

1958

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

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

George M. Mason; Joseph C. Foley; Attorneys for Respondents;

Recommended Citation

Brief of Respondent, *Weber Basin Water Conservancy District v. Braegger*, No. 8835 (Utah Supreme Court, 1958).
https://digitalcommons.law.byu.edu/uofu_sc1/3076

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact hunterlawlibrary@byu.edu.

UNIVERSITY UTAH

DEC 19 1958

LAW LIBRARY

In the
Supreme Court of the State of Utah
FILED
AUG 28 1958

WEBER BASIN WATER CONSERV-
ANCY DISTRICT,
Plaintiff and Appellant,

vs.

DAVID BRAEGGER, JOHN R. LAR-
KIN, et al.,
Defendants and Respondents.

Clerk, Supreme Court, Utah

Case No.
8835

BRIEF OF RESPONDENTS

GEORGE M. MASON,
JOSEPH C. FOLEY,

Attorneys for Respondents.

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	2
ARGUMENT	2
POINT I. THE VERDICT IS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE	2
POINT II. THE INSTRUCTIONS GIVEN AS TO SEVERANCE DAMAGES WERE ADEQUATE AND THE EVIDENCE OFFERED SUSTAINS THE JURY'S AWARD OF SEVERANCE DAMAGE	4
POINT III. THE COURT PROPERLY EXCLUDED FROM CONSIDERATION BY THE JURY CLAIMED BENEFITS TO THE LANDS NOT TAKEN	5
CONCLUSION	9

CASES CITED

East Baton Rouge Parish Council v. Koller, (La.), 94 So. 2d 505	8
Moyle v. Salt Lake City, 111 Utah 201, 176 P. 2d 882 .	3
Salt Lake & Utah R. R. Co. v. Butterfield, 46 Utah 431, 150 Pac. 931	7
Shurtleff v. Salt Lake City, 96 Utah 21, 82 P. 2d 561 .	8
State v. Cooperative Security Corp., 122 Utah 134, 247 P. 2d 269	4
State v. Peek, 1 Utah 2d 263, 265 P. 2d 630	3

TABLE OF CONTENTS—Continued

Weber Basin Water Conservancy District v. Skeen,
(Utah), Not Yet Reported

TEXTS CITED

15 Am. Jur. 795

145 A. L. R. 7

43 Iowa Law Review 305

In the
Supreme Court of the State of Utah

WEBER BASIN WATER CONSERV-
ANCY DISTRICT,
Plaintiff and Appellant,

vs.

DAVID BRAEGGER, JOHN R. LAR-
KIN, et al.,
Defendants and Respondents.

Case No.
8835

BRIEF OF RESPONDENTS

STATEMENT OF FACTS

We will adopt the same nomenclature as did the appellant in its brief and we are in agreement with the statement of facts as therein set out as a general proposition. In support of our argument as to specific points, we will refer specifically to parts of the record and we will add a few additional references in support of that argument.

STATEMENT OF POINTS

POINT I.

THE VERDICT IS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE.

POINT II.

THE INSTRUCTIONS GIVEN AS TO SEVERANCE DAMAGES WERE ADEQUATE AND THE EVIDENCE OFFERED SUSTAINS THE JURY'S AWARD OF SEVERANCE DAMAGE.

POINT III.

THE COURT PROPERLY EXCLUDED FROM CONSIDERATION BY THE JURY CLAIMED BENEFITS TO THE LANDS NOT TAKEN.

ARGUMENT

POINT I.

THE VERDICT IS SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE.

We can neither follow nor agree with the appellant's analysis of the manner in which the witness, Capener, arrived at his figures as to value. No witness for either party placed any value on the water rights owned by respondents and it was stipulated that the jury would not consider water and that none was being condemned (R. 34)

However, appellant now seeks to place a value upon it based upon some theory that its value is reflected in what the respondents paid for a part of it a good many years ago. This is an objectionable and improper assumption.

