1980

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

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

TED CLARK, et al.,

Plaintiffs-Appellants,

v.

DEE C. HANSEN, State Engineer,

Defendant-Respondent.

Case No. 17093

BRIEF OF RESPONDENT

ON APPEAL FROM THE JUDGMENT OF THE
FOURTH JUDICIAL DISTRICT COURT
IN AND FOR JUAB COUNTY, STATE OF UTAH
HONORABLE J. ROBERT BULLOCK, PRESIDING

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September 4, 1980

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BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

This action was initiated as an attempt to review the Decision of the State Engineer approving Application No. 50723, filed by L. Derral Christensen. However, prior to the filing of this action, the State Engineer withdrew that Decision by granting a Rehearing on Application No. 50723.

DISPOSITION IN THE LOWER COURT

Respondent State Engineer moved to dismiss Appellants' Complaint on the grounds that the District Court lacked subject matter jurisdiction, since there was no final decision of the State Engineer for the Court to review, and also that the applicant was an indispensable party to the action. The District Court concluded that it was without jurisdiction and dismissed the action.

RELIEF SOUGHT ON APPEAL

Respondent State Engineer seeks to affirm the Order of the

Fourth Judicial District Court dismissing this action.

STATEMENT OF THE FACTS

Respondent State Engineer does not believe that there is any substantial disagreement between the parties concerning the basic facts of this case, but there are certain additional facts—omitted by Appellants from their Statement—which are relevant to the Court's consideration of this matter. Consequently, we believe the following summary more completely reflects the relevant facts in this case.

Application No. 50723 was filed by L. Derral Christensen to appropriate groundwater in Juab County, Utah (R. 6-8). Notice of this Application was given by publication in the local newspaper, and the subject Application was protested by the Deseret Irrigation Company, Melville Irrigation Company, Abraham Irrigation Company, Delta Canal Company, Jack M. Nelson, Steel McIntyre, and Gordon and Barbara Nielson (R. 6-7). But this Application was not protested by any of the Appellants in this action, nor did they participate in the administrative hearing subsequently held by the State Engineer to consider the protests which had been filed (R. 6-7).

The State Engineer issued a Memorandum Decision on January 18, 1980, approving Application No. 50723 (R. 6-7). On February 13, 1980, the State Engineer received a "Petition for Reconsideration" from the Deseret Irrigation Company, Melville Irriga-

tion Company, Abraham Irrigation Company and Delta Canal Company—all of whom had protested the approval of this Application—to reconsider the issues associated with Application No. 50723. The State Engineer granted a Rehearing on February 20, 1980 (R. 20). The Rehearing was held on March 12, 1980 (R. 22), which was the same day Appellants filed their Complaint (R. 1). The State Engineer has not yet issued any further decision regarding Application No. 50723.

Appellants' Complaint sought a reversal of the State Engineer's January 18, 1980, Decision approving Application No. 50723 (R. 5). Respondent filed a Motion to Dismiss the action on the grounds that the Court lacked subject matter jurisdiction because the granting of the Rehearing by the State Engineer withdrew his prior Decision, and thus he had not yet made a final decision within the meaning of Section 73-3-14, Utah Code Annotated 1953, as amended (R. 15-23). Respondent's Motion to Dismiss also asserted that the applicant, L. Derral Christensen, was an indispensable party to any action to review his Application (R. 16).

The District Court dismissed this action for lack of jurisdiction following consideration of memoranda and oral argument by the parties (R. 61-62). Appellants' appeal challenges that decision.

