

1959

## Leon E. Mayer v. Wayne D. Criddle : Brief of Appellant

Utah Supreme Court

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Sam Cline, Attorney for Appellant;

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# In the Supreme Court of the State of Utah

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IN THE MATTER OF THE GENERAL DETERMINATION OF RIGHTS TO THE USE OF ALL WATER, BOTH SURFACE AND UNDERGROUND, IN THE ESCALANTE VALLEY DRAINAGE AREA.

FILED

24 1959

Clerk, Supreme Court, Utah

In re: Water User's Claim No.  
1420, Underground Water Claim  
No. 10150, Claimant Leo E.  
Mayer,

No. 9146

LEO E. MAYER,

*Plaintiff and Appellant,*

vs.

WAYNE D. CRIDDLE, State Engineer of the State of Utah,  
*Defendant and Respondent.*

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## APPELLANT'S BRIEF

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ON APPEAL FROM THE DISTRICT COURT OF THE  
FIFTH JUDICIAL DISTRICT OF THE STATE OF  
UTAH, IN AND FOR IRON COUNTY

HON. WILL L. HOYT, *Judge*

SAM CLINE,

*Attorney for Appellant.*

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# In the Supreme Court of the State of Utah

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IN THE MATTER OF THE GENERAL DETERMINATION OF RIGHTS TO THE USE OF ALL WATER, BOTH SURFACE AND UNDERGROUND, IN THE ESCALANTE VALLEY DRAINAGE AREA.

In re: Water User's Claim No. 1420, Underground Water Claim No. 10150, Claimant Leo E. Mayer,

No. 9146

LEO E. MAYER,  
*Plaintiff and Appellant,*

vs.

WAYNE D. CRIDDLE, State Engineer of the State of Utah,  
*Defendant and Respondent.*

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## APPELLANT'S BRIEF

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### STATEMENT OF THE CASE

This cause is before this Court as an intermediate appeal or on appeal from an interlocutory order made and entered by the Fifth District Court of the State of Utah, in and for Iron County, involving a well and underground

water right of the appellant, Leo E. Mayer.

As indicated by the title of the case, a proceeding was originally initiated as a general adjudication of all of the rights to the use of water in the Escalante Valley Drainage Area in Utah, which includes the Milford Underground Water basin immediately south of the City of Milford in Beaver County.

After complying with the provisions of *Chapter 4 of Title 73, Utah Code Annotated, 1953*, and after completion of a hydrographic survey of the area, the State Engineer on or about the 1st day of April, 1949, served and filed in the District Court of Iron County his proposed Determination of water in said area.

In the due course of said general adjudication proceedings, and on or about the 17th day of March, 1936, the predecessor in interest of this appellant, one Fred W. O'Leary, then the owner of said premises, filed an underground water claim in the office of the State Engineer of the State of Utah, and which claim was assigned a number, to-wit, No. 10150; that thereafter and on or about the 27th day of May, 1947, the said O'Leary filed a statement of water user's claim in this proceeding as required by statute, and said statement of claim was by the Clerk of the District Court assigned a number, to-wit, No. 1420; thereafter, by the said proposed determination the claim was allowed for the irrigation of five acres of land, to-

gether with a stock-watering and domestic use;

After the proposed determination was made available to the various water users and the said O'Leary was then advised that his water right was so limited, and on or about the 15th day of October, 1950, upon an order of the District Court permitting him so to do, the said O'Leary duly filed an amended underground water claim and an amended water user's claim, together with his objection and protest to the disallowance of his well and underground water right in excess of five acres. In his protest he claimed that he was the owner of an eighty acre tract of land; that the original underground water claim as filed stated that five acres of land were irrigated in the year 1933, but gives no further statement concerning the irrigation of any acreage excepting the statement "this well was used for irrigating natural grass pasture and watering farm stock each summer since 1928, excepting 1935"; that in the proposed determination he was limited to the use of water from the well for irrigation purpose to five acres, and that he was informed and believes that such limitation was made because of the information set forth in the original underground water claim; and in furnishing the data concerning the number of acres irrigated from his well, he was under the impression that he should set forth the number of acres previously *planted* to crops and irrigated for the purpose of raising crops, and the information furnished the State Engineer was

limited accordingly; that in truth and in fact, commencing with the year 1928 and up to and including the year 1935, he irrigated with waters from the said well and upon his land thirty-five acres of land for the purpose of pasturage and raising forage for stock grazing purposes and in addition during the year 1933 he planted five acres of grain and irrigated the same; that the water was being beneficially used by the irrigation of native grasses and other forage; that the flow of said well was 450 gallons per minute (Tr. 16-23).

