

1959

South Kamas Irrigation Co. v. Provo River Water Users' Association : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

FILED

DEC 28 1959

SOUTH KAMAS IRRIGATION
COMPANY,

Plaintiff and Appellant,

— Vs. —

PROVO RIVER WATER USERS'
ASSOCIATION,

Defendant and Respondent.

Clerk, Supreme Court, Utah

Case
No. 9168

APPELLANT'S BRIEF

EDWARD W. CLYDE,

Attorney for Appellant

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NATURE OF THE CASE

The Duchesne Tunnel conveys water from the Duchesne River to the Provo River. Appellant has an approved water filing to divert and beneficially use water from Little Deer Creek, and such water can be used most economically by bringing it through the Duchesne Tunnel. Respondent Provo River Water Users' Association, a mutual water corporation, operates and controls the Duchesne Tunnel pursuant to a contract with the United States Bureau of Reclamation. Appellant, also a mutual water corporation, owns shares of stock in Respondent

corporation and brought this action for a declaratory judgment, requesting the court to declare that appellant, as a stockholder in respondent mutual water corporation, has the right in common with other stockholders of the corporation to use all water conveyancing facilities which respondent corporation has the right to use.

STATEMENT OF FACTS

No evidence was introduced in the court below. The facts recited in this brief, therefore, do not appear in the record, except as allegations in the complaint or admissions in the Motion. Also, some reference is made to the public records in the office of the State Engineer, since this Court takes judicial notice of those records.

Appellant, a mutual water corporation, owns shares of stock in respondent Provo River Water Users' Association, also a mutual water corporation. Appellant has a water right, independent of its shares of stock in respondent, for 25 c.f.s. of water from Little Deer Creek. This water can be used most economically if the water is brought through the Duchesne Tunnel and connected facilities which were constructed as part of the Deer Creek Division of the Provo River Project, and financed by the United States Bureau of Reclamation (See Contract attached to Motion). Legal title to these facilities was retained by the United States, but the operation has been turned over to respondent, and the facilities are operated and controlled for the benefit of the stockholders of respondent (Contract attached to Motion).

The water to which appellant has a right by its Application No. 16063 has for several years been captured and used by respondent. Thus, when appellant requested use of the Duchesne Tunnel for conveying the water above-mentioned, respondent refused to permit such use (Complaint). Further, the Bureau of Reclamation has attempted to obtain the water for which appellant has an approved application, and has made a junior filing, not yet approved (Application No. 30389, Misc. Book 16, page 481). The file in the State Engineer's office on this junior application reveals that the Bureau has made repeated efforts to induce the State Engineer to lapse appellant's approved application and to approve the Bureau's junior application. Though this evidence was not introduced below in documentary form, it was brought out in oral argument in response to questions from the court, and, in any event, it is well settled in Utah that this Court will take judicial notice of the records in the office of the State Engineer:

“Since the records of the State Engineer's Office are public records, we take judicial notice thereof.” *McGarry v. Thompson*, 114 Utah 442, 447 (1948).

Thus, the Bureau seeks a water right through its unapproved, junior filing on the very water for which appellant has an approved application. If the Bureau is successful, the use and benefit of the water will go, as it now does, to respondent Association, just as does all Project water (Contract attached to Motion).

Appellant filed this action for a declaratory judgment, requesting the court to adjudge that appellant, as a stockholder in respondent mutual water corporation, has the right in common with other stockholders of the corporation to use all water conveyancing facilities which respondent mutual corporation has the right to use. Appellant did not seek and does not now seek to have the court construe respondent's contract with the Bureau of Reclamation. The relief sought is limited entirely to a declaration that appellant, as a stockholder of respondent company, has the right in common with other stockholders to use all water conveyancing facilities of respondent company (whatever they are).

Respondent filed a motion to dismiss in the court below, and in support thereof argued that since respondent's right to use the Duchesne Tunnel and all related facilities are governed by a contract between the United States and respondent Provo River Water Users' Association, the instant suit for a declaratory judgment would necessarily require the court to construe that contract. Therefore, argued respondent, the United States is an indispensable party to the instant action, and since it cannot be sued without its consent, and since it has not given its consent to the instant suit, the action must be dismissed. Accordingly, the lower court dismissed appellant's complaint, and from that judgment of dismissal appellant has brought this appeal.

