

1990

Larry Little v. Greene & Weed Investments : Petition for Writ of Certiorari

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_sc1



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Supreme Court; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

E. J. Skeen; Keith S. Christensen; Attorneys for Appellees.

John W. Anderson; Clyde, Pratt & Snow; Attorney for Appellant.

Recommended Citation

Legal Brief, *Larry Little v. Greene & Weed Investments*, No. 900451.00 (Utah Supreme Court, 1990).
https://digitalcommons.law.byu.edu/byu_sc1/3207

This Legal Brief 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 by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

CKET NO.

90 0451

IN THE SUPREME COURT OF THE STATE OF UTAH

LARRY LITTLE,

Plaintiff and Appellant,

VS.

GREENE & WEED INVESTMENTS,
LEON S. LIPPINCOTT, CAROLINE
LIPPINCOTT, and DEE C. HANSEN,
STATE ENGINEER OF THE STATE OF
UTAH,

Defendants and Appellees.

Utah Court of Appeals
Case No. 890177-CA

Supreme Court of Utah
Case No.

900451

On Appeal From the Sixth District Court
for the District of Utah, Kane County

The Honorable Don V. Tibbs
District Court Judge

D.C. No. 1950

PETITION FOR WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

LARRY LITTLE, APPELLANT

E. J. SKEEN
50 SOUTH MAIN, #1600
P.O. Box 45340
SALT LAKE CITY, UTAH 84144
TELEPHONE (801) 532-3333
ATTORNEY FOR APPELLEES
LIPPINCOTTS

KEITH S. CHRISTENSEN
230 SOUTH 500 EAST, #250
SALT LAKE CITY, UTAH 84102
TELEPHONE (801) 359-1530
ATTORNEY FOR APPELLEE
GREENE & WEED INVESTMENTS

JOHN W. ANDERSON
CLYDE, PRATT & SNOW
77 WEST 200 SOUTH, #200
SALT LAKE CITY, UTAH 84101
TELEPHONE (801) 322-2516
ATTORNEY FOR APPELLANT
LARRY LITTLE

FILED

SEP 28 1990

Clerk, Supreme Court, Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

LARRY LITTLE,)	
)	
Plaintiff and Appellant,)	
)	
vs.	)	Utah Court of Appeals
	)	Case No. 890177-CA
)	
GREENE & WEED INVESTMENTS,)	
LEON S. LIPPINCOTT, CAROLINE)	
LIPPINCOTT, and DEE C. HANSEN,	)	Supreme Court of Utah
STATE ENGINEER OF THE STATE OF	)	Case No.
UTAH,)	
)	
Defendants and Appellees.)	

On Appeal From the Sixth District Court
for the District of Utah, Kane County

The Honorable Don V. Tibbs
District Court Judge

D.C. No. 1950

PETITION FOR WRIT OF CERTIORARI
TO THE UTAH COURT OF APPEALS

LARRY LITTLE, APPELLANT

E. J. SKEEN
50 SOUTH MAIN, #1600
P.O. Box 45340
SALT LAKE CITY, UTAH 84144
TELEPHONE (801) 532-3333
ATTORNEY FOR APPELLEES
LIPPINCOTTS

JOHN W. ANDERSON
CLYDE, PRATT & SNOW
77 WEST 200 SOUTH, #200
SALT LAKE CITY, UTAH 84101
TELEPHONE (801) 322-2516
ATTORNEY FOR APPELLANT
LARRY LITTLE

KEITH S. CHRISTENSEN
230 SOUTH 500 EAST, #250
SALT LAKE CITY, UTAH 84102
TELEPHONE (801) 359-1530
ATTORNEY FOR APPELLEE
GREENE & WEED INVESTMENTS

Table of Contents

	<u>Page</u>
QUESTIONS PRESENTED FOR REVIEW.	1
OPINION BELOW	2
JURISDICTION OF THIS COURT.	3
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES	3
STATEMENT OF THE CASE AND THE FACTS	3
ARGUMENT.	7
I - JUSTICE DEMANDS THAT A COURT OF LAW ADDRESS	7
AND RESOLVE THE CENTRAL AND DISPOSITIVE ISSUES OF THE CASE BEFORE ADDRESSING AND RESOLVING QUESTIONS OF FIRST IMPRESSION WHICH HAVE NO REAL BEARING ON THE OUTCOME OF THE CASE	
II - THE RULINGS OF THE TRIAL COURT AND THE COURT	11
OF APPEALS WILL UNDOUBTEDLY DISRUPT AND INVALIDATE THE ADMINISTRATIVE PRACTICE OF THE UTAH STATE ENGINEER WHICH HAS BEEN UNIFORMLY ACCEPTED AND APPLIED FOR OVER 25 YEARS. IN THE PROCESS, IT WILL ALSO CLOUD EVERY TITLE THAT HAS BEEN TRANSFERRED ACCORDING TO THAT POLICY DURING SAID 25 YEAR PERIOD	
III - THERE IS NO LEGAL BASIS FOR THE DECISION OF	13
THE TRIAL COURT	
CONCLUSION.	16

