

1981

Robert S. Nielson And Ila Dean Nielson v. Central Waterworks Company, A Utah Corporation, And The State of Utah, By And Through Its Division of Water Resources : Brief of Respondent State of Utah

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT S. NIELSON and
ILA DEAN NIELSON,

Plaintiffs-Appellants,

v.

Case No. 17333

CENTRAL WATERWORKS COMPANY,
a Utah corporation; and the
STATE OF UTAH, by and through
its Division of Water Resources,

Defendants-Respondents.

BRIEF OF RESPONDENT STATE OF UTAH

ON APPEAL FROM THE JUDGMENT OF THE
SIXTH JUDICIAL DISTRICT COURT
IN AND FOR SEVIER COUNTY, STATE OF UTAH
HONORABLE DON V. TIBBS, DISTRICT JUDGE, PRESIDING

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Clk, Supreme Court, Utah

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT S. NIELSON and
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v.

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CENTRAL WATERWORKS COMPANY,
a Utah corporation; and the
STATE OF UTAH, by and through
its Division of Water Resources,

Defendants-Respondents.

BRIEF OF RESPONDENT STATE OF UTAH

NATURE OF THE CASE

Appellants brought this action against the Central Waterworks Company and the State of Utah seeking a declaration from the trial court that constitutional equal protection requires Respondent Central Waterworks Company to grant Appellants' request for eighteen culinary water hook-ups and for damages against the Company.^{1/}

DISPOSITION IN THE LOWER COURT

Respondents Central Waterworks Company and State of Utah filed separate Motions for Summary Judgment. The Sixth District Court heard arguments on August 20, 1980, and on August 26, 1980, granted both Respondents' Motions for Summary Judgment (R. 91).

1. No damages were sought against the State of Utah (R. 4-5).

RELIEF SOUGHT ON APPEAL

Respondent State of Utah seeks a complete affirmance of the lower court's Order granting both Respondents' Motions for Summary Judgment.

STATEMENT OF FACTS

The basic facts before the trial court are set forth in the Affidavit of H. Conrad Hansen (R. 49) which was uncontroverted, as Appellants did not file a Counter-Affidavit under the provisions of Rule 56(e) of the Utah Rules of Civil Procedure.

However, because the Affidavit of Mr. Conrad contains certain legal interpretations regarding the nature of the transaction between Central Waterworks Company and the State, some clarification as to that relationship is necessary. The State of Utah, through its Division and Board of Water Resources, is involved in the construction of water conservation and development projects (such as the improvements undertaken on the Central Waterworks system) for the benefit of Utah water users under Chapter 10 of Title 73, Utah Code Annotated 1953, as amended. This program is intended to encourage the efficient, waste-free use of water and to help place the limited water resources of this arid State to their highest and best use (§73-10-1). Pursuant to the provisions of this Act, the Board of Water Resources entered into an agreement with the Central Waterworks Company for the construction of improvements to the existing water system.

the Company.^{2/} Under the terms of the 1952 Agreement and the 1973 Amendment thereto (R. 52), the Division provided most of the funding for this project. As required by Section 73-10-7, Utah Code Annotated 1953, as amended, the State of Utah took title to the water rights and distribution system of the Company, and the Company agreed to repurchase the water rights and system back from the State for the costs of the improvements plus certain engineering and planning fees. The agreements further provide that during the repurchase period—so long as the Company is not in default—the Company has control over the operation of the system and the obligation to maintain it. Thus, the State neither undertakes nor seeks to undertake any control or influence over the day-to-day operational or managerial affairs of the Central Waterworks Company (R. 50). Further, the Board of Water Resources had no involvement in the decision to deny the Appellants their eighteen connections.

Clarification is also required with regard to the allegations on page 10 of Appellants' Brief, where it is asserted that the Central Waterworks Company has developed a "monopoly" on water service in the area, and that the Company protested a "well application" filed by Appellants for their property. The fact is that the Appellants do not have to look to Central Waterworks Company for their water supply. Appellants filed Exchange App-

2. The 1973 Agreement attached to the Affidavit of H. Conrad (R. 52) is actually an amendment extending the original repurchase contract entered into in 1952, as stated in the 1973 Agreement.

lication No. 965 to exchange thirty acre feet of water from Piute Reservoir to their property in the unincorporated town of Central for domestic and other uses. The application was approved by the State Engineer in August of 1976. Thus, Appellants currently have a valid water right for their property. A copy of the Memorandum Decision of the State Engineer approving Appellants' Exchange Application is attached to this Brief as Appendix A. This Court has ruled that it can take judicial notice of the records of the State Engineer's Office. See McGary v. Thompson, 114 Utah 442, 201 P.2d 288 (1948) and American Fork Irr. Co. v. Linke, 121 Utah 90, 239 P.2d 188 (1951).