The State Engineer filed a reply to the objections and protest admitting that he had limited the use of waters from the well to five acres and pleading further "that the State Engineer lacks any information upon which to base an admission or denial of the remaining facts alleged in paragraph two," which paragraph alleges the irrigation of thirty-five acres of pasture land together with the five acres planted to grain, and alleges the reasons why the original underground water claim mentioned five acres.

After the filing of the protest and before the hearing thereon, this appellant, Leo E. Mayer, purchased the said premises and water rights from O'Leary, and ever since has been and now is the owner thereof.

Thereafter, a hearing was duly held by the District Court on the said protest, after which the Court made and entered its findings of fact and conclusions of law and

an interlocutory order (Tr. 24-26) denying the protest of this appellant.

A petition for interlocutory appeal from said order was filed in accordance with and as provided by the Utah Rules of Civil Procedure (Tr. 29-35) and which appeal was duly allowed and granted by order of said Court (Tr. 27).

### STATEMENT OF FACTS

In the following statement of facts it is not deemed necessary to re-state those which are incorporated in the foregoing statement of the case, many of which are taken almost bodily from the trial court's findings and conclusions (Tr. 24-26).

While the State Engineer and the claimant and appellant herein differ as to the correctness of the court's conclusions of law and the interlocutory order based thereon, there is little, if any, controversy concerning the facts.

The said findings of fact, the pertinent portions of which, insofar as this controversy is concerned, are briefly as follows:

1. That on or about the 28th day of May, 1948, the claimant, Fred W. O'Leary, filed a statement of water user's claim in this proceedings and said statement of claim was assigned No. 1420, and thereafter and on or about the 21st day of October, 1950, leave of court first



having been had and obtained, the said claimant filed an amended water user's claim; and that the said Proposed Determination limited the use of water under said water user's claim to the irrigation of five acres and for incidental domestic and stock-watering purposes.

2. That said Claim No. 1420 was based upon Underground Water Claim No. 10150, which claimed a right to irrigate from a well drilled during the year 1928 with a flow of 350 gallons per minute; and that said Claim No. 10150, as amended, now claims and contends that the protestant, in addition to the five acres awarded, used water on 35 acres for the purpose of pasturage and the raising of forage for stock-watering purposes (Tr. 25).

3. That during the years 1928 to 1934, inclusive, the well in question was equipped with a three-inch centrifugal pump with a 6 horsepower gasoline motor; that during the said period the quantity of water pumped was approximately 120 gallons per minute when the pump was in operation; and that, prior to March 22, 1935, the maximum acreage brought under cultivation and irrigated from the said well was five acres (Tr. 25).

From the foregoing findings of fact the trial court concluded:

1. That the evidence fails to show any additional use by claimant prior to March 22, 1935, other than as allowed by the State Engineer in said Proposed Determination of

## Water Rights (Tr. 25).

2. That the action of the State Engineer should be approved and confirmed and the protest of the claimant should be denied (Tr. 26).

Thereupon the interlocutory order appealed from was made and entered by the trial court (Tr. 27), disallowing the said protest which in effect limits the right of the appellant to irrigate more than five acres of land.

A very short hearing was held before the trial court on June 9, 1954, and a transcript thereof is made a part of the record on this appeal (Tr. 1-15).

Testimony was given at the hearing by Fred W. O'Leary, the owner of the premises at the time the underground water user's claim was filed, concerning the use of the ground and water thereon for a number of years prior to 1927 or 1928 until 1934 or 1935 and within his personal knowledge. Testimony was also given by the claimant, present owner of the ground, concerning the kind of land, the well thereon, evidence of ditches conveying water to the land when he purchased it in 1950, and the benefits to be derived from irrigation. The evidence is uncontradicted, uncontroverted, positive and unimpeached.

