

1952

Angus H. Bishop v. Duck Creek Irrigation Co. et al : Petition for a Rehearing and Brief in Support Thereof

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Elias Hansen; Attorney for Plaintiff and Respondent;

Recommended Citation

Petition for Rehearing, *Bishop v. Duck Creek Irrigation Co.*, No. 7660 (Utah Supreme Court, 1952).
https://digitalcommons.law.byu.edu/uofu_sc1/1450

This Petition for Rehearing is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

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

ANGUS H. BISHOP,
Respondent and Cross-Appellant,

— vs. —

DUCK CREEK IRRIGATION COM-
PANY,

Appellant and Cross-Respondent,
DUCK CREEK IRRIGATION COM-
PANY, BENJAMIN DRAINAGE DIS-
TRICT, KENNETH DIXON, CARL
LINDSTROM, LEO STEELE, LaVON
PAYNE, RULON CREER and JOHN
B. JONES,

Defendants.

**PETITION FOR A REHEARING AND BRIEF
IN SUPPORT THEREOF**

Appealed from the District Court of Utah County
HON. JOSEPH E. NELSON, *Judge*

FILED

MAR 18 1932

ELIAS HANSEN

*Attorney for Plaintiff and
Respondent.*

.....
Clerk, Supreme Court, Utah

INDEX

TOPICS

	Page
Petition for Rehearing.....	1
Argument	3
The Mandate Wherein the District Court is Directed ‘To Award To the Irrigation Company the Ordinary Flow of Duck Creek’ is so Uncertain as to be Unen- forceable and this Court Has Heretofore Uniformly Condemned Decrees of Trial Courts where Similar Language Has Been Used.....	3
All of the Evidence in this Case Including That Pro- duced by the Duck Creek Irrigation Company Shows that the Maximum Quantity of Water to Which The Company is Entitled to is a Flow of 4.3 Second Feet.....	5

CASES CITED

Hardy v. Beaver County Irrig. Co., 65 Utah 28; 234 Pac. 524	4
Lost Creek Irrig. Co. v. Rex et al., 26 Utah 486; 73 Pac. 660	3
Nephi Irrigation Co. v. Jenkins, 8 Utah 369; 371; 31 Pac. 986	4
Nephi Irrigation Co. v. Vickers, 15 Utah 374, 377; 49 Pac. 301	4
Sharp v. Whitmore, 51 Utah 14; 168 Pac. 273.....	4

STATUTES CITED

U.C.A., 1943, 100-1-2.....	4
----------------------------	---

IN THE SUPREME COURT
of the
STATE OF UTAH

ANGUS H. BISHOP,
Respondent and Cross-Appellant,

— vs. —

DUCK CREEK IRRIGATION COM-
PANY,

Appellant and Cross-Respondent,

DUCK CREEK IRRIGATION COM-
PANY, BENJAMIN DRAINAGE DIS-
TRICT, KENNETH DIXON, CARL
LINDSTROM, LEO STEELE, LaVON
PAYNE, RULON CREER and JOHN
B. JONES,

Defendants.

No. 7660

PETITION FOR A REHEARING AND BRIEF
IN SUPPORT THEREOF

TO THE HON. CHIEF JUSTICE AND ASSO-
CIATE JUSTICES OF THE SUPREME COURT OF
THE STATE OF UTAH:

COMES NOW the plaintiff in the above entitled
cause and respectfully petitions this Court for a rehear-
ing in the above entitled cause for the following reasons
and upon the following grounds:

1. This Court erred in its mandate wherein it directs the District Court to modify its decree "To award to the Irrigation Company the ordinary flow of Duck Creek which is controlled, diverted and used by means of dams as presently constructed." That this Court has in a number of its decisions condemned similar provisions as the foregoing for the reason of the same being so indefinite as to be unenforceable.

2. That this Court erred in approving of findings that one second foot of water should be awarded to each 50 acres of land and that therefore the Duck Creek Irrigation Company should be awarded a prior right of not less than six second feet. That an award of such a quantity of water is wholly without support in the evidence and is in direct conflict with the evidence offered by the Duck Creek Irrigation Company.

WHEREFORE, plaintiff prays that this Court re-examine the evidence and amend its mandate so that the parties to this litigation will be able to ascertain from the decree the exact amount of water to which they are entitled and further amend its opinion to conform to the evidence and particularly to limit the amount of primary water right which is awarded to the Duck Creek Irrigation Company to the amount which its witness Jacobs testified could be beneficially used on the lands of its stockholders.