	<u>Page</u>
<u>Cases Cited:</u>	
<u>Anderson v. Hamson</u> , 5 Utah 151, 167 P.2d 254 (Utah 1917). . .	7
<u>Cortella v. Salt Lake City</u> , 93 Utah 236, 72 P.2d 630 (Utah 1937)	7
<u>Church v. Meadow Springs Ranch, Inc.</u> , 659 P.2d 1045 (Utah 1983)	14
<u>Little v. Greene & Weed Investments</u> , 141 Utah Adv. Rpts. 20 (C.A. 8/15/90)	2
 <u>Authorities:</u>	
Utah Code Annotated §73-1-10.	13
Utah Code Annotated §73-1-11.	2, 3, 7 10, 11 12, 16
Utah Code Annotated §73-3-16.	5
Utah Code Annotated §78-2-2(3)(a) (Supp. 1989).	3
Utah Code Annotated §78-2a-4 (1987)	3

IN THE SUPREME COURT OF THE STATE OF UTAH

LARRY LITTLE,)	
)	
Plaintiff and Appellant,	)	PETITION FOR WRIT OF
	)	CERTIORARI TO THE
vs.	)	UTAH COURT OF APPEALS
)	
GREENE & WEED INVESTMENTS,	)	Utah Court of Appeals
LEON S. LIPPINCOTT, CAROLINE	)	Case No. 890177-CA
LIPPINCOTT, and DEE C. HANSEN,)	
STATE ENGINEER OF THE STATE OF)	
UTAH,	)	Supreme Court of Utah
	)	Case No.
Defendants and Appellees.)	

QUESTIONS PRESENTED FOR REVIEW

The Trial Court and the Court of Appeals both refused to address the central and dispositive issue in this case. Instead, both Courts focused on and decided an issue of first impression which did not have to be addressed and which invalidated a twenty-five year old Administrative Policy of the Utah State Engineer.

The questions presented for review are:

1. Is it appropriate for the Court of Appeals to decide a question of first impression and thus overturn a long standing and generally accepted Administrative Policy of the Utah State Engineer when the answer to that question is unnecessary to the determination of the case? Does not justice require that courts of law address

and resolve the central and dispositive issues of the case before seeking out and resolving questions of first impression that have no real bearing on the outcome?

The specific issues Appellant has pressed in both the Trial Court and before the Court of Appeals are:

1. Under §73-1-11 U.C.A. 1953, does not water pass as an appurtenance to land, unless reserved, after the State Engineer's certificate of appropriation issues and it is stipulated that said water was actually placed to use on the land so conveyed? (This is the question the Court of Appeals sidestepped and failed to address. But, the answer to this question renders unnecessary the answer to the question the Court of Appeals did address and did decide. This is so because Appellant received deeds conveying the land and all appurtenances before, and, after the State Engineer issued the certificate of appropriation.)

2. Consistent with the policy of the Utah State Engineer to transfer water as an appurtenance to the land under §73-1-11 U.C.A. before a certificate of appropriation issues, Appellant also claims to have received land and appurtenant water before the State Engineer's certificate of appropriation issued. (This is the issue the Court of Appeals unnecessarily decided.)

OPINION BELOW

Little v. Greene & Weed Investments, 141 Utah Adv. Rpts. 20 (C.A. 8/15/90) (see Addendum "A" for the text of the decision).

JURISDICTION OF THIS COURT

This is a Petition for Writ of Certiorari to the Utah Court of Appeals which affirmed the decision of the Trial Court in a Decision entered August 15, 1990. A Petition for Rehearing was filed August 28, 1990. The Petition was denied September 5, 1990. (See Addendum "B".) This Court has jurisdiction to hear this Petition pursuant to Utah Code Annotated §78-2-2(3)(a) (Supp. 1989) and §78-2a-4 (1987).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Section 73-1-11 U.C.A. 1953.

Appurtenant Waters - Use as Passing Under Conveyance. A right to the use of water appurtenant to land shall pass to the grantee of such land, and, in cases where such right has been exercised in irrigating different parcels of land at different times, such rights shall pass to the grantee of any parcel of land on which such right was exercised next preceding the time of the execution of any conveyance thereof; subject, however, in all cases to payment by the grantee in any such conveyance of all amounts unpaid on any assessment then due under any such right; provided, that any such right to the use of water, or any part thereof, may be reserved by the grantor in any such conveyance by making such reservation in express terms in such conveyance, or it may be separately conveyed.