## STATEMENT OF ERRORS DELIED ON

1. The trial court error in concluding that the evidence

fails to show any additional use by the claimant prior to March 22, 1935, other than as allowed by the State Engineer in his Proposed Determination.

2. The trial court erred in making and entering its interlocutory order denying the claim and protest of appellant, which order has the effect of depriving appellant of any right to use water from said well for irrigation in excess of five acres.

## ARGUMENT

The above statement specifies two errors which in substance and effect are but one; and the sole question to be decided by this Honorable Court is simply this:

Are the trial court's conclusions of law supported by the record?

Appellant contends not.

The findings pertinent to the controversy now before this Court are very short.

Findings Nos. 3 and 4 (Tr. 25) are merely recitals of the fact that Fred W. O'Leary filed a statement of water user's claim and thereafter filed an amended water user's claim, and that the water user's claim was based upon an underground water claim which claimed a right to irrigate from a well drilled in 1928; that the claim as amended contends that the claimant, in addition to the five-acre

water right awarded, used water on 35 acres for the purpose of pasturage and the raising of forage for stock-grazing purposes.

Finding No. 5 (Tr. 25) is the finding upon which the conclusions of law are based, and even though it has been set forth heretofore in this brief, for the purpose of emphasis we quote it again, to-wit:

“That during the years 1928 to 1934, inclusive, the well in question was equipped with a three-inch centrifugal pump with a 6 horsepower gasoline motor; that during said period the quantity of water pumped was approximately 120 gallons per minute when the pump was in operation; and that prior to March 22, 1935, the maximum acreage under cultivation and irrigated from the said well was five acres.”

It is impossible to determine from this short finding whether the trial court predicated his conclusions on the theory that water used solely for irrigation of pasturage and to raise forage for stockgrazing purposes is not a beneficial use, or on a conclusion that the evidence “failed to show any additional use (over and above five acres)” for any irrigation purposes whatsoever.”

Because of the uncertainty of the theory or legal principle upon which the Finding No. 5, and the conclusions were based, we will treat the two problems separately.

## THE IRRIGATION OF PASTURE LAND IS A BENEFICIAL USE

Mr. O'Leary testified that he came to the Milford Flat in 1926 and that his occupation while there was farming; that he commenced farming the  $W\frac{1}{2}SE\frac{1}{4}$  of Section 35, Tp. 28 S., R. 11 W., S.L.M., which is involved in this case, in 1927 and that he farmed it for ten years or until 1937; that he purchased the land in 1934 (after farming it for some seven or eight years); that when he commenced to farm the land there was a well on it equipped with perforated casing and a three-inch centrifugal pump and a 6 horsepower gasoline engine; that either in 1927 or 1928 water was being pumped out of the well and was used to irrigate five acres of oats, and the balance of the time water was run on the north pasture or approximately thirty acres of grass land; that the pasturage was used for grazing sheep; that the ground was in natural grass, which land was about a mile and a half from "Hay Springs" which are actual springs of water; that he had what was called his Hay Springs ditch, and that he plowed ditches running from that into a new furrow each time; that by means of this irrigation system water was carried from the well and water was run out and flooded over the ground; that such manner of irrigation was the best type of irrigation because with natural grasses the water got down to the roots, but if corrugated it would tear out most of the grass; that in 1935 the pump was removed from the

ground and up until then from 1928 he continued to irrigate the ground in the manner above described (Tr. 3-6).

The underground water claim, as originally filed in 1936, in answer to the question "Acres of land irrigated first year, he answered 'none'." Then in answer to the balance of the question "Acres irrigated each year thereafter with dates, he answered '1933—5 acres'."

Then under general remarks he stated: "This well was used for irrigating natural grass pasture and watering farm stock each summer since 1928, excepting 1935. The pump is not installed on this well at the present date, removed in May, 1935."

