1989

Larry Little v. Greene & Weed Investments, Leon S. Lippincott, caroline Lippincott, and Dee C. Hansen, State Engineer of the State of Utah : Petition for Rehearing

Utah Court of Appeals

E. J. Skeen; Attorney for Appellees Lippincotts; Keith S. Christensen; Attorneys for Appellee Green & Weed Investments.
John W. Anderson; Clyde, Pratt, and Snow; Attorney for Appellant Larry Little.

DOCKET NO. 89-177 CA IN THE UTAH COURT OF APPEALS

LARRY LITTLE, Plaintiff and Appellant, vs. GREENE & WEED INVESTMENTS, LEON S. LIPPINCOTT, CAROLINE LIPPINCOTT, and DEE C. HANSEN, STATE ENGINEER OF THE STATE OF UTAH, Defendants and Appellees.	)	Case No. 890177-CA

On Appeal From the Sixth District Court
for the District of Utah, Kane County

The Honorable Don V. Tibbs
District Court Judge

D.C. No. 1950

PETITION FOR REHEARING

LARRY LITTLE, APPELLANT

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IN THE UTAH COURT OF APPEALS

LARRY LITTLE, Plaintiff and Appellant, vs. GREENE & WEED INVESTMENTS, LEON S. LIPPINCOTT, CAROLINE LIPPINCOTT, and DEE C. HANSEN, STATE ENGINEER OF THE STATE OF UTAH, Defendants and Appellees.	PETITION FOR REHEARING Case No. 890177-CA

Pursuant to Utah Rules of Appellate Procedure 35(a), Appellant respectfully petitions the Court to grant a rehearing of this Court's August 15, 1990 Opinion. This petition is made because the Court's Opinion overlooked or misapprehended Appellant's position and thus did not address an issue that demands reversal of the trial court's decision. The issue this Court overlooked and which is decisive also makes it unnecessary for the Court to address the issue of first impression that it did decide and which upsets a long established State Engineer administrative policy.

PRELIMINARY STATEMENT

In its August 15, 1990 Opinion, this Court decided an issue of first impression in a manner inconsistent with a long established administrative policy of the Utah State Engineer. This Court correctly found that "[T]he appropriation process is complete only after the certificate of appropriation has issued and that certificate then becomes 'prima facie evidence' of the owner's water right". But, the Court's conclusion that water could not then be appurtenant to land until the certificate issues is directly contrary to what has been the Utah State Engineer's administrative practice for over twenty-five (25) years (Tr. 56). Moreover, the issue of first impression, which this Court did decide, was only the first part of Appellant's two-part argument. And, it wasn't necessary to reach this issue in deciding the case.

Appellant started with the January 16, 1968 deed because that is the precise same deed the Utah State Engineer relied upon in its title abstract as constituting the root title for this water right (Plaintiff's Ex. #6). Appellant thus contended that this conveyance carried with it appurtenant water. But, this was only the first part of Appellant's two-part argument. Yet, it was the only argument addressed by this Court.

This Court did not need to decide whether the January 16, 1968 deed carried with it appurtenant water. The case could have been decided by addressing only the second part of Appellant's argument and thus avoided disrupting long established State Engineer

administrative practice. Nevertheless, this Court held that the January 16, 1968 Warranty Deed did not carry with it any appurtenant water because the Certificate of Appropriation had not issued as of January 16, 1968. In so deciding this Court undoubtedly clouded every title the State Engineer has transferred according to his long established administrative policy and disrupted the understandings reached as a result of this policy. Clearly, the State Engineer's policy has been to transfer title to water, based on its having passed as an appurtenance to land before the issuance of a certificate of appropriation, provided there is some demonstration of actual diversion and use of the water (Tr. 56). This makes sense because the land purchaser knowing water is being used on the ground has a reasonable expectation of receiving the water as a part of the conveyance unless it is expressly reserved. But, the merits of such an argument aside, this Court did not need to decide that issue and thus disrupt this long standing State Engineer administrative policy.

Appellant's second argument was to the effect that even if the water did not pass as an appurtenance to land on January 16, 1968 because a certificate of appropriation had not issued, it nevertheless passed into Appellant's chain of title as of December 30, 1969 as an appurtenance to a land transfer after the Certificate had issued. Thus, this Court did not need to address the issue of first impression but could have focused on the second part of Appellant's argument and thus decided the case on that basis.

As Appellant pointed out in its Brief, pp. 28-30, Reply Brief, pp. 18-20, ¶6, and in oral argument, even if the water did not pass as an appurtenance to the land by the Warranty Deed of January 16, 1968, which this Court has concluded it did not, there is still the further question of why said water did not thereafter pass as an appurtenance to said land on December 30, 1969 when the owners of the water right, who also owned the land, conveyed the land upon which the water was then being used and to which it was then unquestionably appurtenant to themselves and their two brothers.

On January 16, 1968, Lorna and Clara each received an undivided interest in the land, if not the water, upon which the water was being placed to use. This Court decided that that conveyance did not include the water. Thus, they only received the land. This Court concluded that Lorna and Clara Little thereafter received the water by Quit Claim Deed dated November 19, 1969. Thus, under either Appellant's theory of title or under this Court's Opinion, Lorna and Clara owned the water and the land as of November 19, 1969. Under Appellant's theory and under the State Engineer's administrative practice the water would have passed as an appurtenance to land January 16, 1968. Under this Court's Opinion they did not get the water until November 19, 1969. But, they received the land on January 16, 1968. It is then undisputed that the State Engineer issued his Certificate of Appropriation on the subject water right October 21, 1969. Because of a descriptive error the certificate was amended and reissued November 25, 1969.

