

1960

Plain City Irrigation Co. v. Hooper Irrigation Co. : Brief of Respondent

Utah Supreme Court

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Case No. 9135

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

PLAIN CITY IRRIGATION COMPANY,

Clk. Supreme Court, Utah

a corporation,

Plaintiff,

vs.

HOOPER IRRIGATION COMPANY,

a corporation et al.

JUL 10 1967

Defendants.

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Respondent's Brief

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

PLAIN CITY IRRIGATION COMPANY,
a corporation,
Plaintiff,

vs.

HOOPER IRRIGATION COMPANY,
a corporation et al.,
Defendants.

BRIEF OF RESPONDENTS
Ogden City, a municipal corporation

STATEMENT OF FACTS

The facts as set forth in the Appellants' brief are substantially correct and are accepted by the Respondent, with the addition that the exchange approved and decreed by the court in Paragraph 7(a) of the April 1, 1948 Decree, involved flow rights on the part of the Lower Valley Users and storage rights on the part of Ogden City through its stock ownership in the Ogden River Water Users Association. The additional fact should be noted that no determination has ever been made what, if any, effect Ogden City's withdrawal of water from its wells has upon the water available for the Lower Valley Users. The exchange provided by Paragraph 7 (a) was a compromise and settlement of the question of interference.

STATEMENT OF POINTS

POINT I.

THE COURT DID NOT ERR IN MAKING THE ORDER DIRECTING DISTRIBUTION OF WATER, DATED AUGUST 13, 1959, EXCEPT IN DECLARING OGDEN CITY A TRUSTEE OF THE WATER DISTRIBUTED TO IT.

POINT II.

THE COURT DID NOT ERR IN DETERMINING THAT THE WATER ALLOCATED TO OGDEN CITY, WHICH WAS OBTAINED FROM THE UTAH POWER AND LIGHT COMPANY BY THE OGDEN RIVER WATER USERS ASSOCIATION (HEREINAFTER CALLED THE ASSOCIATION) IS NOT SUBJECT TO PARAGRAPH 7 (a) OF THE DECREE OF APRIL 1, 1948.

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ARGUMENT

POINT I.

THE COURT DID NOT ERR IN MAKING THE ORDER DIRECTING DISTRIBUTION OF WATER, DATED AUGUST 13, 1959, EXCEPT IN DECLARING OGDEN CITY A TRUSTEE OF THE WATER DISTRIBUTED TO IT.

The admitted allegations of the petition which Appellants complain were not included in the Decree were not necessary to support the decree. However, the Respondent sees no objection to including those facts if the Appellants desire.

No attempt is made in this case to overturn or to modify the Decree entered by the court on April 1, 1948. The Respondent realizes as well as the Appellants that the matters determined in that suit are res adju-

dicata and are governed by that Decree. The problem in this case is what does the decree mean. Certainly a court has the power and authority upon proper petition and notice to interpret its decrees. As hereinafter argued, under different headings, it is clear that the determination by the lower court that the water acquired from the Utah Power & Light Company by the association as not contemplated or intended by the Decree of April 1, 1948, to be controlled by Paragraph 7 of that Decree. The point that the court erred in declaring the City a trustee of the water purchased from Utah Power & Light and allocated to it is covered in the City's cross appeal.

POINT II.

THE COURT DID NOT ERR IN DETERMINING THAT THE WATER ALLOCATED TO OGDEN CITY, WHICH WAS OBTAINED FROM THE UTAH POWER AND LIGHT COMPANY BY THE OGDEN RIVER WATER USERS ASSOCIATION (HEREINAFTER CALLED THE ASSOCIATION) IS NOT SUBJECT TO PARAGRAPH 7(a) OF THE DECREE OF APRIL 1, 1948.

POINT III.

THE COURT DID NOT ERR IN DETERMINING THAT THE WATER ACQUIRED BY THE ASSOCIATION FROM THE UTAH POWER AND LIGHT COMPANY WAS NOT INTENDED OR CONTEMPLATED BY THE PARTIES TO THE STIPULATION AND DECREE TO BE CONTROLLED BY PARAGRAPH (7)a OF THE DECREE OF APRIL 1, 1948.