When interrogated concerning his statement of five acres irrigated Mr. O'Leary stated it was his understanding that the question called for ground that had been plowed and put into producing crops, that is, cultivated and plowed rather than pasture land. He testified also that without irrigation the pasture would not have produced nearly as much by way of crops and forage. The capacity of the well was one second foot or more (Tr. 6-9).

He testified further that he put more water on the pasture land than on the row crops because such land needs more water; that water was actually applied every year that he was on the ground; that the well was pumped during the entire irrigation season, continuously from the time the season commenced until it concluded (Tr. 8-10).

Mr. Leo E. Mayer, the present owner of the land, testified that he has resided in Milford since 1945; that he purchased the land and water rights in the fall of 1950 and has been in the possession of the land since then; that the eighty-acre tract has about fifty-five acres of natural pasture ground which could be watered efficiently; that the land is summer grazing native pasture land and that it is very good pasture land; that there is no comparison between the land with and without irrigation, and that without water the land would produce only fifteen or twenty percent as with irrigation; that when he purchased the land in 1950 there was evidence on the ground of an irrigation system of ditches, canals or laterals conveying water for irrigation of the pasturage and that the water was obtained from the well on the ground; that there was evidence that water had been conveyed from the well on the 35 acres as well as the five acres that had been planted to crops (Tr. 10-12).

The underground water claim originally prepared by O'Leary was prepared entirely by himself and it is very obvious upon an examination of the claim now on file in and a part of the records of the State Engineer's Office, that when he stated five acres had been irrigated each year after the first year (1927 or 1928) and each year thereafter, he had in mind and so understood the question called for five acres actually planted to crops and under cultivation as such, because under "general remarks" he went

on to state: "This well used for irrigating natural grass pasture." There can be no dispute or question about the fact that there was five acres of oats planted on the ground and of course the five acres mentioned in the underground water claim could refer to no acreage other than the five acres planted to oats.

It is quite obvious also that when the State Engineer formulated his proposed determination he limited the water claim to the five acres claimed, and disregarded the irrigation of the natural grass pasture because no specific acreage had been set forth.

The State Engineer did not introduce any evidence whatsoever to refute the testimony of either O'Leary or Mayer, either by attempting to show the premises could not have been or were not adapted for use as pasturage, or that ditches running into the pasturage lands were not in evidence, or from testimony of others who had lived in the vicinity showing no irrigation of pasture lands.

The State Engineer apparently was satisfied to stand on his answer to the protest which sets forth he was without information upon which to base either an admission or denial of the facts contended for by the claimant, and at the hearing no attempt whatsoever was made by the State Engineer either to impeach the testimony given by claimant and his witness O'Leary or in any way to contradict such testimony.



At the conclusion of taking testimony at the hearing it was stipulated that the court might view the premises and consider the view in connection with the evidence (Tr. 13). If there was anything about the premises, when viewed by the court, that would impeach or contradict the witnesses or contravert any of the testimony the court failed to make any findings thereon and appellant is without any information or knowledge of how or in what manner the viewing of the premises was considered as evidence, or if considered as evidence at all. The only finding having to do with a determination of the problem now before this Court is finding No. 5 (Tr. 25) which finds that during the years 1928 to 1934 inclusive, the well was equipped with a three-inch centrifugal pump with a 6 horsepower gasoline motor; and that during such period the quantity of water pumped was approximately 120 gallons per minute when the pump was in operation and that prior to March 22, 1935, the maximum acreage brought under cultivation and irrigated from the well was five acres. As a matter of fact the underground water claim shows a *minimum* use of 120 gallons per minute and a *maximum* of 350 gallons per minute and the testimony of O'Leary was that the well flowed one second foot. Just how the court determined that the minimum flow of 120 gallons, and not the maximum flow of 350 gallons was the amount actually pumped is quite a mystery. It was not contended by claimant that more than five acres was

*brought under cultivation*, but it was and is claimed that thirty-five additional acres of natural grass and forage were irrigated, and the court has made no finding whatsoever that such was not the case. And because there is no finding whatsoever by the court that the land was not susceptible of irrigation or the raising of natural wild grasses and forage, that he found no evidence of an irrigation system or ditches and laterals, that any irrigation of the premises could not be considered as beneficial in any way, etc., claimant contends there is no finding upon which to base or to support the conclusion of law. We believe also that even though such a finding was made there would be no evidence to support it and that all of the evidence, being unimpeached and uncontradicted is to the contrary.

