

1956

Theodorus E. McKean, Frank M. Spencer and R.  
L. Mitchell v. A. Adolphus Lasson, Glen D. Lasson,  
Bernard G. Lasson, Niels Oscar Lasson and George  
A. Siler : Brief of Appellant

Utah Supreme Court

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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THEODORIUS E. McKEAN, FRANK  
M. SPENCER and R. L. MITCHELL,  
*Plaintiffs and Appellants,*

— vs. —

A. ADOLPHUS LASSON, GLEN D.  
LASSON, BERNARD G. LASSON,  
NIELS OSCAR LASSON and  
GEORGE A. SILER,  
*Defendants and Respondents.*

Case No.  
8448

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## Appellant's Brief

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Clerk, Supreme Court, Utah

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## Appellant's Brief

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### STATEMENT OF FACTS

The purpose of this action is to determine and establish by decree the relative rights of the parties to the use of the waters of Thistle Creek from the Sanpete-Utah County boundary line downstream to the mouth of Nebo Creek.

The parties include all of the users along the stream between those points.

The Lasson defendants own the ranches from the County line down to The Spencer Ranch; then come

Spencer, McKean, Mitchell and Siler, in the order named, (R. 20). Siler is a necessary party; his interests lie with the plaintiffs, but he refused to join with us so we made him a defendant. He defaulted.

Thistle Creek has its headwaters in Thistle Valley in Sanpete County; two creeks, namely, Clear Creek and Rock Creek, join Thistle Creek at the mouth of the canyons on the east side of the valley. Panawats Slough rises in some springs in the meadows in Thistle Valley and flows north, joining Thistle Creek a few rods north of the county line. This slough also picks up the runoff from the meadows, (R. 27).

In the year 1894 a decree was entered in the District Court of Utah County, adjudicating the water rights in Thistle Creek as between the users in Thistle Valley on the one side and the users down the canyon on the other side. We call this the Smith Decree, (R. 14).

In the action which resulted in the Smith Decree the predecessors in title to all of the parties to this action were the plaintiffs and the users in Thistle Valley were defendants. We refer to the Thistle Valley rights as the Indianola Rights, and the rights of the parties to this action as the Canyon Rights.

The Smith Decree does not expressly allocate the rights of the Canyon users as among themselves; and there has never been an adjudication or any other proceeding until now to establish the rights of the Canyon users as among themselves.

The Smith Decree, is like many of the earlier decrees,

somewhat incomplete. It does not give points of diversion nor fix the duty of water, irrigated acreage, etc. Primarily the decree divided the water for a thirty-day period, commencing June 15th and ending July 15th of each year. The parties to this action and their predecessors were given two five-day turns during this period and the Indianola rights took two ten-day turns<sup>1</sup>. On July 15th, the Indianola rights were permitted by the Smith Decree to shut the stream off dry, and the parties to this action after July 15th get only the return flow from Thistle Valley, (R. 15).

Historically, it would appear that there generally has been sufficient water in Thistle Creek and its tribu-

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<sup>1</sup>The Smith Decree is set out in full at pages 14 and 15 of the Record, and it may be summarized as follows:

*The Indianola Rights have*

From June 15th at 6:00 a.m. to June 25th at 6:00 a.m. — All of Thistle Creek, Clear Creek and Rock Creek.

From June 30th at 6:00 a.m. to July 10th at 6:00 a.m. — All of Thistle Creek, Clear Creek and Rock Creek.

Also — after July 15th down to March 1st of the next year — All of Thistle Creek, Clear Creek and Rock Creek, subject to the rights of the Canyon users.

*The Canyon Rights have*

From June 25th at 6:00 a.m. to June 30th at 6:00 a.m.; and from July 10th at 6:00 a.m. to July 15th at 6:00 a.m. — All of Thistle Creek and one-fourth of Clear Creek and Rock Creek.

Also from March 1st to June 15th — 5 acres from Hyrum Seely Ditch and 7 acres from Panawats Ditch.

Also — During the whole year — all of Panawats Slough and all of Gardner's Dam.

Also — Whenever the waters from Panawats Slough and Gardner's Dam together with 5 acres from Hyrum Seely Ditch and 7 acres from Panawats Ditch are less than  $\frac{1}{2}$  the flow of Thistle Creek and  $\frac{1}{4}$  the flow of Clear Creek and Rock Creek, then to a sufficient flow from Thistle Creek to make up the  $\frac{1}{2}$  and the  $\frac{1}{4}$ .

taries to meet the needs of all of the parties at least until about the 15th day of May, (R. 257). It also would appear that from the 15th of May until the 15th of June, when the Smith decree divided the water into turns as set forth above, there was always a substantial quantity of water in the source, (R. 257, 245). The Smith Decree of 1894 did not describe nor limit the acreage. The court has in this case, however, determined what the acreage of each of these parties is and the portion thereof which is cultivated ground, and the portion thereof which is meadow. While there was considerable time devoted to this acreage problem, the findings of the court in this regard are not questioned on this appeal. Those acreages are as follows, to-wit: (R. 63)

R. L. Mitchell.....	16.62 acres
Frank Spencer .....	40.1 acres
Theodarius E. McKean.....	76.15 acres
George A. Siler.....	18.7 acres
<hr/>	
Sub-Total .....	151.49 acres
A. Adolphus Lasson.....	224.95 acres
Bernard G. Lasson.....	85.05 acres
Neils Oscar Lasson.....	78.04 acres
Glen D. Lasson.....	88.0 acres
<hr/>	
Sub-Total .....	476.04 acres
Grand Total .....	627.53 acres

During the 30 day period when the water is on turns with Thistle Valley, the Lassons, who are the defendants

and respondents here, do not irrigate their meadows below the Upper Wimmer Dam, and the water which reaches the Upper Wimmer Dam is used on the cultivated land, (R. 330, 236-8, 240).