Respectfully submitted,

ELIAS HANSEN
*Attorney for Plaintiff and
Respondent.*

I, Elias Hansen, attorney for the plaintiff hereby certify that in my opinion there is merit to the foregoing Petition for a Rehearing and that either a rehearing should be granted or the opinion and mandate of this court should be amended in the particulars above indicated to the end that the Decree should be in conformity with the evidence and be made definite enough to admit of enforcement.

ELIAS HANSEN

*Attorney for Plaintiff and
Respondent.*

ARGUMENT

THE MANDATE WHEREIN THE DISTRICT COURT IS DIRECTED "TO AWARD TO THE IRRIGATION COMPANY THE ORDINARY FLOW OF DUCK CREEK" IS SO UNCERTAIN AS TO BE UNENFORCEABLE AND THIS COURT HAS HERETOFORE UNIFORMLY CONDEMNED DECREES OF TRIAL COURTS WHERE SIMILAR LANGUAGE HAS BEEN USED.

In the case of *Lost Creek Irrig. Co. v. Rex et al*, 26 Utah 486; 73 Pac. 660, the trial court entered a decree in which it was provided:

"First that Plaintiff is entitled to, is the owner of and has title to one-half of the waters of the *normal* flow of the said Lost Creek after the 15th day of June of each and every year . . . That the defendants are entitled to, are the owners of and have title to one-half of the waters of the *normal* flow of said Lost Creek after 15th day of June of each and every year . . . etc."

In the case of *Nephi Irrigation Co. v. Jenkins*, 8 Utah 369; 371; 31 Pac. 986, the trial court made Conclusions of Law as follows:

“That the defendant, Richard Jenkins, is entitled to use of the waters of Salt Creek, a quantity equal to the amount appropriated by him” and the Court ordered adjudged and decreed that “Richard Jenkins be and he is hereby adjudged and decreed to be entitled to take and use of the waters of Salt Creek, an amount of water equal in quantity to the amount of his prior appropriation.”

In the case of *Nephi Irrigation Co. v. Vickers*, 15 Utah 374, 377; 49 Pac. 301, the defendant was awarded sufficient water to irrigate 31 acres of land. Similar language was used in the case of *Sharp v. Whitmore*, 51 Utah 14; 168 Pac. 273 and *Hardy v. Beaver County Irrig. Co.*, 65 Utah 28; 234 Pac. 524. In each of the foregoing cases this Court condemned the decree because of the uncertainty. Other cases from this and other jurisdictions might be cited, but the foregoing shows that heretofore this Court has been firmly committed to the doctrine that a Decree must be certain and definite as otherwise it is fatally defective if not void. We have a statute U.C.A., 1943 100-1-2 which provides for the measurement of water as being a second foot as to flow, and as to volume an acre foot.

To award a water user the *ordinary flow of a stream* certainly does not inform anyone of the quantity of water that such user is entitled to.

We do not understand by the opinion rendered in this case that the cause is remanded for the taking of additional evidence. The opinion does not so state, and at the trial heretofore had, the parties offered all of their evidence and such evidence we submit is ample for a court to fix with certainty the amount of water to which each party to the action is entitled to have awarded to it or him.

ALL OF THE EVIDENCE IN THIS CASE INCLUDING THAT PRODUCED BY THE DUCK CREEK IRRIGATION COMPANY SHOWS THAT THE MAXIMUM QUANTITY OF WATER TO WHICH THE COMPANY IS ENTITLED TO IS A FLOW OF 4.3 SECOND FEET.

In the course of the opinion heretofore written, it is said that the Court found the duty of water there to be 1 c.f.s. for 50 acres, it also found that the stockholders of appellant company had irrigated 300 acres of land with this water. Upon that basis, it would appear that they ought to have a primary right to at least 6 second feet of water together with the right to use such proportion of the high water as they customarily used for irrigation of pasture land before letting the excess run on down to Bishop's land.

We again note that a decree which provides that a party to an action brought to fix a water right is awarded such a quantity of water as is *customarily* used is so uncertain that such language has received the uniform condemnation of this and other appellate courts as will be seen from the cases heretofore cited, together with the authorities and cases cited from other jurisdic-

tions in the opinions heretofore rendered by this Court.