It is a basic concept of the law of eminent domain that the landowner whose land is being condemned, is entitled to the value of that land for its highest and best use. *Moyle v. Salt Lake City*, 111 Utah 201, 176 P. 2d 882; *State v. Peek*, 1 Utah 2d 263, 265 P. 2d 630. The highest and best use of respondents' land was for the production of crops and the use of water for irrigating those crops was an indispensable part of that production.

If the appellant had sought to condemn both the land and the water, respondents would have been entitled to an additional amount of damage for the water. It is clear and beyond any reasonable doubt that all of the appraisers were viewing the respondents' lands as irrigated crop producing lands and that their values did not include any separate figure for the water rights. And the instructions of the Court fully covered this phase of the case as did the Court's remarks at the beginning of the trial.

The case of *Weber Basin Water Conservancy District v. Skeen*, decided by this Court on August 4, 1958, and not yet reported, holds:

"The jury had the benefit of opinions from three qualified experts as to the value of the land. Although these opinions varied considerably it is within the prerogative of the jury to believe whom it chooses, and it chose to believe defendants' expert rather than plaintiff's. On cross examination of the

two experts, called by plaintiff, some doubt was cast on the thoroughness of their inspection of the land, and this may well have affected the jury's consideration of their lower evaluations."

Each statement in the foregoing quotation is equally applicable to the present case.

In addition, and as commented on by the trial judge at page 287 of the Record, there was competent evidence that the respondents were losing valuable hunting rights and privileges by the taking of their properties. Although no witness expressed an opinion as to the monetary value of these rights, there was uncontradicted evidence that they were valuable. 15 Am. Jur. on Damages, Sec. 356 at page 795, states the rule:

"Where the law presumes that the plaintiff suffered substantial damage from the alleged wrongful act, it is not necessary for him to prove damages in any specific or certain amount in order to recover damages for a substantial amount."

POINT II.

THE INSTRUCTIONS GIVEN AS TO SEVERANCE DAMAGES WERE ADEQUATE AND THE EVIDENCE OFFERED SUSTAINS THE JURY'S AWARD OF SEVERANCE DAMAGE.

On page 13 of appellant's brief, there is a quotation from *State v. Cooperative Security Corp.*, 122 Utah 134, 247 P. 2d 269. We adopt that quotation and feel that it correctly states the law that severance damage cannot be

awarded unless there is evidence that no comparable land is available to replace that taken by the condemnor.

We would call this Court's attention to page 35 of the Record. The respondent offered evidence that would have shown that there was no comparable land available. The trial court, upon appellant's objection, refused to receive such evidence. We do not believe that appellant can now urge that it was error for the trial court to have sustained his objection. It was not, therefore, error to refuse to give the instruction that appellant requested.

As to the state land lease, it is clear from the record that the witness, Capener, included \$1,000.00 severance damages not for the "taking away of the State lease", but because the condemnation proceeding effectively made that said lease ineffective as any part of the new farm unit that would be left for operation by respondents. It was, without any doubt, a proper item of severance damage.

POINT III.

THE COURT PROPERLY EXCLUDED FROM CONSIDERATION BY THE JURY CLAIMED BENEFITS TO THE LANDS NOT TAKEN.

We urge upon this Court that the trial judge acted properly in this respect for three sound reasons. First, there were no pleadings and no issue raised as to alleged benefits. Second, proper objection was made and there was no foundation laid for the evidence of value of the benefits as testified to by the witness. And third, the benefits testified to were general and not special.

As to the first reason above mentioned, we believe it to be self-evident and in need of no further comment.

As to the second, we would call specific attention to the objection made and the ruling of the trial court as shown at page 279 of the Record. The witness, Warnick, was a civil engineer with twenty years experience with the United States Bureau of Reclamation. There is not a scintilla of evidence that he had had any experience in valuation and appraising or that he had ever done so before. He did not qualify as an expert and no foundation was laid for his evidence and it would have been error to have permitted a jury to speculate with this type of evidence.

The third reason is, of course, the most important. We believe the best distinction between general and special benefits to be contained in 43 Iowa Law Review at page 305, where it is stated:

“Special benefits are defined as those that accrue directly to the particular tract in question because of its peculiar relation to the public improvement. General benefits are termed as those that accrue to lands generally in the vicinity because of the improvement.”