The respondents are generally upstream from the plaintiffs and appellants, and the velocity of water through their meadows is such that it would cut a deep channel unless check dams were maintained therein, (R. 195). These check dams are not high enough to divert the water out of the channel; they are constructed of rock which retard the flow of the stream, holding the ground water table through the meadows at a reasonably high level and preventing heavy erosion in the channels. In addition, the respondents maintain diversion dams which take water from Thistle Creek and on to their meadows. The respondents contend for the right to maintain tight dams diverting all of the water from Thistle Creek on to their lands without regard to the quantity of water which might be available and without any regard for the needs of their land. They deny that the appellants have any right except during the 30 days when the water is on turns with Thistle Valley to have any direct flow of water remain in the channel for diversion by the plaintiffs at their lands, (R. 224, 236-8). The trial court so found and decreed, (R. 67). The result of this is that the plaintiffs will be essentially dependent upon return flow from the lands of the respondents.

Spencer had lived on his ranch for a period of 63 years at the time of the trial, McKean on his since 1911,



and Mitchell had owned his place since 1942, and before that he leased it. The Lassons are the second generation of that family to occupy their ranches, (R. 19, 81).

During all the time from as far back as the memory of any of the witnesses extended right down to the year 1950, there had never been any trouble among these people about the distribution and use of the water, (R. 232, 290, 306). They got along fine without a water-master, or water commissioner, or State Engineer, or anybody else; they distributed the water among themselves, (R. 232). When there was plenty they helped themselves to it as they felt they needed it. In times of shortage they shared the loss and seem to have been considerate of one another's needs, (R. 305-6). In years of normal precipitation the crops on the Lason cultivated lands were usually no better or poorer than those on the Spencer, McKean and Mitchell places; that is likewise true with respect to the dry years, (R. 286, 261, 257, 231, 88, 56). Some very dry years they all had crop failures, (R. 54).

Lassons took the water whenever they needed it and as long as there was any water in the stream; so did the plaintiffs. If Spencer and McKean needed water when there was none coming past the Lason diversion dams, they would go up the creek and open up the dams and let some down. At times they would see a Lason on his place and mention to him their need for water and the matter would be amicably arranged between themselves, (R. 257, 232, 233, 273, 296, 305) but if a Lason did not happen to be present they would take

what they regarded as their fair share of the stream and turn it down, (R. 84-87).

In 1950, however, something transpired to change the happy state of affairs which had prevailed among these ranches on Thistle Creek. There was a case on trial at Manti in which Arthur R. Lasson sued Justus O. Seely for damages and for an injunction for putting a dam in Panawats Slough. Arthur owned the southernmost Lasson meadow at that time. In that case Arthur testified that he owned or claimed to own the right to the use of all of the waters of Panawats Slough. Frank M. Spencer heard that testimony. It was a surprise to him to hear such a claim made, for he regarded the Slough as tributary to Thistle Creek, and thought all of the Canyon users were entitled to share in the use of the waters of the slough and that no ranch had the right to all of the flow of that small stream, (R. 52).

In the discussions which occurred among the parties following that disclosure of the Lasson claims to the Slough, appellants were apprised for the first time in 1954 of the claims to the priority of use and exclusive use of the combined waters of Thistle Creek and Panawats Slough, which they set up in their counterclaim, and which the trial court sustained by its judgment in this case, (R. 296-7).

There was plenty of water for everyone in 1952, but in 1953 and 1954 the Lassons took all the low water; and the crop on the McKean Ranch, although this ranch had the right to the use of the Spencer water that season, was virtually a complete failure, (R. 54, 101, 112, 121-7).

When the Canyon people take their turns from Indianola they take the dam out to let the water down to the lower ranches, (R. 239, 242). The Spencers and McKeans have to take the dams out through the Lasson places during low water to let the water on downstream to their ranches. They have always done this, (Tr. 34). There is a stretch where the channel has been filled up, but one can see by the willows where the channel used to be, (Tr. 36). When the water gets down to that point it spreads over the meadows, (Tr. 37). On the map (Exhibit A) the Wimmer Dam is marked Lasson Dam. Below that is the Lower Wimmer Dam, (Tr. 38). Then there is the White House Dam, and below that is the Spencer-McKean Dam, (Tr. 39).

Since the first portion of our argument must be devoted to the contention that the facts do not justify the maintenance of tight dams on Thistle Creek, the diversion of all the water on the lands of the respondents and the depriving of the plaintiffs of direct flow, we forego a further discussion of the facts at this point.

## POINTS ON APPEAL

I. The court erred in finding and decreeing that the defendants hold rights to the use of the water of Thistle Creek and its tributaries which are prior to the rights of the plaintiffs.

II. The court erred in finding and decreeing that the defendants should be permitted to maintain tight dams in Thistle Creek and to divert all of the waters

accumulating therein without regard to the beneficial needs of their land.

III. The court erred in finding and decreeing that the defendants could maintain a tight dam at a point which is known as the Upper Wimmer Dam until May 15th, diverting all waters which accumulated at that point.

