

1960

In the Matter of the General Determination of All
The Rights to the Use of Water, Both Surface and
Underground, Within the Drainage Area of the
Green River Above the Confluence of, but
including, Pot Creek, in Daggett, Summit, and
Uintah Counties, Utah : Brief of Appellants

Utah Supreme Court

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E. J. Skeen; Attorney for Appellants;

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IN THE SUPREME COURT
of the
STATE OF UTAH

FILED

JUL 20 1960

IN THE MATTER OF THE GENERAL
DETERMINATION OF ALL THE
RIGHTS TO THE USE OF WATER,
BOTH SURFACE AND UNDER-
GROUND, WITHIN THE DRAINAGE
AREA OF THE GREEN RIVER ABOVE
THE CONFLUENCE OF, BUT IN-
CLUDING, POT CREEK, IN DAG-
GETT, SUMMIT, AND UINTAH
COUNTIES, UTAH.

Supreme Court, Utah

No.
9218

BRIEF OF APPELLANTS

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BRIEF OF APPELLANTS

This is an appeal from an interlocutory decree in a statutory suit for the general determination of water rights in the Green River drainage area. Objections were filed by the appellants to certain awards in the state engineer's proposed determination of water rights to Larry R. Bullock and Arletta Bullock, his wife, and to J. Alden Olsen. The objections were heard by the District Court of Daggett County and the interlocutory

decree dismissed the objections and confirmed the water rights set forth in the proposed determination upon the ground that such rights had been acquired by adverse use.

STATEMENT OF FACTS

The land area here involved is located in the state of Wyoming but the point of diversion of the water used to irrigate the land is in Daggett County, Utah. Exhibit P-1 is a large map showing not only the ranch owned by Larry R. and Arletta Bullock, referred to herein as the "Bullock Ranch," and the Olsen Ranch, but also the ranches of the appellants, Harry D. Buckley and Marietta Buckley, his wife, and Joe C. Hickey and Erma Hickey, his wife. There are several other ranches shown on the map with which we are not now concerned. The ditch from which the Bullocks and Olsen divert their water is known as the "Whipple Ditch" and is shown on the map. It heads in the NE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 25, T 3 N, R 15 E, and proceeds northerly for a distance of about 2 miles where it crosses the Utah-Wyoming boundary.

The Bullock Ranch is shown on the map bounded in purple and the Olsen Ranch is bounded in brown.

The ranches of the appellants, Harry D. Buckley and Marietta Buckley, his wife, and Joe C. Hickey and Erma Hickey, his wife, are shown on the map bounded in orange and yellow, respectively.

Points of diversion to serve the Buckley and Hickey ranches are located on the West Fork of Beaver Creek both upstream and downstream from the head of the Whipple Ditch.

THE BULLOCK WATER RIGHTS

The water rights awarded to the Bullocks are listed in the state engineer's priority schedule as follows:

Priority	Flow cfs.	Ditch (Source)	Claimant	Total Acres
July 6, 1899	2.00	Whipple Ditch West Fork Beaver Creek)	Larry R. & Arletta Bullock	474.80 1.60
1900	2.00	Whipple Ditch West Fork Beaver Creek)	Larry R. & Arletta Bullock	474.80 1.60
1906	2.50	Whipple Ditch West Fork Beaver Creek)	Larry R. & Arletta Bullock	474.80 1.60
				(R. 14, 15)

The evidence in support of each water right listed above will be briefly summarized below:

The Bullocks as remote successors to Albert F. Whipple, who made the original appropriation from the West Fork of Beaver Creek, offered in evidence Exhibit K 7, which is a notice of water appropriation. It provides:

