

1958

Weber Basin Water Conservancy District v. David Braegger, John R. Larkin, et al : Brief of Appellants

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

WEBER BASIN WATER CONSERV-
ANCY DISTRICT,

Plaintiff and Appellant,

vs.

DAVID BRAEGGER, JOHN R. LARKIN,
et al,

Defendants and Respondents.

Case No.
8835

BRIEF OF APPELLANTS

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IN THE SUPREME COURT of the STATE OF UTAH

WEBER BASIN WATER CONSERV-
ANCY DISTRICT,

Plaintiff and Appellant,

vs.

DAVID BRAEGGER, JOHN R. LARKIN,
et al,

Defendants and Respondents.

Case No.
8835

BRIEF OF APPELLANTS

This is an appeal from a judgment of the District Court of Box Elder County on a special verdict for \$55,319.00 in an action to condemn land for use in the construction of the Willard Dam and Reservoir, a part of the Weber Basin Reclamation Project. The action was filed against eighteen landowners; however, the trial involved only the property of the defendants, John R. Larkin and Helen W. Larkin, his wife. When the word "defendants" is used, it refers only to Mr.

and Mrs. Larkin. The transcript is referred to as (R.) and the court file as (F.).

STATEMENT OF FACTS

The defendants are the owners of approximately 155 acres of farm and pasture land in Box Elder County, located south of the town of Willard. Plaintiff's Exhibit I is a map showing the tract of land involved in this action with the part taken consisting of 100.86 acres colored in green, and the land not taken left uncolored. The figures in the uncolored portion indicate the acreage of land in the various fields described in the testimony. Certain land under state lease (see Exhibit D 2) lies west of the green area. There are no buildings on the land. The improvements consist only of a small feed yard, drains, irrigation ditches and fences. The water right for the land consists of 266 $17/25$ shares of Class "B" stock in the North Ogden Irrigation Company and 4 shares of Class "A" stock. The 266 $17/25$ shares of Class "B" water represents storage water and is the equivalent of 177.78 acre feet. The defendants paid \$17 per acre foot for this water (R. 100). Since purchasing the water they paid an additional \$6.00 per acre foot making the Larkin "equity" in the water \$23.00 per acre foot, or a total of \$4088.94 (R. 101). It was agreed that the defendants would retain all water rights and the land would be condemned without water rights (R. 6).

It was stipulated that the only issues in the case are, (1) the value of the land taken, and (2) the diminution in value of the defendants' remaining land resulting from the taking (R. 2, 3).

The defendants' principal witness on land values and damages was Joseph A. Capener, who testified that the total of value of the land taken and damages to the remaining land was \$57,054.00 (R. 156). On cross-examination Mr. Capener itemized the values and damages as follows (R. 159-161):

62.31 acres at \$600 per acre.....	\$37,554.00
14.00 acres at \$500 per acre	7,000.00
24.00 acres at \$100 per acre	2,400.00
	<hr/>
	\$46,954.00
Damage to 12 acres because it is cut into 3 triangles	\$ 3,600.00
50 rods of fence	1,500.00
Damage to farming operations	5,000.00
	<hr/>
	\$57,054.00

The item of \$5,000.00 for "damages to farm operations" was further itemized to include (R. 162-166):

Damage to state lease land.....	\$ 1,000.00
Disruption of irrigation system	1,000.00
Breaking of the drain	1,000.00
Making farm unit less desirable	2,000.00
	<hr/>
Total	\$ 5,000.00

Mr. Capener testified that he did not use the before and after method to determine severance damages or the market value of the land to establish value as he testified (R. 157):

"A. That's right, the property you're taking. However, I did go over this property, but I never placed any particular value on it, because of the fact that I wasn't interested in the value of it.

Q. You weren't interested in the value of this remaining property shown in white on the map?

A. Not necessarily, no."

and later testified (R. 172-174):

"Q. In your years as an appraiser, Mr. Capener, I guess you have used the method of determining the value of a given farm before and after the taking, have you not?

A. Not always, no, sir.

Q. But you have used that method?

A. Well, once in a while I have, but I don't use it very often, due to the fact that it's—the condition of the farm and the type of land, the amount of the water, the climate and the location determines the value of the property. That determines the yield of the property and the value of the property.