ARGUMENT

I. THE DECISION TO GRANT REHEARING ON APPLICATION NO. 50723 WAS WITHIN THE POWER OF THE STATE ENGINEER AND WAS FULLY JUSTIFIED UNDER THE CIRCUMSTANCES

A. The Need of the State Engineer for Rehearings as Part of the Administrative Process

The Legislature has delegated to the State Engineer the primary responsibility for the administration and allocation of the water resources of the State (§73-2-1, U.C.A. 1953, as amended). All applications to appropriate water, as well as change applications, must be filed with and initially ruled upon by the State Engineer (§§73-3-2 and -3). This is also the situation with extension of time requests on approved but unperfected applications and changes (§73-3-12). Thus, the State Engineer makes literally hundreds of decisions each year on water right matters and, while all of his final decisions are subject to appeal pursuant to the provisions of §73-3-14, only a few are in fact appealed. There is a significant need to allow the administrative process to run its full course before a court reviews a matter. This is aptly illustrated in this case, where the State Engineer is dealing with complex hydrologic and geologic questions associated with the availability of groundwater and the relationship between a proposed appropriation and already established and existing water rights and other claims. This is an involved, detailed, and technical matter. Certainly

there is every reason to allow the State Engineer to make a complete evaluation of a matter before a Court reviews it—including holding a Rehearing if one is requested and the State Engineer believes, under all the facts and circumstances, that it should be granted.

> Courts are reluctant to interfere with action of an administrative agency prior to its completion and which in this sense is not final. This reluctance has found expression in the manner in which courts construe constitutional provisions to limit the availability of judicial review of such action, in rules relating to timing judicial relief developed by the courts apart from any constitutional necessity, such as the doctrine of exhaustion of administrative remedies, in a general requirement of "ripeness for review," and final action by the administrative agency as a jurisdictional prerequisite to judicial review. Such requirements involve a determination of the particular stage at which a person may secure review of administrative action and the immediacy of the impact of such action and impingement upon an asserted right, as well as the focusing of issues for effective judicial determination, the opportunity for subsequent challenge to the determination, and the freedom of the agency to bring its action to fruition without judicial intervention. The requirements are often stated in terms of the particular remedy in which judicial relief is sought. Thus, it is said that it is the general rule that administrative action which is not final cannot be attacked in an injunction proceeding, the reason being that absent a final order or decision, power has not been fully and finally exercised and there can usually be no irreparable harm; and that where administrative intention is expressed but has not yet come to fruition or where that intention is unknown, the controversy is not yet ripe for equitable intervention. (2 Am.Jur.2d Administrative Law, §583, pp. 410, 411).

B. The State Engineer has Authority to Grant Rehearings

The underpinning for Appellants' case is that the State Engineer is completely without authority to rehear any aspect of one of his decisions. Under Appellants' theory, the State Engineer could not ever correct minor mistakes, nor make any adjustments to any of his decisions—however necessary to or desirable in the interests of the parties. Certainly this should not be the case. Section 73-2-6, Utah Code Annotated 1953, as amended, specifies that:

> The state engineer shall keep his office at the state capitol, but all proceedings and hearings requiring the attendance of water users and witnesses shall be held within the county where the land is located.

Further, with respect to the authority of the State Engineer, Section 73-2-1 provides, in part, that:

> He shall have power to make and publish such rules and regulations as may be necessary from time to time fully to carry out the duties of his office, and particularly to secure the equitable and fair apportionment and distribution of the water according to the respective rights of appropriators . . . .

Pursuant to his statutory authority and the provisions of the Utah Administrative Rule-making Act (§63-46-1 et seq., Utah Code Annotated 1953, as amended), the State Engineer has adopted formal Rules governing his hearings and rehearings. Since the Legislature has delegated to the State Engineer the responsibility to decide whether an application to appropriate water should be approved or rejected based upon specified

