

1956

George C. Goodwin v. Joseph M. Tracy : Brief of Appellant

Utah Supreme Court

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In the Supreme Court of the State of Utah

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IN THE MATTER OF THE
GENERAL DETERMINATION
OF RIGHTS TO THE USE OF
ALL WATER, BOTH SURFACE
AND UNDERGROUND, IN THE
ESCALANTE VALLEY DRAIN-
AGE AREA,

In re: Water User's Claim No. 452,
Underground Water Claim No.
17173, R. L. Bradshaw Claimant,
George C. Goodwin, Successor.
GEORGE C. GOODWIN,
Plaintiff and Appellant,

Clerk, Supreme Court, Utah

8567
No. ~~2118~~

vs.

JOSEPH M. TRACY, State Engi-
neer of the State of Utah,
Defendant and Respondent.

APPELLANT'S BRIEF

ON APPEAL FROM THE DISTRICT COURT OF
THE FIFTH JUDICIAL DISTRICT OF THE STATE
OF UTAH, IN AND FOR IRON COUNTY
HON. WILL L. HOYT, *Judge*

SAM CLINE,
Attorney for Appellant

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In re: Water User's Claim No. 452,
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17173, R. L. Bradshaw Claimant,
George C. Goodwin, Successor.
GEORGE C. GOODWIN,
Plaintiff and Appellant,

No. 2118

vs.

JOSEPH M. TRACY, State Engi-
neer of the State of Utah,
Defendant and Respondent.

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This cause is before this Court as an intermediate appeal or an appeal from an interlocutory order made and entered by the Fifth Judicial District Court of the State of Utah, in and for Iron County, involving a well

and underground water right of the appellant, George C. Goodwin.

As indicated by the title of the case, a proceeding was originally initiated as a general adjudication of all of the rights to the use of water in the Escalante Valley Drainage Area in Utah, which includes the Milford underground water basin immediately south of the City of Milford in Beaver County.

After complying with the provisions of *Chapter 4 of Title 73, Utah Code Annotated, 1953*, and after completion of a hydrographic survey of the area, the State Engineer on or about the 1st day of April, 1949, served and filed in the District Court of Iron County his Proposed Determination of Water Rights in said area.

In the due course of the said general adjudication proceedings, and on or about the 22nd day of October, 1943, one R. L. Bradshaw, predecessor in interest to the within claimant, George C. Goodwin, filed a statement of water user's claim as provided by statute, and said statement of claim was by the Clerk of the District Court assigned a number, to-wit, No. 542; and thereafter by the said proposed determination the claim was wholly disallowed by the State Engineer. Thereupon the claimant filed his objection and protest to the disallowance of his well and underground water right claiming that he was the owner of an eighty-acre tract of land; that in 1934 his predecessor in interest commenced to drill a well on

the premises and during said year completed the work; that the well was drilled at considerable expense and for the purpose of irrigating the eighty-acre tract and that the capacity of the well was and still is one second-foot of water; that during the year 1936 claimant's predecessor in interest placed under cultivation 35 acres of said land and thereafter placed under cultivation up to sixty acres, all of which cultivated land was continuously since its planting been irrigated with the water from said well; that the water user's claim No. 542, claimed an intention to irrigate the maximum acreage that could be irrigated from the well within the eighty-acre tract.

Thereafter two hearings were duly held by the District Court on the said protest, after which the Court made and entered its findings of fact and conclusions of law and an interlocutory order (Tr. 47-52) granting to the claimant and appellant herein the right to irrigate 28 acres within said eighty-acre tract with the water from said well, and denying the claim and protest except to the extent of the irrigation right for 28 acres.

A petition for interlocutory appeal from said order was filed in accordance with and as provided by the Utah Rules of Civil Procedure and which appeal was duly allowed and granted by order of this Court (Tr. 54-62).

STATEMENT OF FACTS

In the following statement of facts it is not deemed

necessary to re-state those which are incorporated in the foregoing statement of the case, many of which are taken almost bodily from the trial court's findings and conclusions (Tr. 47-50).

While the State Engineer and the claimant and appellant herein differ as to the correctness of the court's conclusions of law and the interlocutory order based thereon, there is little, if any, controversy concerning the facts.

The said findings of fact, the pertinent portions of which, insofar as this controversy is concerned, are briefly as follows:

1. That water user's claim No. 542 was based upon underground water claim No. 17173 which claimed a right to irrigate from a well drilled during the year 1934, with a flow of 1.0 c.f.s. of water and the claim stated an intention to irrigate the maximum acreage that could be irrigated from the said well within the $W\frac{1}{2}SW\frac{1}{4}$ of Sec. 17, Twp. 29 South, R. 10 West, S.L.M. (Tr. 48).