STATEMENT OF THE CASE AND THE FACTS

This action was brought in two Counts; Count I being an appeal of a decision of the Utah State Engineer, and Count II being an action to quiet title to a water right. Because ownership of the water right was considered determinative to the outcome of the State Engineer appeal, the trial was bifurcated, with the quiet title action being tried first. The current proceedings involve only the quiet title portion of these bifurcated proceedings.

Both the Trial Court and the Court of Appeals decided the case on the proposition that a water right cannot pass as an appurtenance to the transfer of land until a certificate of appropriation issues from the Utah State Engineer. (See attached Addendum "A", pp. 4 and 5.) Not only is this holding contrary to a clearly established policy of the Utah State Engineer, but it completely fails to address the second part of the Appellant's two-part argument. That is, even if water did not pass to Appellant as an appurtenance to the transfer of land before the State Engineer issued the certificate of appropriation, Appellant nevertheless obtained a deed immediately after the certificate so issued which included 30.1 acres of the subject land and all appurtenances. This second transfer made it unnecessary for either the Trial Court or the Court of Appeals to address the only question they did address and which invalidated a twenty-five year old Administrative Policy of the State Engineer to transfer title to water rights as an appurtenance to land before a certificate issues. Both the Trial Court and the Court of Appeals refused to address this part of Appellant's case, although it was clearly and specifically raised in both proceedings (Appellant's Brief, pp. 28-30; Reply Brief, pp. 18-20, ¶6). Moreover, this question it is the sole focus of Appellant's Petition for Rehearing.

The facts are undisputed. They are:

1. On December 19, 1967, Lester F. Little, Appellant's father, was the owner of a water right for use on a specifically described 83.3 acres of land (Finding of Fact 9, Pre-Trial Order III(b)).

2. On December 19, 1967, Lester F. Little submitted proof of appropriation on said water right (FF 1, Pl. Ex. 41). "Proof" is a sworn statement by the appropriator of water and his or her proof engineer that the appropriation is complete, the diversion facilities have been constructed (wells, pipelines, etc.) and the water has actually been placed to use. It includes, maps, profiles and drawings prepared by the engineer locating the completed water works, place of use, etc. (§73-3-16 U.C.A. 1953). It is the last statutory step required of an appropriator to complete the appropriation. Thereafter, the State Engineer simply issues a certificate of appropriation if it is made to appear that the appropriation has been completed in accordance with the application. In this particular case the State Engineer, because of other pressing problems, (Tr. 50, 51) did not actually issue the certificate until October 21, 1969, approximately two years later. And, because of a descriptive error, the certificate was amended November 25, 1969 (PTO III(d), FF 14).

3. The deed constituting the root title in the file maintained for the subject water right in the State Engineer's files is a deed dated January 16, 1968 (Pl. Ex. No. 6). This deed transferred the land and all appurtenances one month after proof of appropriation was filed by Appellant's father but approximately 20 months before the State Engineer issued the certificate of appropriation. Said deed did not reserve the water and included all appurtenances. The deed was from Appellant's father to his five children, including Appellant, in undivided interests.

4. The Trial Court found that the subject water right, as a matter of law, could not have passed as an appurtenance to the transfer of land on January 16, 1968 because the State Engineer's certificate of appropriation had not issued on the water right. The Trial Court thus allowed extrinsic evidence to interpret the terms of what are otherwise two ambiguous quit claim deeds by which the Appellee claims it received the subject water. The Trial Court then found that these two quit claim deeds transferred the water right to Lorna and Clara (two of Appellant's sisters) on November 17, 1969. (See FF 15 and attached Opinion p. 5.) These deeds constitute Appellee's root title.

5. On October 21, 1969, the State Engineer issued a certificate of appropriation on the subject water right. Because of a description error the certificate was amended November 25, 1969.

6. On December 30 and 31, 1969, the five children, including Lorna, Clara and Appellant, who owned the land upon which the water was being placed to use, joined with each other as grantors and conveyed the land to themselves individually. For example, all five children joined in conveying 30.1 acres to Appellant Larry Little (Pl. Ex. D-4) and 41.3 acres to Lorna and Clara (Pl. Ex. D-5). None of the deeds reserved water and it is stipulated that water was actually being placed to use on the acreage so conveyed (Tr. 42; Order Amending FF 1).

7. At trial, the second conveyance in Appellee's chain of title was an assignment dated September 1, 1972 (PTO IV(2); Tr. 192).

ARGUMENT

I

JUSTICE DEMANDS THAT A COURT OF LAW ADDRESS AND RESOLVE
THE CENTRAL AND DISPOSITIVE ISSUES OF THE CASE BEFORE
ADDRESSING AND RESOLVING QUESTIONS OF FIRST IMPRESSION
WHICH HAVE NO REAL BEARING ON THE OUTCOME OF THE CASE

Justice requires that a court of law apply established principles of law to the facts of the case. But, that cannot possibly occur where, as here, both the Trial Court and the Court of Appeals unquestionably sidestep and thus avoid addressing the central and dispositive issue of this case.