statutory criteria (§73-3-8), the State Engineer should have the authority to rehear and reconsider his decisions where appropriate. It must be remembered that decisions of the State Engineer are not completely final for sixty days following their issuance, as that is the time during which such decisions may be appealed (§73-3-14). This is not a situation where the State Engineer is attempting to leave uncertainty in the decision-making process. The State Engineer realizes the need for certainty and finality in this area. The twenty-day time period (or some reasonable extension thereof) within which to petition for a rehearing is not an effort on the part of the State Engineer to leave his decisions open-ended. Appellants' naked assertion that the State Engineer violated his own Rules (by granting a Rehearing when the request was not filed within the twenty-day period provided for in those Rules) ignores the fact that these Rules also provide that for good cause the twenty-day period may be extended—as it was in this instance. The fact that Appellants were not aware of such extension is not surprising, since they were not involved in the administrative proceedings before the State Engineer. Consequently, Appellants' reliance upon West Gallery Corp. v. Salt Lake City Board of Comm., 537 P.2d 1027 (Ut. 1975), is clearly unjustified. Further, a court will not override an agency's interpretation of its own rules unless the interpretation is clearly erroneous (McKnight v. State Land Bd., 14 Ut.2d 238, 381 P.2d 726 (1963)). Of course,

once the sixty-day appeal period provided for in Section 73-3-14 passes, the State Engineer's decision becomes final and he cannot consider new or additional evidence dealing with the substantive criteria governing his decision on an application. And he does not suggest otherwise. But there are times when fairness and justice dictate that a rehearing should be granted. Such a procedure is fully consistent with the authority granted the State Engineer in this specialized and technical area, and is also in the best interests of the public. The authority to rehear a matter has been recognized as being inherent within the power to initially decide the matter. Davis, in his Treatise on Administrative Law (1958), at §18.09, states:

> Every tribunal, judicial or administrative, has some power to correct its own errors or otherwise appropriately modify its judgment, decree, or order.

Also, 2 Am.Jur.2d, Administrative Law, at §525, states:

> . . . it is held that an administrative agency may reopen its determination to permit the introduction of further evidence, or reconsider, modify, or change its determination by reason of newly discovered evidence, or to meet changed conditions, except as restricted by statute or ordinance.

This rule has been recognized and approved in a number of States:

> The question then arises whether the Commission has jurisdiction to further reconsider its decisions. As to this, the answer must be in the affirmative. The power to reconsider is inherent in the power to decide. Albertson v. Federal Communications Commission, 87 U.S. App.D.C. 39, 182 F.2d 397. The Commission had the jurisdiction to entertain the second motion and the power to grant or deny it. (Wammack v. Industrial Comm. of Arizona, 320 P.2d 920, 954 (Ariz. 1958); Emphasis Added).

In Handlon v. Town of Belleville, 71 A.2d 624 (N.J. 1950), the New Jersey Court ruled that:

> In analogy to the authority of courts of general jurisdiction at common law, administrative tribunals possess the inherent power of reconsideration of their judicial acts, except as qualified by statute. This function arises by necessary implication to serve the statutory policy. (71 A.2d at 627).

Also, see Anchor Casualty Co. v. Bongards Co-op Cream. Ass'n., 91 N.W.2d 122 (Minn. 1958); Spanish International Broadcasting Co. v. Federal Communications Co., 385 F.2d 615 (D.C.Cir. 1967); Magnolia Petroleum Co. v. New Process P. Co., 104 S.W.2d 1106 (Tex. 1937); Ruvoldt v. Noland, 305 A.2d 434 (N.J. 1973); and Equitable Trust Co. v. Hamilton, 123 N.E. 380 (1919).

In evaluating the power to grant a rehearing, courts have also looked with favor where, as here, the request for rehearing must be filed prior to the time that the period for seeking judicial review has expired. The Delaware Supreme Court, in Henry v. Dept. of Labor, 293 A.2d 578 (Del. 1972), stated:

> No provision in Title 19, Delaware Code, chapter 33 provides the Board with the power to grant a rehearing. In Delaware, however, a public body exercising judicial functions inherently has the power, even without statutory authority, to reopen and reconsider a decision until it loses jurisdiction. In Lyons v. Delaware Liquor Commission, 5 Del.Gen.Sess. 304, 58 A.2d 889 (1948), where a decision by the Delaware Liquor Commission refusing to grant a liquor license was affirmed, the Commission granted a motion for rehearing and vacated a previous order before the period for seeking judicial review had expired. (293 A.2d at 581).