2. That there was no irrigation from the well until after March 13, 1936 (the petition for intermediate appeal, in paragraph 2 on page 4 thereof, through inadvertence and error, states that date as March 13, 1956); that by the year 1942, 28 acres of land had been brought under cultivation; that by 1946, 45 acres of land were being irrigated; that during the years 1952, 1953 and 1954 claimant had placed 70 acres under cultivation (Tr. 48).

3. That on Oct. 19, 1935, Richard L. Bradshaw filed in the office of the State Engineer Application No. 11870 to appropriate 1.0 c.f.s. from the same well to irrigate the said 80-acre tract; that on June 5, 1936, applicant was advised by the State Engineer that since his well was then drilled and his application filed he would be free to use the water subject to prior rights and that his application would be held, unadvertised, but in good standing pending further clarification of underground water conditions in the area; that on Feb. 17, 1938, applicant was advised by the State Engineer to file an underground water claim and pursuant to such advice the claimant did file Underground Water Claim No. 17173; that on May 6th, 1938, the claimant was advised by the State Engineer that, if his application No. 11870 were advertised, it would then be the duty of the State Engineer to reject the same for the reason that there was no unappropriated water, but he was also advised that if he chose to pay the advertising fee, following rejection of the application he could take an appeal to the district court; and on this same date and in the same letter he was advised that if he failed to pay the advertising fee by July 5th, 1938, the application would lapse; and that the fee was not paid and on July 5, 1938, the application was endorsed "lapsed" (Tr. 48-49).

4. That during the period between May 6, 1938, and the year 1944, the then State Engineer was of the opinion that there was no unappropriated water in that part of

the Escalante Valley underground water basin referred to as the Milford area. That beginning with the year 1944 the then State Engineer became of the opinion that some additional applications might be allowed and that thereafter many applications were filed and a considerable number have been approved, subject to existing rights in each case (Tr. 49).

5. That between the year 1935 and the present time, it has been the practice of the State Engineer to allow extensions of time for completing appropriations of water, provided that requests for such extensions are timely filed; that during the war period and particularly from 1942 to and including 1945, extensions were granted upon application without requiring proof of previous work done (Tr. 49).

6. That extensions of time up to 20 years have been granted in some cases by the State Engineer for completion of appropriations (Tr. 49).

From the foregoing findings of fact the trial court concluded:

1. That the drilling of the well in the year 1934 initiated a new right to appropriate water from the underground basin with a priority of November, 1934 (Tr. 49).

2. That the right to use water for irrigation from the well should be limited to the maximum acreage brought under irrigation and irrigated within a reason-

able time after drilling of the well; and that the acreage found to have been brought under irrigation up to the date of the investigation by the State Engineer in the year 1942, to-wit, 28 acres, should be considered the maximum acreage for which the right should now be allowed (Tr. 49-50).

3. That a new and distinct right was initiated by the filing of Application No. 11870 on Oct. 19, 1935, but that the right was lost when the application lapsed on July 5, 1938, for failure to pay the advertising fee as required by the notice sent by the State Engineer to the applicant; that the announced policy of the State Engineer to reject applications based upon a bona fide belief that the underground water basin was fully developed and appropriated constituted no justification for reinstating an application rejected or threatened with rejection, because of that belief, even though such belief later be considered to have been erroneous (Tr. 50).

Thereupon the interlocutory order appealed from was made and entered by the trial court (Tr. 51-52) allowing claimant the right to irrigate 28 acres and disallowing any greater acreage.

The appellant, George C. Goodwin, is a dairy farmer and the owner of the 80-acre tract hereinbefore described. He acquired the title to the land by making final payment thereon in 1951, but purchased the land under contract in 1946. When he first went into posses-

sion under his contract in 1946 there was 45 acres under cultivation and being irrigated. He had rented the premises from Richard L. Bradshaw for three years prior to making the purchase in 1946 and from that knowledge knew that the ground had been irrigated for some years prior to that time (Tr. 2-3).

At the time of the first hearing before the trial court in June of 1954, Goodwin was farming and irrigating about 70 acres (Tr. 4).

In 1946 45 acres were being irrigated with a little acreage added from time to time and for three years prior to 1954 he was irrigating up to 70 acres (Tr. 4).

The land has no practical value or use without water with which to irrigate it, and the well furnishes sufficient water for the irrigation of the 70 acres (Tr. 5).

Since the well was first drilled it has never been deepened or enlarged (Tr. 6).

