

1960

# Plain City Irrigation Co. v. Hooper Irrigation Co. : Brief of Appellant

Utah Supreme Court

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Case No. 9135

IN THE SUPREME COURT  
of the  
STATE OF UTAH

PLAIN CITY IRRIGATION COMPANY,

*Plaintiff*

vs.

HOOPER IRRIGATION COMPANY,  
a corporation, et al,

*Defendants*

Lynne Irrigation Company, Inc.  
North Ogden Irrigation Company, Inc.  
Western Irrigation Company, Inc.  
Plain City Irrigation Company, Inc.  
Utah State Engineer

**Appellant's Brief**

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## INDEX

Page

Petition for Rehearing ..... 1

### Grounds for Rehearing:

I. THE COURT ERRED IN HOLDING IN EFFECT THAT THE RESERVOIR CONTAINS TWO CLASSES OF WATER—ONE CLASS BEING ALLOCATED TO THE LOWER USERS UNDER PARAGRAPH 7 (A) OF THE DECREE, AND THE OTHER CLASS NOT BEING SO ALLOCATED. .... 1

II. THE COURT ERRED IN HOLDING THAT THE CLAIMS OF THE APPELLANTS, IF UPHELD, PRODUCE AN INEQUITABLE RESULT. .... 1

### ARGUMENT:

I. OGDEN RIVER WATER USERS ASSOCIATION HAS BUT ONE CLASS OF WATER, ALL OF WHICH IS SUBJECT TO THE DECREE ..... 3

II. THE COURT ERRED IN HOLDING THAT THE CLAIMS OF THE DEFENDANTS AND RESPONDENTS PRODUCE AN INEQUITABLE RESULT ..... 9

CONCLUSION .....14

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PLAIN CITY IRRIGATION COMPANY,  
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Lynne Irrigation Company, Inc.  
North Ogden Irrigation Company, Inc.  
Western Irrigation Company, Inc.  
Plain City Irrigation Company, Inc.  
Utah State Engineer  
*Appellants*

PETITION FOR REHEARING

Comes now The North Ogden Irrigation Company, Western Irrigation Company, Lynne Irrigation Company, Plain City Irrigation Company, and the Utah State Engineer, Appellants in the above cause and respectfully petition this court for a rehearing in the cause, for the reasons and upon the following grounds:

I.

THE COURT ERRED IN HOLDING IN EFFECT  
THAT THE RESERVOIR CONTAINS TWO  
CLASSES OF WATER — ONE CLASS BEING AL-

LOCATED TO THE LOWER USERS UNDER PARAGRAPH 7 (A) OF THE DECREE, AND THE OTHER CLASS NOT BEING SO ALLOCATED.

## II.

THE COURT ERRED IN HOLDING THAT THE CLAIMS OF THE APPELLANTS, IF UPHELD, PRODUCE AN INEQUITABLE RESULT.

### BRIEF IN SUPPORT OF PETITION FOR REHEARING

The fact that we are here confronted by a court which is itself divided in its conclusions places a double responsibility upon us as attorneys of the bar of this court. First, the responsibility and duty of further advocating the position of our clients, so ably stated in the dissenting opinion of Mr. Justice Callister, and, second, the responsibility of treading the narrow margin between respect for the decision of the majority of the court, and honorable disagreement therewith.

The majority opinion, as we read it, rests upon two propositions, neither of which finds support in the record. The first is that the so-called "power water" is water separate and distinct from the water which the decree operates upon. The second is that to subject the power water to the decree produces an inequitable result which should be avoided if the decree may otherwise be reasonably interpreted.

This petition is limited to these two points, and we respectfully petition the court to give further consider-

ation thereto to the end that the court, in seeking to arrive at what it conceives to be an equitable result, does not deny the lower users that which is theirs as a matter of law.

