1960

Plain City Irrigation Co. v. Hooper Irrigation Co. : Brief of Respondent Answering Appellants' Petition for Rehearing

Utah Supreme Court

Jack A. Richards; Attorney for Respondent Ogden City;

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.

Respondent's Brief Answering Appellants' Petition for Rehearing

OGDEN CITY, A Municipal Corporation
by Jack A. Richards, Corporation Counsel
Respondent and Attorney for Respondent

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RESPONDENT'S BRIEF ANSWERING APPELLANTS' PETITION FOR REHEARING

Comes now Ogden City, the respondent, and urges the court to deny the appellants' petition for rehearing for the following reasons:

1. THE COURT DID NOT ERR IN ITS DETERMINATION THAT PARAGRAPH 7 (A) OF THE DECREE DID NOT APPLY TO WATER PURCHASED FROM THE POWER COMPANY.

2. THE COURT DID NOT ERR IN HOLDING THAT THE CLAIMS OF THE APPELLANTS, IF UPHELD, PRODUCE AN INEQUITABLE RESULT.

I.

THE COURT DID NOT ERR IN ITS DETERMINATION THAT PARAGRAPH 7 (A) OF THE

DECREE DID NOT APPLY TO WATER PURCHASED FROM THE POWER COMPANY.

The correctness of the court's determination can be supported by indicating what the city feels to be the fallacy of the dissenting opinion. The fifth to the last paragraph of the dissenting opinion states in part:

> "First, the *Association* is not entitled to water by virture of its shares. The right which the Association has is a *storage right* of 44,175 acre feet by virture of its contract with the United States. Secondly, the arrangement with the Utah Power & Light Company was that the latter forego its right to the release of 15,015 acre feet of water, which is not new or additional water. Had this been new or additional water it would have been necessary for the Association to secure a change application from the state engineer.
>
> The so-called "power water" was already in the reservoir and came from the same source and under the same right as the other water. By its arrangement with the power company, the Association was merely endeavoring to exercise its storage capacity rights".

Referring to page 43 of the decree, Right Number 395 is for a high water flow of 250 second feet and Right Number 397 is for storage of 45,000 acre feet. Both these rights belong to the Association under its contract with the United States Government and the association not only acquired storage rights but water was also obtained to use that storage. See Finding of Fact Number 2 of Order Directing Distribution of Water. It is true the use of the water has now been acquired by stockholders of the association through

their stock ownership. The water to fill the association's storage right was contemplated and in the pervue of the parties at the time the stipulation giving rise to Paragraph 7 (A) of the decree was made. If the dissenting opinion's premise that all the association has is a storage right is correct, it would follow that the association practically each year would have to go to water owners and purchase where it could water to fill its storage right. If that were so, the dissenting opinion's conclusion that the purchase of power rights was merely carrying out this ever present need to obtain water to use its storage right might well follow.

The dissenting opinion's premise is not correct. The water to supply the storage right was made available by Right Number 395 at practically the same time the storage right was acquired by Right Number 397. It was not anticipated that the association would have to forage where it might to obtain water to get any use of those storage rights. This is clearly evidenced by the fact that the association has not purchased water prior to the purchase here involved to make use of its storage right. It thus follows that the conclusion of the court's opinion that the parties by the stipulation and the court its decree intended Paragraph 7(A) to apply only to the water and storage described as Rights Number 395 and 397 is definitely correct.

In the city's opinion another fallacy of the dissenting opinion which helps to point up the correctness of the court's opinion is the conclusion that the power water is not substantially different from the other water; and that the arrangement made between the

association and the power company did not need any action by the state engineer. The city submits that the question of whether or not the arrangement made between the power company and the association needed action by the state engineer was not raised in this suit, but since the dissenting opinion gives emphasis to that point it should be observed that in the city's opinion under Section 73-3-3, Utah Code Annotated, 1953, as amended, the arrangement made is definitely under the supervision and control of the state engineer and action by that officer would have been required had any interested party raised the point. In this case no one raised the issue and apparently the users down the stream were either not adversely affected or did not know about the arrangement. At least they did not deem it necessary to require the processing of the matter by the state engineer. The city submits that any junior appropriator who claims the use of the water after it has gone through the power company plant would definitely be affected by the arrangements made between the power company and the association, and certainly any interested party could require any future such arrangements to be processed as required by Section 73-3-3 Utah Code Annotated 1953. The power company's right involved is described on page 22 of the decree as Right Number 37. That right existing for many years prior to the construction of the association's reservoir and existed independently of that construction. It is a totally different right from the association's Rights Number 395 and 397. It is not a storage right but consists of flow rights for power purposes.