We invite the Court's attention to this article in the Iowa Law Review and to the cases there cited and also to the annotation in 145 A. L. R. commencing at page 7, with particular emphasis as to the language on page 49 where special benefits are defined as those peculiar to the property in litigation.

In the case of *Salt Lake & Utah R. R. Co. v. Butterfield*, 46 Utah 431, 150 Pac. 931, the trial court charged the jury as follows:

“In determining the question as to whether any benefits have accrued to the remaining portion of the land by reason of the construction and operation of the railroad on the land taken, you should not take into consideration any benefits shared by the defendants as owners of this land with the community in general, but only such benefits as are special to this particular property.”

The Court then proceeds:

“In a much later case, namely, in *Beveridge v. Lewis*, 137 Cal. 619, 67 Pac. 1040, 70 Pac. 1083, 59 L. R. A. 581, 92 Am. St. Rep. 188, the rule adopted by this court is the one that is enforced in the latter case. In that case the court, in referring to the question now under consideration, says:

“General benefits consist in an increase in the value of land common to the community generally, from advantages which will accrue to the community from the improvement. *Lewis on Eminent Domain*, § 471. They are conjectural and incapable of estimation. They may never be realized, and in such case the property owner has not been compensated save by the sanguine promise of the promoter.’

“The court then defines special as contradistinguished from general benefits and says that general benefits, as a rule, are based upon what the court calls the chance of increase in value by increased population and by increased facilities of transportation, etc. The court then proceeds:

“This chance for gain is the property of the landowner. If a part of his property is taken for the

construction of the railway, he stands in reference to the other property not taken like similar property owners in the neighborhood. His neighbors are not required to surrender this prospective enhancement of value in order to secure the increased facilities which the railroad will afford. If he is compelled to contribute all that he could possibly gain by the improvement, while others in all respects similarly affected by it are not required to do so, he does not receive the equal protection of the law.’ ”

In the case of *Shurtleff v. Salt Lake City*, 96 Utah 21, 82 P. 2d 561, the fourth syllabus reads as follows:

“In determining damage sustained by water right owner on city’s appropriation of water rights for culinary purposes, substitution of culinary water with other waters could not be considered on theory of benefits to water right owner’s land.”

Even if the evidence that was offered by the appellant as to the value of the benefits had been proper, such evidence was directed to general benefits and not to special benefits. The trial court properly excluded the same from consideration by the jury.

A recent Louisiana case, *East Baton Rouge Parish Council v. Koller*, 94 So. 2d 505, is directly in point and the following quotation from it shows not only the similarity in fact but the applicable rule of law:

“Plaintiff parish council finally urges that the award should be reduced by disallowing any damages to the property not taken, since even defendant landowner’s witnesses agree that the project will cause defendant’s lot to increase in value because of the better drainage afforded it and the lesser

danger of flooding. That is, it is urged that the damages to the remaining land should be offset by the benefits accruing from the drainage project.

“But the testimony is uncontradicted that such benefits as will accrue will also accrue to all other property in the area, whether or not abutting the improvement. These are general benefits to all property concerned, not special to Koller’s property.

“‘General benefits [resulting from construction of the work] are those which are shared alike by all property owners in the neighborhood or community. Such damage as a property owner may sustain as a result of the construction and use of a public work cannot be offset by these general benefits. The reason is that the citizen whose property is taken cannot be compelled to bear more of the cost of the public improvement and general benefits resulting therefrom than is borne by other property owners whose property is neither taken nor damaged for the public purpose,’ *Louisiana Highway Commission v. Grey*, 197 La. 942, 2 So. 2d 654 at page 660; *Oleck, Damages to Persons and Property*, Section 225; 29 C. J. S., *Verbo Eminent Domain*, § 183b, p. 1064.”

CONCLUSION

It is respectfully submitted that the verdict of the jury and the judgment entered thereon is fully supported by competent evidence, that no error was committed by the trial court, and that the judgment should be affirmed.

Respectfully submitted,

GEORGE M. MASON,
JOSEPH C. FOLEY,

Attorneys for Respondents.