IV. The court erred in finding and decreeing that from May 15th until June 15th of each year the plaintiffs McKean and Spencer are only entitled to one-fifth of the water accumulating at their dam.

V. The court erred in failing to determine and decree a duty of water for the lands of the defendants and in refusing to determine the other elements of an appropriation, including points of diversion, rates of flow, period of use, etc.

VI. The court erred in failing to place all of the parties hereto on an equal priority, duty, period of use, etc., and failing to divide the waters of Thistle Creek and its tributaries among said parties in direct proportion to the acreage owned by each.

VII. The court erred in assessing all of the costs against the plaintiffs.

## ARGUMENT

We realize that some of the statements of point made above overlap. Basically the two main points of the case involved are: (1) Should the court have given to the defendants a prior right senior to the rights of

any of the plaintiffs to the waters of Thistle Creek; and (2) should the court have totally disregarded all of the elements of the doctrine of appropriation and beneficial use, and simply given to the defendants the right to maintain tight dams in Thistle Creek to divert and use all of the water, leaving to the plaintiffs only the return flow? It is our basic contention that the priority of all of the parties should be equal, that the water should have been divided among all of the parties to this suit in direct proportion to the irrigated acreage of each, and that reasonable regulations should have been placed on the use of the water by all of the parties. We realize that the court has found the issues of fact against us, and, therefore, in the presentation of the factual argument will essentially confine ourselves to the evidence adduced by the defendants. We do this, although this is an equity case. (*Leland v. Bourne*, 41 Utah 125, 125 Pac. 652). This court has on numerous occasions discussed the extent of its review in equity cases and has held that it can and should review both the law and the facts, but that it should not disturb the findings of the trial court, unless the Supreme Court is satisfied from all the evidence that the findings are contrary to the preponderance thereof. See *Webb v. Webb*, 116 Utah 155, 209 Pac. 2d 201; and *Hatch v. W. S. Hatch Company*, 3 Utah 2d 295, 283 P. 2d 217. We believe that the preponderance of the evidence is clearly against the conclusion of the court to the effect that respondents have the senior right. We think that on their own testimony the court could not reasonably have found that they had rights senior and prior to those of the plaintiffs.

I. THE COURT ERRED IN FINDING AND DECREETING THAT THE DEFENDANTS HOLD RIGHTS TO THE USE OF THE WATERS OF THISTLE CREEK AND ITS TRIBUTARIES WHICH ARE PRIOR TO THE RIGHTS OF THE PLAINTIFFS.

All of these parties or their predecessors in interest were parties to a suit which was completed in 1894, and which resulted in the entry of the Smith Decree, (R. 21-24). None of the parties attempted to show the origin of his water right prior to the Smith Decree, and there is no testimony to the effect that any particular individual made an appropriation which was prior in time to the appropriation of any other individual. Each merely started with the Smith Decree. The testimony was, therefore, confined to the custom which has prevailed since that time. Prior to 1903 no statutory filing was necessary<sup>2</sup>. The existence of valid appropriations is, therefore, not questioned.

The Smith Decree made no effort to divide the water between these parties. There is simply a division of the waters of Thistle Creek between Thistle Valley or Indianola on the one hand, and these parties (the Canyon rights) on the other. This court has noted that when a court makes a joint award, the division between the various individuals is left open for further proceedings to divide the water so jointly awarded. See *Gill v. Tracy*, 80 Utah 127, 13 P. 2d 329. We believe that the testimony of the defendants shows conclusively that the plaintiffs

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<sup>2</sup>*Wellsville-East Field Irrigation Co. v. Lindsay Land & Livestock*, 104 Utah 448, 137 P. 2d 634; *Smith v. Sanders*, 112 Utah 517, 189 P. 2d 701.



have always had their proportionate share of the water and that they have not been relegated to a junior position.

The defendants were specifically asked whether or not back over the years the plaintiffs had had their proportionate share of the water, and they answered that question in the affirmative, (R. 255, 231). For example, Glen Lasson (R. 231) testified as follows:

“Q. Well during all those years did you ever know or hear when Spencer and McKean didn’t get enough water to produce a crop? A. They got as much water as anyone else did proportionately, I think.

“Q. That is what I mean. A. Now that is for the cultivated area.

“Q. Yes, I am referring now to the cultivated area. A. There were some years when possibly the Wimmer Field would get water when there would be no water for Frank Spencer and McKean, because I think it is a prior right.”

He goes on to state that the water was always administered simply by the agreement of the users (R. 232), that McKean and Spencer would simply come up and say that they needed water, that he would look at it and let him have what he judged was about one-fourth (R. 233), and that he would let them have about one-fourth of the water which accumulated at the Wimmer Dam, (R. 233). Bernard Lasson said the amount they got was one-fifth, (R. 303).

Arthur Lasson also said plaintiffs got their proportion of the water (R. 255) “the same proportion as we

would have I imagine after May 15.’’

Bernard Lasson testified that when Spencer and McKean came upstream for water there was never a time when he told them they could not have water, (R. 290); they looked at the stream and if plaintiffs did not have their share he would release water to them, (R. 301, 305, 306).

Because all of these parties or their predecessors were parties to the suit in 1894 which resulted in the Smith Decree, (R. 21-24) it was freely admitted by all concerned that they have been using the waters in question since at least that date. The defendants consistently testified that except during extreme drouth periods the parties have been able to raise good crops. For example, Arthur Lasson testified: (R. 257)

“Q. You know very well that they (plaintiffs) raised just about as good a crops as you did?