Q. Well, this before and after method—

A. Well, not necessarily. Due to the fact that—you take some farmers may have this farm here and and it wouldn't probably sell for more than two-thirds of what it would if a good farmer went on it. A farmer and the way a farm looks and the way it's handled and the way it's manipulated and farmed has quite considerable to do with what a man can sell a farm for or buy it for. (R. 172-173).

Q. Well, in other words, this thousand dollars represents the difference in the value of the state lease before and after the taking; is that clear?

A. Well, no, not necessarily that way. I based that on the fact he has, or did have, a ten-year lease.
* * * (R. 174.)"

Mr. Capener testified that he did not know how many drains were in the land and did not know what would be done to take care of the drains (R. 164, 165). He said,

“A. If they take care of his drains so that they will not interfere with his operations above, why, I’d say that the thousand dollars would be eliminated.”
(R. 165).

Mr. Capener also stated that his appraisal of the 62.31 acres at \$600 per acre was made on the assumption that it was fully irrigated (R. 166). He said the value without water would be \$600 per acre less the value of the water (R. 172).

Mr. Larkin testified on redirect examination that the value of the land taken was \$1300 per acre. He said:

“A. It’s worth \$1300 per acre to me.”

An recross examination, Mr. Larkin testified as follows:

“Q. Well, in other words, your statement a few moments ago that the whole hundred acres was worth \$130,000 was incorrect; isn’t that a fair statement? Think it over. Don’t let me rush you. Just think it over.

A. It is the way you’re looking at it, Mr. Skeen.

Q. Well, I’m just attempting to have you state your opinion of the value of that land, and I’ll ask you to answer “yes” or “no.” Is that hundred acres worth \$130,000?

A. You want “yes” or “no”?

Q. Yes.

A. To be honest, no.

Q. Well, you intend to be honest and testify honestly as to what the values are?

A. That’s my hope, Mr. Skeen.”

Other witnesses called by the defendant either did not know the Larkin property, or testified as to the value of other property they thought was similar, or upon cross examination, demonstrated such absolute ignorance of the Larkin property that their testimony could not be considered. See the testimony of Mr. Dix (R. 113-120) and Mr. Steele (R. 139-152). A study of Mr. Steele's testimony with reference to the Map Exhibit I will show that he did not even know where the Larkin land, which was taken, was located. He had the land taken and the land remaining hopelessly confused (R. 141-143, and 151). He said he based the appraisal on certain comparable sales; the Westover and Knudson farm sales. Later, he said, "you can't compare" the Larkin property with the Westover and Knudson property (R. 152).

The plaintiff called two expert witnesses on values, Mr. Waddel and Mr. Watkins, who worked together (R. 269), and arrived at the same figures. Mr. Waddel testified that the value of the entire tract of 155.68 acres was \$54,488.00 and the value of the land remaining consisting of 54.82 acres was \$16,446.00, leaving a difference for the value of the land taken and severance of \$38,042.00 (R. 207). The testimony in support of the appraisal consists of an exhaustive discussion of sales of comparable property in Box Elder County (R. 198-205).

Mr. Francis M. Warnick, a civil engineer working for the Bureau of Reclamation, was called to testify as to the effect on Mr. Larkin's remaining land of the construction of the Willard Dam and Reservoir and appurtenant works, particularly a large new drain which has already been constructed on the

defendants' lands. He said the construction of the new drain would benefit fifteen acres of the defendants' property to the extent of \$75.00 an acre (R. 277-180). This evidence is the only evidence on the subject of benefits to the remaining land.

The defendants contended throughout the trial that the taking of the 100.86 acres destroyed their economic farm unit, but there is substantial evidence that the land taken could be replaced by other land in the vicinity (R. 167-168-36). Mr. Larkin testified that the owners of three adjoining tracts of land had offered to sell him their land (R. 35-37).

The trial court's instructions to the jury were seriously defective in the following particulars:

1. No adequate instructions were given as to the method of determining severance damages.
2. No instructions were given as to the legal questions concerning the state lease.
3. The court told the jury that it could not consider benefits to the defendants' remaining land which will result from the construction of the reservoir project.

All three items were fully covered in the plaintiff's requested instructions 13, 14 and 15 (File pages 38-40). Instruction No. 7 given by the court made it absolutely clear that the jury could not consider benefits. Timely and adequate exceptions were taken (File pages 23-24).

The trial court submitted to the jury a form of special verdict consisting of two questions which were answered as follows:

1. What was the value of the 100.86 acres actually taken and all improvements thereon as of 22 July, 1957? (Answer in dollars.)