ARGUMENT

I. APPELLANTS ARE NOT ENTITLED, AS A MATTER OF RIGHT, TO A WATER SUPPLY FROM THIS WATER PROJECT IN ORDER TO SUBDIVIDE THEIR LAND

A. Appellants' Claim

The essence of Appellants' claim before this Court is that the Central Waterworks Company must furnish Appellants a water supply so they can subdivide their property. Appellants assert that the involvement and participation of the State of Utah in this project in effect causes it to become a public water supply project, and transfers the Central Waterworks Company from a private company into a public utility. As will be seen in the subsequent section of this Brief, this is not so. Appellants also argue on page 10 of their Brief that Central

Waterworks Company has developed a monopoly on the delivery of water in this area. Appellants offer no citations to the record or any legal authority to support this argument. What Appellants seem to be suggesting by this argument is that Central Waterworks Company has some sort of exclusive franchise to serve the subject area, thus preventing Appellants and other landowners from acquiring an independent water supply. This is not so. Mutual water companies occupy no such position in Utah. ^{3/} Appellants' own actions best refute this claim, since they have filed a water application which has been approved by the State Engineer (see Appendix A hereto).

If Appellants wish to develop their property as a subdivision, that is perfectly proper. But it is not proper for this Court to force Respondents to make a water supply available to them under the facts of this case.

B. The Public/Private Relationship in Water Conservation and Development in Utah

1. An Historical Perspective

The various programs and procedures which govern the utilization and conservation of Utah's water resources contains

3. For a discussion of the historical development and nature of a mutual water company, see 4 Waters and Water Rights, ch. 20 (Allen Smith Co., 1970), and Hutchins, Water Rights Laws in the Nineteen Western States, vol. 1, pp. 552-569 (Misc. Pub. No. 1206, U.S.D.A. 1971). Also see Green Ditch Co. v. Monson, 100 Utah 446, 116 P.2d 387 (1941); Nash v. Alpine Irrigation Co., 58 Utah 84, 197 Pac. 603 (1921); Holmgren v. Utah-Idaho Sugar Co., 582 P.2d 856 (Utah 1978); and St. George City v. Kirkland, 17 Ut.2d 292, 409 P.2d 970 (1966).

an unusual combination of public and private involvement which presents a unique chapter in the jurisprudence of this State. It is against this backdrop that the program of the Division of Water Resources must be evaluated and measured. When this is done, it can be seen that the practice followed by the Division on this project does not suffer from the constitutional deficiency Appellants urge. There has historically existed in Utah a public policy which combines elements of both public and private involvement to assure the most efficient and beneficial use of Utah's limited water resources. This policy has allowed for the development of Utah's water resources while promoting the public welfare by preventing the waste and non-beneficial use of this valuable resource.

The need to divert and utilize our water resources was essential to the settlement and development of this region of the State. This Court recognized this fact in some of its earliest decisions wherein it adopted the doctrine of prior appropriation and recognized the concept of riparian rights (Munroe v. Ivie, 2 Utah 535 (1820) and Crane v. Winsor, 2 Utah 248 (1878)). The Legislature subsequently has declared that:

All waters in this state, whether above or under the ground, are hereby declared to be the property of the public, subject to all existing right to the use thereof. (§73-1-1).

Private parties may acquire the right to use water (§§73-1-1 et seq.), and once a water right is perfected it has been treated by this Court as a species of real property (In re Bear River

Drainage Area, 2 Ut.2d 208, 271 P.2d 846 (1954)). However, even then the right is subject to certain public interest limitations and conditions. For example, whatever the scope of a water right on paper, beneficial use is still the measure and limit of the right (§73-1-3), and the right is subject to forfeiture for non-use (§73-1-4). The public/private dichotomy of water has manifest itself in other ways as well. In Utah, an individual is given the right of condemnation for ditches, canals and reservoirs (§§73-1-6 and 7). This concept was validated by both this Court and the Supreme Court of the United States early in the history of the development of this State (Nash v. Clark, 27 Utah 158, 75 Pac. 371 (1904), aff'd, Clark v. Nash, 198 U.S. 361 (1905)). This Court recognized the extreme importance to the public welfare of placing Utah's water resources to beneficial use in Nash v. Clark:

In view of the physical and climatic conditions in this state, and in the light of the history of the arid West, which shows the marvelous results accomplished by irrigation, to hold that the use of water for irrigation is not in any sense a public use, and thereby place it within the power of a few individuals to place insurmountable barriers in the way of the future welfare and prosperity of the state would be giving to the term "public use" altogether too strict and narrow an interpretation, and one we do not think is contemplated by the Constitution. (75 Pac. at 374).