See also Bd. of Education v. Iowa State Bd. of Public Instr.,

157 N.W.2d 919 (Iowa 1968). This Court has recognized the need for a reasonable interpretation of statutory grants of authority to administrative agencies to carry out agency responsibilities (McGarry v. Ind. Comm., 64 Utah 592, 232 Pac. 1090 (1925)).

C. Established Administrative Practice is Presumed Valid

The State Engineer adopted Rules of Procedure for Hearings (which includes procedures governing rehearings discussed above) in 1974, pursuant to the provisions of §73-2-1 and the Utah Administrative Rule-making Act (§63-46-1 et seq.). Where the Rules promulgated by the State Engineer are in response to express statutory authority and there is no showing that such Rules exceed his authority, his action is presumed to be valid:

> As an administrative agency statutorily created and endowed with specific enumerated powers and duties delegated pursuant to the police power of the state, the Board's exercise of those powers within the scope of its authority is entitled to a presumption of validity and constitutionality . . . . Here, specific authority is delegated to make rules and regulations as may be necessary for the regulation of the practice of pharmacy and the lawful performance of the duties of the Board, including the regulation of the sale of drugs and medicines. C.R.S. 1963, 48-1-2(1)(d) and (e). The presumption of validity of the rules regularly promulgated is not to be lightly cast aside by mere allegations in a complaint of unconstitutionality, and the burden is upon the party challenging the constitutionality to establish by a clear and convincing showing beyond a reasonable doubt the asserted invalidity. This requires more than a mere assertion of a claim. (Moore v. District Court, 518 P.2d 948, 951 (1974)).

Also, the Utah Legislature has met on a number of occasions since the State Engineer's Rules of Procedure for Hearings were adopted, and no effort has been made to change, modify or adjust

the State Engineer's authority in this area. Legislative acquiescence in an administrative practice may be inferred from silence for a number of years (United States v. Midwest Oil Co., 236 U.S. 459 (1915); United States v. Philbrick, 120 U.S. 52 (1887); and Brennan v. Udall, 379 F.2d 803 (10th Cir.), cert. denied 389 U.S. 975 (1967)).

D. Appellants' Inconsistent Position

There is a fundamental and basic inconsistency in Appellants' position in this matter. Appellants express profound concern over the potential impact of Application No. 50723 on certain of their unidentified claims. It is most difficult to square this professed concern with Appellants' actions. The Utah Water Code provides interested parties with ample opportunity to protest any new application to appropriate water. Notice of all such applications must be advertised once a week for three weeks in a local newspaper (§73-3-6). There is a thirty-day protest period following publication of the final notice (§73-3-7). Appellants chose not to protest Application No. 50723 and give the State Engineer an opportunity to consider their objection, but, rather, waited until a Decision had been made by the State Engineer and then criticize that Decision for not considering whatever objections Appellants may have had. Thus, this is not a situation where a water user who made his case before the State Engineer and lost is seeking to have the State Engineer's Decision

reviewed by the Court. Rather, it is a situation where parties—who claim to be seriously concerned about their potential claims to water—have ignored the established administrative process and, instead, seek recourse directly from the Court. To allow parties to ignore or bypass the administrative proceedings before the State Engineer is completely at odds with the Utah Water Code, which places the responsibility for water allocation with the State Engineer (with his decisions being subject to court review). Such a result would be inconsistent with the concept of a trial de novo as contemplated under §§73-3-14 and -15 (Bullock v. Tracy, 4 Ut.2d 370, 294 P.2d 707 (1956)). Appellants' actions fall woefully short of supporting the claims and arguments which they are advancing to this Court.

