

1958

Orem City Corp. v. Joseph M. Tracey et al : Brief of Appellants

Utah Supreme Court

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In the Supreme Court of the
State of Utah

MAY 3 1958

OREM CITY CORPORATION, a municipal corporation,

Plaintiff and Appellant,
vs.

JOSEPH M. TRACY, as State Engineer of the State of Utah, UNITED STATES OF AMERICA, through its Bureau of Reclamation, Department of the Interior, PROVO RIVER WATER USERS ASSOCIATION, PROVO BENCH CANAL & IRRIGATION COMPANY, a corporation, TIMPANOGOS CANAL COMPANY, a corporation, UPPER EAST UNION IRRIGATION COMPANY, a corporation, WEST UNION CANAL COMPANY, a corporation, EAST RIVER BOTTOM WATER COMPANY, a corporation, FORT FIELD IRRIGATION COMPANY, a corporation, LITTLE DRY CREEK IRRIGATION COMPANY, or SPRING CREEK COMPANY, an unincorporated association, PROVO CITY, a municipal corporation, and LAKE BOTTOM CANAL COMPANY, a corporation,

Defendants and Respondents.

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Clerk, Supreme Court, Utah

CASE
NO. 8767

BRIEF OF APPELLANTS

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In the Supreme Court of the State of Utah

OREM CITY CORPORATION, a municipal
corporation,

Plaintif and Appellant,
vs.

JOSEPH M. TRACY, as State Engineer of
the State of Utah, UNITED STATES OF
AMERICA, through its Bureau of Reclama-
tion, Department of the Interior, PROVO
RIVER WATER USERS ASSOCIATION,
PROVO BENCH CANAL & IRRIGATION
COMPANY, a corporation, TIMPANOGOS
CANAL COMPANY, a corporation, UPPER
EAST UNION IRRIGATION COMPANY, a
corporation, WEST UNION CANAL COM-
PANY, a corporation, EAST RIVER BOT-
TOM WATER COMPANY, a corporation,
FORT FIELD IRRIGATION COMPANY, a
corporation, LITTLE DRY CREEK IRRI-
GATION COMPANY, or SPRING CREEK
COMPANY, an unincorporated association,
PROVO CITY, a municipal corporation, and
LAKE BOTTOM CANAL COMPANY, a cor-
poration,

Defendants and Respondents.

**CASE
NO. 8767**

BRIEF OF APPELLANTS

STATEMENT OF FACTS

That on the 22nd day of May, 1956, the appellant, Orem City Corporation, a municipal corporation, filed application Number 28194 in the office of the State Engineer of the State of Utah, under which it made application to appropriate 9.33 second feet of water for municipal purposes.

That on date of January 15, 1957, Joseph M. Tracy, State Engineer of the State of Utah, duly addressed a letter to the appellant, and in said letter rejected the application of the appellant to appropriate the water referred to under application Number 28194.

That on March 15, 1957, appellant filed complaint on appeal in the matter of application Number 28194.

Prior to the filing of application Number 28194, a reservoir called Deer Creek Reservoir was constructed across Provo River in Provo Canyon, Wasatch County, State of Utah; that waters were impounded in said reservoir resulting in great saving of water from evaporation and transpiration; that the appellant's application to appropriate water was based on the appropriation of water which had been saved from evaporation as a result of said Deer Creek Reservoir.

The defendants filed a motion to dismiss appellant's complaint on the grounds that it failed to state a claim or any facts upon which relief could be granted.

On date of October 2, 1957, the Fourth Judicial District Court in and for Utah County, State of Utah, by Judge Maurice Harding, dismissed appellant's complaint with prejudice on the grounds that it failed to state a claim upon which relief could be granted, and that the action of the State Engineer rejecting application Number 28194 was proper and entitled to affirmance by the Court.

APPELLANT'S POINTS**POINT I**

THE COURT ERRED IN HOLDING THAT COMPLAINT OF APPELLANT FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

POINT II

THE COURT ERRED IN AFFIRMING THE REJECTION OF THE APPLICATION NUMBER 28194 BY THE STATE ENGINEER OF THE STATE OF UTAH.

ARGUMENT**POINT I**

THE COURT ERRED IN HOLDING THAT COMPLAINT OF APPELLANT FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED.

To state a cause of action appellant, aside from alleging jurisdictional facts, must allege that there was water to be appropriated. This it did in paragraphs twelve and thirteen (R. 7). It must allege that an application to appropriate was filed with the Utah State Engineer. This the appellant did in paragraph eight of the complaint (R. 6). It must be alleged that the application was rejected. This the appellant did in paragraph eleven of the complaint (R. 7). Further it must be alleged that the appellant will put the water to beneficial use. This the appellant did in paragraphs thirteen and fourteen of the complaint (R. 8). Further, it must be alleged by the appellant that the application to appropriate water is prior in time to any other

application. This the appellant did in paragraph thirteen of the complaint (R. 7).

The effect of the granting of the motion by the court is to deny the appellant herein of any opportunity to submit proof in support of appellant's complaint. The court apparently assumed that the Utah Supreme Court decision, in case Number 8390 and 8391, referred to in paragraph eight of appellant's complaint, did not indicate that there was any water to be appropriated. Appellant relies not only on the Utah Supreme Court decision as holding there is unappropriated water, but also on the allegation of the complaint, paragraph 12, that there is unappropriated water which was saved from evaporation as a result of the Deer Creek Reservoir in Provo Canyon, Wasatch County, State of Utah (R. 7). Appellant contends that under the allegation of the complaint, there was sufficient to state a claim of relief and that the appellant should be permitted to introduce proof to establish that there was water that had not been appropriated. It is appellant's contention that there is now water available in the Deer Creek Reservoir, Provo Canyon, Wasatch County, State of Utah, that was never used before because of the impounding of the waters by virtue of the Deer Creek Dam. There is a certain saving of water which heretofore was lost by evaporation. It is water that was not used before, because it was water that went up into the air; with the impounding of the water in the Deer Creek Reservoir, the water that went up into the air is retained in the reservoir. As a result, there is now water for use down below that was not available before. This is water that is subject to appropriation. It is a fundamental rule that first in time is first in right. Utah Code Annotated, 1953, Section 73-3-1. The appellant

is entitled to prove that there is water to be appropriated and it is entitled to show that it can beneficially use the water.

POINT II

THE COURT ERRED IN AFFIRMING THE REJECTION OF THE APPLICATION NUMBER 28194 BY THE STATE ENGINEER OF THE STATE OF UTAH.

The argument under Point One above applies with equal force and effect to Point Two, and is referred to by way of sustaining Point Two.

CONCLUSION

It is submitted that the court erred in holding that appellant's complaint failed to state a claim upon which relief could be granted, and in affirming the decision of the Utah State Engineer; that the appellant should be given the opportunity to submit proof to the Court to establish that there is unappropriated water so that appellant's application for appropriation would be allowed as being first in time to file for the unappropriated water.

Respectfully submitted,

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