ARGUMENT

THE TRIAL COURT ERRED IN RULING THAT THE UNITED STATES OF AMERICA IS AN INDISPENSABLE PARTY, AND IN DISMISSING THE ACTION.

- (a) Appellant's Complaint Does Not Require Adjudication of Any Issues in Which the United States Has an Interest.

The law relating to indispensable parties is not complex, nor do we believe it is in dispute in the instant litigation. We readily concede that if in this action we were trying to interpret respondent's contract with the Bureau of Reclamation, the United States would be an indispensable party, and the trial court could have properly dismissed the complaint. But we do not seek to have the contract construed. One need only examine appellant's complaint to determine the relief prayed for — we seek only to have the court declare our rights as a stockholder of respondent Association.

It is believed there will be no difficulty in applying the law. Rule 19 of the Utah Rules of Civil Procedure is the applicable rule dealing with necessary joinder of parties. Though we have stated that we think the law is not in serious dispute, we will, preliminarily, set forth the policy and purpose of the law in recognizing indispensable parties, and in distinguishing them from conditionally necessary, proper and formal parties.

A formal party is not a real party in interest but must be made a plaintiff or a defendant as a matter of

procedure, as the guardian where the real plaintiff is an infant (see, *e.g.*, *Moore's Federal Practice*, Volume 3, page 2104). A proper party is one who has an interest in the litigation and who may join as plaintiff or be joined as defendant "because there is a question of law or fact common to the right or duty in which he is interested and another right sought to be enforced in the action and the rights or liabilities involved arise out of the same transaction, occurrence, or series of transactions or occurrences." (*Moore's Federal Practice*, Volume 3, page 2104).

Rule 19 does not deal with formal or proper parties, but deals with compulsory joinder of parties, *i.e.*, those parties whose presence before the court is either indispensable or conditionally necessary. Conditionally necessary parties are those persons having a joint interest and who must be joined as parties if they are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it. But if the joinder would deprive the court of its jurisdiction of the parties before it, or if the court's jurisdiction over them can only be acquired by their consent or voluntary appearance, the court will proceed to render judgment, but the judgment rendered will not affect the rights or liabilities of absent persons (Rule 19(b)). An indispensable party is one who has a joint interest in the subject of the litigation, and must be joined as a party or the action will be dismissed (*Moore, op. cit., supra*, at 2104).

The lower court ruled that in the instant action the United States was an indispensable party, thereby con-

cluding that the United States had a joint interest in the relief prayed for in appellant's complaint. In so ruling the court erroneously construed appellant's complaint as a request for a declaratory judgment adjudicating the extent of respondent's right to use the Duchesne Tunnel and connected facilities under the contract between respondent and the United States. Appellant's complaint did not request such an adjudication. In order to understand the nature of the instant action it is necessary to identify two separate questions related to appellant's claim that it has a right to use the Duchesne Tunnel and connected facilities:

1. Does appellant, as a stockholder in respondent mutual water corporation, have a right to use in common with other stockholders of respondent whatever rights respondent has to use the Duchesne Tunnel and connected facilities; and
2. What rights, if any, does respondent Provo River Water Users' Association have to use the Duchesne Tunnel and connected facilities?

The first question is the only one with which the instant action is concerned. Admittedly, an answer to the second question might require, among other things, a construction of the meaning of the contract between respondent and the United States. *But appellant does not seek an answer to that question in this action.*

As we have observed, the lower court erroneously construed appellant's complaint as requiring an adjudication of both of the above questions. But it does not.

The prayer is limited to a determination of appellant's rights as a stockholder in a mutual water corporation. The judgment on that question would not concern or interest the United States in any manner. In order to frame a controversy justifying a declaratory judgment, appellant did recite in the complaint that respondent had a contractual right to use the Duchesne Tunnel and other facilities by virtue of its contract with the United States. Appellant did not ask the court to define, declare or adjudicate the nature or the extent of *that* right. It is not denied that respondent has *some* right — and we seek only to have the court declare that *respondent* cannot exclude appellant from using such rights as respondent has (whatever they are). In other words, appellant alleged that it had a right as a stockholder in a mutual company which respondent company refused to recognize, and asked the court to declare the rights of a stockholder in a mutual water corporation. The prayer of appellant's complaint requests only:

“that the court adjudicate, declare and determine that plaintiff is entitled, as a stockholder in defendant mutual water corporation, to use and employ in common with other stockholders of defendant all of the rights of defendant connected with the use of the Duchesne Tunnel and connected facilities so long as such use does not interfere with any other reasonable or necessary uses by defendant or its other stockholders.”