NOTICE OF THE APPROPRIATION OF WATER

TO WHOM IT MAY CONCERN:—Take notice that the undersigned has located and claims Whipple Ditch waters of that certain Stream named and known as the West Fork of Beaver Creek, situated and being a natural stream of water-heading on the Uintah Range, in Summit County, Utah, together with all sources of supply wherever and whatsoever, contributing to the waters of said West Fork of Beaver Creek above the point of diversion and all such increased flow and

additional waters as may result from development or whatsoever cause and the point of diversion of said waters from said West Fork of Beaver Creek 80 ft. North of the S.W. corner of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 25, Township 3 range 15 East, S. L. M. running North one and one quarter miles ($1\frac{1}{4}$) thence North westerly one half mile ($\frac{1}{2}$) mile, where said ditch crosses the Utah & Wyoming State line into the S. W. Corner Lot 7, Sec. 19, Township 12 N. Range 113 West.

First. The quantity of water claimed and appropriated is two (2) Cubic feet per second, being according to the laws and rules and regulations, governing measurements of water in the State of Utah.

Second. The said waters is claimed and said appropriation is made for irrigation purposes and is intended for use in, upon and about Deseret lands of the appropriator.

Situated Lot 7, N. E. ¼ S. E. ¼, Sec. 19, Lots 1 and 2 Sec. 20 T. 12, N. R. 113 W. Containing 154.13 acres of said lands.

Third:—It is intended to divert said water by means of a ditch to be 4 ft. wide on top, and one foot deep, with an average grade of 20 feet to the mile.

Fourth:—The date of said appropriation is the 6th day of July 1899.

Fifth:—The name of the appropriator is,

-----Albert F. Whipple

State of Wyo.)
County of Uintah.) SS.

Albert F. Whipple being duly sworn says, that he is the appropriator named in the foregoing Notice that the matters and facts contained in said notice are true, that he has caused to be posted a notice in writing being a duplicate copy of foregoing Notice, in a con-

spicuous place at said Headgate of ditch the point of diversion and a like duplicate copy in a conspicuous place at the post office at Lonetree, in Uintah County, State of Wyoming, being the nearest Post office to said point of diversion.

Albert F. Whipple

Subscribed and sworn to before me this 17th day of October, 1905.

Herbert J. Gregory
Notary Public

My commission expires July 6th, 1908.

----- (Notary Seal)

FILED FOR RECORD October " "20" ", 1905, at
1 O'clock P. M., by Albert F. Whipple.
L. E. Eldredge

Abstracted in Book "4" of Lands, at Page 289.

Exhibit K-8 is an affidavit offered in evidence by the Bullocks. It states:

NOTICE OF APPROPRIATION IN BEAVER CREEK

STATE OF WYOMING: SS.
COUNTY OF UINTA,

I, Owen Bullock, Herbert J. Gregory, Mary Bullock, Edgar D. Donohoo, Martha Meeks, and Brig Meeks, being first duly sworn, each for himself, deposes and says: that he is a resident and citizen of Lone Tree, County of Uinta, State of Wyoming: that we were well acquainted with Albert F. Whipple in his lifetime, and with the Homestead known as the Albert Whipple Homestead, located and more particularly described as the:

West half of the Northwest Quarter and the North half of the South West Quarter of Section twenty, in Township Twelve North, Range One hundred and

thirteen West of the Sixth Principal Meridian, in Wyoming, containing one hundred and sixty acres.

That the following water have been used upon said lands and appropriated for use thereon, for a period of more than thirty years, to wit from and since the year 1900, by the said Albert F. Whipple, and his successors and assigns in interest, to wit:

The Whipple Ditch Waters of that certain Stream named and known as the West Fork of Beaver Creek, situated and being a Natural Stream of Water, heading on the Uintah Range of Mountains in Summit County, Utah, together with all sources of supply wherever and whatsoever, contributing to the waters of said West Fork of Beaver Creek above apoint of diversion and all such increase flow and additional waters as may have resulted from development of whatsoever cause, and the point of diversion of said waters from said West Fork of Beaver Creek is 80 feet North of the Southwest Corner of Northeast one forth of Section 25, Township 3, Range 15 East, Salt Lake Meridian, U. S. Survey, and running North one and one-quarter miles, thence Northwesterly one-half mile, where said ditch crosses the Utah-Wyoming State Line into Southwest Corner of Lot 7, Section 19, Township 12 North, Range 113 West, said water so used and appropriated being approximately two (2) Cubic feet per second according to the Laws of the State of Utah.

