

1953

# Joseph M. Tracy v. L. L. Peterson et al : Brief of Appellants

Utah Supreme Court

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E. R. Callister; Robert B. Porter; Attorneys for Plaintiff and Appellant;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

JOSEPH M. TRACY, State  
Engineer,  
*Plaintiff and Appellant,*

— vs. —

L. L. PETERSON, MRS. R. M. OLD-  
ROYD, and MILBURN IRRIGA-  
TION COMPANY, a Corporation,  
*Defendants and Respondents.*

Case No.  
7966

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## Appellants' Brief

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## STATEMENT OF FACTS

This action was commenced by Joseph M. Tracy, State Engineer, to recover delinquent assessments from numerous water users of the Sanpitch River System. The assessments were for the years 1950 and 1951 and were levied in order to pay the salary of the water commissioner and his expenses in connection with the administration and distribution of the water of said river system. (R. 1).

This action was subsequently dismissed or discon-

tinued as to all defendants, except L. L. Peterson, Mrs. R. M. Oldroyd, and Milburn Irrigation Co., a Utah corporation, all of whom filed separate but identical answers and all of whom are represented by the same counsel. (R. 36-41).

By their separate but identical answers, each of these defendants admitted receiving notice of the assessment for each of the years 1950 and 1951, but denied that they had distributed to them, or that they used, any water from the Sanpitch River; and they further denied that the State Engineer, by reason of any estimate of any water users association or upon any other pretended basis, was authorized to make any assessments against these defendants. (R. 36, 38 and 40).

And, by paragraph 4 of their answers, these defendants denied that the assessments had a reasonable basis or justification either by reason of services rendered or on account of any water distributed from the Sanpitch River. (R. 37, 39 and 41).

This case was tried to the court sitting without a jury on May 26, 1952, and judgment was entered in favor of the plaintiff and appellant on June 14, 1952 (R. 48), and Findings of Fact and Conclusions of Law were entered by the court on the same date. (R. 50-52).

Thereafter, a Motion for New Trial was made by the defendants, (R. 46) and on September 30, 1952, this motion came on for hearing, and the court determined that the first Findings, Conclusions and Judgment were

erroneous and ordered counsel for the defendants to prepare new Findings, Conclusions and Judgment. This was done and they were signed and entered by the court on October 14, 1952. (R. 53-61). This appeal is taken from those Findings, Conclusions and Judgment.

The evidence in this case indicates that a proper meeting of the water users was called and held and that the budget adopted and the recommendations as to water commissioner were sent to and complied with in full by the State Engineer; (Pl. Ex. 3 and 4) and that the assessment of the individual water users was based upon the acre feet of water delivered to them, which in some cases was based upon actual measurements and in others was an estimate because the water user had not installed a measuring device. (Tr. 12).

The Sanpitch River flows in a southerly direction and is fed by tributaries rising in the mountains to the east of the Sanpitch Valley. The two tributaries involved in this case are the North Fork of the Sanpitch River and the South Fork of the Sanpitch River although the defendants choose to call them North Sanpitch Creek and South Sanpitch Creek, respectively.

The defendants, Peterson and Oldroyd, are water users of the North Fork and the defendants, Oldroyd and Milburn Irrigation Company, are water users of the South Fork.

Taking the North Fork first, the evidence shows that the respondent, Peterson, is at the head of the stream

and maintains two diversions; that the next diversion is maintained by one Ray Tanner, who has a secondary right to the water, and that following him is the respondent, Oldroyd, who has one or two diversions. (Tr. 41-43).

On the South Fork, the defendant, Milburn Irrigation Company, is at the head of the stream and the defendant, Oldroyd, follows; and below this diversion and before the South Fork flows into the Sanpitch River, one DeMoss Bills has one or two diversions and his is also a primary right. (Tr. 66-67). This right is also shown in the Cox decree which became a part of this record as plaintiff's Exhibit 2. (Tr. 66-67).

# STATEMENTS OF POINTS

## I.

THAT THE TRIAL COURT ERRED IN FINDING THAT THE RESPONDENTS ARE NOT WATER USERS DIVERTING FROM THE SANPITCH RIVER SYSTEM AND IN FINDING AND CONCLUDING THAT THE ASSESSMENT MADE BY THE STATE ENGINEER WAS UNAUTHORIZED AND VOID.

## II.

THAT THE TRIAL COURT ERRED IN FINDING THAT THE WATER COMMISSIONER NEVER ATTEMPTED TO MEASURE OR DISTRIBUTE ANY OF THE WATER OF THE SANPITCH RIVER, INCLUDING THE NORTH AND SOUTH FORKS THEREOF, AND IN FINDING AND CONCLUDING THAT THE ASSESSMENT MADE BY THE STATE ENGINEER WAS UNAUTHORIZED AND VOID.

## III.

THAT THE TRIAL COURT ERRED IN ASSESSING COSTS AGAINST THE STATE ENGINEER, THE PLAINTIFF AND APPELLANT HEREIN.

