

1953

Randolph Land & Livestock Co. et al v. United States of America et al : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

IN THE MATTER OF THE GENERAL DETERMINATION OF RIGHTS
TO THE USE OF WATER OF BEAR RIVER DRAINAGE
AREA IN RICH COUNTY, STATE OF UTAH

RANDOLPH LAND & LIVESTOCK
COMPANY, a corporation; MES-
QUERET LIVESTOCK COMPANY,
a corporation; BOUNTIFUL
LIVESTOCK COMPANY, a cor-
poration; HAROLD SELMAN;
NICK CHOURNOS; ORVAL
JOHNSON; and WILLIAM
JOHNSON,

Objector and Appellants,

— vs. —

THE UNITED STATES OF
AMERICA,

Water Claimant and Respondent,

THE STATE ENGINEER OF THE
STATE OF UTAH,

Respondent.

No. 7983

Brief of Respondent

STATE ENGINEER OF THE STATE OF UTAH

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State Engineer of the

State of Utah

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STATE ENGINEER OF THE STATE OF UTAH

PRELIMINARY STATEMENT

As pointed out in the brief of appellants, this is an
appeal from an interlocutory order of the District Court

dismissing certain objections to the Proposed Determination of the State Engineer of the State of Utah on the grounds that the stipulation of facts and certain stipulations made in open court between appellants and the United States of America, the other respondent herein, presented no justiciable controversy.

Proceedings for the general determination and adjudication of water rights on a given river system or drainage area are not new to this Court but each case that has been brought has so far presented an entirely different situation. In the present matter the State Engineer is only indirectly concerned in the final outcome of the litigation as it may or may not require him to change his Proposed Determination.

However, the final decision herein will have considerable effect, not only upon the present case, but upon the other general adjudication proceedings that are now pending in other districts of the State of Utah. And the State Engineer, being charged with the administration and distribution of all of the waters of the State of Utah, feels that he would be remiss in his duties if he did not present to this Court his views in this matter.

We have no quarrel with the fact situation as presented in appellants' brief, but we cannot entirely agree with the conclusions they draw therefrom; nor is it possible for us to agree with the contention of the government that there is no justiciable controversy for determination in this cause.

STATEMENT OF POINTS

POINT I

A PROCEEDING FOR THE GENERAL DETERMINATION AND ADJUDICATION OF ALL RIGHTS TO THE USE OF WATER WITHIN A GIVEN DRAINAGE AREA INVOLVES THE RIGHTS OF ALL PARTIES THEREIN, INCLUDING THE STATE OF UTAH, FOR AND AGAINST EACH OTHER IN AND TO ALL THE WATERS WITHIN THE DRAINAGE AREA.

POINT II

THOSE CLAIMS FILED BY THE UNITED STATES OF AMERICA AND DESIGNATED AS "DILIGENCE RIGHTS" AND THOSE CLAIMS FILED BY THE UNITED STATES OF AMERICA BASED UPON CERTIFICATES OF APPROPRIATION, WHERE TIMELY OBJECTION TO THEIR INCLUSION IN A PROPOSED DETERMINATION IS MADE, PRESENT AN ISSUE OF FACT FOR DETERMINATION BY THE TRIAL COURT.

POINT III

APPLICATIONS TO APPROPRIATE WATER HERETOFORE FILED BY THE UNITED STATES WHICH ARE STILL PENDING APPLICATIONS SHOULD NOT BE CONSIDERED AT THIS TIME. THE MERE FACT THAT THE APPLICANT DOES NOT OWN LAND OR STOCK WILL NOT OF ITSELF PREVENT PROOF OF BENEFICIAL USE.

ARGUMENT

POINT I

A PROCEEDING FOR THE GENERAL DETERMINATION AND ADJUDICATION OF ALL RIGHTS TO THE USE OF WATER WITHIN A GIVEN DRAINAGE AREA INVOLVES THE RIGHTS OF

ALL PARTIES THEREIN, INCLUDING THE STATE OF UTAH, FOR AND AGAINST EACH OTHER IN AND TO ALL THE WATERS WITHIN THE DRAINAGE AREA.

In the case of *Huntsville Irrigation Assn. vs. District Court of Weber County*, 72 Utah 431, 270 P. 1090, this question was presented to the court and so decided and the court said:

In view of these provisions of the statute, it is difficult to avoid the conclusion that it was contemplated by the Legislature that by this form of action the rights of all claimants, whether conflicting or otherwise, could and should be adjudicated and determined so that the same might be made a matter of public record available at all times as evidence of such rights.

The office of the State Engineer of the State of Utah has made every effort to present his Proposed Determination in proper shape to include every right within the drainage area of the Bear River in Rich County, Utah. (Volume III, Record on Appeal.) And this Court, by an examination of this volume, may take judicial notice that this Proposed Determination is the result of careful and diligent effort on the part of the State Engineer and his assistants to so include every possible claim in this area. It is our hope that, when final judgment is entered in this general adjudication proceeding, that not only will all rights be shown therein, but that no rights will be included that are not just and proper rights; and it is also our hope that, from time to time, this Proposed Determination may be brought

to date in order to include new rights and to delete those that may have been lost by non-use and to indicate other changes in ownership.

We, therefore, contend that, to the extent as herein-after indicated, there is a justiciable controversy that should be tried and the issues found thereon.