That neither the said Albert F. Whipple, nor any of his successors or assigns have been molested in the use of said waters during said period of time, nor at all, by any person or persons whatsoever; that each knows the said Harry Bullock is now, and has been for the past three years the owner of and entitled to possession of said lands, and has used said water thereon.

Herbert J. Gregory
I Owen Bullock

Edgar D. Donohoo
Martha Meeks
Brig Meeks
Mary Bullock

Subscribed and sworn to before me this 30th, day of
April, 1931.

(Sela) My Commissoin Expires June 21, 1931

Wm. Newton,
NOTARY PUBLIC

Recorded at the request of Harry Bullock, May 6th,

A. D. 1931 at 2 o'clock P. M.

Viola Zumbrunnen, County Recorder

Exhibit K 7 is the only notice of appropriation in the record and neither the Bullocks nor their predecessors in interest here made application to the state engineer for appropriation of water for use on the Bullock Ranch.

Larry Bullock testified in a deposition (Exhibit 12) as follows: "Q. Now your right to the use of this water is based upon this notice of appropriation that was filed by Albert Whipple?

A. Yes."

Other evidence adduced by Bullock consists of the testimony of Larry Bullock, which goes back to the year 1932 when he was 9 years of age. He testified that between 1932 and the present time his land had been irrigated from the Whipple Ditch and that it was his practice and it had been the practice of his father before him to flood the land from the South to the North, to pick up the waste water in ditches and to redistribute it on the land (Tr. 61-65). He said that in the

spring everybody on the West Fork of Beaver Creek filled their ditches (Tr. 72); that there had been no substantial increase or decrease of the irrigated area since 1932 (Tr. 66, 71). Mr. Bullock testified in answer to the question as to the usual way in which the Whipple Ditch was handled as follows:

A. "Well, I went up in the early spring as soon as ice and snow was out of the ditch, I would say the last of April or the first part of May, and turned water in the ditch at the head, all the water the ditch would pack, and that water remained in the ditch as long as there was sufficient amount of water in the creek to have it there, *as long as it never interfered with the people below*" (Tr. 67 (emphasis added)).

Also we quote:

Q. "Now, have you or to your knowledge your family ever had any problems with anyone during the time that you have been there or dispute about your right to the use of this water in the manner in which you have used it?"

A. No" (Tr. 68).

Mr. Bullock also testified that there was a swamp area on his land in the place indicated "swamp" on the map (Tr. 71, 72). Appellants proved by the testimony of Claude Bullock, Harry D. Buckley, and Elsie Bullock that the area on the Bullock Ranch irrigated from the Whipple Ditch was approximately 160 acres at various periods of time between 1914 and 1932 (Tr. 27, 43). Claude Bullock, the uncle of Larry Bullock, said that he had been acquainted with the Whipple Ditch since about 1920, that his brother, Harry Bullock, had purchased what is now known as the Larry Bullock Ranch in 1929 (Tr. 3) and operated it until his death in 1948. In 1920

there were 160 acres of land being irrigated. (See Exhibit P-1, Tr. 7, 9).

