

1989

The Estate of Paul Steed through Mary Kazan v. The New Escalante Water Co. : Reply to Response to Petition for Rehearing

Utah Supreme Court

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Steven E. Clyde; Clyde, Pratt & Snow; Attorneys for Defendant .

L.R. Gardiner; Bullock & Gardiner; Richard Ruckenbrod; Attorneys for Plaintiff.

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IN THE SUPREME COURT OF UTAH

THE ESTATE OF PAUL STEED,
through its administratrix,
MARY KAZAN,

Plaintiff-Appellant,

vs.

THE NEW ESCALANTE IRRIGATION
COMPANY,

Defendant-Respondent.

Case No. 890426

Appeal from Judgment and Decree of the Sixth Judicial
District Court dated August 18, 1989, the Honorable Don V. Tibbs,
presiding.

RESPONSE TO RESPONDENT'S REPLY TO
APPELLANT'S PETITION FOR REHEARING

L. R. GARDINER, JR. (1148)
GARDINER & HINTZE
525 East 100 South, Suite 200
Salt Lake City, Utah 84102
Telephone: (801) 355-7900

RICHARD RUCKENBROD (#A2818)
170 South Main Street, Suite 1210
Salt Lake City, Utah 84101
Telephone: (801) 328-4647

Attorneys for Plaintiff-Appellant

STEVEN E. CLYDE
CLYDE, PRATT & SNOW
77 West 200 South, Suite 200
Salt Lake City, Utah 84101
Telephone: (801) 322-2516

Attorneys for Defendant-Respondent

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Salt Lake City, Utah 84101
Telephone: (801) 328-4647

Attorneys for Plaintiff-Appellant

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77 West 200 South, Suite 200
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RESPONSE TO RESPONDENT'S REPLY TO
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Defendant has improperly and contrary to the record in this case made the assertion at page 9 of its reply to the petition for rehearing, that the plaintiff's statements that the water saved by changing to sprinkler irrigation was used by defendant to expand the acreage traditionally irrigated by it is not supported by the evidence or the Court's findings. This statement by the defendant is absolutely wrong. Defendant cites no record reference for this and the record is directly contrary. Here is the record:

Finding of Fact No 8 states:

A pressurized sprinkler irrigation system is more efficient than a than a flood-type irrigation system, in the sense that a smaller amount of water distributed by sprinklers is required to irrigate the same amount of land irrigated by flood-type irrigation.

The defendant's own answers to interrogatories, which were placed in evidence (Ex. 95) also specifically confirm this

statement. The interrogatories and pertinent part of the answers are:

Interrogatory 6(d)iii (page 8 of Ex 95):

For each aerial photograph used by him [defendant's expert witness Duberow], state the location and number of acres shown on the photograph which he has determined to have been irrigated by water supplied by you, the location and number of acres he had determined to have been irrigated by other sources (identifying the other source), and the location and number of acres he has determined to have been dry farmed.

ANSWER: The 1952 photograph indicates 2,118 acres were being irrigated. The 1984 photograph indicates 2,778 acres were being irrigated. . . .

Interrogatory No. 13, p. 11 of Ex 95:

State whether you contend that your change to a sprinkler irrigation system in 1983 enabled your shareholders to make a more efficient use of the water you supplied, and if so, explain how this greater efficiency was achieved and how much more efficient the new sprinkler irrigation system is over the old system.

ANSWER: Yes. . . . By using the sprinkling system, more of the decreed land can be irrigated effectively than could be done by flood type irrigation. We believe that the improved irrigation efficiency is approximately 25%.

This is confirmed by the testimony of both defendant's and plaintiff's expert witnesses. Defendant's expert (Mr. Duberow) testified that in 1952 defendant's shareholders were irrigating 2,118.1 acres (R.793) and that in 1987 they were irrigating 2,778.81 acres (R. 775). Plaintiff's expert (Professor Allen) testified that between 1976 and 1985 an additional 704 acres were irrigated (R. 661-662). The 1952 and 1976 dates were used by these

witnesses to correlate to the available evidence (aerial photographs and maps) to show the extent of actual acres irrigated prior to installation of the sprinkler system in 1983.

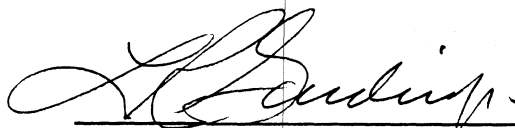
Thus, the plaintiff's statement that defendant has expanded the acres actually irrigated is absolutely true and fully supported by the record. It is irrelevant whether the increased acreage is within decreed acres. All of those acres were not being watered before the sprinkler system was installed. The water saved by this system is being used to irrigate acres not previously irrigated. The additional acres irrigated by the defendant irrigation company comes at the expense of decrease in acres that can be irrigated by the users on Alvey Wash. There can be no argument with that. The argument and issue in this case is whether a small part of the water saved by the change to the new system should be used to equitably allocate this saving to all concerned.

While it is perhaps unusual to file a response to a petition for rehearing, it is here appropriate to correct this erroneous statement on this important point.

Dated this 11 day of November, 1992.

Respectfully submitted,

GARDINER & HINTZE



L. R. GARDINER, JR.
Attorney for Appellant

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing Response to Respondent's Reply to Appellant's Petition for Rehearing was mailed, postage prepaid, to Steven E. Clyde, 77 West 200 South, Suite 200, Salt Lake City, Utah 84101, on this 12th day of November, 1992.



A handwritten signature in cursive script, appearing to read "L. B. Bending", is written over a solid horizontal line.