A. Yes sir.

“Q. And as your brothers did on their irrigated lands? A. That’s right.”

Mr. Lasson also said that plaintiffs came up and got the water sometimes and sometimes Bernard Lasson turned it down; that he felt that plaintiffs were entitled to the water, and that “we don’t deny they are entitled to the water,” (R. 257).

Glen Lasson (R. 286) testified that the plaintiffs’ crops generally were about as good as the Lassons, that their crops “were about the same.”

Of course, the plaintiffs all likewise so testified; that



is, that they and their predecessors had lived on the lands since prior to the Smith Decree; that they until the last three or four years when this suit arose matured their crops about the same as have the defendants, (R. 54, 88, 112-114).

The defendants admit that plaintiffs have come upstream for water over the years; that they have never been refused water, and that defendants have never told the plaintiffs that defendants' rights were superior to plaintiffs. In this regard Glen Lasson said (R. 232) that the water was always handled by agreement of the users; that McKean and Spencer would come upstream for water, and that Lassons would let them have about one-fourth of the water accumulating at the Upper Wimmer Dam, (R. 233). Bernard said about one-fifth, (R. 303). Arthur Lasson testified that he has divided the water with McKean and Spencer from about May 15th forward to June 15th, when the water goes on turn with the Thistle Valley users, (R. 245). He testified that he had maintained a tight dam up until May 15th, and that after May 15th Spencer and McKean had the same proportionate amount of water as he did, (R. 255). Specifically he said:

“Q. Do you know about whether McKean generally had just about as good crops on his cultivated ground as your brothers and you had on yours up there? A. Most of the time, yes.

“Q. Did they have sufficient water generally when there was water available to the rest of you? A. They had the same proportion as we would have I imagine after the 15th of May.

“Q. Well, when did they have to water their grain in the spring? A. About the same time as we would have on ours.”

\* \* \*

“Q. Whenever they needed water on their grain they came up and got it? A. Came up where?

“Q. To wherever the water was. A. Well, if they had water in the ditch to water with they wouldn't come nowheres.” (R. 256)

\* \* \*

“Q. You know very well that they raised just about as good crops as you did? A. Yes sir.

“Q. And as your brothers did on their irrigated land? A. That's right.

“Q. Where did they get the water to do that? A. There was the return flow of this stream back into the creek until the 15th of May. Then we would make some division with them at the lower dam, the New House dam, until the 15th of June.

“Q. Did you make that division, or did they come up and get it? A. Well sometimes they came up and got it, but sometimes Bernard turned it down.

“Q. Felt as if they were entitled to the water? A. We don't deny they are entitled to the water.” (R. 257)

Bernard Lasson, who apparently did much of the dividing, testified (R. 272) that while the Lassons kept tight dams in the stream until May 15th, there was almost always enough water in the stream until that time to take care of the plaintiffs. (The trial court found there was enough to June 25, (R. 64-5).) He was explaining the manner in which the water was used and said:

“I would like to state that up until the 15th of

May generally there was plenty of water for us and them too, so that it was not necessary to interfere with the dams and let water down to them. At the time of the 15th of May we let them have some water if the water stream was down, *so that we didn't all have plenty or enough at that time* we figured on about one-fifth of the water going down to them between the 15th of May and the 15th of June. Of course, on the 15th of June, Indianola took the water and there was no water for anyone."

Bernard Lasson went on to say at pages 294 and 296 that while he claims the right to maintain a tight dam up until May 15th, that this claim was made in view of the fact that there is usually ample water for all of the parties until that date. He was asserting the "*claim*" that he could keep a tight dam even when the water was short. However, there is no testimony from him to the effect that he did so, and in explaining his claim he interrupted counsel twice to explain that usually there was no problem until the 15th of May, (R. 296), that there was plenty of water for everyone until then.

Mr. Lasson admits that historically he had never advised the plaintiffs about this claimed May 15th date and that he first made this claim to take all of the water, if necessary, until the 15th of May during the year 1954, when the parties were discussing a settlement of this matter. He also said that plaintiffs did not agree, (R. 297). He never in all of the time he operated his ranch turned Spencer or McKean down when they came upstream for the water (R. 301); that he gave them about one-fifth of the stream at the Upper Wimmer Dam, (R.

303). He reiterated at page 305 that he never refused their request for water and he again repeated that at Record 306 although at times when they looked at the stream it was concluded that they were getting their share.

It is inconceivable to us that for fifty years the plaintiffs could be coming upstream in the spring of the year when they got short of water that they would see the Lassons (respondents) and request that they be given some water; that during that fifty-year period they would never be refused water; that during the entire period the Lassons would never once assert a prior right or superior claim, and that the parties would not once mention or discuss the proposition that the Lassons had the right to maintain a tight dam and take all of the water until May 15th. The Lessons freely admit that when the water got short (and they say this would happen about May 15th) "*so that there was not enough for all of the parties,*" they would share the water with the plaintiffs. It is inconceivable that they would share the water when it was short, but would not pro-rate during high water prior to May 15th, (R. 272).