Harry D. Buckley, who moved to the vicinity of the Bullock Ranch in May of 1919, said that four 40-acre tracts were irrigated from the Whipple Ditch in that year and also some land in the NE $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec. 20 (Tr. 27). Elsie Bullock testified that she first became acquainted with the Whipple Ditch in 1914 and had known it ever since that date. She crossed it frequently going to and from her home (Tr. 41). In 1914 water from the Whipple Ditch irrigated from 150 to 160 acres in the old Whipple Ranch, now a part of the Bullock Ranch. She said that in 1914 there was no ditch through the two state 40-acre tracts on the West side of the Bullock Ranch (Tr. 44). The two 40-acre tracts in the former Carter place (E $\frac{1}{2}$ NW $\frac{1}{4}$, Sec. 20, T 12 N, R 113 W) were dry in 1914 (Tr. 48). *This evidence as to the extent of use prior to the year 1925 is uncontradicted in the record.* As indicated above, the only witnesses other than the last three listed who testified at the trial as to the Bullock Ranch were Larry Bullock, whose memory did not go back before 1932, and Orval Reuben Ivory, whose testimony goes back only to 1925. Both Larry Bullock and Ivory made statements which are of great significance in connection with Bullock's contention that a water right was obtained by adverse use. Bullock made the claim that he did not use water when it interfered with use below (see quoted testimony above) and Ivory made the following statements which are quoted from the transcript:

Q. When you talk about the distribution of the water, did that occur generally during the high water run-off in the spring of the year?

A. Oh, we had water—we had water there nearly always as long as we needed it.

Q. Did you?

A. Out of that ditch.

Q. Did the Harry Bullock place and the Alan Bullock place have all the water they needed all the time?

Y. You might hit one of those dry years that it don't rain and some of your meadows will burn, but if you took care of the water, you could nearly always have enough water.

Q. That was true of both ranches, wasn't it?

A. Oh, sure.

Q. There was plenty of water to go around in those days?

A. Yes sir. There might be some high bumps, and if it don't rain, then it will—your high bumps, and if it don't rain, then it will—your high bumps will burn, and you might say, "We ain't got enough water" and like that, but if you took care of the water, there was enough water to get around.

Q. And that was your experience during the whole time you lived there?

A. Yes.

(Tr. 99)

The trial court did not make separate findings of fact and conclusions of law with respect to the Bullock water rights, but stated in the preamble to the decree,

"And the Court, having heard the evidence offered by the respective parties and being fully satisfied in the premises, finds that the water rights awarded to each of the parties herein are fully supported by the evidence both as to amounts and quantities of water,

as to dates of priority and as to the extent of the use upon the lands of the parties herein; and the Court further finds that as to the parties herein there has been a use of water substantially as set forth in the said Proposed Determination that has been continuous, uninterrupted, under claim of right, open, notorious, hostile, and adverse to the claims and rights of each of the protestants herein and that such use has occurred during a period of at least fifteen years immediately preceding the year 1939.” (R. 4).

The Court then ordered, adjudged, and decreed that the protests and objections be dismissed and that the proposed determination of water rights as submitted by the state engineer be confirmed.

THE OLSEN WATER RIGHT

J. Alden Olsen succeeded to the interest of Don Clyde, whose water right is listed on Page 4 of the proposed determination as follows:

Priority	Flow cfs.	Ditch (Source)	Claimant	Total Acres
1902	3.00	Whipple Ditch	Don Clyde	79.40
		(West Fork		70.30
		Beaver Creek)		85.70

The evidence relating to this right consists of (1) the testimony of Mr. Olsen, who purchased the ranch in 1956 (2) the testimony of Claude Bullock, who helped hay on what is now the Olsen Ranch between 1920 and 1924 (3) the answers to interrogatories by Irene B. Langendorf and others, and (4) the testimony of Orval Reuben Ivory. The Olsen Ranch is sometimes referred to by the witnesses as the Alan

Bullock Ranch and the Nute Bullock Ranch. Pertinent parts of the testimony are briefly summarized as follows:

The testimony of Mr. Olsen applies only to the period since 1956. He described the methods and places of irrigation and the ditches (Tr. 84-86). Claude Bullock testified that he hayed on what is now the Olsen Ranch from 1920 to 1924 and at that time no water from the Whipple Ditch was used on the Olsen Ranch, and that there was no ditch from the Whipple Ditch to the Olsen Ranch until about 1930 (Tr. 30-32). See also Exhibit H 12, pp. 22-25. His testimony was that until the construction of what is referred to in the record as the Alan Bullock ditch, the only source of water for the Olsen Ranch, was a spring area (Tr. 11-12).

