

1960

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

Utah Supreme Court

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Walter L. Budge; Robert B. Porter; Attorneys for Respondent;

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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IN THE MATTER OF THE GEN-  
ERAL DETERMINATION OF  
RIGHTS TO THE USE OF ALL  
WATER, BOTH SURFACE AND  
UNDERGROUND, IN THE ESCA-  
LANTE VALLEY DRAINAGE  
AREA.

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

LEO E. MAYER,

*Plaintiff and Appellant,*

— Vs. —

WAYNE D. CRIDDLE, State Engi-  
neer of the State of Utah,

*Defendant and Respondent.*

**F I L E D**  
JAN 13 1960  
Clerk, Supreme Court, Utah

Case  
No. 9146

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## BRIEF OF RESPONDENT

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## BRIEF OF RESPONDENT

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### STATEMENT OF FACTS

The State Engineer of the State of Utah, as the respondent herein, is in agreement with the statement of the case and the statement of the facts as set forth in the brief of appellant, with the exception of the last sentence of the fourth paragraph on page 7.

The State Engineer would like to make clear that his position in a general determination proceeding is that of a state administrative officer and not as one water user against the other. In carrying out the provisions of Chapter 4 of Title 73, Utah Code Annotated, 1953, the State Engineer's interest in this action is in conserving the unappropriated water in the state, in determining the relative rights of the parties, but not of determining the rights of the claimant as against the state. Also, we are confident that were this an action involving surface water, there would be other water users allied with us in this defense. However, in this large underground water basin, other users have not as yet grasped the significance of increased flow and use as it will affect their own rights, both present and future. Therefore, the burden fell upon the State Engineer to undertake the defense of this action.

We also concur with the argument advanced by the appellant that water used for the irrigation of pasture land, provided this irrigation is beneficial in nature, is a sufficient use upon which to base a water right. We, therefore, argue only the one point as indicated below.

## STATEMENT OF POINTS

### POINT I.

THE INFORMATION CONTAINED IN THE PROPOSED DETERMINATION OF WATER RIGHTS AS PRESENTED BY THE STATE ENGINEER IN THIS MATTER WAS CLEAR AND CONVINCING PROOF OF THE FACT THAT THE WELL IN QUESTION WAS NOT USED FOR THE IRRIGATION OF MORE THAN FIVE ACRES

PRIOR TO MARCH 22, 1935, AND FORMED THE BASIS FOR AND FULLY SUPPORTED THE FINDINGS OF THE TRIAL COURT.

## ARGUMENT

### POINT I.

THE INFORMATION CONTAINED IN THE PROPOSED DETERMINATION OF WATER RIGHTS AS PRESENTED BY THE STATE ENGINEER IN THIS MATTER WAS CLEAR AND CONVINCING PROOF OF THE FACT THAT THE WELL IN QUESTION WAS NOT USED FOR THE IRRIGATION OF MORE THAN FIVE ACRES PRIOR TO MARCH 22, 1935, AND FORMED THE BASIS FOR AND FULLY SUPPORTED THE FINDINGS OF THE TRIAL COURT.

It is our position that there is no uncertainty of theory or of legal principle upon which the findings and conclusions of law were based in the lower court. We contend that the findings were predicated on the theory that claimant failed to establish that he had used the water from the well in question on any land but the five acres awarded in the proposed determination. The whole tenor of the testimony of appellant and one O'Leary was directed to the point of trying to establish use on an amount of acreage exceeding the five acres which was previously claimed. We agree with appellant that irrigation of pasture land may be considered a beneficial use. However, before deciding whether there was beneficial use made of water, the court must first decide whether there was use of the water at all. The burden is upon the party asserting his right to the use of a particular source of water to prove that he is entitled to this right. The

Supreme Court of the State of Utah, in the case of *Hardy v. Beaver County Irrigation Company*, 65 Utah 28, 234 Pac. 524, which was an action concerning the determination of water rights, stated:

“Claimants in actions to determine water rights, must prove extent and amount of their appropriation with definiteness and certainty.”

We contend and will point out in the following argument that the claimant in this case did not meet this burden of proof. The testimony of appellant and O’Leary was not disregarded by the lower court, but was contradicted by the evidence supplied by the State Engineer and this latter evidence was sufficient proof upon which the court could base its finding. The State Engineer made surveys and collected facts in the Escalante Valley Drainage Area, as is his statutory duty in general adjudication actions, in accord with Section 73-4-11, Utah Code Annotated, 1953. The information thus gathered was assembled into a report and submitted to the District Court in the form of a proposed determination. When the hearing was held in the District Court at Beaver, Utah, the court had before it not only the testimony of appellant and O’Leary, but also the proposed determination prepared by the State Engineer.