A. \$43,519.00.

2. What are the damages which accrued to the portion of defendants' premises not taken by reason of the land taken in question number one? (Answer in dollars.)

A. \$11,800.00.

Judgment was entered on the verdict.

The plaintiff's motion for a new trial was denied and this appeal was taken.

STATEMENT OF POINTS

1. There is no competent evidence supporting the answers given to the questions in the special verdict.

2. The court erred in refusing adequately to instruct the jury respecting severance damages and the state lease.

3. The court erred in excluding from the consideration of the jury the benefits to accrue to the defendants' remaining land.

ARGUMENT

1. THE VERDICT WAS NOT SUPPORTED BY COMPETENT EVIDENCE.

As indicated above, the only competent evidence adduced by the defendants as to values and damages consists of the testimony of Joseph A. Capener. His figure covering both the land and damage is \$57,054.00, which included \$46,954.00 for the 100.86 acres of land, and \$10,100.00 for damages to the land not taken. The testimony is clear that the value of the land included the water rights. The water rights were, by stipulation, excluded from the suit and Mr. Capener admitted on cross examination that the value of the land should be reduced to the extent of the value of the water (R. 172). The only evidence of the value is \$23.00 an acre foot for 177.78 acre feet amounting to \$4088.94. Two-thirds of the farm is taken so the value of the water appurtenant to the land taken would be \$2,726.31.

Mr. Capener also said that \$1,000.00 should be deducted if the drainage system was actually not damaged by the project (R. 165). The undisputed testimony of Francis M. Warnick, a civil engineer of twenty years experience, was that the construction of the deep drain as a part of the project would improve the drainage system (R. 277-280) and effectually eliminates \$1,000.00 from the damage. Mr. Capener's revised figure on value is \$44,227.69 and is \$9,100.00 on damages.

It will also be noted that Mr. Capener again revised his figure on value by changing five acres from cultivated land to pasture at a net reduction of \$2,000.00 (R. 177, 178). This second revision on value reduced the absolute top figure to \$42,227.69, which is \$1,291.31 less than the answer to question No. 1 in the verdict. The revised highest testimony of damage

to remaining property in the record is \$9,100.00 by Mr. Capener and that figure is \$2,700.00 less than the answer to question No. 2 in the verdict.

The testimony of Waddel-Watkins on value of the property taken was \$34,478.00, and on severance was \$3,564.00 (R. 207). The verdict finds no support there. Mr. Larkin gave no testimony on severance, and he honestly admitted that his testimony of value of \$130,000.00 was not correct (R. 82). The verdict is not supported by that testimony. Other testimony such as that of Mr. Dix and Mr. Steele included no separate item for severance, and on cross examination broke down entirely as to value.

In view of the lack of evidence to support the verdict this case must be reversed. See Weber Basin Water Conservancy District v. Moore, 2 Utah 2d 254, 272 Pac. 2d 176 and State v. Ward, 112 Utah 452, 189 P2d 113.

2. NO ADEQUATE INSTRUCTIONS WERE GIVEN RESPECTING SEVERANCE DAMAGES AND THE STATE LEASE.

The only instruction given on the subject of severance damages was No. 2, which reads as follows:

NUMBER 2

The second question for you to answer in this case is as follows:

2. WHAT ARE THE DAMAGES WHICH ACCRUED TO THE PORTION OF DEFENDANTS' PREMISES NOT

TAKEN BY REASON OF THE LAND TAKEN IN QUESTION NUMBER ONE?

You may arrive at the solution to this question by determining the difference in market value of the remaining property before and after the taking July 22, 1957. The foregoing is a definition of the severance involved in this action.

In the first place, the word "may" is used instead of "shall," and in the second place the instruction did not tell the jury how to arrive at the amount of severance damages. This instruction fell far short of the requirements of the law. It completely ignored an element which this court held was necessary in the case of *State of Utah vs. Cooperative Security Corp. of Church*, 122 Utah 134, 247 Pac. 2d 269.