When Goodwin purchased the land from Bradshaw he was under the belief that he was securing a water right for the 80-acre tract. He had farmed and lived in that vicinity practically all of his life and during that time acquired a knowledge of the reasonable value of land such as his without any water right. Without such water right land is worth about \$20.00 per acre, and is practically useless except for a little grazing. With the water the land is worth \$75.00 per acre, and he paid Bradshaw

\$75.00 per acre supposedly for a water right for the full acreage. Since the purchase Goodwin made expenditures on the acres for which water was disallowed, including levelling, plowing, clearing, planting, fencing, ditches and laterals, etc., in the value of \$50.00 per acre, and if not permitted to irrigate the land such improvements are entirely wasted (Tr. 21-22).

At the time of making the purchase from Bradshaw in 1946 Goodwin had not received any information from anyone to the effect that he would not be permitted to use the well to its full capacity for the irrigation of as many acres as might be served from the well up to the 80-acre tract, and he believed he was receiving a water right for 80 acres (Tr. 23-24). The proposed determination disallowing the claim made by Bradshaw was *first filed in the District Court and served upon water users in April of 1949* (Tr. 13).

Goodwin knew that the area had been closed for further applications in 1946, but he knew this well had been put down in 1935 (actually in 1934) prior to the passing of the act in 1935 placing underground water under the jurisdiction of the State Engineer. There was 25 to 30 acres under cultivation and being irrigated when he purchased the land (Tr. 23-24).

The topographical map prepared by the State Engineer showing the irrigated portions of lands in Section

17, Twp. 28 South, Range 10 West, S.L.M., as of the year 1942, shows 52 acres then under cultivation in the east half and the west half of the southwest quarter of the section, of which 24 acres was in the east half (not involved in this cause) and the remainder of 28 acres in the west half. The irrigation of the acreage in the west half of the southwest quarter of Section 17 was from the well covered by underground water claim No. 17173 and Application No. 11870 (Tr. 6-10). As a matter of fact the well described in the application is the same well as the one described in the underground water claim.

Certain interrogatories were propounded to the State Engineer and were answered orally at the second hearing on Jan. 18, 1956. For the sake of brevity appellant will not set forth verbatim the interrogatories and answers but will briefly summarize the same in narrative form.

The State Engineer made his proposed determination in this proceeding about April 1st, 1949, and mailed copies of the same to various water users immediately following (Tr. 12-13).

On May 6th, 1938, in re Application No. 11870, the State Engineer advised Bradshaw by letter that he would reject the application, but if the claimant chose to pay the advertising fee of \$15.00 he could do so and take his appeal to the District Court (Tr. 13, Ex. 5).

After May 6th, 1938, in the Milford Valley underground water basin and particularly in the portion known as the segregated area (in the vicinity of the Goodwin property) in which applications are not now and for several years last past have not been approved, six applications for an aggregate of 7.7 second feet of water were approved, these applications being filed between 1935 and January 1st, 1944 (Tr. 13-14).

That no requests for applications for extension of time to submit final proof on any approved applications for underground waters for irrigation purposes in any part of Beaver County have ever been rejected (Tr. 14-15).

One application made on January 10th, 1936, No. 11917, for 1.1 second feet to irrigate 80 acres is still in good standing in the office of the State Engineer and kept in good standing by requests for extensions of time to submit final proof which have been granted by the State Engineer (Tr. 15). Final proof is submitted when the applicant has drilled his well and put all of the acreage called for by the application under irrigation and by a beneficial use of the water.

Up to April 30th, 1952, 35 approved applications for irrigation purposes, involving an aggregate of 116.75 second feet of water which is an average of 3.3 second feet per well, and which applications were filed during

the years 1936 to April 30th, 1952, are still in good standing in the office of the State Engineer and kept in such good standing by requests for extensions of time to submit final proof and which requests have been granted by the State Engineer (Tr. 15-16).

Since April 30th, 1952, no applications have been approved for drilling wells in what is called the segregated area where the well right of Goodwin is located (Tr. 19-20).

The records of the office of the State Engineer disclose that immediately following the enactment of the underground water law in 1935, applications to appropriate water came so rapidly that the office concluded the Milford underground water basin was becoming overdeveloped (Tr. 16-17); that this idea was communicated to the area as indicated by the letter (Tr. 17) and the then State Engineer on a few occasions sent letters to various applicants similar to the letter which went to Bradshaw, with the idea that the area was small enough so that such letters were pretty widely communicated in a short time (Tr. 17). Within about three years thereafter the State Engineer became convinced that there was some development that could be made in the Milford area, which was likely communicated to the land owners there early in the year 1944, because starting the latter part of 1944 and until April 30, 1952, there was filed in Beaver County for underground water purposes in excess of

200 applications, including some stockwatering and some mining use applications; That 75% of these applications are in the Milford underground water basin (Tr. 17-18). (See Exhibits 1 to 5 incl.).