Paragraph 7 of the Decree, so far as pertinent here, reads as follows:

“That upon the stipulation this day in open Court of all of the users of water of the Ogden River and its tributaries, for the purpose of compromising and permanently settling all disputes, controversies and litigation between the appropriators and users of water from Ogden River and its tributaries, as between the appropriators and users of water in Ogden Valley, and which are shown in the Tabulation herein as right numbers 154 to 392, inclusive, and hereinafter called “Upper Valley Users”, Ogden City and the appropriators and users of water lower down on said river and which are shown in the Tabulation herein as rights numbers 1 to 36, inclusive, hereinafter called “Lower Valley Users” the Court decrees as follows:

(a) That the prior right of Ogden City to the use of all of the flow from Cold Water Creek and springs and from Warm Water Creek and Springs, and of the waters of Wheeler Creek to the extent of the capacity of its present intake is hereby established. Ogden City is likewise entitled to the flow from the forty-eight (48) artesian wells located at the bottom of Pine View Reservoir, but shall not be entitled to drill more wells in that area, except to replace by a well of like size any of said wells which may become clogged or otherwise abandoned by said City, nor shall it be entitled to accelerate the flow of such wells by pumping. However, except in the period between July 1st and September 30th, both inclusive in each year, it shall not withdraw in excess of 22 second feet of water daily average from the artesian basin in which such wells

are situated, except when the waters of Wheeler Creek are permitted to flow past its intake and so become available to other water users.

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 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."

The first observation is that this decree approved and confirmed an exchange of water. The effect of this exchange was that Ogden City would be allowed to withdraw water from 48 wells in the artesian basin and for that water Ogden City should set apart the water to which it is entitled upon 4500 shares of stock of the Ogden River Water Users Association for the lower users. What did that mean at the time the decree was entered? The court and everyone else involved in the

suit knew that the Association had rights Nos. 395 and 397. They further knew that the Association did not have any other rights. It did not have any right whatsoever in Right No. 37 which belonged to the Utah Power & Light Co. The court and the parties therefore must have intended that the only water Ogden City agreed to exchange for the right to withdraw water from its wells as the water represented by 4500 shares of stock in the Association, considering that the Association's right was No. 395 and 397. Certainly there could have been no intention by any party involved that Ogden City was exchanging part of Right No. 37 which was owned by the Utah Power & Light Company. The fact that the Association has an incidental power to acquire additional water was not discussed in the hearing which resulted in the April 1, 1948 Decree, and there is nothing in the record to indicate that any party or the court at any time assumed that the Association would expand its water right beyond rights Nos. 395 and 397.

The Decree says that the "City shall set apart the water to which it is entitled". That would clearly indicate that the court was speaking of the then existing water rights of the Association and not an indefinite amount which the Association may in its judgment from time to time acquire in the future. To find as the Appellants contend that the exchange applied to all waters which the Association then had, together with all water which it may thereafter acquire, is to assume that Ogden City issued a blank check to the Association for the benefit of the Lower Valley Users.

Let us consider the peculiarities on this situation.

The Association is an association of irrigation companies, Ogden City, and certain conservation districts. The majority of the Association are irrigators. Ogden City is a minority stockholder and does not have even its proportionate representation on the Board of Directors of that Association, and certainly the control of the Association is in the hands of the irrigators, some of whom are the appellant corporation. Under such an arrangement it would be ridiculous for Ogden City to agree that whatever waters are purchased by the Association shall be paid for according to stock ownership therein, but that the City's share shall be distributed 45/100 to the Lower Valley Users at no charge to them. If that is the interpretation of the decree the Appellants and their irrigator friends can charge Ogden City for a windfall benefit to the Lower Users. If the Appellants interpretation is adopted by the Court, Ogden City will have to oppose every proposed water purchase by the Association except for the Association's original rights No. 395 and No. 397, because all additional purchases would definitely be to Ogden City's disadvantage.

POINT IV.

THE BENEFITS OR OBLIGATIONS UNDER A DECREE MUST BE DEFINITE AND CERTAIN, AND NOT SUBJECT TO INDEPENDENT ACTION OF ANY BOARD OR PERSON SEPARATE FROM THE COURT IN DETERMINING WHAT THOSE BENEFITS OR LIABILITIES ARE.

The interpretation the Appellants claim for Paragraph 7 make that paragraph void for uncertainty because in effect, it delegates to the Association and to

the Utah Power & Light Co. and other potential sellers of water the determination from year to year of what the benefits to the Lower Valley Users are, and what the detriment to Ogden City is under that Decree. The water users association can, as it has many years in the past, decide not to purchase any additional water in excess of its rights Nos. 395 and 397. On the other hand, the Board of Directors of that Association can decide to purchase additional water if the Utah Power & Light Co. or other potential sellers will agree to sell the same. If the Appellant's interpretation is correct the price of the additional water would be assessed to Ogden City for approximately one-fourth thereof, and approximately half of that fourth would then go for zero price to the Lower Users. Thus the obligation of Ogden City and the benefit to the Lower Users is made entirely different from year to year by the acts of third parties, to-wit: The Ogden River Water Users Association and the Utah Power & Light Co. or other potential water sellers. This is an intolerable condition, and certainly makes this paragraph of the judgment void for uncertainty. On the other hand, if the interpretation asserted for Paragraph 7 by the Respondent is adopted by the court, that paragraph is certain and definite and does not vary from year to year and cannot be modified by any agency, not even the Ogden River Water Users Association. Under the City's contention, Paragraph 7 applies only to the water which the Association has under rights Nos. 395 and 397 and does not apply to any additional water which the Association buys or otherwise acquires.