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## ARGUMENT

### POINT I

THAT THE TRIAL COURT ERRED IN FINDING THAT THE RESPONDENTS ARE NOT WATER USERS DIVERTING FROM THE SANPITCH RIVER SYSTEM AND IN FINDING AND CONCLUDING THAT THE ASSESSMENT MADE BY THE STATE ENGINEER WAS UNAUTHORIZED AND VOID.



This case was tried upon the theory of the respondents that they were the sole water users on the North and South Forks of the Sanpitch River, or as respondents choose to call them, North Sanpitch Creek and South Sanpitch Creek, respectively; and that their position on the stream was so remote that they did not need nor require any services of the water commissioner.

In the three cases that have been decided by this Court in construing the statute dealing with the appointment of a water commissioner and providing for the assessment of the water users, the Court has used the phrase "services rendered and benefits received" as the basis for the assessment. These three cases are *Bacon vs. Gunnison-Fayette Canal Co.*, 75 Utah 278, 284 Pac. 1004; *Bacon vs. Plain City Irrigation Co.*, 87 Utah 564, 52 P. 2d 427, and *Utah Power & Light Co. vs. Richmond Irrigation Co.*, 115 Utah 352, 204 P. 2d 818.

In the first two of these cases, the Court held the assessment improper because of the lack of a proper relation between the costs to be borne and the benefits and services to be received and indicated that acre feet delivered should be the proper basis. However, in the latter of the three cases cited above, the Court upheld the basis of the assessment, and we believe the fact situation there presented is fundamentally the same as the one in the present case as it dealt with the contention of the Paradise Irrigation Company that they should not be charged with their share of the water commissioner's expenses because of their peculiar and remote situation on the East Fork of the Little Bear River.

In this case of *Utah Power & Light Co. vs. Richmond Irrigation Co.*, supra, commencing at the top of page 824 of the Pacific Reporter, this Court said:

The diagram which accompanies the opinion will show the Paradise Company occupying a position on the east fork of the Little Bear River with only the Jackson ditch upstream from it and the Hyrum Irrigation Company as the water user immediately downstream. Its decreed right consists of sixty second feet until July 1st of each year, fifty second feet until July 10th and thirty-eight second feet thereafter. Whenever the flow of the east fork reduces below the Paradise Company's decreed right, it maintains a tight dam across the east fork of the river diverting the entire flow into its canal. During a considerable portion of each season, Paradise is entitled to all the waters of the east fork and maintains its tight dam so that during this time it is not necessary for the water commissioner to regulate the waters of the river in order to give Paradise the amount of water to which it is entitled. For the protection of lower users, however, the commissioner continues to take readings to make certain the Paradise Company is not taking more than its decreed rights. Because the Paradise Company normally requires less service from the water commissioner than that rendered other users, it naturally feels that it should not be assessed on the same basis with them—in fact, it would like to be excluded from the river system entirely and fight its own battles, should any arise. However, its problems are fundamentally the same as those of the other users on the stream. There are persons both above and below it who might interfere with its rights which the water commissioner is required to protect. Prior to the present system of ap-

pointing a water commissioner clothed with authority to regulate the distribution of the waters of the Little Bear River, serious disputes, sometimes accompanied by violence, occurred from time to time and established water rights were successfully adversed in certain of these instances. These difficulties have been largely done away with under the present system of extending protection to all users against encroachment upon existing water rights. While the relative position of certain of the users requires closer supervision in comparison with that required of others, even the Paradise Company, in its comparatively remote position on the stream, is not so isolated as to render the services of a water commissioner unnecessary. The knowledge that a commissioner patrols the area may in and of itself reduce the possibility of strangers or junior appropriators interfering with the rights of the Paradise Company. Restating that mathematical exactness is not necessary for a valid assessment, and that the rule is—there should be a reasonable relationship between the proportion of the cost of distribution to be individually borne and the benefits and services to be received, we think an assessment should be levied against the Paradise Company on the same basis as that used to determine the levy imposed on other users.

In the foregoing quotation, we desire to emphasize that the position of the Paradise Company, with the primary right at the head of the stream, is identical with that of the respondent, Peterson, at the head of the North Fork, and is identical with that of the respondent, Milburn Irrigation Company, at the head of the South Fork.

The respondents have also advanced the theory,

which apparently was adopted by the trial court, that there was discrimination in including the North Fork and the South Fork in the river system and in leaving out all of the other tributaries of the Sanpitch River. We maintain that this theory is untenable in view of the statute and the cases heretofore cited.

The statute involved is Section 73-5-1, Utah Code Annotated, 1953, and the applicable provisions read as follows:

Whenever in the judgment of the state engineer, or the district court, it is necessary to appoint one or more water commissioners for the distribution of water from any river system or water source, such commissioner or commissioners shall be appointed annually by the state engineer, after consultation with the water users. The form of such consultation and notice to be given shall be determined by the state engineer as shall best suit local conditions, full expression of majority opinion being, however, provided for. If a majority of the water users, as a result of such consultation, shall agree upon some competent person or persons to be appointed as water commissioner or commissioners, the duties he or they shall perform and the compensation he or they shall receive, and shall make recommendations to the state engineer as to such matters or either of them, the state engineer shall act in accordance with their recommendations; but if a majority of water users do not agree as to such matters, then the state engineer shall make a determination for them. The salary and expenses of such commissioner or commissioners shall be borne pro rata by the users of water from such river system or water source, upon a schedule to be fixed by the

state engineer, based on the established rights of each water user. \* \* \*

This statute commences with "Whenever in the judgment of the state engineer" and then uses the words "for the distribution of water from any river system or water source". These words give the state engineer a considerable discretion and the courts should uphold his acts unless there is a clear abuse of discretion; and the use of the word "any" in connection with a river system or water source is, we contend, a part of the same discretion vested by this statute in the state engineer.