STATEMENT OF ERRORS RELIED ON

1. The error relied on by the applicant for a reversal of the interlocutory order of the trial court can be stated as follows:

The Court erred in making its interlocutory order limiting the claimant, George C. Goodwin, to the use of water from the well therein described for the irrigation of only 28 acres of land within the premises therein described, and in not awarding said claimant the right to irrigate 70 acres of land within said premises with the water from said well—for the following reasons:

(a) That as a matter of law the right of this claimant and his predecessor in interest to use water from the well drilled and completed in November, 1934, should not be limited to the acreage put under cultivation prior to 1942, since the underground water statutes which became effective March 8th, 1935 (Chapter 104, Session Laws of Utah, 1935, Amending Section 100-1-4, Revised Statutes of Utah, 1933) and (Chapter 195, Session Laws of Utah, 1935, Amending Section 100-1-1, Revised Statutes of Utah, 1933) did not in any manner place any limitation of time

within which the full beneficial use of such a well must be accomplished, but on the contrary specifically provided the non-user statute should not apply to underground water.

(b) That in any event the mere fact that the State Engineer surveyed the acreage under cultivation in 1942 in the general adjudication proceedings should not be considered as the maximum period when a well owner might use the full capacity of his well for the irrigation of the maximum acreage intended to be irrigated or susceptible of irrigation; and this is true particularly when the evidence shows without contradiction that after the passage of the underground water act in March, 1935, when appropriation of underground water was required, the State Engineer allowed many well owners extensions of time to submit final proof of maximum beneficial use to as long as 20 years; and particularly when the evidence shows without contradiction that from the years 1942 to and including 1945, extensions were granted by the State Engineer without requiring proof of previous work done, and that in not one single instance, at least in Beaver County, was an application for extension of time between March of 1935 and up to the time of the last hearing concerning the within claim on the 18th of January, 1956, denied by the State Engineer, thus indicating that the State Engineer considered as long as 20 years to be a reasonable time within which to make full

beneficial use of a well right.

(c) That there is no statutory authority for the State Engineer or the Court to limit the acreage which may be irrigated from a well drilled prior to March, 1935, to anything less than that intended when the well was drilled; and particularly when the full capacity of the well was pumped and used prior to the making of the proposed determination even though the acreage so irrigated was less than intended when the well was drilled. In other words, the Legislature not having placed any limitation upon the time when wells drilled prior to March, 1935, could be brought to a full beneficial use, there is no statutory authority for the State Engineer or the Court to adopt some arbitrary time limitation which is considerably less than the time granted by the State Engineer for wells drilled after March, 1935.

(d) That when a new and distinct right was initiated by the filing of Application No. 11870 on Oct. 19th, 1935, for the irrigation of the same acreage as intended to be irrigated under the underground water claim, such right should not be held to be lost for failure to pay an advertising fee when the State Engineer advised the applicant the application would be rejected in any event, and when the applicant was advised to file an underground water claim and that he had a good right for the irrigation of his 80-acre tract because his well was drilled prior to 1935. (Under his application the applicant could have

applied for and been allowed up to at least 20 years to bring his acreage under said well up to 80 acres).

ARGUMENT

1 a-b-c

The problem before this Court is summarized in the statement of errors relied on under No. 1, and the reasons for contending that the court erred in making its interlocutory order are more fully set forth under the sub-heads of a, b, c, and d.

Since the subheads a, b, and c are closely related, appellant will, for the purpose of the argument, treat them together.

The primary question is: Did the trial court err in making its interlocutory order limiting the claimant to the use of water from the well therein described for the irrigation of only 28 acres and in not awarding claimant the right to irrigate 70 acres of such land?

Prior to the enactment of the so-called underground water statute which was enacted by the Legislature of 1935 and became effective during March of 1935 (Ch. 105, Session Laws of 1935, amending Sec. 100-1-1 R.S.U. 1933, and Ch. 104, Session Laws of 1935, amending Sec. 100-1-4 R.S.U. 1933) any person desiring to use underground water for irrigation, stockwatering, domestic or any

other purpose, could drill a well in any size, at any location within his premises, or at any depth he desired, without applying to the State Engineer for permission so to do, and without the necessity of filing an application to appropriate the water or thereafter make final proof upon showing of beneficial use; and could, as he desired, use a minimum amount of water from said well for a minimum acreage or as large an acreage as the full capacity of the well would permit; or he could from time to time increase his acreage, cease using water for any period of time he desired and resume use of the well at will.

