

1960

# Leon E. Mayer v. Wayne D. Criddle : Appellant's Reply Brief

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

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.*

## APPELLANT'S REPLY BRIEF

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.*

# 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.

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## APPELLANT'S REPLY BRIEF

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Upon a reading and study of respondent's brief, appellant feels impelled to file this very short reply thereto in order to clarify some statements therein con-

tained which conceivably could be misleading or at least confusing to this Court.

The respondent concedes that water used for the irrigation of pasture land, provided the irrigation is beneficial in nature, is a sufficient use upon which to base a water right, and thereafter directs his entire argument to the proposition that "the information contained in the proposed determination of water rights as presented by the state engineer 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 22nd 1935, and formed the basis for and fully supported the findings of the trial court."

We agree with respondent as stated in his brief, that claimants in actions to determine water rights must prove extent and amount of their appropriations with definiteness and certainty; and appellant insists that the extent and amount of the appropriation has been so established, as we will point out later in this brief.

Appellant seems to stand on this position as set forth on page 4 of his brief: "The testimony of appellant and O'Leary was contradicted by the evidence supplied by the State Engineer; \* \* \* when the hearing was first held in the District Court at Beaver the court had before it not only the testimony of appellant and O'Leary but also the proposed determination prepared by the

State Engineer.”

There is no evidence whatsoever in the record as to how the State Engineer arrived at the limitation of five acres, excepting information set forth in the Underground water claim filed in March of 1936. At the hearing and after both appellant and O’Leary testified the State Engineer did not introduce any evidence as to the extent of his investigation, when it was made, what physical facts he may have found on the ground, but apparently relied entirely upon the underground water claim. Since the State Engineer would have very little, if any, knowledge concerning the extent and use of underground water rights initiated many years prior to the underground water act of 1935, he did, of necessity, rely largely, if not entirely, on the information set forth in the underground water claims, and when so set up in the proposed determination any other water user could protest the award, or the claimant himself could protest any limitation thereon, or disallowance thereof. There are numerous cases where the State Engineer disallowed claims for various reasons and this Court reinstated water rights. (See *Goodwin vs. Tracy*, 6 Utah 2nd 1, 304 Pac. 2nd 964; *Cook vs. Tracy*, 6 Utah 2nd 344, 313 Pac. 2nd 803). In the early years when the statute first provided for the filing of underground water claims, many of these claims were prepared by farmers without the aid of technical assistance from engineers or lawyers,

and were very loosely expressed in layman's language. The claim filed by O'Leary, then the owner of the premises and well right is an example. The following appears on the claim and in answer to questions:

11. Maximum quantity of water diverted in g.p.m. (Gallons per minute). Ans. 350—Date Feb. 1935.

12. Minimum quantity of water diverted in g.p.m. Ans. 120. Date June 1928-29-30-32-33-34.

\* \* \* \* \*

16. Acres of land irrigated first year (Feb. 1928) Ans. none. Acres irrigated each year thereafter with dates. Ans. 1933—5 acres.

17. If used during non-irrigation season, give amount in g.p.m. Ans. 120. Nature of use—stockwatering.

\* \* \* \* \*

General remarks. (Describe below in detail, the nature and extent of any use not listed, or give other explanatory information not heretofore covered).

Ans. "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 this time—removed in May, 1935."

The proposed determination on page 235 thereof, Claim No. 1420, Underground water claim 10150, under name of claimant, Fred W. O'Leary, describes a well 50

feet deep, 16 inches in diameter, with a priority of 1928, and with a flow of 0.780 second foot of water, but limits the right of irrigation to five acres and awards a stock-watering right for 400 sheep and a domestic right. It can be noted that the State Engineer, in setting up the award in the proposed determination followed the underground water claim as to year of priority, depth and size of well, extent of stockwatering right, and maximum flow of 350 gallons per minute or approximately 0.780 second foot of water. (The district court for some unknown reason held this down to 120 gallons per minute). It is very obvious that the State Engineer allowed the five acres because of the answer under paragraph 16, and entirely ignored the explanatory statement that "this well was used for irrigating natural grass pasture and watering farm stock each summer since 1928, excepting 1935." No blame attaches to the State Engineer for the limitation, because O'Leary omitted in the explanation to mention the acreage so irrigated, no doubt relying on the eighty acres he owned and described in the underground water claim as being the maximum right to which he was entitled. The State Engineer no doubt had it in mind that when the proposed determination was set up a claimant could file an amended claim, or file a protest and make the showing as to his rights in a hearing. O'Leary's testimony remains absolutely uncontradicted that the pasturage so irrigated was 35

acres in addition to the five acres planted to crops. His testimony likewise is without question, and as stated in his protest and at the hearing, that question No. 16 called for ground that had been plowed and put into producing crops, that is, planted to crops and cultivated rather than pasture land, (which pasture land, without irrigation, would not have produced nearly as much hay by way of crops and forage) (Tr. 6-9).

In 1935 O'Leary expressly stated that the well was used for irrigating natural grass pasture each summer since 1928, and his explanation as to why he claimed only five acres in answer to question No. 16 is certainly no after-thought or attempt to enlarge upon his right.

On page 7 of respondent's brief much is made of the fact that the underground water claim was filed in March of 1936, and the water user's claim thereunder based upon the original underground water claim was filed in 1947, a matter of eleven years later; and it is claimed if there had been a mistake in the original claim eleven years was more than ample time *in which to discover and to correct any mistake*. The answer to such argument is clear and simple. In the first place, O'Leary had no way of knowing that his statement "this well was used for irrigating natural grass pasture each summer since 1928" would be entirely disregarded by the State Engineer in setting up the proposed determination.



There was no error or mistake in the underground water claim. True, in his awkward manner of expression and belief that the answer to question 16 called for acreage actually plowed and planted to crops, he thus answered five acres, and no doubt created some confusion or perhaps ambiguity—particularly by his oversight in failing to mention the acreage irrigated as pasture land. Secondly, the proposed determination setting forth his right and limiting it to five acres was not prepared and submitted to the court until April of 1949, two years after filing the water user's claim (as distinguished from the underground water claim). Until such proposed determination was submitted to the court and made available to water claimants, there could be no way of knowing that his water right was limited to five acres. When the limitation of five acres was discovered and within the time when protests could be filed, O'Leary filed his protest after asking for and receiving leave to file an amended claim setting forth the acreage claimed.

We call attention to the fact that the State Engineer in the hearing offered no proof whatsoever concerning why he limited the award to five acres—whether he made any investigation concerning the land, or whether the determination was based on anything other than the information he found in the underground water claim under question No. 16. As stated by respondent, the State Engineer relies upon the fact that he claims the testimony

of O'Leary and Leo Mayer was contradicted by the proposed determination based upon the underground water claim. We submit that actually there is no conflicting evidence and that the evidence presented to the trial court should sustain an award of thirty-five acre water right in addition to the five acre award. The loss of a water right of long standing is a serious matter to a farmer and rancher and should not be lost to him because of a very obvious and apparent inadvertence in the preparation of an underground water claim which was prepared with no technical assistance.

*Respectfully submitted,*

SAM CLINE,  
*Attorney for Appellant.*