We submit that from the record it is conclusively shown that until about the 15th of May there was usually plenty of water for everyone. The trial court found that in normal years there is plenty until June 25, (Finding No. 9, P. 65). The parties would use the water which accumulated at their respective points of diversion, and each would generally have all he needed. This was true of the Indianola right also. As the stream receded and

there was not enough water for all to use all they needed, (R. 272) the plaintiffs would move upstream looking for water. They would meet the Lassons and request water, and in fifty years the Lassons did not refuse their request on a single occasion, (R. 305, 306). They would all look at the stream and release one-fourth according to Glen Lason (R. 233) and one-fifth according to Bernard Lason, (R. 303). Thus, when the flow was high, all took what they needed. When water got short, the Lassons would share with the plaintiffs. This division of the waters was generally necessary after about May 15th. On June 15th, Indianola then took the water for ten days under the Smith Decree. The water was then turned back to all of the parties (both plaintiffs and defendants) for five days, (R. 236). During this five-day period the defendants did not contend for the right to irrigate their meadows, (R. 240). The dams were all taken out, (R. 239) the waters from the main tributary known as Panawats Slough were permitted to flow uninterruptedly and commingle with the waters of Thistle Creek, (R. 242), and the water during this five-day period was divided between the plaintiffs and the defendants for their cultivated grain and alfalfa lands on the basis of one-fourth to the plaintiffs and three-fourths to the defendants, (R. 239). Indianola then took the water for an additional ten days under the Smith Decree and then it again came back to all these parties (plaintiffs and defendants) for five more days, (R. 236-39). Again during these five days the water was divided one-fourth to the plaintiffs, and three-fourths to the defendants, and at that time Indianola took all the water under the

Smith Decree for the rest of the season and for all intents and purposes the irrigation season is over, (R. 241).

It is utterly fantastic for a court to hold that during extreme low water the plaintiffs were on an equal priority and pro-rated the water; but during high water the defendants have the superior right, and refused to pro-rate. This is exactly opposite to the way all water rights in the West become vested. During high water when there is enough to permit it, all users take what they want. When the water recedes, those with senior rights cut off those with junior rights, and during extreme low water only the primary users get water. If the District Court's judgment is permitted to stand in this case, plaintiffs and defendants are treated as having equal priority during extreme low water and during the period of intermittent flow, but they are placed in a junior position during high water prior to May 15th.

We respectfully submit that this court should set aside the District Court's findings and its decree to the extent that the same purport to grant to the defendants the senior and prior right to divert the waters of Thistle Creek and to take all of the water away from the plaintiffs, except return flow, until a rigid date of May 15th.

## II. THE COURT ERRED IN FAILING TO PLACE REASONABLE RESTRICTIONS ON THE USE OF WATER.

The court by its decree placed no restrictions whatsoever on the use of water by the defendants. They are

decreed to have the right to keep water-tight dams in Thistle Creek and to use all of the water diverted thereby, (R. 72). It is clear under the evidence that there are at times more than 20 c.f.s. of water in Thistle Creek<sup>3</sup> and the court so found in Finding No. 8, (R. 64).

Testimony was adduced by respondents to the effect that the stream varies from day to day and season to season, and that because of this fluctuation it is impractical to take the water on turns, (R. 275). There was also testimony adduced by the defendants to the effect that this is a closed basin, and that water diverted on to the Lasson (Respondents) lands will yield some return flow to the stream. The percentage of return flow varies according to the quantity of water diverted to the lands. Engineer Jacobs, a witness of the respondents, testified that the percentage of water returning to the stream would vary with the time of year and the discharge of the stream. The percentage would be as high as 60 per cent in the early part of the season and later on the return flow would probably go down to 30 per cent, (R. 362). Respondent Glen Lasson testified, (R. 330) that if the Lassons diverted 5 c.f.s. of water on to their meadows "that almost none of that would return" to the stream. He also testified that if 20 c.f.s. were diverted by the Lassons, 50 per cent would return.

Because of the fact that the lands of these users are in a closed basin, and surplus water diverted to the

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<sup>3</sup>Glen Lasson, an engineer, testified that five inches of water over their six foot weir would yield 7 c.f.s. of water, (R. 370). Arthur R. Lasson testified that at times the water flows 20 inches deep over that weir, making flows as high as 28 c.f.s., (R. 166).



land will return to the stream channel, and because the stream flow fluctuates from day to day and season to season, the District Court permitted the Lassons to maintain tight dams in the channel diverting all of the water on to their lands and leaving to the appellants only the return flow. We think that it is obvious from the manner in which the stream is administered when it is on turns with Indianola that it is not necessary to administer the stream in this fashion. During those times, the tight dams are taken out and the water is allowed to run directly down the channel to the appellants. All of the witnesses so testified, (R. 151, 219, 239). See for example the testimony of Glen Lasson, (R. 330). Engineer Jacob also testified that it would be practical to turn the stream down direct, (R. 372), and that letting part of the stream run directly down the channel would be one practical system for handling the water, (R. 375). We readily concede that a variable stream is difficult to administer. However, this court has recently held that this fact does not justify diverting more water onto the land than it can beneficially use.

The case is *McNaughton v. Eaton*, Case No. 8277. The first decision in this case is reported in 242 P. 2d 570 (Utah), and the last decision is not yet reported. The case is directly in point. In the *McNaughton* case the court expressly found that the flow of water in McNaughton Gulch varied from day to day and season to season; that at times the flow was negligible, and that at other times it flowed several c.f.s. The trial court in this case also so found, (R. 64).