It is well established Utah law that a deed in statutory form conveys whatever right the grantor has to the water appurtenant to the land, unless the water is expressly reserved. Cortella v. Salt Lake City, 93 Utah 236, 72 P.2d 630 (Utah 1937); Anderson v. Hamson, 5 Utah 151, 167 P.2d 254 (Utah 1917). The applicable statute, §73-1-11 U.C.A. 1953 could not be more clear. It provides, "A right to the use of water appurtenant to land shall pass to the grantee of such land" unless expressly reserved.

Here, both the Trial Court and the Court of Appeals decided that water, as a matter of law, could not pass as an appurtenance to land until the State Engineer issues a certificate of appropriation on the subject water right. (See attached Opinion pp. 4 and 5). Be that as it may, both Courts then refused to address Appellant's undisputed contention that he nevertheless received a deed transferring the land and appurtenant water after the State Engineer certificate issued (Pl. Ex. D-4) - thus rendering the Court's

decision on when water becomes appurtenant irrelevant to the determination of the case. The conveyance Appellant relies on occurred December 30, 1969 and, as a matter of law, had to have included appurtenant water because the State Engineer certificate issued on the subject water right October 21, 1969 and reissued November 25, 1969; it was stipulated that the water was actually placed to use on the 30.1 acres conveyed to Appellant immediately preceding the conveyance of land (Tr. 42; Order Amending FF 1); the warranty deed included all appurtenances and did not reserve the water (Pl. Ex. D-4); and the grantors and grantees to the transfer of land upon which the water was placed to use testified that that was how they passed and received their interest in the subject water right (Tr. John Little 97, 100; Lorna Little Cottam Tr. 127, 136; and Larry Lester Little Tr. 161). (The grantors and grantees were the same, they simply conveyed the land and all appurtenances which they held in undivided interests to themselves individually.) Thus, it is simply wrong for both the Trial Court and the Court of Appeals to avoid and fail to address the legal effect of this conveyance. There is simply no testimony or evidence presented that even suggests that the December 30, 1969 conveyance was not meant to include appurtenant water. It is all the more improper for both courts to sidestep this conveyance because this issue was specifically raised in every proceeding before both lower courts, including it being the sole focus of Appellant's Petition for Reconsideration to the Court of Appeals. Moreover, the December 30,

1969 conveyance rendered unnecessary the decisions of both Courts on when water becomes appurtenant to the land because under the Court of Appeals' reasoning Appellant nevertheless received a deed of conveyance after the water unquestionably became appurtenant to the land.

There is no dispute in the facts. On January 16, 1968, the land upon which the water was being placed to use was conveyed in undivided interests to the children of the grantors. At that time no certificate of appropriation had issued. On November 19, 1969, the Trial Court determined that the subject water right passed to Lorna and Clara, two of the children who by virtue of the January 16, 1968 conveyance also held the land in undivided interests. The State Engineer issued his certificate of appropriation on October 21, 1969 and because of a descriptive error amended and reissued it November 25, 1969. Thus, on November 25, 1969, Lorna and Clara unquestionably owned the land and the water right - under anyone's theory. All parties have stipulated that the subject water right was actually placed to use on the land Lorna and Clara co-owned during the 1969 irrigation season (Tr. 42; Order Amending Findings of Fact 1). Thus, under the rationale adopted by the Court of Appeals, the water could have, as of November 19, 1969 or certainly no later than November 25, 1969 when the certificate of appropriation reissued, passed as an appurtenance to the land. Thus, when Lorna and Clara thereafter joined their two brothers and one sister in conveying and dividing the land between themselves without reserving the water the subject water right passed as an

appurtenance to the transfer of land under statutory authority of §73-1-11 U.C.A. 1953. By separate warranty deeds dated December 30, 1969 they conveyed 8 acres to one brother (Pl. Ex. D-3) and 30 acres to Appellant Larry Little (Pl. Ex. D-4). On December 31, 1969, they conveyed 41.3 acres to themselves (Pl. Ex. D-5). All deeds included all appurtenances. None reserved the water. Critically, the only testimony of Lorna and Clara was to the effect that this conveyance - the December 31, 1969 conveyance - was how they thought they received their water (Tr. 127, 136) - not by virtue of the November 19, 1969 quit claim deeds as asserted by Appellee and as found by the Trial Court. These conveyances are undisputed and a matter of record. No contention has ever been made that these deeds were ambiguous. And, they clearly conveyed the land upon which the water was being used and to which it was then unquestionably appurtenant. Thus, the water passed to the grantees of these deeds as a matter of law and under statutory authority of 73-1-11 U.C.A. 1953. There is no evidence to the contrary. And, it places the water squarely within the chain of title asserted by Appellant and outside the chain of title of Appellee. It also demands, as a matter of law, reversal of the Trial Court and renders unnecessary the decision reached by the Court of Appeals on the issue of whether water is appurtenant to land before the State Engineer issues his certificate of appropriation.