## ARGUMENT

### I.

#### OGDEN RIVER WATER USERS ASSOCIATION HAS BUT ONE CLASS OF WATER, ALL OF WHICH IS SUBJECT TO THE DECREE

At the outset the court should have it clearly in mind that the so-called "power water", which has been so designated solely for the purpose of identification, does not find itself from a source separate and apart from the source of the other water in the reservoir. All of the water comes from what the majority opinion refers to as the "normal recharge of the basin". In the year 1959, this normal recharge produced a total of 30,915 acre feet, and it was all available for storage in the reservoir. The power water was not in addition to this normal recharge, but was a part of it. However, the Power Company had the right to require the release to it for power purposes of 15,015 acre feet of this total. If this right were exercised the amount of water remaining for the stockholders of the Association would be reduced by this amount. On the other hand, if the Power Company's right of release was not exercised, the Association would have the full 30,915 acre feet. Accordingly, and at the request of the Association, the Power Company for a consideration of \$1.28 per acre foot waived its right of release, and the Association

thereby became entitled to the use of the full 30,915 acre feet. The majority opinion speaks of this as being "additional water purchased from the power company", which we believe inaccurately describes the transaction, but whether it was in fact a sale of water, or a waiver of a right, perhaps is not important. What is important is that the water involved was not "additional" to the normal recharge, but was a part of the normal recharge. Thus we believe that this court became, as was the lower court, led astray by accepting the City's characterization of the water as "additional water".

Another point which the majority must have overlooked, although the same has never been denied by the City, is that the Association, in discharge of its duties to its stockholders to attempt to provide an acre foot of water per share of stock, is not limited to a particular source, but has broad powers to obtain such water from any source. And having obtained such water it holds the same, and the whole thereof, for the pro-rata use of its shareholders. No shareholder is preferred as against others, but each share "is entitled" (to use the language of the decree) to an equal pro-rata share of the Association's water, which in the year 1959 was 30,915 acre feet. Thus we have the situation where each share was entitled to  $1/44,175$  of 30,915 acre feet, or approximately .7 acre foot per share, and the 4,500 shares we are here concerned with were entitled to  $4,500 \times .7$ , or a total of 3,150 acre feet. The narrow question then is "who is to receive the 3,150 acre feet represented by these 4,500 shares?" Or, to state it another way, "who is to receive the 3,150 acre feet to which these shares is entitled"?

The lower court specifically found that the power water was “not subject to the decree”, and we assume that this court in affirming the lower court confirmed that finding. But if we accept the premise, which even the City has not denied, that the power water is water which inures to shareholders of the Association the same as any other water of the Association, then this finding by the lower court fails, because the decree by its terms operates upon all water of the Association which inures to the Association’s shareholders. Frankly, we believe that if the decision of the lower court, as affirmed by this court, is valid, it must be upon the ground that the decree does not allocate the power water to the lower users, not upon the proposition that the power water is not subject to decree. This is probably what the majority of this court was attempting by its emphasis upon the word “is” in the decree, rather than excluding the water from the decree as did the lower court. We believe, however, that the hidden fallacy in this premise likewise may be demonstrated.

The decree by its terms provides then in exchange for the water from the wells “the City set apart the water to which it is entitled upon 4,500 shares of stock”. It further provides, “That the water represented by said 4,500 shares of stock shall be distributed to the water (lower) users”. The so-called power water, as well as any other water of the Association, is certainly water “represented” by the 4,500 shares, and is likewise water to which the City “is entitled” under such shares, because the City has no right to any Association water except by and under its shares of stock. How then is this power water allocated by the decree? Is it to the

lower users, as is other water, or is it excluded from the allocation as held by the majority of this court?

To exclude it from the allocation requires an interpretation of the phrase "is entitled" in the narrowest sense, namely, in the sense of "the water then available", as stated by the majority, and this narrow construction is justified by the Court to the end of producing "a fair and equitable result". That is an absolute non sequitur we will show under Point II of this Petition, but we accept it for the moment to the end of showing where the narrow interpretation of "is entitled" leads, because if it is to be narrowly construed at all it must so be for all purposes — not first narrowly and then loosely to reach a desired end.

When the majority holds that the phrase "is entitled" relates to "the water then available", it means, of course, that water available at the time the decree was entered, namely, April 1, 1948. While the record is silent as to the exact amount of water then available, we doubt not but that the court will acknowledge from experience that the water "then available" was at its lowest. The reservoir had been emptied, or substantially so, from the previous years' use, and the spring run off was but commencing. The amount of water "then available" was minimal, but the amount thereof as of that date can be obtained from the Association's records. Under this decision as it now stands the City can from the Association's records determine just what that amount then was in terms of acre feet (in fact it was but 1,128 acre feet as shown by the Association's daily storage records) and insist that it was but a pro-rata portion of this minimal amount of water only

that was allocated to the lower users under the decree, and for which the City receives in return the year round flow of 22 second feet from the wells. We are, of course, satisfied that neither this court nor the City itself intended this drastic result, but the majority opinion of the court necessarily puts the parties in the position where it may be claimed.