The court also expressly found in the *McNaughton* case that there was a drain ditch across the entire lower end of McNaughton's field which returned the entire surplus flow from McNaughton's land directly back to the McNaughton Gulch at a point upstream from any of the other points of diversion. In this case the court also so found, (R. 65).

The trial court in the *McNaughton* case permitted McNaughton on the first trial to maintain tight dams in the McNaughton Gulch, and to divert all of the water accumulating therein on to his land. McNaughton argued on appeal that even though the quantity thus diverted exceeded a reasonable duty, nevertheless the drain ditch would return all surplus immediately back to the gulch so that no one was prejudiced. In the *McNaughton* case, only 66 acres were involved. The lands were situated on both sides of the gulch and, as here, there clearly was no other place for the water to go, except back to the gulch. The findings on a variable and fluctuating stream and on return flow were thus identical to the court's findings here.

On the first appeal, the Utah Supreme Court held that the trial court had erred in permitting McNaughton to take the water without reasonable limitations on his use. The case was remanded with instructions to the District Court to determine the extent of the restrictions. After the case was remanded the trial court placed restrictions on McNaughton, and McNaughton appealed. On the second appeal the Supreme Court held that because of the variable flow it was not reasonable to

restrict McNaughton to a maximum rate of flow of 2 c.f.s., for at times he might have to take the entire flow in order to get 15 acre feet of water for each ten-day turn. McNaughton also urged on the second appeal that because of the variable stream and the fact that surplus would return to the channel, the most practical method of use was to let him divert the entire stream and let the downstream users who held junior rights depend on the return flow. The Supreme Court refused to follow this theory and expressly affirmed the trial court in establishing a duty of 3.5 acre feet of water per acre of land per year during the 150 day irrigation season. It permitted McNaughton to divert, without restriction, water at a sufficient rate of flow to yield a total of fifteen acre feet of water during each ten-day period, but when he had diverted that quantity, the court required him to release the balance of the water downstream to the junior appropriators.

In this case we, of course, deny (as argued under Section I) that we are junior to the respondents. But as to this point that does not matter. Even if the respondents have a senior right, we think that under the holdings of the *McNaughton* case the trial court should have fixed the duty of water and restricted respondents to the quantity of water which their lands reasonably need. Water not needed by respondents should, in any event, be left in the channel to run downstream directly to appellants.

There apparently is no practical difficulty in the establishment of diversion dams which will divert to the

Lassons only the water they can beneficially use. We say this, because during the time when the water is on turn with the Indianola users, the appellants are permitted to get their water direct, and are not restricted to the use only of the return flow, (R. 151, 219, 239, 330). Also, Engineer Jacob, called by the respondents, testified that it would be practical to turn the stream down directly to appellants, and that this would be one practical system of irrigation, (R. 372, 375).

We, therefore, respectfully urge that without regard to what this court holds, as to the matters argued under Section I of this brief, the trial court committed prejudicial error in decreeing to the respondents the right to maintain tight dams in Thistle Creek and to divert all of the water from the channel without regard to the duty of water, or the needs of their land. We do not believe that it is possible to distinguish the *McNaughton* case from this one. The evidence in the *McNaughton* case overwhelmingly demonstrated that since 1888 McNaughton had maintained at least two, and at times three, tight dams across McNaughton Gulch, and that for more than 60 years he had diverted all of the water that accumulated therein. The evidence also overwhelmingly established the fact that McNaughton was the senior appropriator, that he had used the water prior to any use by the defendants. Yet, in the *McNaughton* case this court squarely held that McNaughton should only have been permitted to divert to his land a total of 3.5 acre feet of water per acre of land, per irrigation season. This was divided into 15 turns, and McNaughton

was restricted to fifteen acre feet of water each ten days for his 66 acres of land.

We submit that the trial court has erred in granting to the Lassons the right to maintain numerous tight dams diverting to their lands the total flow of Thistle Creek, and leaving to appellants only the return flow, and this is true without regard to whether appellants have an equal priority with respondents, (as appellants urge) or whether respondents have the senior right (as respondents contend).

### III. THE COURT ERRED IN DECREERING THAT THE DEFENDANTS COULD MAINTAIN A TIGHT DAM AT A POINT WHICH IS KNOWN AS THE UPPER WIMMER DAM UNTIL MAY 15th OF EACH YEAR.

This Point No. III is partially discussed above. The court has expressly decreed that the Lassons need not share nor pro-rate the water with the plaintiffs until May 15th. We do not believe that the evidence will justify such a finding, although at one point in his testimony Arthur Lasson so stated, (R. 245). We think that the testimony of the respondents on this point is inconsistent, and also contrary to experience of mankind. It is also in conflict with testimony of the plaintiffs, and the trial court should not have adopted it.

The trial court has found that until the 25th day of June of each year "there is during the normal year more than sufficient water to supply the needs of all the parties to this proceeding." (Finding No. 9, R. 65). If this finding is correct, then there has not been a need

for pro-rating the water until the water went on turns with Indianola during the normal water year. Nevertheless, Arthur Lasson testified that beginning the 15th day of May and continuing until the turn system with Indianola he has prorated with the plaintiffs, McKean and Spencer, (R. 233). Bernard Lasson also so testified, (R. 272). He also said (R. 273):

“At the time of the 15th of May we let them have some water if the stream was down, so that we didn't all have plenty or enough and at that time we figured on about one-fifth of the water going down to them between the 15th of May and the 15th of June. Of course, the 15th of June Indianola took the water and there was no water for anyone.”

