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Current Creek Irrigation Co. et al v. Orville Andrews et al : Brief of Respondent State Engineer

Utah Supreme Court

E. R. Callister; Robert B. Porter; Attorneys for Respondent;

In the
Supreme Court of the State of Utah

District Court of Juab County—Civil No. 3763,
CURRENT CREEK IRRIGATION CO., a corporation,
Plaintiff and Appellant,
vs.
ORVIL ANDREWS, et al.,
Defendants and Appellants.

District Court of Juab County—Civil No. 3768,
ORVIL ANDREWS, et al.,
Plaintiffs and Appellants,
vs.
CURRENT CREEK IRRIGATION CO., a corporation, et al.,
Defendants and Appellants.

District Court of Juab County—Civil No. 3770,
GERALD FOWKES, et al.,
Plaintiffs, Respondents and Cross Appellants,
vs.
CURRENT CREEK IRRIGATION CO., a corporation, et al.,
Defendants and Appellants.

Case No. 8745

BRIEF OF RESPONDENT STATE ENGINEER

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ARROW PRESS, SALT LAKE

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STATEMENT OF FACTS

We believe that, in the whole, each of the parties to this proceeding have fairly stated the facts and we have

no desire to belabor them further. In our argument, we may refer to certain of the facts as proved by way of emphasis and do not feel that any further statement is necessary here.

Each of the parties have adopted the nomenclature as set forth in paragraph two of the Amended Findings of Fact and we will use the same designations in this brief.

STATEMENT OF POINTS

POINT I.

THAT THERE IS UNAPPROPRIATED WATER IN THE SOURCE AND THAT THE ACTION OF THE STATE ENGINEER IN APPROVING BOTH THE APPLICATION AND THE CHANGE APPLICATION AS FILED BY THE IRRIGATION COMPANY WAS PROPER.

POINT II.

THAT THE APPLICATION OF SECTION 73-3-23, UTAH CODE ANNOTATED, 1953, WHICH IS REFERRED TO BY THE VARIOUS PARTIES AS THE REPLACEMENT STATUTE, SHOULD BE RESTRICTED TO THE FACTS OF THE SPECIFIC CASE.

ARGUMENT

POINT I.

THAT THERE IS UNAPPROPRIATED WATER IN THE SOURCE AND THAT THE ACTION

OF THE STATE ENGINEER IN APPROVING BOTH THE APPLICATION AND THE CHANGE APPLICATION AS FILED BY THE IRRIGATION COMPANY WAS PROPER.

The State of Utah is a respondent herein in two capacities, namely, as the Utah Water and Power Board and as the Utah State Engineer. The Water and Power Board assisted Current Creek Irrigation Company financially in drilling three of the five wells and under the statute took title to all five wells. The Irrigation Company by contract is purchasing these wells by repayment of the sums advanced by the Board and by the specific terms of that contract is required to warrant and defend these rights to the use of water. The Board is, therefore, only a nominal party and must depend upon the Irrigation Company to properly defend and uphold its rights.

The State Engineer is, however, a much more interested party and is the representative of the public in this litigation. Because of the ramifications that a decision in this case will cause, we believe it only proper to take part in the appeal and argument.

The trial court upheld the State Engineer's decision in approving the change application as filed by the Irrigation Company. That decision is now attacked only by Andrews but we are firmly of the opinion that it was proper and fully in accord with the law and the fact. On pages 24 to 26 of his brief, Andrews complains that no finding was made on this issue and that the evidence required a finding that the change impaired vested rights.

We submit that paragraph 13 of the Amended Findings was a proper and sufficient finding and that it can properly be quoted here: "That there is unappropriated water within the area and that the action of the State Engineer in approving the Andrews' Applications Nos. 21443 and 21444 and the Irrigation Company's Applications Nos. 22760 and A-2786 was proper and that the statutory requirements of approval were complied with by the applicants in each instance".

As this court has often remarked, and on occasions too numerous to require citation, the one problem that faces the State Engineer in the approval of change applications is that he must find a reasonable probability that the change may be made without impairment of existing rights. A careful analysis of the record and of the briefs reveals that most of the argument is devoted to reasons that would pertain to the approval of the original application; but the time to appeal from that approval has long since passed and we are here concerned only with the approval of a change application.

That there is unappropriated water in this source does not to us appear subject to question and we contend that all of the parties have more or less admitted this fact. The original applications were all, therefore, properly approved and the record is devoid of any evidence that would show that the change application requires a different consideration and action. The original application sought to secure 18.0 second feet of water from three wells. The change application proposes to secure this same 18.0 second feet

from five wells. The evidence reveals that, without pumping, the wells are flowing 2.74 second feet of water.

POINT II.