Actually the decision as written extends even further than that. The majority of the court in allocating the water under the decree to that "then available" further observes that "no future tense appears in the language used and no reference is made to the future". Obviously the purport of this language, even though it may not have been the intendment of the court, is that the allocation of water to the lower users was strictly that water then available, namely, on April 1, 1948, with no provision for the future and no provision for future years. The result is that even an annual allocation to the lower users is denied, and they are held to have had only the right to a proportionate share of the water available to the Association on the date of the decree, and none thereafter. And this still isn't the end of the matter, for the purport of the decision must be pursued to its logical conclusion!

If the lower users are restricted to the allocation of the water "then available", then what the lower users gave to Ogden City "in exchange" therefor must of necessity be likewise restricted, and what we have is Ogden City receiving the right to the use of the wells in the year 1948, and the lower users receiving an allocation of storage water in the year 1948. In other

words, the decree provides not a permanent solution of the problem at all, but only a solution for the year 1948.

We recognize that in thus presenting the matter we may be charged with arguing the ridiculous, but we submit that once the decree is limited to water "then available", the consequences we have developed above of necessity result.

What then is the answer? We submit it lies in this court acknowledging by further decision in this case that its narrow application of the phrase "is entitled", to only such water as was "then available", was erroneous, and that some further interpretation must be given thereto. To do this the court must say that the water the decree was allocating to the lower users was not only the minimal amount then in the reservoir, to which the shares were then entitled, but also some further water the Association might in the future from time to time acquire.

Certainly this is what the court intended, at least as to water accumulated and acquired from the natural flow of the river, but to make that intention manifest a further statement thereon is required of this court. But once the court acknowledges that water over and above the minimal amount in the reservoir as of the date of the decree was in fact allocated to the lower users under the decree, where can it logically stop? Can it say that the additional water which the decree operates upon is only the flow from the river which inures to the Association under Right Number 397 in the name of the United States? How can it say that and yet exclude water the use of which the Association

acquired through agreement with the Power Company under Right 37, or to any other water which the Association may lawfully acquire?

We submit that if this court acknowledges, as we believe in fairness it must, that the decree is not limited in its allocation of water to the lower users to that amount of water which was as of April 1, 1948, "then available", then the court must further acknowledge that the position of the lower users and of the State Engineer throughout these proceedings was correct, and that there is no basis under the decree, either in law or in fact, for saying that the decree allocates some of the water of the Association to which the 4,500 shares are entitled, but not all of the water to which the shares are entitled.

That this does not result in an inequity to the City which the Court sought to avoid we will now show.

## II.

### THE COURT ERRED IN HOLDING THAT THE CLAIMS OF THE DEFENDANTS AND RESPONDENTS PRODUCE AN INEQUITABLE RESULT.

At the outset we would observe that the paragraph of the decree we are here concerned with was entered by the Court upon stipulation of the parties, and whether it was advised or ill advised as to any party is not presently of primary importance. As stated by the majority opinion it is only where there is doubt as to the interpretation of an agreement that questions of fairness and equity play any part in its interpre-

tation. We will, accordingly, assume with the court, but without admitting, that there is some doubt as to just what the parties intended, and from there consider the equity of the claim of the lower users as compared to the result reached by the majority of the court.

We have already seen what may well happen to the lower users if the majority opinion to the effect that the decree allocates only water "then available" remains unmodified. Under this decision the City may well contend that it has heretofore been over generous to the lower users, and that hereafter by virtue of this decision all they are entitled to receive and will receive (if any at all) is but a fractional part of some minimal quantity of water, measured by the amount of water actually available as of April 1, 1948. We assume however that any possibility of that contingency arising will be eliminated by further action by this court.

Even so, and assuming the right of the lower users is extended to include each year all water available to the Association under Right 397, equity is not done by excluding water otherwise acquired by the Association. To get the matter in proper perspective an understanding of the situation as of the time the stipulation was agreed to must be had.