There is little, if any, use in this appellant tracing the history of water rights in Utah or in pointing out wherein the Session Laws of Utah, 1935, brought underground water under the jurisdiction of the State Engineer and the reasons therefor, since Justice Wade has very fully and ably discussed these matters in the case of *Hanson vs. Salt Lake City*, 115 Utah 404, 205 Pac. 2nd 255. It is sufficient to point out that the decision clearly states (page 260 of Vol. 205 Pac. 2nd):

“As previously pointed out prior to the Wrathall case, the courts, legislature, bar and the public in general apparently understood that the law of 1903 prescribing the procedure to be followed in order to acquire the right to use unappropriated public water *did not apply to underground water basins*. * * * It is clear that the legislature did not

intend, at the time of these enactments (statutes of 1903) that these statutory provisions should govern the appropriation of underground waters such as are involved in this case because it did not understand that such waters could be appropriated. So it made no provision for such a procedure. Later this court held that such waters were subject to appropriation and then the legislature amended the provisions so as to provide for the appropriation of such waters. In the meantime many persons had appropriated such waters to a beneficial use, and no doubt such persons would have complied with the statutory regulations had the legislature made it clear that such was its intention. It would be a great injustice to hold that these people acquired no right to the use of such waters by appropriating them to a beneficial use because they had failed to comply with statutory regulations which the legislature at that time did not intend that they should comply with and the courts had held were not applicable to their case. No one has been harmed by their failure to comply with these regulations.'''

In the Hanson case, *supra*, the early well in question had been drilled many years before and the water had been for many years used in the irrigation of premises; and therefore this Court stated that the use of underground water could be acquired prior to the 1935 enactments by merely diverting such waters from their natural source and placing them to a beneficial use, and acquired a vested right to the use of the waters flowing from a well to the extent that the well owner had placed them to a beneficial use. The question of whether a well drilled

in 1934 and completed before the irrigation season of 1935 had commenced initiated a right which could thereafter be put to a beneficial use, was not before the court. So far as we have been able to determine, the question now presented to this Court for determination is one of first impression in Utah. In the Hanson case, therefore, the use of the language "to the extent that he placed them (waters) to a beneficial use" was applicable to the situation then before the court, and certainly was not intended to mean that a well right initiated by drilling the well too late in 1934 to put the same to beneficial use before the 1935 enactment precluded the owner from thereafter putting the water to a beneficial use.

The Hanson case has been cited with approval and referred to by this Court in subsequent cases, all of which state emphatically "until 1935 the decisions of this court treated the waters of artesian basins as percolating waters and as such the ownership went with the owner of the ground and were not considered to be subject to appropriation." See:

Riordan vs. Westwood, 115 Utah 215, 203 Pac. 2nd 922, 927;

Bullock vs. Tracy, 4 Utah 2nd 370, 204 Pac. 2nd 707;

Fairfield Irr. Co. vs Carson, — Utah —, 247 Pac. 2nd 1004.

That the legislature by the 1935 enactment did not

intend to limit or restrict the right of a well owner to hereafter bring his well into full beneficial use at such time as he desired or his financial ability might permit, is manifested by its provision 100-5-12 of Ch. 105, Session Laws of Utah, 1935, which provided for the filing of a claim to underground waters, and the amendment to Section 100-1-4 R.S.U. 1933, as found in Chapter 104 of the Session Laws of Utah, 1935. Section 100-1-4 R.S.U. 1933 provided that when an appropriator or his successor abandons or ceases to use water for a period of five years the right ceases. The amended section provides for a method whereby the non-use of water beyond the five-year period could be obtained by filing with the State Engineer an application for an extension of time to use the water for a period of up to five years, and for successive extensions thereafter. The amendment then provided that *“nothing in this section shall apply to underground or subterranean water.”*

When the legislature failed to provide in the 1935 enactment some provision limiting the use of water from a well drilled prior to such enactment to any definite amount or setting a time limit within which the full beneficial use of water must be accomplished, but on the contrary specifically provided that the non-use statute was not applicable to underground or subterranean water, it was equivalent to saying that any person who had a well right prior to the 1935 enactment could take such time as

he desired to put the water to a full beneficial use since he could not lose his right by non-user. Had the legislature intended otherwise, it would have been a very simple matter to have provided in substance as follows :

“Provided, however, that concerning wells heretofore drilled, the owner thereof shall put the same to such beneficial use as he desires at any time within one year (or two years or three years) from the effective date of this act, or within such further time as shall be granted by the state engineer upon application as now provided concerning water acquired by applications to appropriate water.”