Critically, neither the Trial Court nor the Court of Appeals addressed this part of Appellant's case. Moreover, the Appellees

did not address it in their answer brief on appeal or at trial. Yet, Appellant has raised it at each stage of these proceedings and carefully preserved it for appeal and has set it forth in all briefs (see Appellant's Brief pp. 28-30, and Reply Brief pp. 18-20, and Petition for Reconsideration) and in argument.

The issue which the Court of Appeals and the Trial Court overlooked can be decided as a matter of law. The subject water, as a matter of law, had to have passed as an appurtenance to land December 30 and 31, 1969 because there is no evidence to the contrary and the deeds of conveyance clearly included all appurtenances. Under §73-1-11 U.C.A. 1953 there can be no other conclusion.

II

THE RULINGS OF THE TRIAL COURT AND THE COURT OF APPEALS WILL UNDOUBTEDLY DISRUPT AND INVALIDATE THE ADMINISTRATIVE PRACTICE OF THE UTAH STATE ENGINEER WHICH HAS BEEN UNIFORMLY ACCEPTED AND APPLIED FOR OVER 25 YEARS. IN THE PROCESS, IT WILL ALSO CLOUD EVERY TITLE THAT HAS BEEN TRANSFERRED ACCORDING TO THAT POLICY DURING SAID 25 YEAR PERIOD

Putting aside for the moment the question of why the Trial Court and the Court of Appeals elected to tackle a question of first impression rather than address the legal effect of the warranty deeds dated December 30 and 31, 1969 - which transferred the land and appurtenant water after the State Engineer's certificate issued - there is the larger problem of the impact their decision will have on all conveyances made under said State Engineer policy. The instant action provides a good case study.

Here, the State Engineer considered the deed of January 16, 1968 as constituting the root title for the subject water right (Pl. Ex. No. 6). On January 16, 1968 the owner of the water right had submitted proof of appropriation, demonstrating actual and beneficial use of the water, the drilling of the well, construction of the diversion facilities, etc., but the State Engineer had not issued his certificate of appropriation. Under these circumstances where there is a demonstrated actual and beneficial use of the water the State Engineer has consistently transferred title to the water before the certificate issues (Tr. 56). Here, the only reason the certificate did not issue was because the State Engineer was too busy with other non-related pressing problems (Tr. 56). Thus, the actual certificate did not issue until almost two years after the proof of appropriation was submitted. But, the State Engineer nevertheless transferred title to the water right as an appurtenance to the transfer of land before he issued the certificate of appropriation. The next deed in the title abstract maintained by the Utah State Engineer on the subject water right is the warranty deed dated December 31, 1969 whereby the five children, including Lorna and Clara conveyed 41.3 acres to themselves and thus received the water appurtenant thereto under statutory authority of §73-1-11 U.C.A. 1953 (Pl. Ex. No. 6, Ex. D). Critically, the quit claim deeds relied upon by the Appellees for their root title are nowhere found in the State Engineer files maintained for this water right. The Utah State Engineer did not consider Appellee's root title

documents as constituting any part of the title to the water right. Neither were they filed of record with the Kane County Recorder. Moreover, the only testimony of the parties to the December 30 and 31, 1969 conveyances was to the effect that this was how they received their water - as an appurtenance to the transfer of land (Cottam Tr. 127, 136; John Little Tr. 97, 100; and Larry Little Tr. 161). Thus, it would be, and is, absolutely impossible to confirm title to a water right if parties are, as here, unable to rely on the title abstract maintained by the Utah State Engineer; the administrative policies adopted by the Utah State Engineer to transfer title to water; the deeds maintained by the County Recorder's Office as required by (§73-1-10 U.C.A. 1953); or the testimony of the parties to the transaction which is subsequently called into question. Here, it is clear that the State Engineer's title abstract supports Appellant's and not Appellee's chain of title - the two chains of title are mutually exclusive at this point and the deeds of January 16, 1968 and December 30 and 31, 1969 are in Appellant's and not in Appellee's chain of title. Thus, there is absolutely no way that a result such as that reached by the Trial Court and Court of Appeals will not make title abstracting an impossible proposition.

III

THERE IS NO LEGAL BASIS FOR THE DECISION OF THE TRIAL COURT

In order to succeed in an action to quiet title to a water right, a party must prevail on the strength of his/her claim.

