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Plain City Irrigation Co. v. Hooper Irrigation Co. : Reply Brief of Appellants

Utah Supreme Court

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David K. Holther; Howell, Stine and Olmstead; Neil R. Olmstead; Walter J. Budge; Attorneys for Appellants;

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Case No. 9135

**IN THE SUPREME COURT
of the
STATE OF UTAH**

FILED
MAY 11 1960
Clerk, Supreme Court, Utah

PLAIN CITY IRRIGATION COMPANY,

Plaintiff

vs.

HOOPER IRRIGATION COMPANY,

a corporation, et al,

Defendants

REPLY BRIEF OF APPELLANTS

Lynne Irrigation Company, Inc.
North Ogden Irrigation Company, Inc.
Western Irrigation Company, Inc.
Plain City Irrigation Company, Inc.
Utah State Engineer
DAVID K. HOLTHER
HOWELL, STINE AND OLMSTEAD
By NEIL R. OLMSTEAD
WALTER L. BUDGE
Attorney General

Attorneys and Appellants

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IN THE SUPREME COURT
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PLAIN CITY IRRIGATION COMPANY,
a corporation,

Plaintiff

vs.

HOOPER IRRIGATION COMPANY,
a corporation, et al,

Defendants

The City urges in its brief, among other matters, that the interpretation of the decree sought by the lower users and the State Engineer requires a departure from the decree itself, and results in a breach of the fiduciary relationship that Ogden River Water Users Association owes the City as a minority stockholder. A brief reply is deemed in order, as these contentions completely misconceive the position of the lower users and of the State Engineer.

I.

THE INTERPRETATION OF THE DECREE AS
SOUGHT BY APPELLANTS DOES NOT IN ANY-
WISE CONSTITUTE A DEPARTURE FROM THE
PLAIN LANGUAGE OF THE DECREE.

Ogden River Water Users Association is a corporation. It has issued and outstanding 44,175 shares of stock, of which Ogden City, as a shareholder, had at the time of the decree in question, and now has, ten thousand (10,000) shares. The Association's storage capacity in the enlarged Pineview Reservoir is forty-four thousand one hundred seventy-five (44,175) acre feet. Thus one share of stock equals one (1) acre foot of stored water if the storage capacity is filled, and a prorata fractional part of an acre foot of water when there is less than a full supply. While Ogden City owns a total of ten thousand (10,000) of such shares, but four thousand five hundred (4,500) shares are subject to the decree in question.

The powers and purposes of Ogden River Water Users' Association are such as to invest it with the authority, and to impose upon it the obligation, to use its best efforts to provide its shareholders with a full reservoir each year. To this end its powers to acquire water are broad. Article V of its Articles of Incorporation provide in part:

"This corporation is organized * * * for the purpose of purchasing, condemning, leasing or acquiring water, water rights * * * Water will be furnished only to the stockholders of this corporation.

"And for carrying out the purposes set forth the corporation shall have the power to * * * contract with the United States or other parties for the purchase, acquisition or lease of water, water rights * * * (R. 10, 11 abridged)."

To provide such an annual supply it relies primarily

on Right No. 397, the use to which it has by contract with the United States. To the extent that such right in any year does not provide a full reservoir, the Association has the right and power to acquire water from other sources. All water it acquires, regardless of the source, inures to the benefit of its shareholders.

In 1959, because of less than normal snow fall, the flow of the river produced but approximately thirty thousand nine hundred fifteen (30,915) acre feet of water capable of being stored. This was but approximately .7 of an acre foot per share, and even this amount was subject to the prior right of Utah Power & Light Company to Fifteen Thousand fifteen (15,015) acre feet thereof, which, if exercised, would leave but fifteen thousand nine hundred (15,900) acre feet for the shareholders of the Association — approximately one-third of an acre foot per share.

Confronted with this emergency the Directors of the Association entered into an agreement with the Power Company whereby the Power Company, for a consideration, namely One and 28/100 (\$1.28) Dollars per acre foot, waived its prior right to the fifteen thousand (15,015) acre feet, and thereby the Association preserved to its shareholders the full thirty thousand nine hundred fifteen (30,915) acre feet. The added cost of this water was assessed against all of the shareholders, and Ogden City paid its prorata share. Ogden City did not and does not challenge the propriety of this action by the Association, nor its obligation as a shareholder to pay its prorata share of this additional cost. Neither does it deny—in fact it affirmatively

asserts its right to its prorata share as a shareholder in the Association of the Fifteen Thousand Fifteen (15,015) acre feet of water so acquired from the Power Company.