In that manner, every user of water from wells previously drilled at large expense and with the expectation of irrigating the full acreage up to the capacity of the well, would have been under notice that he must accomplish such purpose within a given time, and would have had the same opportunity for extensions of time as those who theretofore and thereafter acquired a right through formal applications to appropriate.

It will be observed that when the 1935 enactment was passed and approved and became effective, Section 100-3-16, R.S.U. 1933, was on the statute books (carried forward as 73-3-16 U.C.A. 1953). That section provided “sixty days before the date set for the proof of appropriation to be made the state engineer shall notify the applicant by registered mail when proof of completion of works and application of the water to a beneficial use

will be due.” Section 100-3-18 R.S.U. 1933, as amended by Chapter 130 Session Laws of Utah, 1937 (now 73-3-18 U.C.A. 1953) provided that within sixty days after written notice of the lapsing of an application the state engineer may, upon a showing of reasonable cause, reinstate the application with the date of priority changed to the date of reinstatement, except upon a showing of fraud or mistake of the state engineer.

It thus appears that when an application to appropriate water is filed the applicant is given a certain length of time within which to show a beneficial use. Then *before* he loses his right he is given a notice of at least sixty days (and such notice must be by registered mail) to complete his full beneficial use. Then even after his application has lapsed for failure to show a full beneficial use he is given a second sixty-day notice of the lapsing of his application, and he can have a reinstatement with the only penalty attached that he loses his priority but not his water right. The purpose of the notices is to afford the applicant at least sixty days within which to complete his beneficial use or to apply for extension of time, which extensions have never been refused.

Surely the legislature did not intend, when it passed the 1935 enactment, to place the well owner who already had initiated his right by the drilling of a well in a position to lose his right without notice, and give to the well

owner who thereafter acquired a right a complete protection against such loss.

The trial court found that Claim No. 542 was based upon underground water claim No. 17173 which claimed a right to irrigate from a well drilled during the year 1934 with a flow of 1.0 c.f.s. and that the claim *stated an intention* to irrigate the maximum acreage that could be irrigated from the well within the 80-acre tract (Tr. 48); that there was no irrigation from the well until after March 13, 1936 (no doubt meaning March 13, 1935, which was the effective date of Chapter 105, Session Laws of Utah, 1935); that by the year 1942 28 acres of land had been brought under cultivation; by 1946 45 acres of land were being irrigated; and during the years 1952, 1953 and 1954 claimant had placed 70 acres under cultivation (Tr. 48). The State Engineer has never contended and does not now contend that there was ever an intentional abandonment of any right.

The trial court concluded correctly that the drilling of the well in the year 1934 initiated a right to appropriate water from the underground basin tapped by the well and that the right has a priority of November, 1934, when the well was completed (Tr. 49).

However, the trial court concluded that the right to use water for irrigation from this well should be limited to the maximum acreage brought under irrigation and

irrigated within a reasonable time after the drilling of the well, and that the acreage found to have been brought under irrigation up to the date of investigation by the state engineer in the year 1942, to-wit, 28 acres, should be considered the maximum acreage for which the right should now be allowed (Tr. 49-50). This conclusion, we earnestly urge, is erroneous.

This for a number of reasons. First, as heretofore pointed out, the underground water statutes of 1935 did not in any manner fix a specific time limitation within which the full beneficial use of such a well must be accomplished, but on the contrary in every way by implication and otherwise, left such time open, excepting as provided by the abandonment statute in which intent is the controlling element or factor, and as to non-user specifically provided the non-user statute should not apply to underground water. We have heretofore discussed this legal aspect of the problem. Secondly, that in any event the mere fact that the State Engineer surveyed the acreage under cultivation in 1942 in the general adjudication proceedings should not be considered as the maximum period when a well owner might use the full capacity of his well for the irrigation of the maximum acreage intended to be irrigated or susceptible of irrigation.

We cannot believe that the expeditious or dilatory action of the State Engineer in making surveys prelimi-

nary to an underground water adjudication can shorten or enlarge the time within which the appellant can make use of the full capacity of the well.

The trial court concluded that the year 1942 should be the outside period for determining the reasonable time after the drilling of the well because that was the year the state engineer conducted his investigation or survey as to what acreage was then under irrigation. If such yardstick can be adopted, then if the State Engineer had made his survey in 1935 or 1936, there would have been very little, if any, acreage under cultivation. Contrariwise, had the State Engineer made his survey in 1946 he would have found 45 acres under cultivation. We cannot reconcile the court's conclusion which makes the year 1942 the determining factor concerning the right to irrigate acreage, in the light of its finding that the underground water claim filed showed a flow of 1.0 second feet of water and stated an intention to irrigate the maximum acreage that could be irrigated from the well within the 80-acre tract.