We emphasize that appellant's complaint recited that respondent had a contractual right to use the facilities in question purely for the purpose of framing the need

for a declaratory judgment. There was no prayer for a construction of the contract between respondent and the United States.

It is submitted, then, that the United States has no joint interest, nor any interest, in the present litigation. The instant lawsuit is purely one between the stockholder and the corporation, seeking a declaratory judgment as to the rights of a stockholder in a mutual water corporation. In fact, the United States could not even qualify for permissive joinder as a *proper* party, since there is not even a question of law or fact common to a right or duty in which the United States is interested. Perhaps if we would have added a second count to our complaint asking the court to consider the meaning of the contract with the Bureau, then the United States would have been interested — but we did not raise this issue. The only possible interest the United States could have relates to its rights and duties under its contract with respondent Association, and that contract will not be construed as part of the present litigation.

The issue on appeal is simply one of analyzing plaintiff's complaint to determine what in fact appellant has prayed for. The validity of the analysis presented above is obvious from an examination of the face of the complaint. Nevertheless, the lower court has erroneously held that the United States is an indispensable party. Probably it is this matter, and not the law, which divides the parties. If the contract with the Bureau *must* be construed in order for the court to declare that a stockholder

in a mutual company has the right to use facilities and rights of the mutual company, then we concede that the United States is an indispensable party. But if it is possible to declare what a stockholder's rights are under the Articles of Incorporation and under the law of mutual irrigation companies, without also construing the purchase contract, then the court is wrong. Therefore, we will briefly set forth the criteria for determining who are indispensable parties, and the policy considerations which should guide the court.

There are no clear-cut rules which can be applied in every case to distinguish indispensable parties from necessary parties, but the determination is made on the facts of the particular case, guided by certain basic principles. The landmark case in this area of the law, *Shields v. Barrow*, 17 How 130 (1854), is discussed by Professor Moore as follows:

“In spite of the vast number of cases that have arisen concerning who are necessary and who are indispensable parties, the governing principles have remained comparatively simple and constant. Most often cited for these principles is the case of *Shields v. Barrow*, in which Mr. Justice Curtis said, ‘persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine rights in it . . . are commonly termed necessary parties; *but if their interests are separable from those of the parties before the court so that the court can proceed to a decree, and do complete and final justice, without affecting other persons, not before the court, the latter are not indispensable parties.*’

Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and in good conscience' are indispensable parties.'" Moore's Federal Practice, Volume 3, Page 2150 (emphasis added).

There are two counter-balancing policies of equal importance which serve as guides in distinguishing between indispensable and necessary parties. One is the desire to avoid a multiplicity of lawsuits and to bring all interested parties before the court so that a final judgment can be entered which will be binding on all the parties; the counter-balancing policy is the desire to have some adjudication rather than none, and when the parties otherwise would be left remediless, the court will strain hard to permit some adjudication. This is illustrated by Professor Moore, who in turn cites Mr. Justice Sutherland speaking for the United States Supreme Court:

"In spite of the simplicity of the principles, however, their application to cases in which it is essential to distinguish between necessary and indispensable parties, bears out the statement made by the Supreme Court that 'there is no prescribed formula for determining in every case whether a person or corporation is an indispensable party or not.' On the one hand is the desirability of preventing a multiplicity of suits, and that there might be a complete and final decree between all parties interested. Opposed to this is the desirability of having some adjudication, if at all possible, rather than none, that leaves the parties remediless due to an ideal desire to have all interested persons before

the court. This thought was well expressed by Mr. Justice Sutherland in *Bourdieu v. Pacific Western Oil Co.* as follows :

‘The rule is that if the merits of the cause may be determined without prejudice to the rights of necessary parties, absent and beyond the jurisdiction of the court, it will be done; and a court of equity will strain hard to reach that result. (citing cases)

‘We refer to the rule established by these authorities because it illustrates the diligence with which courts of equity will seek a way to adjudicate the merits of a case in the absence of interested parties that cannot be brought in.’ ” Moore’s Federal Practice, Volume 3, Page 2154.