If this May 15th date were a date that had become fixed through usage and custom as a rigid date, it would have been proper to base the decree on it. But at page 297 it was admitted by the respondents that this particular date had never even been discussed until the Fall of 1954. Bernard Lasson testified at page 296 of the Record that they claimed the right to take all of the water until May 15th, but he interrupted counsel to state, “I would like to add that there is usually ample for all the parties until that date.” He was asked when he first made his claim to the water until May 15th known to the plaintiffs and he answered, “First time we ever discussed proportionate water rights with them” in the Fall of 1954. He was then specifically asked if this May 15th date had ever been discussed before and he answered, “never discussed it with them before.”

“Q. Never had any occasion to discuss it? A. Yes, never have.

“Q. So that so far as you know they didn’t know that you asserted such a claim? A. I don’t know what they knew.”

The parties were having an argument about their water in the Fall of 1954, (R. 296). In endeavoring to settle this difference, Lasson, for the first time in nearly 60 years, asserted that plaintiffs could not pro-rate the water prior to May 15th. This is the first time that date ever came into discussion. Every party who testified admitted that when there was plenty of water in the stream during high water the plaintiffs simply diverted the water accumulating at their points of diversion, (R. 233). When the water got short, so that there was not enough for all, plaintiffs went upstream to get their water, (R. 94, 233, 255, 262, 288, 305). Every witness who testified about this subject matter readily so admitted.

Since all of the parties admit that the plaintiffs came upstream for water when there was not enough at their headgates, this we think must be accepted as an uncontradicted fact. To this must be added the additional admitted fact that in the sixty years while the parties were following such a practice the defendants never on even a single occasion verbally told the plaintiffs that they could not have water.

At page 290 Bernard Lasson testified that “there has never been a time, as I remember it, that I have told them they couldn’t have any” water. He was inter-



rupted by counsel and indicated he had not completed his answer, and he said:

“A. May I explain what I did do. I didn’t say anything only I would look at the water and see how it was.”

On re-direct examination he was again asked about when Spencer and McKean came up and asked for additional water. He said that he never did tell Spencer and McKean on those occasions that they didn’t have any right to any water and that the nature of the arrangement was that he would go and look at the water “and see how it was.” If it was between the 15th of May and the 15th of June “I figured they should have 1/5 of the water that hit the Upper Wimmer Dam,” and if they didn’t have that such, “in my estimation,” he turned it down to them. He said that they left it to him to tend the water and that if he didn’t turn enough down they would come up and complain, and “we would go through the same process again.” And they never objected to that method of operation, (R. 302).

He was asked again about their asking for water on re-cross, (R. 304). The witness said that it was not true, that he let Spencer and McKean “have what water they wanted,” but (R. 305)

“I don’t know that I ever denied them any water, but there is lots of times that I didn’t turn them down any. I simply said ‘I will go look at the stream.’

“Q. Well, did you ever say to either one of them, ‘Now you can have this much, but you can’t have this much’, and point out just how much they

could have? A. No I don't think I ever did." (R. 305).

From the above testimony only one conclusion is possible. The parties during high water got all of the water they needed at their respective dams. When the stream receded, Spencer and McKean would go upstream and usually see one of the Lassons. They would tell him that they needed some water. The parties would go look at the stream and if plaintiff's share of the stream was going on down to Spencer and McKean they would not make any adjustments to the dam. If they were not getting their water, then the dam would be changed so as to pro-rate the water between them, and this method would continue until the water went on turns with Indianola.

It simply is contrary to the common experience of man that for 60 years the Lassons could have maintained a senior position on the stream without on a single occasion having asserted it. It is from the Lassons' own testimony that we are told that the claiming of a prior right before May 15th was made for the first time during the trial, (R. 292). It is also from the Lassons that we learn that Spencer and McKean came up for the water "when there was not enough for all of us," (R. 273), and that Lassons never on a single occasion in sixty years told them they could not have any water, (R. 305); that they would go and look at the stream "and see how it was." If plaintiffs were getting their share, Lasson did not turn any more down; if not he would release some. If he did not release enough,



they would again complain and "we would go through the process again," (R. 302).

Again and again Lassons said that they never verbally told plaintiffs they couldn't have any water, but at times after looking at the stream and seeing the amount already going down to them they made the decision not to turn any more down.

If during the past sixty years Lassons had the prior right, certainly on at least one occasion when Spencer and McKean came upstream looking for water Lassons would have asserted that prior right. It is certain that in sixty years the season did not always break on exactly May 15th, and that McKean and Spencer would have been short of water prior to that time. Still the Lassons never said in effect, "It is not May 15th yet, and you can't have any water."

The court would have to find from the testimony of the defendants that they did pro-rate the water with the plaintiffs when plaintiffs requested water, and, of course, the plaintiffs all testified that such was the case. When this is added to the fact that the defendants have said that the plaintiffs got proportionaely as much water as did the defendant (R. 231, 255); that year in and year out they raised crops about the same as did the defendants, (R. 257, 261, 286), the decree of the court giving to the defendants the primary right on the stream simply can not stand.