It is our contention that the proposed determination was evidence in this controversy and that the lower court was not only entitled to take it into consideration in the determination of the lawsuit, but was required to consider the report of the State Engineer and weigh it against the other evidence presented. 20 Am. Jur., Sec. 1023, on p. 861, states:

“It is a well recognized general rule that official records and written reports of a public nature which public officers are required, either by statute or by the nature of the duties of their office, to keep of transactions occurring in the course of their public service, made either by the officers themselves or under their supervision are recorded therein, so far as they are relevant and material to the particular inquiry, although the entries have not been testified to by the persons who actually made them and although they have, therefore, not been offered for cross-examination.”

The United States Supreme Court, in a case involving the determination of water rights, *Pacific Livestock Company v. Oregon Water Board*, 241 U. S. 440, 36 S. Ct. 637, 60 L. Ed. 1084, at page 453 of the United States Reporter, articulated the rule that the State Engineer's report is competent evidence :

“And while it is true that the State Engineer's report is accepted as evidence, although not sworn to by him, it is also true that the measurements and examinations shown therein are made and reported in the discharge of his official duties and under the sanction of his oath of office, and that timely notice of the date when they are to begin is given to all claimants. The report becomes a public document accessible to all and is accepted as *prima facie* evidence, but not as conclusive.”

The Utah Supreme Court has stated, in *Garrison, State Engineer v. Davis, et al.*, 88 Utah 358, 54 P. 2d 439, on page 367 of the Utah Reporter, in referring to the weight which shall be given to evidence furnished by the State Engineer in actions of this nature, that :

“While it may be that the trial court was not bound to accept such recommendation, still, in light of the fact that the State Engineer collected the information which formed the basis of the decree, the recommendation of the State Engineer was entitled to great weight.”

The Supreme Court of the State of Utah has also declared, that in actions concerning the general adjudication of water rights, the reports of the State Engineer constitute competent and prima facie evidence. *Smith v. District Court, etc.*, 69 Utah 493, 256 Pac. 539, and *Plain City Irrigation Company v. Hooper Irrigation Company, et al.*, 87 Utah 545, 51 P. 2d 1069. In this latter case on page 559 of the Utah Reporter, the court used the following language in setting out this proposition:

“The statements filed by the claimants shall take the place of pleadings, and these statements with other information gathered, the maps, records, and reports of the State Engineer, or others appointed by the court, shall be competent and prima facie evidence of the facts.”

Appellant's claim to a water right is predicated not only upon the testimony of the witnesses in the lower court but also upon Underground Water Claim No. 10150. This underground water claim was filed in accordance with Section 73-5-10, Utah Code Annotated, 1953, which has since been repealed by the 1959 Legislature. Although the statute provided for amendment to an underground water claim previously filed, we urge that such amendment should be limited to amendments made when the claim in question is not involved in litigation. The facts in the present controversy show that Underground Water Claim

No. 10150 was originally filed March 17, 1936, and the claimant filed Water Users Claim No. 1420 on May 26, 1947, basing it upon the original underground water claim. If there had been a mistake in the original claim, we believe the 11 years which lapsed before the filing of Water Users Claim No. 1420 was more than ample time in which to discover and to correct any mistake. However, the water user waited until the proposed determination had been submitted to the court, April 1, 1949, and then in 1950 he amended Underground Water Claim No. 10150, claiming he was entitled to irrigate seven times the original amount of acreage which he claimed at the outset. This is an error of such magnitude that we cannot conceive that a person could go from 1936 until 1950 before discovering that he had made the error.

We further content that the claims filed by the water users are only evidence to be taken into consideration by the State Engineer in formulating the proposed determination. This appears to be the intent of the Legislature in Section 73-4-11, Utah Code Annotated, 1953, which deals with the report and recommendations of the State Engineer:

“After full consideration of the statements of claims and of the surveys, records, and files, and after a personal examination of the river systems or water source involved, if such examination is deemed necessary, the State Engineer shall formulate a report and a proposed determination of all rights to the use of the water of such river system or water source and a copy of the same shall be mailed by regular mail to each claimant, with notice that any claimant dissatisfied therewith may within ninety days from such date of mailing file

with the clerk of the district court a written objection thereto duly verified on oath.”

Section 73-4-14, Utah Code Annotated, 1953, referring to pleading in general adjudication action, states in part :

“The statements filed by the claimants shall stand in the place of pleadings, and issues may be made thereon. \* \* \* and in all proceedings for the determination of the rights of claimants to the water of a river system or water source the filed statements of the claimants shall be competent evidence of the facts stated therein *unless the same are put in issue.*” (Emphasis supplied)

We urge that when the appellant claimed more water than was allowed in the proposed determination that an issue was formed and the court was to determine by the same rules of evidence as in any other case whether to allow the claim.