The law relating to indispensable and necessary parties is the same in actions for declaratory judgments as in other actions :

“The general theory as to who are indispensable and necessary parties applies to suits for declaratory judgments. Obviously, an indispensable party must be joined in a declaratory judgment action, just as in any other, since the court could not proceed to enter an equitable judgment in the absence of such party. *But we have called attention to the desirability of not expanding the concept of indispensable parties to the point that parties, having rights warranting adjudication, are left remediless, if it is at all possible to proceed with the*

parties before the court, and that 'a court of equity will strain hard to reach that result.' As a result of this, and due to the flexibility of the declaratory judgment procedure there may be times when the court will be able to proceed, without prejudicing the rights of absent persons, when it would be difficult to do so under a more rigid procedure. On the other hand a declaratory judgment action must serve a useful purpose, mainly in affording a remedy for rights or duties warranting adjudication, which could not be presented at all or only imperfectly under the older and traditional forms of procedure." Moore's Federal Practice, Volume 3, Page 2197 (emphasis added).

The Utah law is in harmony with the principles just cited. The Utah Supreme Court has said that:

"Whenever a party has been omitted whose presence is so indispensable to a decision of the case upon its merits that a final decree cannot be made without materially affecting his interests, the court should not proceed to a decision of the case upon the merits." Hoyt v. Upper Marion Ditch Co., 76 P. 2d 234.

But that:

"... it is not the uniform, unvarying practice to join as a party plaintiff or defendant every party having an interest in the subject matter or in granting or opposing the relief sought. There is the distinction between proper and necessary or indispensable parties. Thus, in actions to quiet title the plaintiff may join all or as many persons claiming adversely as he chooses and make them parties defendant. And the judgment will settle matters only as between those actually joined and

served with process. In creditors' suits and in numerous other actions by stockholders, creditors, heirs, or others, the plaintiff may join all or as many as he deems necessary or judicious in view of the nature of the relief he seeks and the ends in view. It is not always essential to jurisdiction that every party in interest be joined on the record at the outset." *McCarthy et al v. Public Service Commission of Utah et al*, 77 P. 2d 331.

In summary, we think it is clear that the United States has no legitimate interest in an adjudication limited to the prayer of plaintiff's complaint. If the complaint required a construction of the contract between respondent and the United States, in order to determine what rights respondent has against the United States, then the United States clearly would be an *interested* party, and, perhaps, an indispensable party. But the complaint does not request a construction of that contract, nor does it require the adjudication of any question in which the United States has an interest.

If the present action is adjudicated on the merits in favor of appellant, and if respondent then refuses to permit appellant to use the facilities in question, claiming that it (respondent) does not have any right to use such facilities, appellant might then be required to bring a stockholder's derivative suit in the name of the corporation against the United States in the federal district court or in the court of claims. In such an action the United States could not plead its immunity from suit because the action would be on a contract to which the United States was a party and prosecuted in the name of the other

contracting party. But the contingency of such a future lawsuit in the federal court in order to bring ultimate relief to appellant is quite immaterial on this appeal, except to show that the present action requires only an adjudication of rights between appellant and respondent, and to show that such present adjudication would serve a useful and necessary purpose as a foundation for a second lawsuit, if necessary, to bring appellant ultimate relief.

We wish to emphasize that it is only *after* determining that a party has an *interest* in a lawsuit that the court determines if such party is *necessary* or *indispensable*. Under the prayer of appellant's complaint, it is clear that the United States has no interest in the present litigation, and the distinction between necessary and indispensable parties is moot. But if this Court should determine that the United States has an interest in the instant lawsuit, the declaratory judgment prayed for by appellant can be granted without prejudice to the United States, and, since appellant would otherwise be remediless, the court will strain hard to permit some adjudication by designating the United States a conditionally necessary party, rather than an indispensable party.

(b) If the Present Action Is Dismissed, Appellant Will Never Have Its Day in Court.

The most fundamental concept in Anglo-American jurisprudence is that every person should be entitled to his day in court. A system of law which does not provide a procedure to permit a party to have his rights deter-

mined upon their merits seems wholly foreign to the concept of justice as we know it. Yet, if this Court sustains the holding of the lower court, appellant will never have its day in court and, as a result thereof, will probably lose a valuable water right.

The background facts giving rise to the instant litigation are illuminating, and were brought to the attention of the lower court in response to questions from the court.