It is true that the trial court found that the duty of water was one second foot for 50 acres of land, but such finding is wholly without support in the evidence and is in direct conflict with the evidence offered by the Duck Creek Irrigation Company.

It is so elementary that Courts are bound by the uncontradicted evidence offered at the trial especially where such evidence is offered by a party who seeks to have the Court disregard the uncontradicted evidence so offered by it, that we deem it unnecessary, if not improper, to cite cases so holding to this Court.

In the belief that this Court must have overlooked the evidence touching the duty of water on the lands here involved, we direct the attention of the Court to such evidence and the whole thereof. The only witness who testified as to the duty of water was Elmer Jacob, who was called by the defendant, Duck Creek Irrigation Company. His testimony will be found in Vol. 2 of the transcript. His direct testimony will be found on the following pages: direct 413; cross 435; redirect 445; recross 449; redirect 641. We quote his testimony touching the duty of water:

Mr. Jacob testified that he is a civil and irrigation engineer. Counsel for the plaintiff admitted his qualification to testify as an expert on matters relating to irrigation (Tr. 413). He was asked these questions and gave these answers:

“Q. Have you sufficient information in your judgment to enable you now to give a judgment

of the duty of water in this particular locality of water and lands served by the Duck Creek Irrigation Company?

A. Yes sir.

Q. What would be your judgment?

A. Well, I think a reasonable duty there would be seventy acres to the second foot delivered at the land based upon the flow of water; that is the amount allowed by the State Engineer in his certificate.

Q. What is there about this territory to indicate a higher duty?

A. Well, I think seventy would be a reasonable duty. Seventy acres to the second foot. It is a heavy clay ground, and the seepage would not be heavy; and the land will hold the water very well." (Tr. Vol. 2, page 433).

On cross-examination he testified:

"Q. What would you say on lands like this would be about the proper size to use economically?

A. Well, a good stream would be three or four second feet. A good irrigator can use five or six. (Tr. 435).

Q. Now this second foot—put it this way—if the water is only available for a part of the year, would you need more or less than one second foot to seventy acres of land where you only had water a part of the time?

A. It wouldn't make any difference, if you have an excess of water, and we have a drought later on, I am trying to answer your questions as I understand it, and with your drought after the first of July, if you pour water into prior to that time, the only thing that you can follow up is ground water and when that is gone, the drought will destroy

the crops later on. Now the water that was available earlier than July first, that it water under the bridge. If you don't get it after July first, your crop will die. It wouldn't matter if you had a duty as large as ten acres to the second foot." (437-8).

Mr. Jacobs was recalled and enlarged his opinion as to the number of acre feet of water that might be used on the land, but did not change his testimony to the effect that one second foot to seventy acres was the proper duty of water. He testified that as much as 6 acre feet of water might be used, but the land could get along with four acre feet. That water might be beneficially used for a period of six months. (Tr. 641-42). No where in the testimony is there any evidence touching the question of the loss of water in carrying it to the land to be irrigated. The only reasonable inference to be drawn from the evidence is that such loss is negligible because Mr. Jacob testified that "the seepage would not be heavy and the land would hold the water very well." If the loss of water in carrying it to the land is substantial, doubtless such fact would be inquired into. Certain it is that the evidence is not sufficient to justify the conclusion that substantially 1/3 of the water was lost in coursing it from Duck Creek to the land to be irrigated, especially as is shown by the map, the lands of the stockholders of the defendant corporation in the main abut on Duck Creek. Needless to say that one second foot to 70 acres of land will be approximately 4.3 second feet for 300 acres of land.

For the reasons heretofore set out, we must earnestly urge that this Court either grant plaintiff a rehearing or so amend its opinion as to conform to the evidence and especially that this Court do not direct or permit a decree to be entered herein to the effect that the "Irrigation Company be awarded the ordinary flow of Duck Creek and such proportion of the high water as they customarily used for irrigation of pasture lands." If such provisions are permitted to be placed in a decree, it will be impossible to ascertain with any degree of certainty what are the rights of the parties herein without further litigation and such provisions in a decree will be at war, so far as we have been able to ascertain, with all of the decisions heretofore rendered by this court and with the authorities generally.

Respectfully submitted,

ELIAS HANSEN
*Attorney for Plaintiff and
Respondent.*