Interrogatories were propounded to Lee Bullock, Keith Bullock and Mrs. Albert Jensen. (Exhibits H 9, H 10 and H 11). The answers are so general that they cannot support a finding of adverse use. The period covered by the answers is too late to support a diligence claim.

The answers to interrogatories propounded to Mrs. Langendorf (Exhibit H 13) which pertain to the Whipple Ditch and Olsen Ranch are very brief. The questions and answers follow:

Q. 81 Referring to the Whipple Ditch, do you know what farm it presently waters?

A. Yes.

Q. 83 Would another be the place presently owned by the Olsens and formerly owned by Allen Bullock and located in Sections 18 and 19 in Wyoming?

A. Yes.

Q. 84 Were you present when the above referred to lands in Sections 18 and 19 were first placed under irrigation?

A. Yes, I lived out there.

Q. 85 If so, when was this?

A. Before 1905.

Q. 86 If not have you ever observed them under irrigation?

A. Yes.

Q. 87 If your last answer is "Yes," when did you first observe them under irrigation?

A. The Larry Bullock ranch was irrigated before 1905 and Section 19 was irrigated approximately 1910.

Q. 88 Do you know who first placed any portion of the Allen Bullock place under irrigation?

A. Yes.

Q. 89 If so, who was it?

A. Jack Stone and Nute Bullock.

Q. 90 Do you know where the water was obtained from which watered the Allen Bullock Ranch?

A. Yes.

Q. 91 What ditches were used to deliver it?

A. The Poison Creek Ditch, the Whipple Ditch and the Bullock Ditch.

Q. 92 Was any of it delivered via the Whipple Ditch?

A. Yes.

Q. 93 Do you know when the Whipple Ditch was dug?

A. Yes.

Q. 94 If so, when?

A. Before 1905.

Q. 95 Who dug it?

A. Mr. Whipple and my father, Ike Bullock and his hired men.

Q. 96 (a) Do you know when Whipple Ditch water was first applied to the Allen Bullock ranch?

A. Yes.

Q. 96 (b) If so, when?

A. Around 1910.

Q. 97 Do you know whether there was any interruption in such use thereafter, that is, were there any years after the first use you observed during which water from the Whipple Ditch was not applied to the Allen Bullock Ranch?

A. I don't know of any time when that water wasn't being used.

Q. 98 When was the most recent occasion when you had an opportunity to observe on what areas of the Allen Bullock place the water was being applied?

A. 1959.

Q. 99 Tell us please whether it was being applied to the same or different lands from those to which it was originally applied.

A. To the same land as far as I know.

Q. 100 How did the area irrigated by such waters compare with the area watered on the dates you observed it nearest to 1902; 1911; 1925; 1939? (In your answer indicate the nearest year of observation.)

A. Regarding both the Olsen and Bullock ranches, there was probably a little more of the ranch being watered in 1959 than through the years of 1902, 1911, 1925 and 1939.

Orval Reuben Ivory testified that he first went into the West Fork of the Beaver Creek area in 1925, that he occupied what is now the Larry Bullock farm for 3 years and then sold it to Harry Bullock (father of Larry Bullock) (Tr. 91). He bought what is now the Olsen Ranch in 1938 and operated it until 1941 (Tr. 92). He testified that during both periods he and Harry Bullock divided the Whipple Ditch water. He said:

A. Yes. Sure, we just divided. We didn't divide exactly. Here is a stream of water, and throw some over there and some of it over here.

Q. You did that each of the years that you occupied the place after you got it from Alan?

A. Sure.

There is no evidence in the record that either Olsen or his predecessors filed applications for appropriation of water in the office of the state engineer, and no evidence whatsoever, as indicated above, of any appropriation of water by notice or otherwise prior to 1903.

The findings of the Court quoted in full under the heading "The Bullock Water Rights" applied also to the Olsen rights.