All parties also stipulated that the water was actually placed to use on the subject land during the 1969 irrigation season. Thus, Lorna and Clara owned the land and water on November 19, 1969 under anyone's theory. The water was actually being placed to use on said land and the certificate of appropriation had issued. So, when Lorna and Clara on December 30 and 31, 1969 joined their one sister and two brothers in conveying the land upon which the water was being used and to which it was then unquestionably appurtenant, it should have passed as an appurtenance to that land under authority of Utah Code Annotated 73-1-11 and thus come within Appellant's chain of title. The conveyances of December 30 and 31 included all appurtenances and did not reserve the water. Those conveyances (Exhibit C to Appellant's Brief), the second part of Appellant's two-part argument, are the conveyances this Court overlooked.

This Court did not address or misapprehended Appellant's argument and thus did not address the legal effect of the conveyances of December 30 and 31, 1969 when the owners of the land to which the water right was appurtenant conveyed that land to themselves and their two brothers.

ARGUMENT

I

ON DECEMBER 30, 1969 THE SUBJECT WATER RIGHT PASSED INTO APPELLANT'S CHAIN OF TITLE AS A MATTER OF LAW

There is no dispute in the facts. On January 16, 1968 the land upon which the water was being placed to use was conveyed in

undivided interests to the children of the grantors. At that time no certificate of appropriation had issued. On November 19, 1969 the trial court determined that the subject water right passed to Lorna and Clara, two of the children who by virtue of the January 16, 1968 conveyance held the land in undivided interests. The State Engineer issued his Certificate of Appropriation October 21, 1969 and because of a descriptive error amended and reissued it November 25, 1969. on November 25, 1969 Lorna and Clara owned the land and the water right - under anyone's theory. All parties have stipulated that the subject water right was actually placed to use on the land Lorna and Clara co-owned during the 1969 irrigation season (Tr. 42; Order Amending FF 1). Thus, under the rationale adopted by this Court, the water could, as of November 19, 1969 or certainly no later than November 25, 1969 when the Certificate of Appropriation reissued, pass as an appurtenance to the land. Lorna and Clara did convey the land approximately one month later when they joined their two brothers and one sister and conveyed the land to themselves without reserving the water. By separate Warranty Deeds dated December 30, 1969 they conveyed 8 acres to one brother and 30 acres to Appellant Larry Little. On December 31, 1969 they conveyed the remaining 41.3 acres to themselves. All deeds included all appurtenances. None reserved the water. Critically, the only testimony of Lorna and Clara was to the effect that this conveyance - the December 31, 1969 conveyance - was how they thought they received their water (Tr. 127, 136) - not by virtue of the November

19, 1969 Warranty Deed. These conveyances are undisputed and a matter of record. No contention has ever been made that these deeds were ambiguous. And, they clearly conveyed the land upon which the water was being used and to which it was then unquestionably appurtenant. Thus, the water passed to the grantees of these deeds as a matter of law and under statutory authority of 73-1-11 U.C.A. 1953. There is no evidence to the contrary. And, it places the water squarely within the chain of title asserted by Appellant and outside the chain of title of Appellee. It also demands, as a matter of law, reversal of the trial court and renders unnecessary a decision on the issue of whether water is appurtenant to land before the State Engineer issues his Certificate of Appropriation.

Critically, neither the trial court nor this court addressed the second part of Appellant's argument - the issue which is being squarely raised in this petition for rehearing. Moreover, the Appellees did not address it in their answer brief. Yet, Appellee has raised it at each stage of these proceedings and carefully preserved it for appeal and has set it forth in all its briefs and in argument.

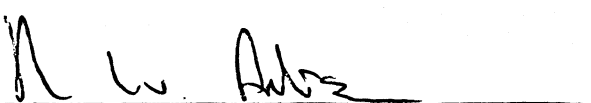
The issue which this Court overlooked can be decided as a matter of law. The subject water, as a matter of law, had to have passed as an appurtenance to land December 30 and 31, 1969 because there is no evidence to the contrary and the deeds of conveyance clearly included all appurtenances. Under 73-1-11 U.C.A. 1953, there can be no other conclusion.

CONCLUSION

This Court has overlooked or misapprehended Appellant's argument regarding the transfer of water into Appellant's chain of title after such water unquestionably became appurtenant to the land upon which it was being used. This Court only decided the first part of a two part question. But, it could have and likely should have avoided disrupting long established State Engineer policy by simply deciding the case on the legal effect of the conveyances made December 30 and 31, 1969. As a matter of law, the subject water right passed as an appurtenance to the land by the December 30 and 31, 1969 deeds. A resolution of that question, as a matter of law, demands a reversal of the trial court's decision and renders it unnecessary for the Court to disrupt the administrative practice of the State Engineer.

Respectfully submitted this 28th day of August, 1990.

CLYDE, PRATT & SNOW



John W. Anderson
Attorney for Appellant
Larry Little

CERTIFICATION

I hereby certify that this Petition is presented in good faith for the reasons set forth herein and not for delay.

John W. Anderson

CERTIFICATE OF SERVICE

I hereby certify that I mailed true and correct copies of the foregoing Petition for Rehearing to the following attorneys of record, this 28th day of August, 1990, postage prepaid:

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