POINT II

THOSE CLAIMS FILED BY THE UNITED STATES OF AMERICA AND DESIGNATED AS "DILIGENCE RIGHTS" AND THOSE CLAIMS FILED BY THE UNITED STATES OF AMERICA BASED UPON CERTIFICATES OF APPROPRIATION, WHERE TIMELY OBJECTION TO THEIR INCLUSION IN A PROPOSED DETERMINATION IS MADE, PRESENT AN ISSUE OF FACT FOR DETERMINATION BY THE TRIAL COURT.

Certificates for the appropriation of water issued by the office of the State Engineer are a creature of statute, and the last sentence of Section 73-3-17, Utah Code Annotated 1953, states:

The certificate (of appropriation) so issued and filed shall be prima facie evidence of the owner's right to the use of the water in the quantity, for the purpose, at the place and during the time specified therein, subject to prior rights.

Prior to the year 1903, a right to the use of water was acquired by an application of that water to a beneficial use and we have consistently recognized such a right and have placed it in the same general category as a right obtained by a certificate of appropriation. In a general adjudication proceeding, a water user's claim

is filed based upon either a diligence right, a decreed right, a right evidenced by a certificate of appropriation, or an initiated right evidenced by an application to appropriate. Decreed rights are not involved in the present matter and rights initiated by applications to appropriate are hereafter discussed in this brief. At this point, we are concerned with the other two.

It is our contention that the filing of these claims by the United States of America presented a prima facie case for the existence of those rights and that the filing of the objections by the appellants raised an issue of fact. Neither the stipulation of facts, to which the State of Utah is not a party, nor the waiver of priority by the government settled this issue of fact; and, as we have heretofore stated, it is our earnest desire to secure a decree that will show all rights as they now exist and that will show no rights that should not be included.

We would at this point call the Court's attention to the record in this matter which contains no evidence other than the Stipulation of Facts entered into between the United States and the appellants herein; and it is our contention that it is not possible to finally determine the questions here presented upon the few facts contained in that Stipulation. In order to make proof of appropriation upon an application, it is necessary for the water user to show the location of the stream and the point of diversion, a detailed statement, including drawings of the diversion works, the acreage irrigated, or, in the case of stockwatering, the number and kind of stock watered and the amount of water diverted and

beneficially used; and, in the case of diligence rights, substantially the same factual situation must be determined by the State Engineer before such a right is placed in the Proposed Determination.

We feel that Section 73-4-12, Utah Code Annotated 1953, is conclusive on this question and we have underlined the last part of this section as hereinafter quoted:

If no contest on the part of any claimant shall have been filed, the court shall render a judgment in accordance with such proposed determination, which shall determine and establish the rights of the several claimants to the use of the water of said river system or water source; and among other things it shall set forth the name and post-office address of the person entitled to the use of the water; the quantity of water in acre feet or the flow of water in second feet; the time during which the water is to be used each year; the name of the stream or other source from which the water is diverted; the point on the stream or other source where the water is diverted; the priority date of the right; *and such other matters as will fully and completely define the rights of said claimants to the use of the water.*

The sections of the code dealing with protests and objections are 73-4-13, 73-4-14, and 73-4-15, Utah Code Annotated 1953, and they specifically refer to the section above quoted as the basis for the final decree.

This statute was carefully considered by this Court in *Huntsville Irrigation Assn. v. District Court*, supra, and the Court made the following comments with respect thereto:

The statute, as before stated, provides that the claims filed by the claimants shall stand in

the place of pleadings and issues may be made thereon. As we interpret that provision, if one claim conflicts with another, there is an issue to be determined. One claimant by claiming too much water may be an adverse party to every other claimant in the system. He may be adverse to only a part. In any event an issue is presented which should be tried by the Court by the same rules of evidence and the same orderly procedure as in other cases. * * * Every facility seems to have been provided for a thorough adjudication of the rights of each claimant as against every other claimant as well as against the state. There is nothing in any previous decision of this court involving this statute in conflict with these views.

The later case of *Plain City Irrigation Company v. Hooper Irrigation Company*, 87 Utah 545, 51 P. 2d 1069, again concerns the general determination statute and reaffirms the views expressed in the Huntsville case.

POINT III

APPLICATIONS TO APPROPRIATE WATER HERETOFORE FILED BY THE UNITED STATES WHICH ARE STILL PENDING APPLICATIONS SHOULD NOT BE CONSIDERED AT THIS TIME. THE MERE FACT THAT THE APPLICANT DOES NOT OWN LAND OR STOCK WILL NOT OF ITSELF PREVENT PROOF OF BENEFICIAL USE.

It is well settled in this State that ownership of land is not a necessary requisite of the right to appropriate water. We do not feel that there is any need to cite the many cases on this point other than to call attention to the following statement made by this Court in *Whitmore v. Salt Lake City*, 89 Utah 387, 57 P. 2d 726, 732, as follows :

The right to the use of water is independent of the right to land.

And it is also noted that in the Proposed Determination it is recommended that the District Court retain jurisdiction for a five year period after rendition of judgment for the express purpose of permitting the State Engineer to report as to these pending applications. It is, therefore, urged upon the Court that, until proof of appropriation is submitted to the State Engineer and a further report made by him to the District Court, the lower court's determination that there is no justiciable controversy is correct in connection with these pending applications.

CONCLUSION

The State of Utah, acting through its State Engineer, respectfully urges that the decree of the lower court as it affects pending applications to appropriate water is correct and should be affirmed but that said decree as it affects diligence rights and certificates of appropriation is in error and that this cause in that respect should be reversed and remanded for the taking of further evidence.

Respectfully submitted,

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