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Current Creek Irrigation Co. et al v. Orville Andrews et al : Reply Brief of Appellant Andrews

Utah Supreme Court

E. J. Skeen; Carvel Mattsson; Attorneys for Appellant;

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 Respondent,
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.,
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Case No.
8745

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GERALD FOWKES, et al.,
Plaintiffs, Respondents and Cross Appellants,
vs.
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This reply brief will be confined to an analysis of, and comment on, the argument of the Irrigation Company respecting the following points:

1. The contract between Andrews' predecessor and the Irrigation Company established legal rights and obligations which cannot be ignored.

2. The Irrigation Company had the burden of proof of non-interference.

3. The approval of the change application will impair the Andrews' water rights.

The arguments of the Irrigation Company and the State Engineer on other points are fully covered by the Andrews brief heretofore filed.

1. THE CONTRACT CANNOT BE IGNORED.

The Irrigation Company, after having entered the Andrews land and drilled flowing wells thereon which admittedly contributed to the over draft on the underground water basin involved in these suits, and thus having enjoyed the benefit of the contract dated November 2, 1953 (Deft. Ex. 1), now seeks to avoid the obligation imposed by the contract. It argues in substance and effect that, (1) the Andrews did not give timely notice to the Company to appoint an engineer to meet with the engineer appointed by the Andrews, (2) the Andrews participated in the Fowkes case and urged the court to determine the issue of damages, (3) because the court decided that the Andrews had failed to show the "net effect of the interference caused to his flowing wells and spring by the Irrigation Company," an impossibility, they had no rights under the

contract and (4) by some process of reasoning not disclosed in the brief, that because the Andrews filed a cross-claim seeking damages in the Fowkes case, this fact relieved the Irrigation Company of the burden of proof as plaintiff in the case of Irrigation Company v. Andrews, No. 3763.

An examination of the Andrews answer in case No. 3763 will disclose that the Andrews pleaded the contract dated November 2, 1953, and alleged that before the institution of the suit, they orally and in writing, offered to select an engineer to meet with the Irrigation Company engineer, as provided by contract. See affirmative answer in file No. 3763 at page 26. The following statement appears in the Irrigation Company brief in Civil Nos. 3763 and 3768:

> "It was after all this that the Andrews group for the first time, on November 21st made a demand by letter for the Irrigation Company to appoint an engineer."

The impression from the statement that no demand was made prior to the date given above is contrary to the evidence. Orvil Andrews met with officers and agents of the Irrigation Company in July, 1956, and requested the company to comply with the contract by naming an engineer. (See reporter's transcript of hearing on August 20, 1956, pp. 9-19.) This was refused. It is apparent from the record that timely request to comply with the contract was made, and that the Irrigation Company argument on this point is entirely without merit.

The contract, by its terms, gave the Irrigation Company the right to enter upon the Andrews land and to drill and maintain certain wells upon very definite conditions imposed for the protection of the Andrews wells. The Irrigation Com-

pany has had the benefits of the contract and now insists that it should be disregarded because of the Andrews participation in a suit filed for the adjudication of water rights, for injunctive relief, and for damages. There is nothing in the record to support this argument. The Andrews have never agreed to a modification of the contract to substitute the court for the engineers. *The contract does not provide, as apparently is argued by the Irrigation Company, that the Andrews must show the "net effect" of the interference by the Company wells—a practical impossibility.* To hold that the parties agreed to any such thing would be to make a contract for them.

There is no intimation in the Irrigation Company brief that the contract is void, and indeed there can be none. It was the plain duty of the court to make a finding that the contract was valid, and determined the rights of the parties. The record clearly discloses interference. The contract should have been recognized and enforced by the court.

2. THE BURDEN OF PROOF OF NON-INTERFERENCE WAS ON THE IRRIGATION COMPANY.

The Irrigation Company, in its brief in Civil Nos. 3763 and 3768, states on page 8 that the matter of burden of proof of non-interference will be discussed as a part of the Fowkes case. It is argued under the heading of the Fowkes case that Andrews are plaintiffs seeking damages and obviously have the burden of proof. This maneuver was made to avoid this issue. In case No. 3763 the Irrigation Company was the plaintiff, and as pointed out in our opening brief had the burden of proof.

The Irrigation Company states that the cases cited in our opening brief are not in point because they involved "developed water." The factual situation is the same in our case as in the case of Bastian v. Nebeker, 49 Utah 390, 163 P. 1092, cited in our opening brief, and we submit that the decision in that case is sound and is controlling here. The latest comer should, in all good conscience, be required to show that he is not interfering with the rights of prior appropriators. This principle is fundamental with regard to surface water, and under the statutes, both surface and underground waters are treated the same. If the rule were otherwise, "a late comer" like the Irrigation Company could, as in this case, make a contract to drill with the understanding that upon interference the wells would be closed; and then when the wells are drilled, could say, as the Irrigation Company has said in substance:

> *You can get no relief from my destruction of your springs and wells unless you can prove the "net effect" of my wells on your wells.*

This, the Company and the trial court says, cannot be shown unless you can prove the "net effect" of each well on every other well. This cannot be done; certainly not under the conditions prevailing in this case. If the Irrigation Company prevails the courts must countenance getting water by trick. The prior rights of the Andrews are protected by contract and by the law of water rights, and it was error for the trial court to ignore both.

3. THE APPROVAL OF THE CHANGE APPLICATION WILL IMPAIR THE ANDREWS' WATER RIGHTS.

It is stated in the brief of the respondent Irrigation Company on pages 10 and 11, with reference to case No. 3768, as follows:

> "From reading appellants' brief it appears that the complaint being made is not that we are taking water from the new point of diversion, but rather they complain because we are taking water from the hydrologic basin at all. There is no evidence referred to by appellants, nor is there anything in the record even tending to show that the taking of a given quantity of water in Section 8 will cause more or less interference than the taking of the same quantity of water in Sections 17 or 18."

The Irrigation Company analysis of our opening brief ignores our plain words. On page 27, we said:

> "In this case, the evidence is conclusive that the flowing of the three wells drilled in 1954 caused the Andrews spring and flowing wells to cease flowing during the winter of 1954-1955, and the spring and early summer of 1955, before the operation of the Andrews pump well began (July 23, 1955, see R. 249-264). The reason the two wells drilled in 1951 by the Irrigation Company did not adversely affect the Andrews springs and wells, and the wells drilled in 1954 at the new point of diversion did affect them, is apparent from a study of the testimony of David I. Gardner and George H. Hanson, and from the maps in evidence. Wells Nos. 3 and 4 are nearer the mountains than the original wells, they are in coarser water bearing material and they are closer to the Andrews springs and wells. See (R. 40, 162, 170-175) for testimony supporting the above assertion."

The Irrigation Company argument is based entirely upon theory and supposition. Our argument is based upon what actually happened to the Andrews wells before and after the wells were drilled at the new points of diversion. There could be no clearer case of impairment by a change of point of diversion.

There is no finding of fact by the trial court on the material issue of impairment by the change; the only issue in the case. The statement in finding No. 13 that the action of the state engineer in approving the Irrigation Company's application "was proper" is a conclusion, and is admitted by the respondent to be a conclusion. Therefore, there was no finding of fact on the issue, and the decree is wholly without support.

Respectfully submitted,

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