It should be observed that any time an exchange or

trade is made, there are hazards or risks involved. The trade made and decreed was to compromise an unknown, to-wit, the extent if any the City's withdrawal of water from the artesian basin interfered with the Lower Valley Users. It was not a decreed payment by the City on an acre foot or gallonage basis for a known loss to the Lower Valley Users. It is common knowledge that a water right can vary from year to year, depending upon the precipitation and many other factors. The exchange between Ogden City and the Lower Users has those hazards. Something could happen to the wells or the diversion works thereof, or the recharge area, or many other things which could materially affect Ogden City's draw from the wells. If that occurred, could Ogden City refuse to comply with Paragraph 7 and refuse to allow the water represented by 4500 shares to go to the lower users? It could not. The decree is binding upon Ogden City, as well as on the other parties. On the other hand, if, because of minimum precipitation there is a shortage in water to the Association so that the lower users do not receive what they hoped to have received from their 4500 shares, can they then use their influence with the Association and have it buy additional water and make Ogden City pay for it? Manifestly this is unfair, and is contrary to the wording of the decree.

It must be remembered that the lower users were subject to the hazards of the amount of precipitation before the exchange was made. They had only flow rights prior to the exchange. After the exchange they have representative rights in the storage created by the reservoir which was constructed. This change would

certainly increase the possibility of their having the water during the irrigation season when needed. In addition, no determination has ever been made as to what if any effect the City's withdrawal from its wells has on other water rights, including those of the lower users. It may well be that there is little or no effect on the Lower Valley rights, considering the fact that they were flow rights, and during only the irrigation season. Be that as it may, the exchange was made as a compromise and settlement, and therefore regardless of what effect the City's withdrawal would have, the exchange approved by Paragraph 7 is now the law of the case and controlling, and this lawsuit involves strictly the interpretation of what is meant by that paragraph of that decree.

This decree was drawn after years of study, negotiation and conferences. It was drawn by able and discerning attorneys, and approved by the court. The Appellants here are seeking to modify Paragraph 7 to provide that the lower users are entitled to 4500 acre feet of water each year rather than the water to which 4500 shares of stock are entitled. Had the parties and the court at the time this decree was entered intended such a result, they very easily could have provided that the city was to supply 4500 acre-feet rather than using the words they did. It must be assumed, therefore, that the hazardous possibility of inadequate water to supply the 4500 acre-feet to the lower users was on the lower users, and that the City's obligation under the decree is to supply only the amount of water represented by 4500 shares of stock in the Association as applied to the rights which that association had at the

time the decree was entered. Undoubtedly a strict gallon for gallon exchange was not provided for in order to avoid the annual argument of which side got the most and presumably to avoid having to make the extremely difficult determination of what if any interference resulted to the Lower Valley Rights from the City's withdrawal from the wells.

POINT V.

IF THE INTERPRETATION OF THE RESPONDENT IS ADOPTED BY THE COURT, THE PURCHASE OF WATER FROM THE UTAH POWER & LIGHT COMPANY AND ANY FUTURE PURCHASES OF WATER BY THE ASSOCIATION WAS AND WILL BE A BREACH OF THE FIDUCIARY DUTY WHICH THE DIRECTORS OF THE ASSOCIATION OWE TO OGDEN CITY AS A MINORITY STOCK HOLDER IN THAT ASSOCIATION.

Ogden City is a minority stock holder of the Association owning approximately 1/4 of the stock therein. Many of the Lower Valley Users are also minority stock holders of the Association. The Board of Directors of the Association are in a fiduciary capacity as to the stock holders of the Association, including Ogden City. If the Court determines that Paragraph 7 of the Decree applies not only to the water which the association has under its original rights Nos. 395 and 397, but it also applies to all other water which the Association acquires, it would follow that the Association has no right to acquire any additional water.

If such is the interpretation, the Board of Directors

would know that 1/4 of the additional water acquired will have to be paid for by one of its stockholders, to-wit: Ogden City and that stock holder would receive only approximately one-half of the water it paid for. The Board of Directors would also know that its proposed acquisition of additional water would result in the Lower Valley Users, most of whom are also its stock holders receiving approximately 1/8 of the water purchased for nothing and at Ogden City's expense.

Under this facts situation, the City contends that it would be a breach of the fiduciary relationship of the Board of Directors of the Association to Ogden City one of the stockholders if any additional water is purchased from the Utah Power & Light Co. or from any source.