The record stands uncontradicted that after the well was first drilled it was never deepened or enlarged, and has the same capacity now as then (Tr. 5-6).

The trial court's conclusion that a reasonable time within which to bring land under cultivation should be limited to the year 1942 flies in the face of the State En-

gineer's conception of a reasonable time within which the full beneficial use of underground water may be accomplished; and is contrary to the practice adopted by the State Engineer in granting extensions of time to make final proof and show the full beneficial use of water. The court's conclusion arbitrarily limits the time within which this claimant could get his land under cultivation because it was drilled prior to the effective date of the 1935 enactment, whereas the State Engineer has permitted well owners who appropriated water after such effective date, up until the present time, a matter of some twenty years to submit final proof.

The State Engineer admitted in open court at the second and last hearing that no requests for applications for extension of time to submit final proof on any approved applications for underground waters for irrigation purposes in any part of Beaver County have ever been rejected; and that at least one application made on Jan. 10, 1936, No. 11917, for 1.1 second feet to irrigate 80 acres, is still in good standing in his office and kept so by requests for extensions of time to submit final proof (Tr. 15). It was admitted also that up to April 30th, 1952, thirty-five approved applications for irrigation wells were filed in his office commencing with the year 1936 and up to 1952, and are still in good standing and kept so by requests for extensions of time (Findings Nos. 9 and 10, Tr. 49). Until final proof is submitted every

applicant is given the opportunity of bringing into cultivation and irrigation the full acreage applied for, thus getting the maximum beneficial use of the water applied for.

The State Engineer is permitted by statute to extend the time when the construction of the works and application of water to beneficial use may be prosecuted to completion to a period up to *fifty years* from the date of approval of the application. Extensions up to 14 years shall be granted upon a showing of reasonable diligence by affidavit. After 14 years extensions shall be granted by publication of notice and a hearing (Sec. 73-3-12 U.C.A. 1953). This section has been in effect during all of the times prior to 1935 and ever since.

The question may then be asked—by what logic, under what statute, by what authority, either found in textbooks or court decision, should this claimant be treated with greater severity, with less consideration, and in a manner utterly different than one who in 1935 or 1936 filed an application to appropriate water and has been given up to at least 20 years to construct his works and apply the water to a full beneficial use?

Simply put, the legislature not having placed any limitation upon the time when wells drilled prior to March, 1935, could be brought to a full beneficial use, there is no statutory authority for the State Engineer or

the court to adopt some arbitrary time limitation which is considerably less than the time limit granted by the State Engineer for wells drilled after March, 1935. It would seem that as a matter of law and fair dealing, equity and good conscience, a water user's right, being a property right, under a changed condition and a new statute should not be placed in jeopardy and finally taken away and lost to him, without affording him some opportunity to protect himself against such changed condition.

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At the hearing it developed that on Oct. 19, 1935, Richard L. Bradshaw, who was then the owner of the 80-acre tract involved in this controversy, and upon which tract he had the preceding fall drilled the well in question, filed in the office of the State Engineer application No. 11870 to appropriate 1.0 c.f.s. of water from the same well to irrigate some 80 acres (Tr. 40-42, Ex. 1-a).

At the time of the hearing Bradshaw was not a resident of Utah and was not available as a witness to state why he filed the application (Tr. 2). However, an underground water claim was prepared and acknowledged on March 13, 1936, and it sets forth the reason why the application to appropriate water from the well was filed (Tr. 39, Ex. 1). It claims 450 gallons (one second foot) of water from the well for the irrigation of the W¹/₂SW¹/₄ Sec. 17, Twp. 28 S., R. 10 W., S.L.M. It states:

This well was drilled before the present law governing underground water was passed (passed). This claim filled (filed) to establish dates and details of well, when drilled and completed. Under separate blank have made application to appropriate water from this well.

The claim was filed March 22nd, 1938, and the reason for the delay in filing is not known, and certainly is not important. It would seem that for some reason or another Bradshaw was advised that he should appropriate one second foot of water from the well because he had not used the water prior to the effective date of the 1935 underground water law for the irrigation of any of his premises.