The theory of the respondents, if carried to its ultimate conclusion, would render the statute meaningless and would create a situation that would make appointments of water commissioners for any reasonable division of a river system or for a water source impossible.

In the *Utah Power & Light Co. vs. Richmond Irrigation Co.* case, supra, it is noted that a water commissioner was appointed for the Little Bear River and that the East Fork of the Little Bear River and the South Fork of the Little Bear River were included. But a review of the whole record convinces us that neither Blacksmith Fork nor the Logan River were included and both are tributaries of the Little Bear River. And the Little Bear River is not a river system in and of itself but is a tributary of the Bear River; and respondents' theory would require that the Bear River system must be considered as a whole.

In the locality of the present case, the theory advanced by respondent would make the Sevier River system the only basis for the appointment of a water commissioner. We submit that this theory would create an intolerable situation from an administrative standpoint, that it is not a fair nor reasonable interpretation of the statute, and that it completely ignores the use of the words "water source" as used in the statute. We maintain that the State Engineer, in conjunction with and after consultation with the water users, has the right to determine what river system, or part thereof, and what water source or sources need be included within the jurisdiction of a particular water commissioner.

## POINT II.

THAT THE TRIAL COURT ERRED IN FINDING THAT THE WATER COMMISSIONER NEVER ATTEMPTED TO MEASURE OR DISTRIBUTE ANY OF THE WATER OF THE SANPITCH RIVER, INCLUDING THE NORTH AND SOUTH FORKS THEREOF, AND IN FINDING AND CONCLUDING THAT THE ASSESSMENT MADE BY THE STATE ENGINEER WAS UNAUTHORIZED AND VOID.

We contend that the assessment in this case was properly and fairly made and that the basis for the assessment was in accord with the cases heretofore cited.

It is true that the assessment was based upon an estimate of the quantity of water delivered, but that was necessary because none of the defendants involved

here have installed measuring devices. And the estimates were made by a water commissioner who had been such over a period of some three or four years and who testified that he had lived on the river a long time and had been water master of the Moroni Irrigation Company for twenty years.

This court, in the case of *Bacon vs. Plain City Irrigation Co.*, supra, at page 431 of the Pacific Reporter, stated:

It is difficult, if not impossible, to determine accurately in advance the amount of water which will be available for the use of the various water users during any given year; but one familiar with a given river system or other source of supply should be able to approximate the amount that will be available.

And, in the case of *Utah Power & Light Co. vs. Richmond Irrigation Co.*, supra, this court said that mathematical exactness is not necessary.

In connection with respondents' contention that the assessment was based only on an estimate as to water used, we call attention to Section 73-5-4, Utah Code Annotated, and the first part of this section, which reads as follows:

Every person using water in this state shall construct or install and maintain a substantial head gate, cap, valve or other controlling works, weir flume and measuring device at each point where water is diverted or turned out, for the purpose of regulating and measuring the quan-



tity of water that may be used. Such controlling works or measuring device shall be of such design as the state engineer may approve and so that the same can be locked and kept set by him or his assistants; and such owner shall construct and maintain, when required by the state engineer, flumes or other measuring devices at such points along his ditch as may be necessary for the purpose of assisting the state engineer or his assistants in determining the amount of water that is to be diverted into his ditch from the stream or water source, or taken from it by the various users. \* \* \*

We do not feel that respondents are entitled in this case to take advantage of their own failure to comply with the law.

### POINT III.

THAT THE TRIAL COURT ERRED IN ASSESSING COSTS AGAINST THE STATE ENGINEER, THE PLAINTIFF AND APPELLANT HEREIN.

The last sentence of Rule 54 (d) (1), of the New Rules of Civil Procedure, provides that "Costs against the state of Utah, its officers and agencies shall be imposed only to the extent permitted by law".

This provision has no counterpart in the statutes superceded by these new rules and, consequently, there is no judicial interpretation. However, the courts have on numerous occasions declared that costs are a creation of statute and the statutes with respect to costs are to be strictly construed.



It is appellant's contention that costs should not be assessed against the office of the State Engineer by reason of this rule and by reason of the further fact that the statutes of this state, and particularly Title 73 of Utah Code Annotated, 1953, do not in any manner charge the office of the State Engineer with payment of costs of suit.

## CONCLUSION

It is respectfully submitted that the lower court erred in finding in favor of the respondents herein and that this cause should be reversed and remanded with directions to enter a judgment in favor of the appellant, State Engineer, as prayed for in his complaint.

Respectfully submitted,

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