It would be unfortunate for the Court to determine that because of the peculiar wording of the Decree the Association's power in its articles to acquire additional water is ineffective because any acquisition of water is a breach of the fiduciary duty owed by the Directors to Ogden City as a minority stock holder. The interpretation of Paragraph 7 of the Decree contended for by the Respondent avoids this problem and under such interpretation the Directors of the Association are free to acquire additional water as they in their judgment see fit.

This case seems to involve only some 1800 dollars which was collected under the lower court's order. However, it is much more important than that. If the principle is established that Ogden City must pay according to its stock ownership for water acquired by the Associ-

ation and 45% of the water allocated to it is to be distributed to the lower users without charge, there is nothing to prevent or discourage the Association from each year obtaining additional water, if not from the power company from the Weber Basin Conservancy district or from other potential sellers. It is common knowledge that much land which was formerly irrigated is now being converted to housing and the water formerly needed for that land can be purchased by other parties. The Association could purchase some of these other water rights. If the principle asserted by the Appellants is approved, the potential obligation of Ogden City is very indefinite and could be extremely detrimental. That obligation under the principle asserted by them would result in the City paying for approximately 25 per cent but receiving only approximately 14 per cent of the water so acquired.

POINTS ON CROSS-APPEAL

POINT I.

THE WATER OBTAINED IN THE YEAR 1959 BY THE OGDEN RIVER WATER USERS ASSOCIATION FROM UTAH POWER & LIGHT COMPANY AND ALLOCATED TO OGDEN CITY AS A STOCKHOLDER OF SAID ASSOCIATION IS NOT SUBJECT TO THE PROVISIONS OF PARAGRAPH 7(a) OF THE JUDGMENT AND DECREE ENTERED HEREIN ON APRIL 1, 1948, AND IS THE PROPERTY OF OGDEN CITY FREE AND CLEAR OF ANY TRUST OBLIGATIONS AND THE COURT ERRED IN AWARDING TO THE "LOWER VALLEY WATER USERS" 1,543 ACRE FEET OF SAID

WATER UPON PAYMENT OF THE CITY'S ACQUISITION AND ADMINISTRATIVE COSTS AS PROVIDED IN THE FINDINGS AND JUDGMENT OF THE COURT ENTERED HEREIN ON AUGUST 13, 1959.

Ogden City is a stockholder of the Ogden River Water Users Association. Under its stock ownership, it is entitled to its proportionate share of the water available on the same basis as all other stockholders. The Association allocated to all stockholders the Utah Power & Light Company water according to their share ownership. This allocation was proper and legal.

Paragraph 7(a) of the April 1, 1948 Decree applies only to the water which the Association has under rights Nos. 395 and 397, and does not apply to any other water which it acquires by purchase or otherwise. Thus, when the Association made the allocation to Ogden City of the Utah Power & Light Company water, that water belonged to Ogden City. It was not charged with Paragraph 7(a) of the Decree, and there is no other trust relationship whatsoever between Ogden City and the lower users. The Paragraph 7 allocation to the lower users was based on an exchange for other water. It is not based on any fiduciary relationship between Ogden City and the Lower Users. Most of the Lower Users are also stockholders of the Association and as such were allocated their proportionate share of the Utah Power & Light water.

It is the contention of the Respondent that after the allocation of the Utah Power & Light Co. water was made to the City. It had the right to determine

what should be done therewith, and it had no obligation to sell it to anyone, and it certainly had no obligation to sell it at the same price it had to pay therefor.

CONCLUSIONS

There is basically one question in this appeal and in the cross-appeal, and that is the interpretation of Paragraph 7(a) of the April 1, 1948 Decree, and particularly as to whether that paragraph applies only to the water rights which the Association had at that time the Decree was entered or whether it also applies to all other water or water rights which the Association may thereafter acquire in addition to the water rights which it had at the date of that Decree.

To make the Decree certain and definite and not subject to change each year by the actions of the Association and by the actions of potential water sellers, the Court must find that Paragraph 7(a) applies only to the water rights which the Association had at the time of the Decree, and not to any rights which the Association has no duty to acquire and which it may or may not, at its discretion and according to the availability of the other water, acquire. This determination allows the Board of Directors of the Association to acquire such additional water as it desires without breaching its fiduciary duty to the city as a minority stockholder

of the Association. After the allocation of the water is made to the stockholders as required by law, the stockholder has the absolute right to determine the disposition thereof, and except for the water which goes to Ogden City and by virtue of the Association's rights Nos. 395 and 397, the City receives that water as its own and can dispose of it as it sees fit.'

Respectfully submitted,

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JACK A. RICHARDS,
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