STATEMENT OF POINTS

1. The decree is not supported by findings of fact and conclusions of law.

2. There is no evidence whatever to support the decree as it affects certain awards to the Bullocks and Olsen.

3. No rights by adverse use were established because essential elements are missing.

ARGUMENT

THE DECREE IS NOT SUPPORTED BY FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Rule 52 of the Rules of Civil Procedure provides:

In all actions tried upon the facts without a jury or with an advisory jury, the court shall, unless the same are waived, find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.

The Trial Court ignored this rule. No effort whatsoever was made to "find the facts specially." The decree contains a general assertion quoted in full about on pages 12 and 13 to the effect that the award of rights is supported by the evidence and that the rights had been acquired by adverse use but this falls far short of the clear requirement of the rule.

The law is well settled in this jurisdiction that written findings of fact and conclusions of law, separately stated, must be filed before any judgment can be entered. It is said that they are "the foundations of the judgment." *Reich v. Rebellion Silver Min. Co.*, 3 U. 254, 2 P. 703; *In re Thompson's Estate*, 72 U. 17, 35; 269 P. 103. In the case of *Gaddis Inv. Co. v. Morrison*, 3 U. 2d 43, 278 P. 2d 284, this Court stated:

It has been frequently held that the failure of the trial court to make findings of fact on all material issues is reversible error where it is prejudicial. (Many cases cited).

CERTAIN AWARDS OF WATER RIGHTS ARE NOT SUPPORTED BY ANY EVIDENCE WHATSOEVER

Under the settled law of this state a water right must be acquired (1) by diversion and beneficial use prior to the effective date of the law of 1903, (2) by filing an application in the office of the state engineer and following the statutory procedure or (3) by adverse use for a period of seven years prior to 1939, the date when the statute was amended to prevent the acquisition of such rights.

Deseret Livestock Co. v. Hooppiana, 66 Utah 25, 239 P. 479.

Wellsville East Field Irrigation Company v. Lindsay Land & Livestock Co., 104 Utah 448, 137 P 2d 634.

Riordan v. Westwood, 115 Utah 215, 203 P 2d 922.

Smith v. Sanders, 112 Utah 517, 189 P 2d 701.

It will be observed by an inspection of the priority schedule of water rights on the West Fork of Beaver Creek that where an award of a water right is based upon an application to the state engineer or upon a state engineer's certificate such fact will be shown in the column "Appl. or Cert. No.", and the application or certificate is also mentioned under "remarks." None of the rights of the Bullocks and Olsen which are attacked by this appeal are based on applications to the state engineer. The only possible sources of such rights must therefore be (1) appropriation before 1903, or (2) adverse use.

We may eliminate from this discussion the right on page 3 of the priority schedule (R. 14) which is awarded to Larry R. Bullock and Arletta Bullock for 2 second-feet with a priority of 1899. This right was initiated prior to 1903 as shown by Exhibit K 7.

The other rights awarded to the Bullocks and to Olsen will be discussed under separate headings.

Bullock Rights

The two Bullock rights which are in controversy are numbered for convenience Nos. 1 and 2 and are as follows:

No. 1 Priority 1900—flow 2 second feet—irrigated area
474.80 acres.

No. 2 Priority 1906—flow 2.5 second feet—irrigated area
474.80 acres.

Unquestionably the Whipple Ditch was constructed prior to 1905 (according to the statement of Mrs. Langendorf, quoted above) but it was constructed for the irrigation of only 154.13 acres of land in the old Whipple Ranch described in the notice of appropriation, (Exhibit K-7), and it was expressly limited to 2 second feet). The evidence is uncontradicted that in 1914 the water from the Whipple Ditch was used on only 150-160 acres, which is strictly in line with the notice of appropriation. See the testimony of Elsie Bullock (Tr. 42, 43). In 1919 the water from the Whipple Ditch was used on the same land. See the testimony of Harry D. Buckley (Tr. 26). The same use was being made in 1920, according to Claude Bullock (See Tr. 7 and area indicated by cross-marks on Exhibit P-1).