Church v. Meadow Springs Ranch, Inc., 659 P.2d 1045 (Utah 1983). Therefore, it is incumbent upon Defendant/Appellees to clearly articulate their chain of title - which they could not and did not do in the courts below. When they tried to set forth their chain of title (Defendant's Brief, pages 25 through 27) critical dates were omitted, intervening conveyances were not referenced, and fractional ownership interests were not disclosed. Defendants simply did not want to set forth their position. Moreover, they clearly changed their position from the Trial Court to the Court of Appeals. For example, at trial Defendant's chain of title was short and simple. Defendant's root title was comprised of two quit claim deeds, one was undated and the other bore the date of November 17, 1969. By virtue of these two deeds - neither of which expressly referenced the subject water right - Defendant's claimed their immediate predecessors in interest, Lorna and Clara Bess, obtained 100% of the subject water right from their father Lester F. Little. Thereafter, Appellee Greene & Weed contended it received its title from Lorna and Clara Bess when by assignment dated September 1, 1972 the two sisters conveyed 100% of the water right to them (PTO IV(2); Tr. 192). Contrary to Defendant's theory of title the Trial Court expressly found that Greene & Weed obtained their title by virtue of deeds - not assignment - from Lorna and Clara Bess and by quit claim deed from East Canyon Irrigation Company (FF 20). Apparently, the trial judge was relying on the deeds dated December 18, 1975 whereby Lorna and Clara Bess, by separate deeds, expressly conveyed a 5/8ths

interest in the disputed water right (Def. Ex. 15 and 15A) and on a quit claim deed dated December 18, 1974 from East Canyon Irrigation Company (Pl. Ex. 14; Def. Ex. D-7). This finding is absolutely inconsistent with Defendant's theory of title. Thus, Defendants clearly had to, and did, change their theory of title to accommodate the Court's finding - yet their theory still cannot be explained because the 5/8ths interest Lorna and Clara Bess expressly conveyed is consistent with what Lorna and Clara Bess received by deed dated December 31, 1969. So too is the interest of East Canyon Irrigation Company which traces its interest back to the December 30, 1969 conveyance (Tr. 97, 100). Both fall squarely within Appellant's and not Appellee's chain of title.

Significantly, when Defendant did set forth their modified chain of title on appeal they did not include all the conveyances made by the parties, the ownership interests being conveyed (fractional or whole) or, in some circumstances the dates of conveyance. They did not do this because it would make their theory of title incomprehensible. The inconsistency with the Trial Court's Findings of Fact and Conclusions of Law and that of Defendant's theory of title are many. There is simply no theory of title which will support Defendant's chain of title. However, Appellant's chain of title is clear and consistent and in accordance with the testimony of the parties.

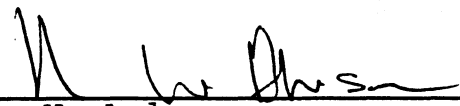
CONCLUSION

The Trial Court and the Court of Appeals decided a question of first impression rather than the central and dispositive issue in this case. Water passed as an appurtenance to the conveyance of land under statutory authority of §73-1-11 U.C.A. 1953 on December 30 and 31, 1969, and the uncontradicted testimony of the parties to those conveyances was that this was how they received their water right.

Based on the foregoing, Appellant respectfully requests that this Court grants its Petition for Writ of Certiorari.

Respectfully submitted this 23rd day of September 1990.

CLYDE, PRATT & SNOW



John W. Anderson
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I mailed true and correct copies of the foregoing Petition for Writ of Certiorari to the Utah Court of Appeals to the following attorneys of record, this 28th day of September, 1990, postage prepaid:

E. J. Skeen
50 South Main, #1600
P.O. Box 45340
Salt Lake City, Utah 84144
Attorney for Lippincotts

Keith S. Christensen
230 South 500 East, Suite 250
Salt Lake City, Utah 84102
Attorney for Greene & Weed

Donnie Garrett

ADDENDUM A

FILED

AUG 15 1990

OPINION
(For Publication)

Case No. 890177-CA

Defendants and Appellees.

Attorneys: John W. Anderson, Salt Lake City, for Appellant
Larry Little
E. J. Skeen, Salt Lake City, for Appellees Leon S.
Lippincott and Caroline Lippincott
Keith S. Christensen, Salt Lake City, for Appellee
Greene & Weed Investments

DAVIDSON, Judge:

On January 16, 1968, Lester F. Little and Madge Little, husband and wife, conveyed to their five children by warranty deed 80.1 acres of land located in the Johnson Canyon area in

1. This is an appeal from an interlocutory decree which the lower court certified as a final judgment pursuant to Utah R. Civ. P. 54(b). The lower court action was brought on two counts: (1) a challenge to the state engineer's decision; and (2) an action to quiet title to a water right. The issues below were bifurcated. The quiet title action was tried first since determination of the water right ownership will likely determine the challenge to the state engineer's decision. The present appeal concerns only the quiet title action.

