1980

# Ted Clark et al v. Dee C. Hansen : Brief of Appellants

Utah Supreme Court


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J. Franklin Allred; Attorney for Appellants;

IN THE SUPREME COURT

OF THE STATE OF UTAH

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| TED CLARK, et al.,<br><br>Plaintiffs-Appellants,<br><br>vs.<br><br>DEE C. HANSEN, State Engineer,<br><br>Defendant-Respondent. | Case No. 17093 |

APPEAL FROM A JUDGMENT OF THE FOURTH JUDICIAL DISTRICT COURT OF JUAB COUNTY, THE HONORABLE J. ROBERT BULLOCK, PRESIDING

# BRIEF OF APPELLANTS

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# BRIEF OF APPELLANTS

## STATEMENT OF THE NATURE OF THE CASE

Appellants filed an action, pursuant to Section 73-3-14, Utah Code Annotated (1953), seeking a trial de novo as to a decision of the State Engineer appropriating certain water rights in the Sevier Desert Groundwater Basin.

## DISPOSITION IN LOWER COURT

Respondent filed a motion to dismiss appellants' case based on a claim that the Fourth Judicial District Court of Juab County lacked jurisdiction to hear the matter because the State Engineer had granted a rehearing as to the subject application. The Court granted respondent's motion on or about May 21, 1980.

## RELIEF SOUGHT ON APPEAL

Appellants seek a reversal of the District Court's order of dismissal and a remand for trial de novo.

## STATEMENT OF FACTS

On January 18, 1980, respondent approved the application of L. Derrel Christensen to appropriate 5,460 acre feet of water annually from the Sevier Desert Groundwater Basin.

In granting said application, the State Engineer passed over the applications of appellants and numerous other persons which had been filed prior to the Christensen application.

On or about February 9, 1980, the Deseret Irrigation Company, Melville Irrigation Company, Abraham Irrigation Company and Delta Canal Company (hereinafter referred to as the DMAD companies), by and through their attorney, filed a petition for rehearing of the Christensen application by the State Engineer. On February 20, 1980, respondent granted the petition for rehearing.

On March 12, 1980, within the 60-day period provided by law, appellants filed a complaint for a trial de novo as to the January 18, 1980, decision of the State Engineer granting the Christensen application.

Respondent filed a motion to dismiss appellants' complaint, claiming that the rehearing granted by respondent vacated the January 18 decision and deprived the District Court of jurisdiction on the basis that there was no final appealable ruling for the Court to act upon. After briefing and oral argument, the District Court granted respondent's motion and dismissed the action without prejudice.

## ARGUMENT

### POINT I

THE ACTION OF THE STATE ENGINEER IN CONNECTION WITH THE SUBJECT APPLICATION TO APPROPRIATE IS VOID AB INITIO THERE BEING NO STATUTORY AUTHORITY TO PREFER SUBSEQUENT APPLICANTS IN THE SAME GROUNDWATER BASIN.

The action of the State Engineer in preferring the Derrel Christensen application and considering it prior to consideration of the applications of all of the appellants as well as numerous other persons, is not authorized by the statutes of the State of Utah govering the appropriation of water and is, therefore, void ab initio. The respondent State Engineer is required by law to "administer the division of water rights," Section 73-2-1.2, Utah Code Annotated (1953), and in accordance therewith is "vested with such powers and required to perform such duties as are set forth in law," Id. 73-2-1.1.

The manner in which applications to appropriate water are to be dealt with is clearly set forth in Chapter 3 of Title 73 of the Utah Code. The applicable sections are set out as follows:

> 73-3-1****no appropriation of water may be made and no rights to the use thereof initiated and no notice of intent to appropriate shall be recognized except application for such appropriation first be made to the State Engineer in the manner hereinafter provided and not otherwise. The appropriation must be for some useful and beneficial purpose, and, as between appropriators, the first in time shall be the first in rights; (emphasis added)

73-3-2****any person****in order hereafter to acquire the right to the use of any unappropriated public water in this state shall****make an application in writing to the State Engineer.