E. Lack of Harm to Appellants

It is extremely difficult to understand Appellants' basic concern at this stage of the proceedings before the State Engineer, and also their reluctance to let the administrative process be completed. The State Engineer has held his Rehearing on Application No. 50723, and—while he has not yet issued a decision—if he were to now reject this Application Appellants' Complaint would be moot. Of course, the applicant might then seek court review of the decision. If, on the other hand, the State Engineer affirms the approval of the subject Application, that would then be a final decision subject to appeal pursuant to

the provisions of §73-3-14. Thus, it is difficult to see where Appellants are running any risk at all as a result of the Rehearing, or have any standing to complain about the Rehearing of this matter in any event, since they have refused to participate in the administrative process.

F. Appellants' Cases

The cases upon which Appellants rely do not support their argument. First, with respect to Smith v. Sanders, 112 Utah 517, 189 P.2d 701 (1948), we have no quarrel with this Court's conclusion that §73-3-14 provides the exclusive means of seeking judicial review of a decision of the State Engineer. However, the Court there was discussing a final decision of the State Engineer after the sixty-day appeal period had elapsed. There was no consideration or discussion of the matter of rehearing by the State Engineer within that sixty-day period.

In Laws v. Industrial Commission, 116 Utah 432, 211 P.2d 194 (1949), this Court ruled that the Industrial Commission could not adopt a regulation dealing with denial of medical expenses which was inconsistent with a statute allowing such expenses. That is not the situation here. There is no statutory prohibition against rehearings by the State Engineer. McKnight v. State Land Board, 14 Ut.2d 238, 381 P.2d 726 (1963), can be of little comfort to Appellants. There, the rules and regulations were found to be consistent with the statutory authority of the Land

Board. This Court also pointed out in that case that administrative agencies have the power and authority necessary and proper to accomplish their statutory objectives and duties (14 Ut.2d at 245).

II. THE TRIAL COURT CORRECTLY CONCLUDED THAT IT LACKED SUBJECT MATTER JURISDICTION BECAUSE OF THE PENDENCY OF THE REHEARING ON APPLICATION NO. 50723, AND DISMISSED THE ACTION

Section 73-3-14, Utah Code Annotated 1953, as amended, which governs the review of decisions of the State Engineer, clearly contemplates a final decision of the State Engineer as a jurisdictional prerequisite to any such appeal. That situation does not exist here. The effect of granting a rehearing deprives the prior ruling of the finality required by §73-3-14. The jurisdiction of the subject Application is still before the State Engineer pending his decision on Rehearing. Once a review is made of the issues presented at the Rehearing, a final Memorandum Decision will be issued by the State Engineer which will be appealable under the provisions of §73-3-14. However, at this point in time there is simply nothing for a court to assume jurisdiction over for review, since the State Engineer's January 18th Memorandum Decision was withdrawn by the granting of a Rehearing. Other water users have no legitimate complaint at this point.

The pendency of a rehearing on a matter deprives a prior decision of its finality, thus leaving no subject matter for a

court to review:

> As a general rule, when a rehearing is granted, the status of the case is the same as though no hearing had occurred. 3 Am.Jur., Appeal and Error, Section 810. "At common law an order granting a rehearing operates as a reversal of the original decision." 4 C.J. 641; 4 C.J.S., Appeal and Error, §1446. See also Hook v. Mercantile Trust Company, 7 Cir., 95 F. 41, 36 C.C.A. 645. Though the filing of a petition for a rehearing does not vacate or annul a judgment, it suspends the judgment from the date of the filing of the petition. The granting of a rehearing withdraws an opinion previously rendered and destroys its force and effect unless it is subsequently adopted by the same tribunal. 3 Am. Jur., Appeal and Error, Sections 809 and 811. (Atlantic Greyhound Corp. v. Public Service Comm'n., 54 S.E.2d 169 (W.Va. 1949)).

This Court, in the Laws case, supra, stated that: "The granting of a rehearing operates to vacate the award previously rendered, and to require the case be tried anew." (211 P.2d at 198). Also, see Southland Industries v. Federal Communications Comm'n., 99 F.2d 117 (D.C.Cir. 1938); State Dept. of Ecology v. City of Kirkland, 523 P.2d 1181 (Wash. 1974); and 2 Am.Jur.2d, Administrative Law, §587, pp. 417-418. Thus, it must follow that since only final orders or decisions are reviewable by the courts under statutes such as §73-3-14, there is no subject matter jurisdiction for this action.