‡73-3-1, *U C A 1953*. The appropriation must be for some useful and beneficial purpose.

The law permits the appropriation of water only for some beneficial use or purpose. Hence it follows that water can only be appropriated for that purpose when it assists in the raising of some useful crop. This need not necessarily be what is known as a *cultivated crop*, but the watering of land to produce hay and grass for the feeding of stock is sufficient to come within the rule. ‡693, 2nd Ed. Vol. 2, page 1197, *Kinney on Irrigation and Water Rights*.

Where one constructs a ditch and conducts water upon his land, year after year, and permits the same to spread out over wild hay land for the purpose of making hay or using such land for pas-

ture, he thereby secures the right to the use of sufficient water to irrigate such land, provided the amount of water so used is sufficient for that purpose; *such use being a beneficial use.*" *Pyke vs. Burnside, et al.*, 69 Pac. 477 (Ida.).

"Where by irrigation an appropriator increased the amount of grass for pasture, such use of the water was a useful and beneficial use within Civ Code §1881, limiting appropriations to such purposes." *Sayre vs. Johnson*, 81 Pac. 389 (Mont.) quoting 'In this case it was contended that the respondent's use of the water was not a useful and beneficial one within the meaning of those terms as employed in §1881 of the Civil Code, at least insofar as the water is used upon his homestead which is devoted to grazing purposes. But the evidence shows that by irrigation the amount of grass for pasture is greatly increased. If respondent should cut grass for hay it would hardly be contended that the use of water was not then beneficial; and if so, it can hardly be that the question whether the use is a beneficial one can be made to depend upon the particular manner in which respondent feeds the grass procured by the irrigation.'

To support his contention that Spencer was not making a beneficial use of water the relator relies upon the testimony of Robbins that the water was flowing onto pasture land which probably "might be good hay land if it was irrigated right." The irrigation of pasture land is a beneficial use. *State ex rel Silve vs. District Court*, 69 Pac. 2nd 972.

"The first commandment relating to the water policy of this state is to use the water to the utmost. By that I do not mean that it must serve the most valuable or the highest possible use. That is an-

other matter. The second commandment, a corollary of the first, is that beneficial use is the basis, measure and limit of the use. Beneficial use does not mean the highest beneficial use. If there is a hierarchy of values in beneficial uses, the higher may be compelled to condemn the lower if the lower is prior in time. The third commandment, a corollary of the second and like unto it is: Thou shalt not waste water." *Judge Wolfe—in Hanson vs. S.L.C.*, 205 Pac. 2nd 255 at page 270.

In the case of *Riordan vs. Westwood*, in Pac. 2nd 203, at page 930 Justice Wade in a prevailing opinion states "It is clear that a part of the water in question produces a beneficial plant life thereon, *even though very limited.*" At page 925 it is said the water in question supported the growing of a few brush, some small patches of native grass and a few scrubby cottonwood trees. The application to appropriate that water was ordered approved, although the trial court sustained the rejection. In a part dissent Justice Lattimer states: "Had plaintiff ever attempted to use the water to improve *the fertility of the soil or to grow grass or vegetation for meadow purposes*, to use it for subterranean irrigation for products of the soil, or to use it for any other well recognized purpose, then I would believe plaintiff had acquired some rights."

It is common knowledge that throughout the State of Utah it has been recognized by the office of the State Engineer and by the Courts, that water can be and has been appropriated and used for the purpose of increasing the

growth of natural grasses and forage, and for the feeding of such growth to livestock by grazing the livestock, including cattle and sheep, upon such lands. Such lands sometimes have been called meadow lands and sometimes pasture lands and sometimes grazing lands. It is common knowledge also that the appropriation of water has never been limited to irrigation of crops planted upon the premises after plowing and clearing such premises of natural grasses and forage and re-planting the same to alfalfa, row crops, grain, etc.