Thus the sole question involved in this proceeding is whether the decree of April 1, 1958, operates upon the water acquired by the Association from the Power Company, as well as upon the Association's other water. The lower users and the State Engineer contend that it does, and the City contends it does not. The lower court agreed with the City on this point, specifically holding (Par. 2 of Order)

"The water allotted to Ogden City, which was obtained from the Utah Power & Light by the Association *is not subject to Paragraph 7 of the decree entered herein * * **". (Italics added)

This contention of the City, and this holding by the lower court, is manifestly unsound. Paragraph 7 of the decree provides in part:

"In exchange for the water which by diversion from such wells Ogden City withholds from the other water users of such river, said City shall *set apart the water to which it is entitled upon 4500 shares of the stock of Ogden River Water Users Association*, to the use of the other water users of said Ogden River to be used by them at such times and in such manner as hereinafter set out, and shall be bound to make all payments for such water requisite to perfect the rights to the continued use of the water represented by said shares of stock, which said exchange the Court decrees is a fair and equitable exchange."

"That the *water represented by said 4500 shares of stock* shall be distributed only during the low

water period of the irrigation season to the water users as set out in the Tabulation of water rights herein, in such manner and at such times as may be determined by the State Engineer, or by his direction, by the Water Commissioner upon the river, to be reasonably available for the use of such water users after consultation with them."

If the Association was acting within its powers in acquiring the water (and this is admitted), and if Ogden City as a shareholder is entitled to its prorata share of such water (and this is admitted), then such water of necessity is water to which "the City is entitled upon 4500 shares of the stock of Ogden River Water Users Association", and is "water represented by said 4500 shares of stock", which quotes are direct quotes from Paragraph 7 of the decree.

The Association does not have two classes of water. It has but one class, and all of its water falls into that class. Ogden City as a shareholder is "entitled" to its prorata share of that water. That water is "represented" by Ogden City's shares of stock. The lower court's conclusion that this water is not water subject to the decree—that this is not water to which Ogden City is *entitled* to as a shareholder in the Association—that this water is not *represented* by Ogden's shares in the Association—is simply wrong. Not only is it wrong, but Ogden City itself admits and asserts that it is water to which it is entitled as a shareholder, and that it is water represented by its shares.

Accepting then, as we must, the premise that the water in question is water within the purview of the decree, the only question remaining is whether it is

water which the decree sets apart to the use of the lower users, and this too must be answered in the affirmative.

“In exchange for the water which by diversion from such wells Ogden City withholds from the other water users of such river, said City shall *set apart the water to which it is entitled upon 4500 shares of the stock of Ogden River Water Users Association to the use of the other water users of said Ogden River * * *.*”

“*That the water represented by said 4500 shares of stock shall be distributed * * * to the water users as set out in the tabulation of water rights herein, * * *.*” (Italics added)

The foregoing are direct quotations from Paragraph 7 of the decree itself, and the same are plenary. The decree doesn't operate upon but a part of the water to which Ogden's 4500 shares *entitle* it, or upon but a part of the water *represented* by such shares. It operates upon *all* of such water, and no distinction can be made as between water obtained by the Association for its shareholders from one source, as distinguished from another source.

II.

THE INTERPRETATION OF THE DECREE SOUGHT BY APPELLANTS DOES NOT REQUIRE THE ASSOCIATION TO BREACH ITS FIDUCIARY DUTY TO ANY MINORITY STOCKHOLDER.

The City in its brief points out that the decree in effect confirms an exchange of water. With this we agree. The lower users exchange their rights to the flow from the forty-eight wells for the water represen-

ted by 4500 shares of stock in Ogden River Water Users' Association. What was each actually getting?

By the tabulation in the decree the City acquired the year round right to 22 cubic feet per second daily average flow from the forty-eight (48) wells, or sixteen thousand sixty (16,060) acre feet in a twelve month period. A second foot of water produces about two (2) acre feet in twenty-four (24) hours. Applying this flow to a normal irrigation season of from May 1 to October 1, which is what the lower users were concerned with, it means that Ogden City during this period would receive 6,600 acre feet of water from the wells. Forty-five Hundred (4,500) shares of stock represented, with a full reservoir, about forty-five hundred (4500) acre feet, which the lower users were getting in exchange. This, of course, might be reduced in years of short storage supplies, but the lower users recognized, as we do, that the directors of the Association would use their best efforts to provide water to the extent of an acre foot per share.