73-3-4****whenever in this title the word "received" is used with reference to any paper deposit in the office of the State Engineer, it shall be deemed to mean the date when such paper was first deposited in the State Engineer's office, and whenever the term "filed" is used, it shall be deemed to mean the date when such file was acceptably completed in form and substance and filed in said office.

73-3-5****upon receipt of each application****it shall be the duty of the State Engineer to make an endorsement thereon of the date of its receipt and to make a record of such receipt in a book kept in his office for that purpose.

73-3-6****When an application is filed in compliance with this title, the State Engineer shall publish****notice of the application.

73-3-7****any person interested may, at any time within 30 days after the completion of the publication of such notice, file with the State Engineer a written protest together with a copy thereof against the granting of the application stating the reasons therefor which shall be duly considered by the State Engineer, and he shall approve or reject the application (emphasis added)

73-3-8****it shall be the duty of the State Engineer to approve an application if (1) there is unappropriated water in the proposed source: (2) the proposed use will not impair existing rights or interfere with the more beneficial use of the water:****if an application does not meet the requirements of this section, it shall be rejected****.

Each of the appellants in the instant case filed applications to appropriate or became entitled to applications to appropriate by way of inheritance, assignment or otherwise, all of which were filed many years prior to the application to

appropriate filed by L. Derrel Christensen. The statutes cited above require that an accurate record be kept of the date and time of the filing of the applications and that they be acted upon in numerical sequence by the State Engineer. No statutory authority exists to allow the State Engineer to pass over the applications of appellants herein and to consider the application of L. Derrel Christensen prior to consideration of appellants' applications to appropriate.

In the case of McGarry v. Thompson, 114 Utah 442, 201 P.2d 288 (1948), the Utah Supreme Court construed the statutory provisions concerning applications for appropriation of water. While noting that no vested right to use water arises from the mere filing of an application, the Court then proceeded to consider the effect of filing an application, stating:

> But the filing of such an application is the initiating step in acquiring such a right without which no such right can be acquired and the priority of any water right later acquired through such initiating step is determined from the date of filing the application and not from the date of appropriation. This is a valuable inchoate right which may mature into a vested right to the use of water. 201 P.2d at 292.

In accordance with appellants' arguments herein, the filing of their applications conferred a priority over any subsequent applicant in the event the respondent were to determine that there existed unappropriated water in the Sevier Basin. Appellants assert that the State Engineer had no authority to pass over their applications and to act on the

Christensen application. Therefore, any and all of respondent's actions regarding the Christensen application, including the purported rehearing thereof, are void ab initio.

The claims of appellants herein are not based solely upon a technical reading of Section 73-3-14, et. seq., Utah Code Annotated (1953), but are also founded upon the general principle of law that an administrative official is only authorized to and required to obey the statutory mandate concerning the duties and responsibilities of his office. Consequently, respondent herein can act only in conformity with the framework established by the relevant Utah statutes.

## POINT II

## RESPONDENT STATE ENGINEER HAD NO AUTHORITY TO GRANT A REHEARING OF THE SUBJECT APPLICATION

The respondent herein has no authority to grant a rehearing on applications. The statutory scheme for hearing and acting on applications to appropriate is clear: The State Engineer must accept and mark each application as to the date received in his office, and such date is to serve as a priority date concerning the application in question. He must then publish notice of said application and rule thereon, granting it if there is a compliance with the requirements of Section 73-3-8, Utah Code Annotated (1953). The statutes authorize only one hearing and not a rehearing. After the decision of the State Engineer, any "aggrieved person" has a right to bring suit, in accordance with Section 73-3-14:

> In any case where a decision of the State Engineer is involved, any person aggrieved by such decision, may within 60 days after notice thereof, bring a civil action in a district court for a plenary review thereof. The State Engineer shall give notice of his decision by mailing a copy thereof by regular mail to the applicant and to each protestant and notice shall be deemed to have been given on the date of mailing.

The Supreme Court of the State of Utah has held that the exclusive remedy to challenge a decision of the State Engineer is to file an action for a plenary review under the foregoing statute. Smith v. Sanders, 112 Utah 517, 189 P.2d 701 (1948).