Included in the area which the proposed determination says was irrigated by the Bullock water rights are two 40-acre tracts, which were acquired from Carter in 1931, (Tr. 4, 5) (See Exhibit P-1) comprising the E $\frac{1}{2}$ NW $\frac{1}{4}$, Sec. 20, T 12 N, R 113 W (Wyoming) and two 40-acre tracts referred to in the evidence as the "state 40's" consisting of the E $\frac{1}{2}$ SE $\frac{1}{4}$ of Sec. 19, same Township and Range (Tr. 5). The evidence indicates that the state land and Carter land were added to the Bullock Ranch many years after 1903 (Tr. 4, 5). Exhibit K-8, offered by respondents Bullocks, quoted in full on pp. 7-9 above, shows that the old Whipple right was limited to 2 second feet for 160 acres. The state engineer's proposed determination enlarges this right to 6.5 second feet for 474.80 acres.

Exhibit S-2 is a plat showing the date of entry and patent of the land involved. The two Carter 40's which are given a priority before 1903 were not entered until July 20, 1907, and were patented September 24, 1913. The two state 40's which were given the same early priority were actually not entered until March 10, 1952, and were not patented until November 5, 1952!

In view of the uncontradicted testimony, there is no support whatever for the right for 2 second feet having a priority of 1900.

There is no application to the state engineer supporting right No. 2, described above, which has a priority of 1906, so it is very apparent that the award must be reversed. A diligence right must have a priority before the effective date of the 1903 law, so this award cannot be sustained as a

diligence right. If this award is based upon adverse use there would have to be proof that a 1906 right was adversely. This is impossible, not only because no adverse use right was proved, as will be demonstrated under the next heading of this brief, but also, because there was no 1906 water right on the West Fork of Beaver Creek to be adversely. An examination of the priority schedule will show that the earliest date of an application is June, 1911, when applications Nos. 4058 and 4059 were filed for what is now the Buckley Ranch.

There is no evidence in the record, oral or documentary, indicating that anything whatsoever was done in 1906 to justify the award. This award of 2.5 second feet with a 1906 priority was arbitrarily picked out of the air and placed 5 years ahead of Buckley and Hickey rights, which are based on applications to the state engineer. This right cannot be sustained under any theory.

Olsen Right

The Olsen right is given a priority earlier than 1903 (the priority in 1902, see R. 15) without a scintilla of evidence to support it. There was no notice of appropriation and no evidence of use prior to 1903. The only early evidence adduced by Olsen is found in the answers to the interrogatories which were propounded to Mrs. Langendorf. She said the Whipple Ditch was constructed before 1905, but she testified in answer to question No. 87 (Ex. H 13) that the Larry Bullock Ranch was first irrigated in 1905, "and Section 19 was irrigated approximately 1910." The only part of the Olsen Ranch which it is claimed was irrigated from the Whipple Ditch is in Section 19. So Olsen's own evidence indicates the initiation of the right after 1903!

The next evidence in the record in order of time is the testimony of Elsie Bullock, that in 1914 there was no irrigation from the Whipple Ditch (Tr. 45). She said:

“There wasn’t any irrigated from the Olsen or from the Whipple ditch” (Tr. 45).

She testified the Alan Bullock ditch was constructed in 1931 or 1932 (Tr. 49).

There is no evidence that the Alan Bullock ditch, which takes out of the Whipple Ditch at about the state line, and is the only means of getting water from the Whipple Ditch to the Olsen Ranch, was constructed before 1925. The testimony of Ivory on the one hand and of Harry Buckley, Claude Bullock and Elsie Bullock on the other, is in dispute as to whether the Alan Bullock ditch was constructed in 1925 or about 1930 or 1931. There is no proof of earlier construction. In either case there is no conceivable basis for dating the Olsen right before 1903. Furthermore, Exhibit S-2 shows that the land in the Olsen Ranch claimed to have a priority from the Whipple Ditch before 1903 *was not actually entered until November 10, 1911, and was not patented until October 1, 1917.*

The award cannot be sustained by proof of diversion and beneficial use before 1903.