In the proceedings culminating in the decree in question Ogden City was represented by S. P. Dobbs and the lower users by J. A. Howell. Each was an astute and extremely capable lawyer. If the decree is to be interpreted in the manner contended by the City and that it is limited in application to water stored under the United States right, it would mean that the lower users were exchanging their right to the flow of the wells, which in a five month irrigation season would produce to the City Six Thousand Six Hundred (6,600) acre feet of water, for water from forty-five hundred

(4,500) shares which at most would produce forty-five hundred (4,500) acre feet, and in short years would produce substantially less—as little as sixteen hundred (1,600) acre feet in 1959. We would agree that to the end of obtaining storage water the lower users might be willing to accept something less than the direct flow from the wells, but it is inconceivable that they would agree to an exchange upon the basis urged by the City.

Ogden River Water Users Association had and has storage capacity of forty-four thousand one hundred seventy-five (44,175) acre feet. It had and has plenary powers to acquire water from any source. It had and has a duty to its shareholders to use its best efforts to fill the reservoir and thus provide an acre foot of water per share of stock. In 1959 its best efforts fell far short of its goal, but what it did acquire it acquired for all of its shareholders, share and share alike, and under the decree the lower users were entitled to the water from forty-five hundred (4,500) of such shares.

True it is that the water in 1959 cost Ogden City more than it would in a year of full supply, but it must not be overlooked that in this year of short supply to the irrigators, Ogden City was still getting its full flow from the wells. Ogden City complains in its brief that this construction of the decree results in Ogden City issuing a “blank check” in favor of the lower users. We disagree. What it means is that Ogden City lives up to its stipulation as embodied in the decree, namely, that it will maintain for the use of the lower users forty-five hundred (4,500) shares of stock. If in some

years the cost of maintaining those shares is greater than in other years, such was the condition of the exchange. It is to be expected that water may in some years cost more than in others, depending in part on whether it is plentiful or in short supply. Ogden City, having agreed to maintain these shares for the lower users "and to make all payments for such water requisite to perfect the rights to the continued use of the water represented by said shares of stock" must do just that, and the lower court erred grievously in conditioning the lower users use of this water to their paying Ogden City a price therefor.

As the Directors of Ogden River Water Users Association are by the Articles of the Association vested and charged with the powers, duties and responsibilities of using their best efforts of supplying the shareholders of the Association with a full reservoir, and the resulting one acre foot of water per share, their good faith efforts directed toward this end cannot result in a breach of duty to the shareholders, but are in furtherance of a duty. No charge of bad faith is here asserted, but on the contrary the City admits and acknowledges that in this year of short supply the acquisition of the Power water by the Association was right and proper. We are at a complete loss to understand how the City can in one breath say that the Association did right in acquiring the Power water for its shareholders, and in the next breath urge that the lower users, who are the beneficiaries of 4,500 shares, should be deprived of their prorata share of this Power water.

Finally it is suggested by the City that if the decree contemplated what the lower users contend for, it should have provided in so many words that Ogden supply the lower users with forty-five hundred (4,500) acre feet of water. This is but exemplary of the City's failure and refusal to view this problem in its proper perspective.

The lower users do not contend, and have not contended, that they are entitled to forty-five hundred (4,500) acre feet of water. What they contend is that they are entitled to the water represented by forty-five hundred (4,500) shares of stock. If in a given year this amounts to forty-five hundred (4,500) acre feet, that is what they are entitled to. If in a given year it is less, they are entitled to the lesser amount. But they do contend, and contend vigorously, that they are entitled to *all* of the water represented by such shares up to the reservoir capacity of one acre foot per share. The Association has the duty to its shareholders in good faith to use its best efforts to provide this full supply, including as it did in 1959, the acquisition of the Power water. All water so acquired by the Association is water to which the shareholders are entitled, and is water represented by the shares of stock. What the lower users object to, and all they object to, is being told that there are two classes of water in the reservoir represented by the same shares of stock—one class to which they have a right and the other to which they do not.

We submit there is no such distinction. The order

and decree of the lower court should be vacated and set aside, and the lower court directed to enter its order and decree herein confirming to the lower users the water here in question.

Respectfully submitted,

DAVID K. HOLTER
HOWELL, STINE AND OLMSTEAD
By Neil R. Olmstead
WALTER L. BUDGE
Attorney General

Attorneys for Appellants