Thus, it can be seen that the development, utilization and conservation of the water resources of this State have both public and private aspects. It is this unique arrangement which

has resulted in the sound and effective water resource program which exists in this State.

2. Division of Water Resources' Program

The Utah Legislature created the Division of Water Resources in the late 1940's to further the development and conservation of the water resources of the State. One aspect of this legislation provided for the participation of the Division in the construction of water projects which increase the efficient use of water and prevent the waste of this limited resource (§73-10-1). This program, pursuant to which the State participates in the construction of water projects throughout the State with local sponsoring organizations (§§73-10-5, -6, -8), is consistent with and reflects the long-standing public policy of Utah as recognized by the Legislature and this Court that the development and efficient use of water advances the public welfare. Under this program the State enters into a contract with a local group of water users for the construction of the water project. The State holds title to the project under the provisions of §73-10-7 until the sponsors of the project repurchase the project facilities under the terms of the original agreement and any amendments thereto.

Obviously, the Division of Water Resources must deal with all potential sponsors for projects in a fair and even-handed manner when selecting projects for state participation. But once a project is selected and the Board enters into an agree-

ment with a sponsoring organization (in this case, the Central Waterworks Company), this does not then have the effect of converting the mutual water company into a public water supply agency, which would destroy the elements for which the company was organized. Nor is the State obligated to police every action of a sponsoring water company. There is no legal prohibition against the State occupying the role it does in these water projects. The development and firming up of the water supplies for local water users (such as the Central Waterworks Company) throughout the State is a substantial public benefit, and it is not diminished by the fact that these local sponsoring organizations serve only a limited group of people.

C. Appellants are not Denied Constitutional Equal Protection

It is not the State's purpose to advance arguments for Respondent Central Waterworks Company—except as they relate to the State's position in this matter—but the fact seems to be that Appellants are trying to force a private water company to sell them shares of stock in the company. It is not simply a matter of selling a so-called "hook-up", since the right to use water in a mutual water company comes about only through ownership of shares of stock in the company (see cases cited in Footnote 3 at page 5). It is most difficult to see how the State's involvement in this project can accomplish this for Appellants.

Certainly the Division of Water Resources must treat competing applicants who wish to participate with the State in const-

ructing these types of projects in a fair and equal manner as a matter of constitutional equal protection (State v. Masc 94 Utah 501, 78 P.2d 920 (1938); Kent Club v. Toronto, 305 P. 870 (Utah 1957); and Child v. City of Spanish Fork, 538 P.2d 184 (Utah 1975)). But this is not Appellants' complaint. In fact, it is somewhat difficult to determine from Appellants' Complaint and Brief exactly what specific actions of the State are being complained of, or what specific relief is being sought against Respondent State of Utah. Appellants seem to suggest that the State's allowing the Company to operate and manage this water system is an illegal delegation of authority. Or, stated differently, Appellants complain of supposed inaction by Respondent State of Utah in failing to adequately supervise the day-to-day operation of the water system. But it must be remembered that this is an already-constructed project, and Respondent Central Waterworks Company has contracted to purchase it from the State. The State has no desire to diminish its involvement in this project, nor to deny any responsibility it has with regard to the general public. But it is respectfully urged that because of the broad public purposes served by this program in developing and conserving Utah's water resources, there is no legal prohibition because there is some private benefit under this program (Nash v. Clark, supra; and Nelson v. Marshall, 497 P.2d 47 (Id. 1972)).

