HAVE NOT BEEN PREJUDICED.

It must be remembered that under the uncontradicted evidence the McNaughtons have maintained a tight dam across the McNaughton Gulch above the points of diversion used by the defendants since at least 1895 (R. 12, 15, 19, 63, 73, 100, 140). Rudy and Tyzack, who were predecessors in interest of the defendants, readily acknowledge that the McNaughton Dam was in ahead of the defendants' dams (R. 19, 2, 34), and according to McNaughton in all of the years from 1900 to 1948 there had never been any trouble on the stream (R. 183).

Ed Hoft, a predecessor in interest to one of defendants, acknowledged that the McNaughton Dam was a tight dam and that it did not overflow (R. 100); and that from 1919 until he sold the property he never had occasion to disturb the McNaughton Dam (R. 102). Ernest Johnson owned part of the defendants' lands and he said that he never bothered to walk upstream during the time he farmed the lands (R. 125). Mr. Ross, who was a predecessor in interest to some of the defendants, was on the stream for 48 years, and he never once had occasion to go upstream to the McNaughton farm (R. 33). John B. Eaton has farmed some of defendant's property for 35 years, and he never during all of that

time had occasion to go to the McNaughton property until 1948 when this trouble started (R. 353).

It is thus clear that for half a century the McNaughtons have maintained a tight dam and have diverted all the water from the gulch and applied it to the irrigation of their lands. The dam washed out in 1947 (R. 375). It was replaced in 1948 and 1949 (R. 171) and of course when it was replaced the water was shut off. Fisher, who had just become an owner of land on the gulch (R. 275) missed the water and went upstream to find it (R. 276, 293). He saw the dams and ditches of McNaughton. The dam had been recently replaced and the ditches had been recently cleaned. Fisher thought the dam and ditches were new construction (R. 281, 287). He took his shovel and diverted the water out of the McNaughton ditches (R. 294) and then had McNaughton arrested. The defendants selected as their attorney Hugh B. Colton, who was at that time County Attorney, and rather than bring a civil action, they used the criminal law (R. 159). Threatened with further criminal prosecution for using the water as he had done for half a century, McNaughton brought this suit to quiet title against the claims of the defendants. He was upstream from all of them. He has used the water in question for at least 50 years openly, notoriously, continuously, adversely and under claim of right; for fifty years his use had never been challenged. During practically all of the 50 year period (until 1939) water rights could be acquired by adverse use. *Wellsville-East Field Irrigation Company v. Lindsay Land &*

Livestock Company, 104 Utah 448, 137 P. (2d) 634. The defendants are thus in the position of attempting to upset the established usage which has prevailed for all these years and which has been known by their predecessors to have existed. There is not one word of testimony in the record that the amount of water diverted by the McNaughtons is in excess of the needs of their land. The only evidence relating to the need of water is that adduced by the plaintiffs, and it is all to the effect that the water diverted has all been necessary, that it all can be retained on the McNaughton land, and that at times it is inadequate so that canal water must be commingled with it (R. 29, 221, 101, 152).

The flow of water in the McNaughton Gulch is variable. When farmers upstream permit their waste water to run uncontrolled into the gulch there may be substantial quantities of water present (R. 52, 158). By impounding the same behind this large dam, which is 20 feet high, 100 feet long, and will back the water along the channel for 150 yards, McNaughton can control the size of irrigation stream for the irrigation of his farm. It would be almost impossible to divide the use of the water into definite hours per week or per day, because the amount of water in the gulch is so variable. One day there may be large quantities of water because of the irrigation practices followed upstream and on the next day there may be very little water. The dam which the McNaughtons maintain is a permanent dirt-filled dam, not adapted to removal and replacement.

The court should also note Exhibits 1 and A, and the record at Pages 261-2 relating to the existence of a drain ditch on the bottom (east) end of the McNaughton farm. The McNaughton lands straddle the gulch. On each side of the gulch the land slopes toward the gulch, in addition to sloping generally to the east. Across the entire east end of the McNaughton property is a drain ditch which will intercept every bit of water which would otherwise run off the McNaughton land to the east (R. 261, 262). Therefore, if any excess water were applied to the McNaughton lands, it would either find its way directly back into the gulch or would find its way to the drain ditch on the east end of the McNaughton property which would return the water directly to the gulch at a point above two of the points of diversion used by the defendants. The third point of diversion, which is above the drain ditch, crosses the drain ditch and the water from the drain ditch could be very easily diverted into the first ditch of the defendants, the trial court so found (Finding No. 10, page 70). It would, therefore, be physically impossible for McNaughton to divert the water away from these defendants or to hold it away from them.

This is an important consideration. See *Sharp v. Whitmore*, 51 Utah 14, 168 P. 273, where the quantity of water awarded to Whitmore was increased by the Supreme Court from four feet to five feet. The lands sloped directly to the creek and any excess water would be returned to the creek ahead of the plaintiffs' point of diversion. The stream varied greatly as to the quan-

tity of water available. Justice Frick noted particularly that in increasing the quantity of water above that awarded by the trial court no possible injury could be done to the downstream users. If Whitmore were limited to less water than he had used in the past he might suffer irreparable injury, but if too much water were applied to the Whitmore lands, it would find its way directly back to the stream and be available for downstream users. Such is the condition which prevails here. There is not one word of evidence to the effect that McNaughton has been diverting more water than he needs, but to the contrary, the evidence is that there was not sufficient water in the gulch even to meet his needs (R. 29, 101, 152, 221). Even were there too much water diverted, it could not injure the appellants because the slope of the lands and the location of the defendants' points of diversion are such that any excess water must be returned directly to the channel and be thus available to the defendants.

V. THE COURT PROPERLY ADMITTED THE RUDY DEPOSITION

Since the Rudy deposition is for the most part only corroborating other uncontradicted evidence, it probably is not too material whether the court committed error in admitting the deposition. It was admittedly inadmissible as against some of these defendants anyway, because they were not given notice, nor even thought of as being parties to this suit at the time the deposition was taken. The only contention concerning the deposition is that the judge in fixing the order for the taking of the deposi-

tion did not name the clerk of the court to whom the deposition should be returned. It is correct that the court did not so provide, but in view of that fact that notice of the taking of the deposition was properly served upon five of the defendants and the deposition was actually returned to the clerk of the District Court, it is difficult to see how the defendants were prejudiced. No authority is cited by the appellant for their assertion that this was prejudicial error. The new rules (Rule 27) do not contain a like provision, and we have been unable to find any authority indicating that the failure of the court to specify the place where the deposition should be sent is too material. It should also be noted that the petition was filed in the District Court of Uintah County, and that both the order and the notice of hearing were entitled in that court. There is no material finding of fact which is dependent alone upon Rudy's testimony, and we submit that the court committed no error in admitting it.

VI. FINDING NO. 2 SHOULD BE CORRECTED

Finding No. 2 entered by the trial court recites that additional parties were added to the case by stipulation. Reference to the Record 227-8 will show that there were additional parties who entered their appearance who were not covered by said finding. The following names should be added to the finding: Jack Turner, and Marie L. Turner; W. S. Ross and Fern Ross Faucett, and Myron D. Perry. These persons all entered their appearance and of course are bound by the judgment. How-

ever, the transcript may eventually be unavailable and the judgment and decree should show the names of these additional parties. This court should in its opinion direct the trial court to add these additional defendants in Finding No. 2.

It is respectfully submitted that the action of the trial judge should be affirmed.

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