Kanab, Utah. The deed conveyed to each an undivided one-fifth interest "[t]ogether with all improvements and appurtenances appertaining thereto." At the time of the conveyance the water right later associated with the land had not yet been certificated by the state engineer. This water right was carved out of a larger water right application originally filed by Lester on April 12, 1955 and approved by the state engineer on October 15, 1958. On November 30, 1967, Lester filed the application to segregate the water right in question. The new application requested permission to appropriate .92 cubic feet per second (cfs) out of the 10 cfs in the original application for use on 83.3 acres. The state engineer opened a new file upon receiving the segregated application.

Lester constructed diversion facilities and irrigated the 83.3 acres beginning in the early part of 1967. On December 19, 1967, Lester filed proof of appropriation with the state engineer demonstrating that the diversion facilities were complete and that the water had been placed to beneficial use. Approximately one month after filing the proof of appropriation, but prior to certification, Lester conveyed 80.1 of the 83.3 acres to his five children.

The five children made several conveyances further dividing the land. Appellant contends that the initial warranty deed from Lester and Madge to the five children transferred the water right as an appurtenance to the land. Therefore, the subsequent warranty deeds issued by the children also passed the water rights, and the quitclaim deeds and other documents relied upon by appellees are irrelevant to the court's determination of title to the water.

Appellees argue that the water rights were not conveyed in the warranty deeds issued by Lester and Madge. Rather, they argue that on November 17, 1969, Lester conveyed the entire water right to Lorna and Clara, two of the five children, by quitclaim deeds. They argue that water rights cannot be appurtenant to land until after the state engineer issues a certificate of appropriation. The trial court agreed and held that "[t]he water right involved . . . did not pass as an appurtenance to land conveyed before it was perfected by the issuance of a certificate of appropriation by the State Engineer."

STANDARD OF REVIEW

Our review of the trial court's ruling is a question of law which we review for correctness. Asay v. Watkins, 751 P.2d 1135, 1136 (Utah 1988); see Gonzales v. Morris, 610 P.2d 1285, 1286

(Utah 1980) ("[Q]uestions of legislative intent and statutory application are matters of law, not of fact.")

Appellant argues here that the water right becomes appurtenant upon the filing of the proof of appropriation.² He therefore contends that the water right automatically transferred in the warranty deed. He relies specifically on Utah Code Ann. § 73-1-11 (1989) which states that "[a] right to the use of water appurtenant to land shall pass to the grantee of such land" unless expressly reserved by the grantor. He also relies on Utah Code Ann. § 73-1-10 (1989), which states that final water rights may be transferred by deed in substantially the same manner as real estate, and upon Utah Code Ann. § 73-3-18 (1989), which states that rights claimed under water right applications may be transferred by instruments in writing prior to issuance of a certificate of appropriation.

To determine if the water right here was appurtenant to the land at the time of the initial conveyance, we must look to the nature of the right created by statute. See Bonham v. Morgan, 788 P.2d 497, 500 (Utah 1989), reh'g denied (1990); Mosby Irrigation Co. v. Criddle, 11 Utah 2d 41, 46, 354 P.2d 848, 852 (1960). In determining the nature of this right we rely upon the plain language of the statutes in question and prior case law. Bonham, 788 P.2d at 500. In this analysis, we note that the right to use and appropriate water is created by statute. See Criddle, 11 Utah 2d at 46, 354 P.2d at 852; Utah Code Ann. §§ 73-3-1 to -29 (1989). The statutory procedure "prescribes the exclusive manner in which such a right can be initiated, the conditions upon which such right can be acquired, and the procedural requirements which must be complied with." Criddle, 11 Utah 2d at 46, 354 P.2d at 852.

Section 73-1-11 provides that "water appurtenant to land shall pass to the grantee of such land" The term "appurtenant" is not defined by statute. The Utah Supreme Court has stated, however, that "[a] water right, acquired by appropriation and used for a beneficial and necessary purpose in connection with a given tract of land, is an appurtenance thereto, and as such passes with the conveyance of the land, unless expressly reserved from the grant." Thompson v. McKinney, 91 Utah 89, 98, 63 P.2d 1056, 1061 (1937) (emphasis added)

2. A proof of appropriation is the next to last step in the statutory water appropriation process. Before a certificate of appropriation is issued the applicant must first file the proof of appropriation demonstrating that diversion facilities are complete and that a stated quantity of water has been applied to a beneficial use. Utah Code Ann. § 73-3-16 (1989).

(quoting Lensing v. Day & Hansen Sec. Co., 67 Mont. 382, 215 P. 999, 1000 (1923)).