#### TESTIMONY OF UNIMPEACHED WITNESS MAY NOT BE ARBITRARILY DISREGARDED

It is the contention of claimant that Fred W. O'Leary, previous owner of the premises, is a credible witness; that he had no interest in the premises at the time of the hearing and the giving of his testimony; that his testimony is unimpeached, uncontroverted and uncontradicted in any manner whatsoever. It is the contention of claimant likewise that his testimony remains unimpeached and uncontradicted as to the kind and type of land involved, that better pasture and forage could be had by irrigation over and upon the land, that without water the land would not produce more than fifteen or twenty percent of the amount of pasturage than with water; that when he purchased the land in 1950 there was evidence on the ground of an irrigation system of ditches, canals or laterals conveying

water for irrigation to the pasture land and evidence that water had been conveyed from the well to such pasture land.

“The testimony of an unimpeached witness, not contrary to the usual course of nature or for some other reason unworthy of belief, must be considered by the court in determining the facts.” *Utah Commercial and Savings Bank vs. Fox*, 140 Pac. 660.

This problem was before this Court in the case of *Cottrell vs. Grand Union Tea Company*, 299 Pac. (2nd) 622. While the rule contended for by the appellant in this case was held inapplicable in the *Grand Union Tea* case, Justice Crockett announced the rule as follows:

“It is appreciated that under usual circumstances, uncontroverted testimony of credible witnesses may not arbitrarily be disregarded by the trier of the facts.” Citing several Utah cases. Page 624 of Vol. 299 Pac. 2nd.

And in the later case of *Fuller vs. Mountain Sculpture*, 314 Pac. 2nd 842, at page 846, Justice Crockett again announces the rule in the following language:

“Notwithstanding the fact that considerable tolerance must be indulged in favor of the findings of the trial court because of its advantaged position in immediate contact with the trial and the parties, it nevertheless may not obdurately refuse to find facts which are established by credible and uncontradicted evidence.

“Juries may not without reason overturn legal presumptions or arbitrarily disregard positive statements of witnesses.” *Karren vs. Bair*, 225 Pac. 1094.

Put another way the rule set forth in *State vs. Cummings*, 288 Pac. 2nd, 1037, at page 1051 (Ore.), is a correct rule adopted by courts of all jurisdictions, to-wit:

“Evidence concerning facts which does not discredit itself and which comes from witnesses who have not been discredited, contradicted or impeached, generally demands acceptance by the trier of facts,” citing *Wigmore on Evidence*, 3rd Ed, §2495.

Appellant agrees with the language used by this Court in the case of *In Re Richards Estate*, 297 Pac. 2nd 542, as follows:

“It is conceded that the uncontroverted testimony of eye-witnesses may not arbitrarily be disbelieved by the trier of the facts. But it must also be recognized that a fact finder need not accept a fact as established merely because a witness so testified, *if there is any circumstance which would render the testimony improbable or doubtful.*

In this case appellant submits there is no circumstance whatsoever that would render the testimony of O’Leary or himself improbable or doubtful, or inconsistent, nor is there any inherent improbability shown in the testimony. Quite the contrary, let us consider these facts: The underground water claim shows a well drilled to a depth of

fifty feet and a sixteen-inch perforated casing installed therein; that the well was *pumped* for a number of years continually during the irrigation season with a maximum flow of 350 gallons per minute or almost one second foot of water; that O'Leary owned eighty acre tract of land; and that a number of sheep were on the premises during the summer months of 1928 to 1934. It is not improbable, but upon the contrary more probable that with a well equipped with a pump and with sheep to feed and with only five acres of oats planted thereon, the owner of the land and sheep would use water to irrigate pasture land and raise wild grasses and forage for his livestock. It is certainly against the nature of farmers and livestock men to have water available after the expense of drilling, casing and equipping a well, not to use it to its full capacity, and most certainly the use claimed is a beneficial one. There is no question of loss by a non-user involved.

Plaintiff and claimant herein respectfully submit that under the record in this case and under the law the interlocutory order of the trial court sustaining the State Engineer should be reversed and set aside and the protest of claimant sustained.

*Respectfully submitted,*

SAM CLINE,  
*Attorney for Appellant.*