In that case, writer of the opinion of the Court, Mr. Justice Wade, said:

"The compensation to which an owner is entitled for severance damages in condemnation proceedings is the difference in the fair market value of his property before and after the taking. *State v. Ward*, 112 Utah 452, 189 P. 2d 113. Where severance damage is sought to a remaining tract on the theory that the taking has depreciated the fair market value of that tract there must be proof that no comparable land is available in the area of the condemned land. See *Provo Water Users' Ass'n v. Carlson*, 103 Utah 93, 133 P. 2d 777. In that case the land condemned was pasture land which the owner claimed was a part of his entire dairy farm and that the taking greatly depreciated the fair market value of his remaining property. There was no proof introduced that there was not available other lands in the area which could have been put to the same use as the land taken, and this court held that because

of such failure of proof the testimony of the depreciation in value of the remaining property had 'no adequate foundation of fact' and therefore did 'not warrant a decision on any theory of severance damages.'
* * * ''.

The plaintiff's requested instruction No. 13 (File 38) sets out the substance of the holding of the case last cited. This requested instruction reads as follows:

The property sought to be condemned shown in green on Plaintiff's Exhibit No. 1 will take only a part of the defendants' 155.68 acre property and leaves the defendant the adjoining tillable 54.82 acres of land shown on Plaintiff Exhibit No. 1. You are instructed that you may include in the just compensation to be awarded to the defendants the damages to the remaining property caused by the severance of the part sought to be condemned from the remaining property. The just compensation is the difference in money between the fair market value of the entire 155.68 acre farm on July 22, 1957, before the proposed taking and the amount of the fair market value of the remaining 54.82 acre tract of property on July 22, 1957. The allowable severance damage is the amount left after deducting the fair market value of the property taken from the just compensation total above, however, before any severance damages can be allowed there must be evidence that there was no available comparable land in the area of the condemned land on July 22, 1957.

The court erred in refusing to give an adequate instruction on severance damages.

The defendants injected into the case testimony as to land under state lease which was not condemned in this action.

Defendants' Exhibit 2 is a copy of the lease and upon examination it will be seen that the land was not included in the description of that taken. When the Exhibit was offered (R. 10) no objection was made because the lease shows on its face that the land is not being condemned. The plaintiff requested an instruction No. 14 (File 39) which reads as follows:

You are instructed that the State Leased land shown on Plaintiff's Exhibit Number 1 is not a part of the proposed taking in this action and you may not consider any evidence or allow any damage to the defendant for such State Lease.

The importance of the refusal to give this instruction is evident. Mr. Capener included \$1,000.00 for the "taking away of the State Lease" from the defendants (R. 162). That may have been a subject for further litigation but was not an issue in this law suit. Again the court committed error.

3. THE COURT ERRED IN EXCLUDING FROM THE CONSIDERATION OF THE JURY BENEFITS TO THE LAND NOT TAKEN.

Section 78-34-10, Utah Code Annotated, 1953, provides as follows:

The court, jury or referee must hear such legal evidence as may be offered by any of the parties to the proceedings and thereupon must ascertain and assess:

(2) If the property sought to be condemned constitutes only a part of a larger parcel, the damages which will accrue to the portion not sought to be condemned by reason of its severance from the portion

sought to be condemned and the construction of the improvement in the manner proposed by the plaintiff.

* * * *

(4) Separately, how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff. If the benefit shall be equal to the damages assessed under subdivision (2) of this section, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the former shall be the only damages allowed in addition to the value of the portion taken.

Francis M. Warnick testified that a large drain had been constructed by the government as a part of the Weber Basin project to protect adjacent lands from seepage from the reservoir and that it serves the secondary purpose of lowering the water table on adjacent farm lands. See Mr. Warnick's testimony (R. 276-180). The following testimony appears on pages 278 and 280 of the transcript.

"Q. You are, of course, familiar with the new drain that has been cut through Mr. Larkin's property?

A. Yes, sir.

Q. I'll ask you whether the cutting of that new drain has adversely affected Mr. Larkin's present drainage system.

A. In my opinion it has not in any way affected his present drainage system. It intercepted it and, of course, made it ineffective to the west of the large drain constructed by the Bureau, but the drain to the east has not been impaired in its effectiveness.

Q. Will you state why?

A. Well, the reason for that is that the drain constructed by the government is deeper than his drain, which would lead to an additional lowering of the water table and, therefore, it will not in any way cause any water to back up on his land. The express purpose of the large drain constructed by the government is to protect the adjacent lands primarily, to see that no seepage from the reservoir area gets into the adjacent land area. And it also serves the secondary purpose of lowering the water table on the adjacent farm land.

Q. Will you describe what additional works will be constructed, if any, across Larkin's property in connection with the building of the project?