In *Huntsville Irrigation Association, et al. v. District Court of Weber County, et al.*, 72 Utah 431, 270 Pac. 1089, Chief Justice Thurman, speaking for the court in interpreting the predecessor of the present statute, Section 73-4-14, Utah Code Annotated, 1953, stated :

“The statute, as before stated, provides that the claims filed by the claimants shall stand in the place of pleadings and issues may be made thereon. As we interpret that provision, if one claim conflicts with another, there is an issue to be determined. One claimant by claiming too much water may be an adverse party to every other claimant in the system. He may be adverse to only a part. In any event an issue is presented which should be tried by the court by the same rules of evidence and the same orderly procedure

as in other cases. The protests filed by the plaintiffs here in the Plain City case are claims as well as protests and constitute pleadings within the meaning of the statute. They present an issue to every other claimant in the system who disputes the plaintiffs' claims. The statute provides that pleadings may be amended. Every facility seems to have been provided for a thorough adjudication of the rights of each claimant as against every other claimant as well as against the state. There is nothing in any previous decision of this court involving this statute in conflict with these views."

Therefore, the evidence presented by both parties was submitted to the court to determine whether there should be an amendment to the proposed determination. Neither party was limited in its presentation of evidence and the issue was framed whether the proposed determination need be amended. The court was required to decide this issue on the basis of the conflicting evidence presented and to make a finding in accordance with the weight of evidence. The fact that the court made a finding which was contrary to the testimony of certain witnesses is no different from any other case where the court must decide a case upon conflicting evidence.

With conflicting evidence before it, the court at the suggestion and agreement of counsel agreed to view the premises in question. It was stipulated to by counsel for both parties that the court should view the premises in connection with the evidence (Tr. 13). It appears from the record that the Judge did not intend to view the premises to supply evidence, but merely to aid in the interpretation of the evidence already before the court. The Utah

Supreme Court has indicated that while a view by the court cannot be considered as evidence it would be reticent to upset a finding of a lower court where a view had been had. *Weber Basin Conservancy District v. Moore*, 2 U. 2d 254, 272 P. 2d 176.

We urge that the findings of the lower court in this action should not be disturbed. The Utah Supreme Court in *Silver King Consol. Mining v. Sutton, et al.*, 85 Utah 297, 39 P. 2d 682, speaking through Mr. Justice Folland, announced the following rule:

“This being a suit in equity, it is our duty to examine the evidence, determine its weight, and reach our own conclusions with respect thereto, bearing in mind, however, the rule so often announced by this court that the findings of a trial court will not be disturbed unless we are of the opinion they are against the clear preponderance of the evidence. *Holman v. Christensen*, 73 Utah 389, 274 P. 457. We have in mind also the other rule applicable to this kind of case which casts the burden on one who has discovered subterranean waters and claims such as his own to prove by a preponderance of the evidence that he is not intercepting the tributaries of appropriated streams or the sources of supply of prior appropriators. *Mountain Lake Mining Irr. Co. v. Midway Irr. Co.*, 47 Utah 346, 149 P. 929, 934; *Midway Irr. Co. v. Snake Creek M. & T. Co. (C. C. A.)* 271 F. 157, affirmed by the Supreme Court of the United States in 260 U. S. 596, 43 S. Ct. 215, 67 L. Ed. 423. We have given special attention to the evidence on account of the circumstances attending the signing of the findings of fact, conclusions of law, and decree. These were signed by stamp signature of the judge who tried the cause when was by serious and fatal illness confined to his bed in

a hospital. We are not unmindful of the fact, however, that Judge M. L. Ritchie, before he was stricken, had given the case full and thorough consideration, as indicated by his written memorandum opinion in which he discussed the law and the evidence and directed the drawing of findings, conclusions, and decree, in accordance with his announced decision in favor of the plaintiff.”

The Trial Judge had the opportunity to observe the demeanor of the witnesses on the stand, to examine the evidence of both parties, and observe the land in question. This should lend credit to the findings in the lower court and strongly indicates the findings were not against the clear preponderance of the evidence.

## CONCLUSION

It appears that the only real question before the lower court was whether the appellant established a water right on any land in excess of five acres. The evidence produced by the State Engineer furnished a sound basis upon which the lower court could base its decision that there was no additional water right on the land of appellant. Therefore, the findings and conclusions of the lower court are correct and should be affirmed.

Respectfully submitted

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