For many years prior thereto the lower users were claiming the prior right to the flow from the wells, and this claim had been the subject of long standing litigation between them and the City. The lower users claimed the water for irrigation, whereas the City desired it for culinary purposes, as it was suitable for drinking. To settle and to solve the matter in such

a way as would enable the City to utilize the well water for drinking purposes, and at the same time provide the lower users during the irrigation season with a comparable quantity of irrigation water, the parties agreed to an exchange. To effect this solution the City agreed to deliver to the lower users Association water, the right to the use of which the City had by virtue of 4,500 shares of stock the City held in the Association. These shares were at all times to be held and maintained by the City, but the water thereunder was to be released to the lower users. In return or "in exchange" therefor, the City was to have the year round right to the flow from the wells (possibly limited during some months to 22 second feet daily average flow), but notwithstanding such limitation, the right to the use of in excess of 15,000 acre feet of water annually from the wells. In other words, with a full reservoir in Pineview the lower users were to receive annually 4,500 acre feet of irrigation water, and the City up to 15,000 acre feet of culinary water. Certainly the City was not taken advantage of in that transaction.

But, says the majority opinion, if the City is required to participate, through the payment of assessments, in any special costs incurred by the Association in attempting to provide a full reservoir and a full acre foot of water per share, an inequity develops against it. With this we cannot agree.

Under the Articles of Incorporation of the Association each share of stock is entitled to its pro-rata share of the fill of the reservoir.. As there are 44,175 shares, and the Association capacity in the reservoir is 44,175 acre feet, each share becomes entitled to a maximum of

one acre foot. So unless it be assumed that the Association is going out and obligate itself for water in excess of that which it has capacity to store, and to assess its present shareholders therefor, the maximum obligation the City is under is to pay its pro-rata share under its 4,500 shares of the cost to the Association of filling the reservoir. Where is the inequity and where is the unfairness to the City in that? In those occasional years when the reservoir does not fill under Right 397, and the Association acquires water from some source, the City will be put to some added cost. But even in those years the City is still getting upward of 15,000 acre feet of culinary water from the wells, something worth immeasurably more than any added costs to the City incurred in the acquisition of additional irrigation water, particularly in years of short supply. To find an inequity to the City under those circumstances requires a finding of inequity merely because the court conceives that the City made an improvident bargain in agreeing to subject the water to which its 4,500 shares are entitled to the use of the lower users.

Even if the court desires to assume that the Association might in the future in disregard of its duties to its shareholders, and particularly over the protests of the City, as the major shareholder, seek to obligate the Association for water in excess of its reservoir capacity and assess a portion of the costs to these 4,500 shares, the resulting inequity to the City would be minor in comparison to the inequities this court forces upon the lower users by its majority decision. Let's examine that side of the coin.

The court recognizes, of course, that the wells in question are fed from an artesian basin lying beneath what is now Pineview Reservoir. This basin gets its recharge from the flow of Ogden River. The first run off each year of necessity goes to the recharge of the basin, and it is only after the basin gains its recharge that surplus run off develops for storage in the reservoir. Thus in a short year like 1959 the basin is filled and the City gets its full supply from the wells, and it is only the storage that suffers the shortage. Thus the preferment in every year is in favor of the City, and the weighing of the preferment the City gets through having the water from the wells, as against the occasional added annual charge to the City, demonstrates that the benefits to the City far exceed the burdens.

One further point should perhaps be commented upon. The majority opinion attributes significance to the fact that some of the lower users are shareholders in the Association and as such are in a position to encourage the Association to buy additional water. By the same token the City is a shareholder to the extent of 10,000 shares and in a far better position to discourage any such purchase. The court does not comment upon the size of the share holdings of the lower users as compared to those of the City, and indeed we doubt that it is a part of the record, but we can assure the court, for what it is worth, that the aggregate holdings of the lower users is but a fractional part of the holdings of the City.

## CONCLUSION

We strongly urge that the majority of this court erred in its conclusions in this matter, first, in holding that the decree operated to allocate to the lower users only water "then available", and did not extend to water subsequently acquired in the year 1959 for the purpose of augmenting the then short supply, and, secondly, in permitting its interpretation of the meaning of the decree to be influenced by what it conceived to be equities in favor of the City.

While we have attempted to present our own views with cogency, we have intended no offense to those who may still disagree with us. Petitions for rehearing are to the writer among the more difficult tasks he called upon to perform, as they are of necessity directed against the logic and reasoning of members of this court. We may, however, and do on occasion, honestly disagree with this court, but such disagreement affects in no way our respect for those who judge us, and it is in that spirit that this petition is presented. We respectfully request that it be granted.

Respectfully Submitted,

HOWELL, STINE & OLMSTEAD

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