Further, it is fundamental that the rule-making power of an administrative officer or body is limited to regulations which implement statutory provisions and does not include the authority to alter or amend a legislative mandate. (See Laws v. Industrial Commission, 116 Utah 432, 211 P.2d 194 (1949)). Any rule of an administrative agency or officer must be consistent with the statute it is designed to implement. McKnight v. State Land Board, 14 Utah 2d 238, 318 P.2d 726 (1963).

Respondent's position is that a petition for rehearing was filed and granted and a rehearing was held. Appellants assert that no statutory authority for such an action exists. Said action is also inconsistent with the State Engineer's January 18th decision wherein it was noted that his ruling was subject to the plenary review provisions of Section 73-3-14, Utah Code Annotated (1953).

The State Engineer, without some statutory authority so to do, may not alter, amend or modify the requirement of Section 73-3-14, respecting the rights of aggrieved persons to appeal to the District Court. Respondent seeks to rely upon the administrative rules adopted by the State Engineer pursuant to Section 65-46-1, et. seq., Utah Code Annotated (1953), for the authority to grant a petition for the rehearing of an application to appropriate water. Those rules require that a petition for rehearing must be filed within 20 days from the date of a decision of the State Engineer. It must be noted herein that the DMAD Companies filed their petition for rehearing on Feburary 9, 1980, several days beyond the 20-day period provided for petitions for rehearing by the rules promulgated by respondent. Therefore, even if, for purposes of argument, appellants were to concede the authority of the State Engineer to grant a re-hearing by way of administrative rules, it is apparent that respondent did not even obey those rules in granting a petition for rehearing which was not timely filed. The failure of respondent to abide by his own rules cannot be countenanced. (See West Gallery Corp. v. Salt Lake City Board of Commissioners, 537 P.2d 1027 (1975)).

Further, the granting of a rehearing by respondent affected the rights of appellants in connection with the original decision of the State Engineer on January 18, 1980. The granting of said rehearing sought to cut off the right of appellants to a plenary review of the original decision of respondent. Appellants were not a party to the petition for

rehearing and, in fact, opposed any attempt to grant a rehearing where such was not authorized by statute. Therefore, the rights of the appellants arising from respondent's original decision were infringed upon by the granting of the rehearing despite the fact they were not a party to the petition for a rehearing, and respondent once again violated his own rules by taking an action which affected those rights of appellants. (See Rule 10(4) of the Rules of the State Engineer).

## POINT III

### THE APPLICANT L. DERREL CHRISTENSEN IS NOT AN INDISPENSABLE PARTY TO THIS ACTION.

Although virtually no applications to appropriate water had been approved for the Sevier Basin from 1961 until the decision on the Christensen application, appellants in this case have not requested the court to decide the issue of whether or not there remains unappropriated water in the Sevier Basin nor are they asking the court to appropriate any water. Rather, appellants merely seek an order requiring that the State Engineer comply with statutory mandate in determining the order in which applications are to be considered.

Appellants do not seek to cut off any right of L. Derrel Christensen to use water. If after consideration of all prior applications for appropriation the State Engineer finds that there remains unappropriated water, then the application of Christensen for appropriation of water for a beneficial use could be granted in due course.

Appellants urge that said L. Derrel Christensen is neither an indispensable nor even a necessary party to this action.

## CONCLUSION

Based upon the record before the Court and the foregoing arguments of fact and law, appellants request the court to reverse the order of the District Court, to find that the District Court has jurisdiction and to remand the instant case for plenary review by the District Court.

DATED this 6th day of August, 1980.

Respectfully submitted,

J. FRANKLIN ALLRED
Attorney for Appellants

## MAILING CERTIFICATE

I hereby certify that I mailed two copies of the foregoing Brief of Appellants to Dallin W. Jensen, Assistant Attorney General, 301 Empire Building, 231 East Fourth South, Salt Lake City, Utah 84111, Attorney for Respondent, this 6th day of August, 1980.