A. In addition to the present drain there will be a dike which will form the floor for this Willard Reservoir. At that location it will be about fifteen to eighteen feet in height.

Q. And where will it be located with respect to the drain?

A. It will be located west of the drain away from the land remaining in the possession of Mr. Larkin.

Q. Now I'll ask you whether, in your opinion, the project works when completed on land of Mr. Larkin colored in green on Exhibit One will benefit or in any way diminish the value of Mr. Larkin's remaining land.

A. It's my opinion that his property will be benefited.

* * * *

A. In this area that we have conducted some rather extensive drainage investigations over the past five years, we have kept records of water table, of

the quality of the subsurface water, and of the effect of existing drains in the area. We're very much aware of the fact that Mr. Larkin found the property required drainage, which he accomplished by placing an eight inch tile drain on his property. Our records of water tables show that in the southwest corner of the property that remains in his possession the water table still is often from thirty to thirty-six inches below the surface, which is too near the surface to be a normal rotation system which he is conducting, which includes alfalfa, so it is my position that the construction of the large drain, which is in excess of ten feet deep at the south edge of his property, will act to carry away additional subsurface water which is saline and alkaline in character; and tend to improve about fifteen acres of land in the southwest corner of his land.

Q. Do you have an opinion as to how much that would be improved in dollars?

A. Well, based on studies we have made in other areas within the Weber Basin Project, it's my opinion that that fifteen acres will be improved to the extent of about \$75 an acre.

The foregoing testimony was uncontradicted.

At the trial the court made the comment that he proposed to instruct the jury that there was no pleading or no issue of benefit (R. 279). It was pointed out that no pleading by the plaintiff was called for under the rules and the issue of severance included a consideration of benefits.

The plaintiff requested an instruction on benefits as follows:

You are instructed that you may consider how much the remaining property not sought to be condemned will be benefited by the construction of the reservoir project of the plaintiff. If the benefit shall be equal to the severance damages the defendant shall be allowed no compensation, except for the property taken, but if the benefit shall be less than the severance damages, then the benefits shall be deducted from the severance damages found.

The question of allowing of benefits to the remaining land of the property owner by reason of the construction of the public project is discussed at page 940 of 18 American Jurisprudence:

“When a part of a parcel of land is taken for the public use, it may well happen that although the construction and maintenance of the public works for which the land is taken will inflict some injury upon the remainder of the parcel, it will in other respects benefit it; and it may benefit it to such an extent that the market value of the remaining land will be greater than the whole parcel was worth before the public improvement was laid out. Questions arise with great frequency, when land is taken by eminent domain how far benefits to the remaining land can be considered in ascertaining just compensation for land taken. Of course, any alleged benefit, to have any standing in court at all, must be genuine and capable of estimation in money value. It must add to the present fair market value of the remaining land with reference to all the uses to which it is reasonably adapted and for which it is available, and benefits which are removed, contingent and speculative cannot be considered.”

The distinction between general and special benefits to the remaining land is made at page 943 of 18 American Jurisprudence as follows:

“In cases arising under the exercise of the right of eminent domain, benefits are usually divided into but two classes, general and special, the general benefits as a rule being those derived to the community from the use of the improvement, and special benefits being those derived by particular pieces of property because of their advantageous relations to the improvement, and differing in kind rather than merely in degree from the general benefits.”

The statute quoted above was construed by this Court in the case of *Oregon Short Line Railroad Company v. Fox*, 28 Utah 311, 78 P. 800. The Court said:

“It is plain that the benefits referred to in the foregoing section of the statute are only such as inure to or directly affect the land adjacent to the right of way sought to be condemned.” (Citing numerous cases). See also *Hempstead v. Salt Lake City*, 32 Utah 261, 90 P 397.

There could be no clearer case of special benefits than the present case. The large drain ten deep deep “directly affected” the adjacent land within the rule of the case of *Railroad v. Fox*, *supra*.

The trial court erred in taking from the jury as a part of the problem of severance damages the uncontradicted testimony of Mr. Warnick that the deep drain would lower the saline water table in the defendants’ land not taken and would therefore benefit such land. This case must be reversed on this point alone.

CONCLUSION

The verdict is not supported by competent evidence or, indeed, by any evidence at all. This fact together with the erroneous instructions of the court, and particularly the failure of the court to instruct the jury that benefits to the defendants' land not taken may be offset against severance damages requires reversal of this case.

Respectfully submitted,

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NEIL R. OLMSTEAD

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