Two steps must be completed before water becomes appurtenant to land. First, the water must be beneficially applied to a specific tract of land. Thompson, 91 Utah at 97-98, 63 P.2d at 1061. Second, all the statutory steps for appropriation must be completed. See Utah Code Ann. § 73-3-1 (1989) (no water rights may be appropriated without first following statutory requirements); Criddle, 11 Utah 2d at 46, 354 P.2d at 852; Thompson, 91 Utah at 98, 63 P.2d at 1061 (appropriation plus beneficial use equals appurtenant right); see also Eardley v. Terry, 94 Utah 367, 375, 77 P.2d 362, 365 (1938). The first step is completed when the proof of appropriation is filed. The second step, however, can only be satisfied when the entire statutory process is complete. Prior to completion of the entire appropriation process, the applicant only has an inchoate³ right to the use of the water. See Criddle, 11 Utah 2d at 46, 354 P.2d at 852.

When Lester transferred the 80.1 acres to his five children on January 16, 1968, the final statutory requirement in the appropriative process, the issuance of a certificate, had not been accomplished. Even though Lester had previously completed the diversion facilities, applied the water to beneficial use, and filed the proof of appropriation, the water right could not be appurtenant to the land. The appropriation process is complete only after the certificate of appropriation is issued and that certificate then becomes "prima facie evidence" of the owner's water right. Utah Code Ann. § 73-3-17 (1989);⁴

3. The term "inchoate" means "[i]mperfect; partial; unfinished; begun, but not completed" Black's Law Dictionary 686 (5th ed. 1979).


4. Utah Code Ann. § 73-3-17 (1989) provides, in pertinent part, as follows:

Upon it being made to appear to the satisfaction of the state engineer that an appropriation . . . has been perfected in accordance with the application therefor, and that the water appropriated . . . has been put to a beneficial use, as required by Section 73-3-16, he shall issue a certificate The certificate so issued and filed shall be prima facie evidence of the owner's right to the use of the water in the quantity, for the purpose, at the place, and during the time specified therein, subject to prior rights.

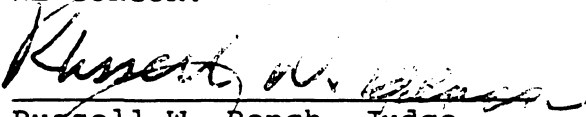
Eardley, 94 Utah at 375, 77 P.2d at 365 ("[N]o final rights are acquired until the proof . . . is made and a certificate has been issued by the state engineer."); Lake Shore Duck Club v. Lake View Duck Club, 50 Utah 76, 81, 166 P. 309, 311 (1917) (certificate is appropriator's deed of title good against the state and against everyone else who cannot show a superior right).

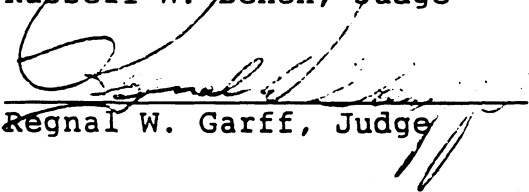
We therefore conclude that the January 16, 1968 warranty deed did not transfer the water as an appurtenance to the land. The trial court properly found that the November 19, 1969 quitclaim deed did transfer the water right at a time when that right was fully vested.⁵

The decision of the trial court is affirmed.


Richard C. Davidson, Judge

WE CONCUR:


Russell W. Bench, Judge


Reginal W. Garff, Judge

5. In its findings of fact, the trial court concluded that Lester and Madge intended to transfer the entire water right in the November 17, 1969 quitclaim deed, even though that deed contained an incorrect property description. The trial court's decision was based in part on a subsequent undated quitclaim deed and on other documents which revealed the grantors' intent. We find no error in the trial court's ruling.

ADDENDUM B

IN THE UTAH COURT OF APPEALS

-----oo0oo-----

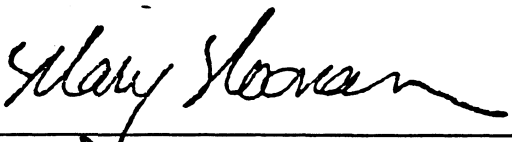
Larry Little,	)	ORDER DENYING PETITION
	)	FOR REHEARING
Plaintiff and Appellant,)	
)	
v.	)	Case No. 890177-CA
)	
Greene & Weed Investments, Leon)	
S. Lippincott, Caroline)	
Lippincott, and Dee C. Hansen,)	
State Engineer of the State of)	
Utah,)	
)	
Defendants and Appellees.)	

THIS MATTER having come before the Court upon
Appellant's Petition for Rehearing, filed August 29,
1990,

IT IS HEREBY ORDERED that the Appellant's Petition for
Rehearing is denied.

Dated this 5th day of September, 1990.

FOR THE COURT



Mary V. Noonan, Clerk