III. THE STATE ENGINEER CLEARLY HAS AUTHORITY FOR HIS ACTION ON APPLICATION TO APPROPRIATE NO. 50723

Appellants argue that, since the State Engineer did not act upon certain applications to appropriate which Appellants

have filed in his office, any action taken by him with respect to Application No. 50723 is void ab initio because Application No. 50723 may have been filed subsequent to other unapproved applications in the same general area. This argument is totally without merit. First of all, there is no evidence or data before this Court demonstrating that the water source covered by Application No. 50723 is the same water source covered by the applications of those Appellants having unapproved applications pending before the State Engineer. Further, Appellants are hardly in any position to complain about the State Engineer's administrative review of Application No. 50723, since they refused to participate in the administrative process, and are in fact trying to totally circumvent it.

However, the more fundamental flaw in Appellants' argument is that the statutory provision governing the approval and rejection of applications to appropriate specifically allows the State Engineer to consider applications other than in the order they are filed. That statutory criteria is set forth in §73-3-8, and this Court has squarely ruled that the State Engineer is not bound to act upon applications to appropriate in their order of filing (see Tanner v. Bacon, 103 Utah 494, 136 P.2d 957 (1943)). Of course, Appellants' argument is really irrelevant at this point, since the State Engineer has not yet issued his final Decision on Application No. 50723.

None of the statutes quoted in Point I of Appellants' Brief support the arguments which Appellants assert. For example, Appellants' reliance upon §73-3-1 is totally unwarranted. That section of the Water Code is simply a legislative recognition and ratification of the appropriation doctrine which does provide that among those users having established rights, the user with the first priority shall receive his entire water supply before a subsequent user shall be entitled to any water. This section has absolutely nothing to do with unapproved applications, because such a user has no right to divert and use water until his application is approved. The State Engineer's action on unapproved applications is governed solely by the criteria set forth in §73-3-8.

Appellants' reliance on McGarry v. Thompson, 114 Utah 442, 201 P.2d 288 (1948) is likewise unfounded. The language quoted in Appellants' Brief was in the context of whether or not an unapproved application could be transferred or assigned prior to approval by the State Engineer. The Court concluded that it could. However, there is not one word in that decision remotely suggesting that applications must be approved in the order in which they are filed. In fact, this Court, in McGarry, stated that no vested right to the use of water is acquired by the mere filing of an application (201 P.2d at 292). Accord, Whitmore v. Welch, 114 Utah 578, 201 P.2d 954 (1949) and Deseret Live Stock

Co. v. Hooppiania, 66 Utah 25, 239 Pac. 479 (1925).

IV. APPELLANTS' COMPLAINT FAILS TO JOIN AN INDISPENSABLE PARTY

It is difficult to understand exactly what Appellants' position is on this question, but in light of the lower court's decision that it was without jurisdiction over this action, there was no need to consider whether L. Derral Christensen (who filed the subject Application) was an indispensable party to this action, and the lower court did not address this question. However, there can be no doubt but that the applicant would be an indispensable party to any adjudication on the merits of said Application. This applicant had the opportunity to appear and defend his Application before the State Engineer, and must be provided the same opportunity in any subsequent proceedings involving his Application (Stone v. Salt Lake City, 11 Ut. 2d 196, 356 P.2d 631 (1960); also, see Hoyt v. Upper Marian Ditch Co., 94 Utah 134, 76 P.2d 234 (1938)).

V. CONCLUSION

This action was properly dismissed by the District Court for lack of jurisdiction since there is no final decision on Application No. 50723 as required by Section 73-3-14.

DATED this 4th day of September, 1980.

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CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the foregoing Brief of Respondent was served upon the following by mailing the same, first class postage prepaid, this fourth day of September, 1980:

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