The United States financed the Deer Creek Division of the Provo River Project, pursuant to the contract mentioned earlier. Legal title to the water rights, storage works and conveyancing facilities is in the United States, but the control and management has been turned over to respondent Provo River Water Users' Association, and the system is operated for the use and benefit of the stockholders of respondent Association (Contract attached to Motion).

As recited in the Statement of Facts, plaintiff's water right discussed in this litigation is an approved application for 25 c.f.s. from Little Deer Creek (Application No. 16063). At the present time, that water is not being used by appellant because appellant has no facilities to carry the water from Little Deer Creek to its diverting canals. But the water can be and is being captured by the Project facilities mentioned. Hence, the water in question is

being taken and used each year by respondent Association. Further, the United States has a junior filing on the same water, and is seeking approval of that application from the State Engineer (Application No. 30389). These filings in the State Engineer's Office, under the case of *McGarry v. Thompson, supra*, are judicially noticed by this Court. If appellant is prevented from litigating its right to use whatever facilities respondent Association has a right to use, and cannot otherwise use its water right, then the State Engineer ultimately will lapse appellant's application and approve the United States' junior application, and the use and benefit of the water will continue to go to respondent Association. It is thus clear that both the United States and the Provo River Water Users' Association will benefit if appellant is prevented from perfecting its use of the water.

The "cooperation" between the United States and respondent Association is well illustrated by the present litigation. Respondent Association defends on the ground that the United States is an Indispensable Party and, therefore, there can be no adjudication upon the merits. The United States refuses to enter the litigation, enjoying its immunity from the present litigation.

If appellant had attempted to bring a stockholder's derivative suit in the federal court against the United States for breach of contract or to construe the contract between the United States and the Association, the Association most certainly would have entered the litigation,

claiming that preliminarily it must be determined that a stockholder can enjoy the same rights as the mutual corporation. Thus, it would be asserted that such issue could not be adjudicated upon the merits because the Association would be an indispensable party and if it were joined as a defendant there would be no diversity of citizenship jurisdiction in the federal court between appellant and respondent Association to permit adjudication of the preliminary question. And so would go the merry-go-round.

Thus, appellant determined that the only procedure whereby its rights could be adjudicated would be to bring two successive (not alternative) lawsuits. First, a declaratory judgment action in the state court to declare that a stockholder in a mutual water corporation is entitled to use in common with the other stockholders all water conveyancing and storage facilities which the corporation has a right to use. Second, if necessary, a stockholder's derivative suit against the United States based upon the contract between the United States and respondent Association, establishing the Association's rights to use the facilities in question. Appellant might elect to bring an action for damages against the United States in the Court of Claims (Title 18,, § 1491,, U.S.C.A.) or in the Federal district court (Title 18, § 1346, U.S.C.A.), and any claim for damages as a result of the United States' refusal to deliver water pursuant to the contract would necessarily involve a construction of the meaning of the contract.

Appellant's route to a legal remedy might seem somewhat arduous and circuituous, but it is the only possible remedy. And, such a circuituous route, if circuituous it be, is made necessary by the conduct of the United States and respondent Association.

We do not seek to discredit either the United States or respondent Association in their desire to obtain the valuable water right owned by appellant. We do seek to discredit the method by which they hope to accomplish the result. Rather than litigate the merits to determine what the respective rights of the parties are, they seek to avoid any determination of the merits in the hope that appellant will not find a means of conveying and using the water and that the State Engineer will lapse appellant's approved application and approve the United States' junior application.

SUMMARY

The only point raised on this appeal is whether the United States is an indispensable party to the present action. In asserting that it is not, we have presented the following arguments:

- (a) Appellant's complaint only requests an adjudication of rights as between appellant and respondent. The United States is not even an *interested* party in the instant litigation, much less an *indispensable* party;
- (b) Even if the United States could be viewed as having an interest in the instant litigation, the law is clear to the effect that, when the

plaintiff would otherwise be remediless, the court will strain hard to consider the interested party to be only a necessary party, and not an indispensable party, so that some adjudication can be had;

- (c) The rights of appellant and respondent can be adjudicated without in any way binding or adjudicating the rights of the United States under its contract with respondent;
- (d) If appellant's present action is dismissed, it will never have its day in court, will never have its rights adjudicated upon their merits, and as a result thereof, will probably lose a valuable water right.

It is respectfully urged that the United States is not an indispensable party to the present proceeding, and that the trial court erred in holding otherwise.

Respectfully submitted,

EDWARD W. CLYDE,

Attorney for Appellant