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Little Cottonwood Water Company et al v. Sandy City et al : Brief of Respondent

Utah Supreme Court

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Clinton D. Vernon; J. Lambert Gibson;

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7898(2)

7898

In the Supreme Court of the State of Utah

LITTLE COTTONWOOD WATER
COMPANY, a corporation and
SALT LAKE CITY, a municipal
corporation, *Plaintiffs and Appellants,*

vs.

SANDY CITY, a municipal corpora-
tion, MIDVALE CITY, a municipal
corporation, and JOSEPH M.
TRACY, STATE ENGINEER OF
THE STATE OF UTAH,
Defendants and Respondents.

Civil No. ~~7752~~

BRIEF OF RESPONDENT

JOSEPH M. TRACY

FILE

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DEC 20 1952

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JOSEPH M. TRACY

STATEMENT OF FACTS

The other parties to this appeal have included in their statement of facts much evidence which was introduced before the State Engineer and into Court. We do not attempt herein to restate the evidence, but only that part thereof which we believe to be controlling in the case.

On April 18, 1941, the defendants, Midvale City and Sandy City, jointly filed with the State Engineer an application

proposing to appropriate one second foot of water for domestic and municipal purposes to be diverted from the ground through two wells located near the mouth of Little Cottonwood Canyon. These two wells had already been drilled pursuant to a Permanent Change Application, the purpose of which was to obtain a clear water supply at all times of the year instead of the murky water from the creek which had previously been used.

Years prior to the Change Application heretofore mentioned, the Little Cottonwood Creek waters users had found it to their advantage to divert all of the creek flow when it was thirty second feet, or less, into a pipe line at the Murray City Dam and convey the said water down to and across the Wasatch fault, thereby saving three second feet of water which would otherwise have been lost in the channel. This application was granted upon the condition that when the stream did not "make" enough water to satisfy the rights of Sandy City, sufficient water would be siphoned across the creek and put into the Sandy diversion to make up the balance of the right. Salt Lake City filed a Saving Application and appropriated this three feet of water. As a result of this diversion through the pipe line, the problem facing the State Engineer in deciding whether to approve or reject the application became an underground water problem.

Originally the creek channel of Little Cottonwood Creek turned to the south and west near the mouth of the canyon. This old channel was deeper than the present one and it became completely covered with large deposits of glacial morain extending both east and west of the Wasatch Fault.

The creek then made a new channel on the north side of the canyon, where it now flows. East of the Wasatch Fault and west of the Murray City Dam the glacial morain is perhaps hundreds of feet deep and is saturated with water. At various points along the glacial morain are springs. The flow of these springs, with the exception of the Granite Water Spring, is surprisingly constant as compared with the flow of the creek. It is from this glacial morain that the applicants filed an application to divert the water which application was approved by the State Engineer subject to the condition that water be pumped at only the following two times:

1. During the flood water season when there is more water in the creek channel than is used and which flows to waste in the Great Salt Lake, (the granting of this part of the application has not been disrupted by any party and is presumably satisfactory to all concerned) and
2. When the creek channel is dry immediately below the Murray City Dam.

Extensive tests were required by the State Engineer prior to approval of these applications. Most of the results of these tests were introduced into evidence in the lower court, appear in the record and are reviewed in the brief of the other parties hereto. The important results, however, insofar as the State Engineer is concerned, is the evidence that the two applicants could pump sufficient water from these wells so that they could deliver across the Wasatch Fault six-tenths of a second foot more of water than would have arrived without the water being pumped. The State Engineer came to

the conclusion that this was water which would otherwise be lost insofar as beneficial use is concerned and approved the application. It is from this approval that this appeal was taken to the District Court and now to the Supreme Court.

Plaintiffs and appellants in this case would like the Court to believe that this glacial morain forms a closed basin as illustrated by their witness, Dr. Marsell, who used a tumbler filled with rocks as illustrative of the conditions found. The conditions are more nearly analgous to a cement ditch which by means of a flood had been filled up with sand, gravel, and other materials through which the water slowly seeps. The Little Cottonwood Canyon moraine is open on the western edge and the water from the moraine seeps through to the fault, passes the fault and drops down to the underground water of Salt Lake Valley and ultimately finds its way to Great Salt Lake. This was admitted by Dr. Marsell, who appeared for the plaintiffs. There is no dispute between the parties that water passes through the Wasatch Fault below the surface of the ground and is lost to beneficial use. Insofar as this case is concerned such waters might be considered as wasted.

ARGUMENT

Plaintiffs contend and have always contended that all of the waters of Little Cottonwood Creek were decreed by the Morse Decree entered in 1910. It is the position of the State Engineer that:

1. The Morse Decree decreed only surface waters flowing above the ground, and
2. It was in 1935 the State of Utah first passed its underground water law relating to appropriations of underground water.