It appears from Exhibits 3, 4 and 5 (Tr. 2, 4, 5, 6), that after filing the application to appropriate the one second foot of water Bradshaw was advised by the State Engineer to withdraw his application since the well was drilled in 1934 and that he had a good right under an underground water claim and should file such claim. He was also advised by the State Engineer that if he proceeded under his application it would be rejected for the reason there was no unappropriated water but if he chose to pay the advertising fee the application would be advertised and then rejected and he could take an appeal to the district court. Accordingly the fee was not paid and the application lapsed. Finding No. 6 of the court's findings fairly reflects the factual situation as

shown by the exhibits.

If the State Engineer believed at that time there was no unappropriated water and stated explicitly that he would reject the application if and when advertised, what reason had Bradshaw to believe he could prevail in an appeal to the district court. And if he was advised that his underground water claim protected his well right, why should he pay out the advertising fee merely to have his application rejected, and to what purpose should he appeal the rejection and set up his judgment against that of the State Engineer. He did the only logical thing he, as a farmer and layman could be expected to do. He did not pay the advertising fee under the circumstances and followed the advice of the State Engineer in filing and standing upon his underground water claim.

Finding No. 8 (Tr. 49) is to the effect that during the period from May 6, 1938 and the year 1944 the then State Engineer was of the opinion there was no unappropriated water in the Milford area. But beginning with 1944 his successor in office became of the opinion that some additional applications might be allowed and thereafter many applications were filed and a considerable number have been approved, subject to existing rights in each case.

The court's conclusion No. 3 (Tr. 50) seems to disregard every rule of equity and fairness and disregards

the fact that a farmer with little technical knowledge of water conditions and the law pertaining to the same, accepted the statements of the State Engineer as correct, relied thereon and following his advice—all to his detriment and damage. The conclusion is that “the announced policy of the State Engineer to reject applications based upon a bona fide belief that the underground water basin was fully developed and appropriated constitutes no justification for reinstating an application rejected or threatened with rejection, because of that belief, even though such belief might later be considered to have been erroneous.” This does not square with equitable principles.

It was urged upon the trial court that under the application to appropriate water Bradshaw and his successor would have been advised from time to time that his final proof would be due, and he could have applied for and been allowed up to at least twenty years to bring his acreage under said well up to the 70 acres now being irrigated. It was urged also that the application was permitted to lapse because of the urging of the State Engineer that the application be withdrawn and that claimant stand on his underground water claim as being a better right. It was urged that in the event the court should feel the acreage should be limited to 28 acres upon other legal principles, as concluded by the court, the court could and should make the claimant whole by direct-

ing the State Engineer to reinstate the application and permit claimant to proceed thereunder. It would seem that a person ought not be misled by a state officer charged with the technical knowledge of his office, and should not be penalized because of faith in the knowledge of such state officer. We know of no rule of law preventing a state officer or the court from rectifying a mistake and relieving a person of a damage caused through such mistake.

CONCLUSION

The claimant Goodwin is a small dairy farmer who is required to make his living from a small farm. When he purchased the 80-acre tract he was under the belief that he was securing a water right for the entire tract. The land is worth about \$20.00 per acre without water and useless except for a little grazing. He paid \$75.00 an acre for the land supposing he had a full water right. It was worth such amount without additional improvements based on the underground water claim which up to the time of purchase had never been disallowed nor had claimant had any notice or intimation that it would be disallowed. He paid out an additional \$50.00 per acre since the purchase for plowing, clearing, planting, fencing, constructing ditches and laterals, etc. Without being permitted to irrigate the land these improvements would have no value (Tr. 21-22). The land was bought

under a contract in 1946 and he finished paying for it in 1951. When Goodwin took over the land and went into possession in 1946 there was 45 acres under cultivation and which had been under cultivation for a few years prior (Tr. 3). For the last three years, 1951, 1952 and 1953, he has had 70 acres under cultivation and irrigation (Tr. 4).

Should the judgment of the trial court be sustained, it will have the result of depriving a farmer of the benefit of an investment of several thousands of dollars in the purchase price of land and improvements because the land will have little, if any, value; and it will have the further result of jeopardizing even the value of the 28 acres for irrigation which the trial court awarded claimant, since he cannot make a living on such a small acreage and he cannot afford in any event to maintain an expensive pumping plant and equipment with the incidental power bill and other expenses on what can be produced on 28 acres.

Plaintiff and claimant herein respectfully submits that the interlocutory order of the trial court should be reversed and set aside and plaintiff should be awarded the right to irrigate 70 acres under his underground water claim, or in the alternative, the State Engineer should be directed to reinstate the application to appropriate water No. 11870 with the right to submit final

proof thereunder as in such cases made and provided.

Respectfully submitted,

SAM CLINE,

Attorney for Plaintiff and Appellant.