It is not a denial of equal protection to limit the benefits of Division of Water Resources' projects to the local sponsors of the project. The purpose of this legislation is fully consistent with the public interest in water resource development and management in this State, and the fact that projects of this nature are not open to the general public does not cause the program to be constitutionally defective. As this Court previously observed with respect to constitutional equal protection:

Of course every legislative act is in one sense discriminatory. The Legislature cannot legislate as to all persons or all subject matters. It is inclusive as to some class or group * * * and exclusive as to the remainder. For that reason, to be unconstitutional the discrimination must be unreasonable or arbitrary. A classification is never unreasonable or arbitrary in its inclusion or exclusion features so long as there is some basis for the differentiation between classes or subject matters included as compared to those excluded
. . . (State v. Mason, *supra*, at 923).

Montana's Supreme Court has observed:

. . . A privilege, or a burden, is or is not a denial of the equal protection of the laws, according to whether the discrimination relates to a matter upon which classification is legally permissible, and, if so, whether the classification is a reasonable one.

That classification is permissible, because in the essential nature of things and in any due appreciation of equality in the operation of the law it is necessary in legislation for purposes of revenue, or in the application of the police power strictly so-called, or in legislation designed to increase the industries of the state, develop its resources, or add to its wealth and prosperity, is abundantly settled by judicial decision as well as by the course of legislation. (Hill v. Rae, 158 Pac. 826, 828 (1916)).

None of the cases cited by Appellants offer either a fact situation or any other circumstances similar to the situation at issue here. This is perhaps best illustrated by a review of the two principle cases upon which Appellants rely.

Appellants cite the case of Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), in urging the Court that the actions of the Company in the present case amount to "state action." While that case may be helpful in stating the general guidelines for determining what is or is not a state action, the facts upon which the Court in Burton found state action to exist are quite different from the case at bar. In Burton, a private entity leased space for a coffee shop in a parking garage that was built, owned and operated by an agency of the State of Delaware. The rents from the coffee shop lease helped to pay some of the project's costs. Plaintiff, a negro, alleged that he was refused service in the coffee shop because of his race. The major point on which the Court based its finding of state action was the fact that the parking garage and coffee shop were public buildings open to the public. The Court, on the last page of its opinion, specifically limited its holding to the situation where state property open to the general public was being leased to a private party. This is not analogous to the situation here, where the State's ownership is subject to a purchase contract of the Central Waterworks Company, and the Company's system has never been a public water supply but has

been limited to serving its shareholders. Appellants would have this Court order a private company to sell stock, which in effect means forcing the shareholders to sell a portion of their interest in the assets of the Company. It should also be pointed out that courts tend to use a stricter test of "state action" where racial discrimination is asserted (see Barrett v. United Hospital, 376 F.Supp. 791 (S.D.N.Y. 1974)).

The other major case relied upon by Appellants is Holodnak v. AVCO Corp., 514 F.2d 285 (2nd Cir. 1975), cert. denied 421 U.S. 1013 (1975). Again, that case involved a different set of facts from the case at bar. In Holodnak, supra, all of the buildings, land and equipment involved were owned by the government—not subject to a repurchase contract, as in our case. The government also maintained a large force at the plant to oversee its day-to-day operations. Such is not the situation here. Before leaving Appellants' cases, it should also be noted that in the case of Jackson v. Metropolitan Edison Company, 419 U.S. 345 (1974), the Court did not find state action under the facts of that case.

It must also be pointed out that there are other cases which have ruled that simply because there is both state and private involvement in a given situation, this does not mean that all aspects of the matter are state action. In Greco v. Orange Memorial Hospital Corp., 513 F.2d 873 (C.A. 5, 1976), cert. denied, 423 U.S. 1000, the issue was whether a hospital could refuse to

perform elective abortions as part of its general policy. The hospital leased a building from the county for a nominal sum, and had the obligation of operating and maintaining the facility. The plaintiff alleged that in effect the county was subsidizing the hospital because of the nominal rent, and therefore state action was involved. The court viewed the issue of whether or not the hospital would allow elective abortions as "only the internal affairs of the facility," with which the court would not interfere unless there was some allegation of racial discrimination. The Court distinguished the Burton case, supra, on several grounds, including the fact that no racial discrimination was alleged (as in the case at bar), and that the hospital had obligated itself to fully operate and maintain the structure (as in this case). The reasoning of the Greco case should apply to the day-to-day affairs of a private mutual water company, especially where what Appellants are trying to do is to force the stockholders to sell them an interest in the assets of the Company, and not merely water service.

Further, to the extent Appellants simply rely on the fact that public funds are involved in the construction of this project, this alone would not be sufficient to reach the result Appellants desire. In Garkane Power Company v. Public Service Commission, 100 P.2d 571 (Utah 1940), this Court held that public financial assistance to a private electrical cooperative did not require the company to render service to the general

public. Also see Barrett v. United Hospital, supra; and Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973).