#### IV. THE COURT ERRED IN GIVING TO SPENCER AND McKEAN ONLY ONE-FIFTH OF THE WATER ACCUMULATING IN THEIR DAM.

The Lassons do not themselves concur in their testimony that the plaintiffs are only entitled to  $1/5$  of the water reaching the Upper Wimmer Dam. Arthur Lasson testified that he did not deny that plaintiffs were entitled to the water, (R. 262). He also testified that they were entitled to about  $1/4$  of the water reaching the Upper Wimmer Dam, (R. 232-3). Bernard Lasson also recognized the right of the plaintiffs to receive water accumulating at the Upper Wimmer Dam after May 15th. But he said they were only entitled to  $1/5$  of the water, (R. 273, 292). Since the testimony in this regard was coming from the defendants personally, there is no justification for the trial court accepting the testimony of the defendants most favorable to them. One of the defendants said " $1/4$ " and one said " $1/5$ ". On an acreage basis the division would have been about 25 per cent to plaintiffs and 75 per cent to Lassons.

It should also be noted that after the water goes on turns with Indianola, the division is  $1/4$  to the plaintiffs and  $3/4$  to the defendants, and no explanation is given by Bernard Lasson as to why the change. As noted, Arthur Lasson testified that plaintiffs were entitled to  $1/4$  of the water when about May 15th the water receded to a point where there was not enough for all the parties. In an equity case where the court can review the fact as well as the law, we submit that the evidence in this regard strongly preponderates in favor of the plaintiffs in the following particulars:

(a) The defendants admit that after May 15th at least, the plaintiffs got their proportionate share of

the water, (R. 232, 255).

(b) Defendants admit that plaintiffs' crops were just as good as the defendants, year in and year out, (R. 257, 261, 286).

(c) One of the Lassons testified that plaintiffs got 1/4 of the water after May 15th, (R. 232-3).

(d) All of the defendants admit that after the water goes on turn with Indianola, the plaintiffs' share is 1/4 of all the water, (R. 51, 239).

(e) On an acreage basis, the pro-ration between the plaintiffs and the defendants would give to the plaintiffs 1/4 of all the water.

(f) The plaintiffs all say that they always got their proportionate share until the last three or four years.

Against all of this we have the testimony of Bernard Lasso that he would estimate the stream released to the plaintiffs as being about 1/5 of the stream. He confesses that the 1/5 figure was never discussed until the day of the trial; that he and the plaintiffs merely looked at the stream and estimated whether or not they had their fair share of the water. If they did, the dam was not disturbed. If they did not he released more, but in determining whether or not they had their fair share, he confesses that this figure of 1/5 was never discussed. We respectfully submit that the finding of the court and decree in this regard is against the preponderance of the evidence.

We also wish to expressly note that in this regard the Lassons are only testifying concerning the amount of water which comes to the Upper Wimmer Dam. We contend that we are entitled to approximately 25 per cent of all the water available to the canyon users on an acreage basis, and this includes Thistle Creek and all of its tributaries, including Panawats Slough. When the water goes on turn with Indianola, the dams are taken out of Panawats Slough and it is permitted to commingle with the waters of Thistle Creek, and the plaintiffs share in the entire combined stream on a 1/4 basis. Unquestionably proper credit should be given to the defendants for such return flow as there is, but the court should finally decree to the plaintiffs the right to receive 25 per cent of all the water, and not merely the water which reaches the Upper Wimmer Dam. We reach the 25 per cent figure by looking at the acreage as found by the court. The Lassons have 476 acres, and the plaintiffs, including Mr. Siler, whose interest is common with the plaintiffs, have 151.57 acres, and this in round figures is 25 per cent of the total.

#### V. THE COURT SHOULD HAVE DETERMINED THE VARIOUS ELEMENTS OF THE DOCTRINE OF APPROPRIATION.

This point likewise has been covered in the general discussion above. The water is certainly governed by the doctrine of appropriation and the decree purporting to adjudicate the rights of the parties to use the public water should have been complete. We again cite the case of *McNaughton v. Eaton*, supra, as authority for the proposition that the facts here do not justify com-

pletely ignoring all of the elements of the appropriation doctrine. Certainly the court should have determined the reasonable needs of the lands of the parties, the length of the irrigation season, the points of diversion, and other similar matters. The desirability of a decree being definite and certain with regard to the elements of appropriation can hardly be denied. See *Sharp v. Whitmore*, 51 Utah 14, 168 Pac. 273; *Francis v. Roberts*, 73 Utah 98, 272 Pac. 633; *Elmer v. McCune*, 29 Utah 320, 81 Pac. 159, and *McNaughton v. Eaton*, *supra*.

## VI. IT WAS ERRONEOUS TO AWARD THE COSTS AGAINST THE PLAINTIFFS.

Under the Utah rules, costs need not automatically be awarded against the losing party, but rather the court has discretion to otherwise provide. See Rule 54(d), where in Explanatory it is stated that the rule leaves the matter of costs “somewhat to the discretion of the court, and to that extent is inconsistent with our present statutory provisions.” Here it is obvious that the parties have needed a court decree to define their rights. They had met in the Fall of 1954 to attempt to resolve their differences and when they could not do so the decision was reached to let the court decide their dispute, (R. 296-7). A decree is just as necessary and desirable from the standpoint of the defendants as it is from the standpoint of the plaintiffs. Of course, if the judgment and decree are set aside under one of the points argued above, the judgment for costs should fail anyway, but we think where parties come into court for the purpose of getting a decree defining with definite-

ness what their water rights are, the court ought in the exercise of its discretion to assess the costs among the parties on some equitable basis, such as requiring each party to stand his own costs and apportioning the costs on the basis of the quantity of water awarded.

Respectfully submitted,

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