The conclusion by the court that the parties to the

decree did not intend the same to apply to any except the association's then rights is eminently correct and to conclude otherwise is to assume the parties stipulated for and the court made a decree which is so indefinite and uncertain that nobody knows what it means and the benefits and burdens therefrom would be controlled by the actions of the association's Board of Directors, which is an agency over which the court has no control.

II.

THE COURT DID NOT ERR IN HOLDING THAT THE CLAIMS OF THE APPELLANTS, IF UPHELD, PRODUCE AN INEQUITABLE RESULT.

The petition for rehearing in the first paragraph at the top of page 13 restates the irrigators' arguments which have been made for generations concerning the water sources and the effect of recharge in the Ogden Valley. The implication is that, in effect, the artesian basin is a cup which automatically fills before any water flows over the top for either the lower users or for storage. This argument has never been supported by engineering data and is such an over simplification of the physical facts involved as to misrepresent the same. The recharge of the artesian basin and the effect thereof on surface flows is definitely an unknown, and equally competent engineers differ widely thereon. It is not known, for example, the time lag between the entry of water in certain of the recharge areas to its availability in the artesian basin. There is no finding in this case and no evidence known to the city which determines that in a year of water shortage the artesian basin receives the same amount of water as in other years

and that all the water it receives is taken from surface water which otherwise would be available that year for either storage or surface use.

The parties to the stipulation and the decree recognized the uncertainty of this problem by the very nature of the settlement agreed to because certainly if it were as simple and as clear as the appellants' brief indicates, the surface users would have insisted on the full compliance and satisfaction each year of their claimed rights before they would have agreed to Ogden City as a junior appropriator receiving any water.

It is true as the appellants' brief points out, Ogden City owns 10,000 of the approximately 45,000 shares in the association. It should be pointed out there are no accumulative voting rights and the irrigators who own the other shares in the association have, since its inception, very generously allowed the city one of the nine directors on the association's Board of Directors.. This allowance of one out of nine directors on an ownership of 10/45 of the stock speaks eloquently of the concern the irrigators have for the city's rights and needs, and that alone should be sufficient to indicate the inequity of allowing the association to determine the rights and benefits under this court decree as between the city on one hand and the irrigators, some of whom are associated stockholders, on the other hand.

The gross inequity of the city having to pay for approximately 1/4 of any additional water purchased by the association and receiving the use of only 1/2 of the amount for which it pays is more obvious when one makes assumptions of instances in which the associ-

ation now and in the future can purchase additional water. The best example is the assumed annual purchase of additional water by the association from the Weber Basin Water Conservancy District. The Weber Basin Water Conservancy District was organized some years after the decree here involved was entered. That district has enlarged the association's reservoir in Ogden Canyon so that it will now hold more than twice the association's storage rights. If the city is correctly informed, the association is negotiating with the basin to purchase 5,000 acre feet a year of water from the Weber Basin Conservancy District. That fact is not in the record, but for the purpose of argument we can assume that such is the case. Under the appellants' theory and as contended by the dissenting opinion, as the city understands it, Paragraph 7(A) of the decree applies to all water which the association purchases regardless of the source from which it comes. If that is correct it would follow that in a year when water available to the association under its Rights Number 395 and 397 results in less than 44,175 acre feet, the decree would require that other water which the association purchases, including that acquired from the Conservancy District, be allocated to the stockholders; and in Ogden City's case, the City would pay for approximately 1/4 thereof and about 1/2 of that 1/4 would belong to the lower users under Paragraph 7(A) of the decree. Obviously the water which may now be available due to the recent construction by the Weber Basin Conservancy District was not in the contemplation of the parties to this lawsuit, and certainly to accept the appellants' arguments would result in a most unfair

situation to Ogden City and would require the city at all times to actively oppose any future water purchases by the association. It would not make any difference what the association itself thought was fair. If appellants' arguments are accepted the lower users would have a decreed right to their approximately 1/8 of any additional water purchased and that at the expense of Ogden City, and it would make no difference what the association tried to do in allocating the water otherwise.

CONCLUSION

The city respectfully urges that the court deny the appellants' petition for rehearing for the reasons that the court's opinion entered herein correctly interpreted Paragraph 7(A) of the decree and results in an understandable and equitable result.

Respectfully submitted,

OGDEN CITY

a municipal corporation

By JACK A. RICHARDS,

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