II. CONCLUSION

The program of the State to construct water conservation and development projects in conjunction with local sponsoring organizations such as the Central Waterworks Company is fully consistent with the long-standing public policy of this State. There is no legal prohibition against the State allowing the local sponsoring organization which is purchasing the project to conduct the day-to-day operations of the project. Nor does this require that Respondent Central Waterworks Company sell Appellants shares of stock in that organization. Appellants cannot point to any actions by the State which amounted to discrimination or unfair treatment. When all the exotic legal arguments are stripped away, what Appellants are attempting is to have this Court interfere with the day-to-day internal affairs of a private mutual water company.

Respectfully submitted,



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BEFORE THE STATE ENGINEER OF THE STATE OF UTAH

IN THE MATTER OF EXCHANGE)

) MEMORANDUM DECISION

APPL. NO. 965 (63 Area))

Exchange Application No. 965 (63 Area) was filed by Township Acres Subdivision Corporation, c/o Robert S. Nielson, R.F.D., Monroe, Utah and seeks the right to exchange a maximum of 30.0 ac. ft. of water obtained by 15 shares of stock in the Piute Reservoir and Irrigation Company. The water has been diverted from the Sevier River at a point West 3070 feet and South 460 feet from the NE $\frac{1}{4}$ Sec. 27, T25S, R4W, SLB&M; and used for the irrigation of 40,000 acres of land within Sevier County.

Hereafter, 30.0 ac. ft. of water will be released from April 1 to October 31 into the Sevier River same as heretofore and, in lieu thereof, 30.0 ac. ft. of water will be diverted from January through December 31 from a 10-inch well, 400 feet deep, located at a point South 768.24 ft. and East 1465.20 ft. from NW Cor. Sec. 27, T24S, R3W, SLB&M. The water will be used for the domestic purposes of 18 families, stockwatering of 10 horses and 10 cattle and from April 1 to October 31 for the irrigation of 3.37 acres of land. All uses are within the N $\frac{1}{2}$ NW $\frac{1}{4}$ Sec. 23, T24S, R3W, SLB&M.

The exchange application was advertised in the Richfield Reaper from April 1 through April 15, 1976 and was protested by Central Waterworks Company of Monroe, Utah.

A hearing was held June 27, 1976 in the Sevier County Courthouse in Richfield, Utah. The applicant explained that the subdivision would not be approved until he could obtain a water right. He had made application to the Central Waterworks Company but was rejected. The protestants were represented by Mr. Tex Olsen who stated that they felt the exchange application was speculative, and if granted, could cause interference and sanitary problems with their existing well.

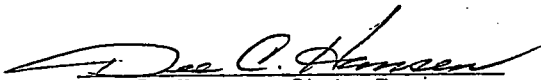
It is the opinion of the State Engineer, after reviewing Water Supply Paper No. 1787, published by the U.S. Geological Survey, that the proposed well will not interfere with existing wells, but the applicant must adequately compensate lower water users for the withdrawal from the ground water network.

It is, therefore, ordered and Exchange Appl. No. 965 (63 Area) is hereby APPROVED subject to prior rights and the following conditions:

1. The total diversion will be reduced 20 per cent to compensate other water users for distribution losses; therefore, not more than 24 ac.ft. annually may be diverted from the well.
2. The quantity diverted from the well shall not exceed the amount available for 15 shares of Piute Reservoir and Irrigation Company stock as distributed by the river commissioner less 20 per cent for losses.
3. The applicant shall install at his own expense on the well, a totalizing water meter that will be available for inspection at all times by the State Engineer or his representatives or by the protestants.

This decision is subject to the provisions of Section 73-3-14, Utah Code Annotated, 1953, which provides for plenary review by the filing of a civil action in the appropriate district court within sixty days from the date hereof.

Dated this 20th day of August, 1976. mcd 3/24/76


Dee C. Hansen, State Engineer

DCH:RLM:jh

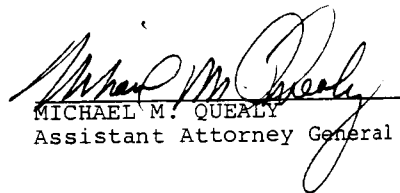
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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Respondent State of Utah were mailed, first class postage prepaid, this thirteenth day of February, 1981, to:

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