THAT THE APPLICATION OF SECTION 73-3-23, UTAH CODE ANNOTATED, 1953, WHICH IS REFERRED TO BY THE VARIOUS PARTIES AS THE REPLACEMENT STATUTE, SHOULD BE RESTRICTED TO THE FACTS OF THE SPECIFIC CASE.

We believe that we must approach a consideration of this problem of artesian pressure and of the right to replacement from a somewhat different angle. It is our position, and we urge its consideration by this Court, that the arguments presented as to artesian pressure do not raise a legal question but rather a factual one. From the facts in each case, the trial court, and this Court on appeal, must determine whether the means of diversion is reasonable and within the requirements of the most beneficial use of water or whether the particular means of diversion is antiquated and unreasonable and results in a waste of water. Based upon such a finding and in the exercise of a sound discretion, the trial court must invoke and apply the replacement statute and either deny the replacement of water or order its replacement and determine how much and upon what terms.

With respect to the consideration of the problem under the specific facts of the instant case, we believe our position should be neutral. Our interest lies in the application

of the principles and of this Court's decision to other areas of this state, and to that end we recognize a duty to inform the Court briefly as to these other areas, as to their problems and of the probable effect upon them if replacement of water is ordered or if it is denied.

One of the areas that may specifically be affected is that generally referred to as the Escalante Valley Drainage Area. This area includes two well developed underground water districts at Milford and at Enterprise. In both areas there are rights to use substantial amounts of water based upon use by diligence prior to the year 1935. In addition, there are rights based upon certificates issued by our office and permission has been granted to many others to proceed and this permission can ripen into a right when proper proof is made. And finally each district is the subject of many additional applications which may never be approved because of the present scarcity of water in the underground water basin.

The instant case concerns a group of small flowing wells, all sufficiently concentrated in area that they may be considered as one unit, another group of five flowing wells drilled by the Irrigation Company and again these are contiguous and should be considered as a second unit, and the two applications filed by Andrews for pump wells one of which has been drilled and pumped. There is a somewhat complicated fact situation involved here but it was possible to say that the Andrews pump well and the Irrigation Company's flowing wells did interfere with the group of small flowing wells. To be able to find as a fact the exact amount of interference by each well, the degree of

that interference and the relative value to be assigned to a priority was impossible even in the present instance.

The comparison between the instant case, involving a possible three units, and an area similar to the Escalante Valley Drainage Area, involving wells that are numbered by the hundreds, needs only to be mentioned to present the problem with which this office is faced under the replacement statute and we urge that this Court should give consideration to this problem.

The Escalante Valley area is primarily concerned with the problem of a small pump well versus larger pump wells. In the Salt Lake Valley, we have pump wells versus pump wells accentuated by small flowing wells numbered in the thousands. The case of *Hanson* v. *Salt Lake City,* 115 Utah 404, 205 P. 2d 255, is only illustrative as far as the facts are concerned of many hundred comparative situations, none exactly the same but all having common problems.

There are other areas of the state where other and different situations exist and there may well be areas with which we are now entirely unfamiliar that may in the future present dissimilar problems. As an example, we are acquainted with an area in an adjoining state where an efficient operation has been successful under controlled subirrigation with limited or no surface irrigation involved. Such a water use is undoubtedly a beneficial one and the effect upon such a use should be well considered in connection with the principles that must be announced in deciding the instant case.

CONCLUSION

We are of the opinion and urge upon this Court that there are two important legal questions to be decided insofar as the State Engineer is concerned. The first concerns the approval of the change application and we respectfully submit that all of the evidence requires and compels the conclusion that there was a reasonable probability that the change could be made without impairment of the rights of others and compels the further conclusion that the change as made and in and of itself did not impair any existing rights.

The second question involves the replacement statute and its application by the trial court. Other counsel have presented forceful arguments both pro and con as to the proper application of this statute and as to whether the trial court gave proper consideration to other elements such as relative priorities of the rights of the parties and the burden of proof and other items. As we have said before, and as we reiterate here, all of these matters require a most careful analysis in determining whether replacement is to be ordered or not, and, if it is so ordered, in determining the nature and the extent and the conditions of replacement. We would also hope that this Court could generally define the State Engineer's position and the scope of his authority in his future dealings with this problem.

The State Engineer has an obligation to the citizens of the state to fully develop and secure from all of the waters in the state the most beneficial use possible, including the most effective management of ground water basins.

To obtain this result, each area of the state requires careful study, investigation and planning; and the same type of development will not be the most beneficial in all areas. One element to be considered in planning and developing ground water resources is artesian pressure. Its existence or non-existence and whether its use as a means of diversion is reasonable or unreasonable is a factual question and each case should be decided upon the specific facts there presented.

Respectfully submitted,

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