The pumping of the two wells under the conditions imposed by the State Engineer causes no interference (or but slight interference) with the surface flow so as to adversely affect other users. The time of the year during which the wells would interfere with the surface flow was eliminated from the application and the applicants were granted permission to pump these wells only when the creek channel was dry and there was no surface flow or when the creek was in flood and the surface flow was going to waste.

Assuming, as claimed by appellants, that the first water in the spring of the year will be used to fill the "cones of influence" caused by the wells, this is an inconsequential amount, much less than the extra 0.6 of a second foot of water. These "cones of influence" can become saturated before the spring runoff appears by ceasing pumping for at most eight days before the runoff. Further experimentation will show the exact time necessary to refill such "cones of influence."

It is the duty of the State Engineer to approve an application for water if there is a possibility that there exists unappropriated water, since the policy of the law is to prevent waste and promote the largest beneficial use of water. *Little Cottonwood Water Company v. Kimball*, 76 U 243, 289 P

116; American Fork Irrigation Company v. Linke, 239 P2d 188; United States v. District Court of the Fourth Judicial District, 238 P2d 1132. In the instant case there is not only a possibility of unappropriated water, but the testimony of all parties show that water seeps through the Wasatch Fault and is lost to use. Immediately west of the Wasatch Fault underground water levels are substantially lower than they are immediately east of the fault. It was and is the duty of the State Engineer to approve the application.

It is the opinion of the State Engineer that by further exploration far more than six-tenths second feet of additional water may be developed from this area; that the glacial moraine acts as a large storage reservoir and contains a great deal of water. All of the interstices are filled and the ground is nearly saturated. The ground friction retards and slows the flow of water across the Wasatch Fault to a point where the moraine is being recharged almost as fast as the water is being discharged through and over the fault. It is the opinion of the State Engineer that a great, although undetermined, amount of water is seeping below the surface through the glacial moraine through the Wasatch Fault and is lost to beneficial use. On two previous occasions since the Morse Decree the office of the State Engineer has approved applications filed by Salt Lake City and the Little Cottonwood water users for water from Little Cottonwood Creek. One application was west of the Wasatch Fault and saved three second feet of water lost from the bed of the creek channel by constructing and lining with rock cemented in place a canal called the "Cut Off." The other was the application filed by

Salt Lake City to appropriate three second feet of water lost in the creek channel between the Murray City Dam and the South Despain Ditch (this immediate area) by taking water out of the creek channel at the Murray City Dam and conveying it through a pipe line. The water saved by this latter application apparently also went through the unconsolidated glacial moraine, across the Wasatch Fault and was lost to the underground water below at the time of crossing the fault.

It is further the opinion of the State Engineer that the additional waters which are being captured by these two wells are unappropriated waters and in the absence of the wells might never be used by any person.

The tests made over roughly ten years demonstrated conclusively that the pumping of the wells resulted in more water being delivered west of the Wasatch Fault than arrived there when the wells were not being pumped. In the case of *Eardley v. Terry*, 94 U. 367, 76 P2d 362, the court states:

"It seems clear to us that the legislature intended that when the application is filed, the state engineer is called upon to determine preliminarily whether there is probable cause to believe that an application can be perfected, having due regard to whether there is unappropriated waters available for appropriation, whether it can be put to beneficial use, and whether it can be diverted and so used without injuring or conflicting with the rights of others. If he determines there is such a probability, the application is approved and the applicant then proceeds to demonstrate by actual use of the rights sought to be acquired that he is entitled to such rights."

In the instant case we submit that the answer to the question of whether there is a probability of additional waters available for appropriation is conclusively shown by the test; that Midvale and Sandy City can put it to beneficial use; that it is being diverted without injuring or conflicting with the prior rights of others; that there is more than a probability that such can be done; that the experiments have conclusively demonstrated it.

CONCLUSION

It is respectfully submitted:

1. The Morse Decree purported to decree only surface rights.
2. The waters involved in these applications are underground waters not covered by the Morse Decree.
3. That the waters covered by these applications, if not used, would seep through the ground to the Wasatch Fault, sink to lower levels and be lost to use.
4. That the water covered by these applications are unappropriated waters.
5. That they can and will be beneficially used.

The State Engineer respectfully requests that the Supreme Court affirm the lower court and the State Engineer as to both parts of the application:

1. The right to pump when the surface flow of Little Cottonwood Creek is so great that water is being wasted directly to Great Salt Lake, and
2. Whenever all the water from the creek bed is diverted through the pipe line at the Murray City Dam.

Respectfully submitted,

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