NO RIGHTS BY ADVERSE USE WERE ESTABLISHED

The trial court recited generally in the interlocutory decree that all water rights under attack were established by adverse use. No facts were found but as indicated above the Court made a “blanket” order sustaining the state engineer.

No indication was made as to whose water rights were adversely and, instead of settling the questions litigated, the trial court by evading Rule 52, left the parties in doubt.

This Court has in many cases discussed the elements essential to the establishment of a water right by adverse use. A few are cited:

Smith v. North Canyon Water Co., 16 Utah 194, 52 P. 283.

Center Creek Water Co v. Lindsay, 21 Utah 192, 60 P. 559.

Spring Creek Irrigation Co. v. Zollinger, 58 Utah 90, 197 P. 737.

Ephraim Willow Creek v. Olson, 70 Utah 95, 258 P. 216.

Clark v. North Cottonwood Irrigation Co., 79 Utah 425, 11 P. 2d 300.

Wellsville East Field Irrigation Co. v. Lindsay Land and Livestock Co., 104 Utah 448, 137 P 2d 634.

In the case first cited this Court said (16 Utah at p. 202, 52 P at p. 26):

“The right of th defendant in the water would become fixed only after seven years’ continuous, uninterrupted, hostile, notorious, adverse enjoyment; and, to have been adverse, it must have been asserted under the claim of title, with the knowledge and acquiescence of the person having the prior right, and must have been uninterrupted. To be adverse, it must have been accompanied by all the elements required to make out such adverse possession; the possession must have been actual occupation, open, notorious, hostile, and under

a claim of title exclusive of any other right, continuous, and uninterrupted for a period of seven years.”

The cases hold without exception that the presumption is against the acquisition of a water right by adverse use.

Spring Creek Irrigation Co. v. Zollinger, *supra*.

Ephraim Willow Creek v. Olson, *supra*.

Clark v. North Cottonwood Irrigation Co., *supra*.

The person asserting a right by adverse use must prove the elements of such right unequivocally and no doubtful inferences will suffice.

Ephraim Willow Creek Irrigation Co. v. Olson, *supra*.

In the case of Spring Creek Irrigation Co. v. Zollinger the Court pointed out an essential of the right that was lacking in that case.

It is conceded that it is far more probable that a right by adverse use may be acquired by parties on the upper portions of a stream than by parties below for the reasons above suggested, but in either case the presumption is against acquisition of title in any such manner. In the instant case we find no suggestion whatever in the evidence that the plaintiff permitted defendants to use the water continuously for any consecutive period of seven years *when plaintiff was needing the water*. If plaintiff, during any period of time, did not need the water, it would have no right to interfere with defendant's use thereof. This is elementary doctrine.

In Long on Irrigation, at Section 90, p. 160, discussing the question of title by adverse use, the author says:

"So also, where there is sufficient water in the stream to supply the wants and demands of all the parties, its use by one cannot be an invasion of the rights of any other, and hence cannot be the foundation of any prescriptive claim."

See cases in the footnote; also *Manning v. Fife*, 17 Utah, 232, 54 Pac. 111; *Cleary v. Daniels*, 50 Utah, 505, 167 Pac. 825; 2 *Kinney on Irrigation*, 789, also page 1883; *Faulkner v. Rondoni*, 104 Cal. 140, 37 Pac. 883; *Egan v. Estrada*, 6 Ariz. 248, 56 Pac. 721. (Emphasis added.)

That there can be no right by adverse use initiated without the actual invasion of another person's right is well established. We quote from *Wiel on Water Rights in the Western States*, (3rd Ed.), Vol. 1, Sec. 588, pp. 637, 638.

There can be no adverse use (between appropriators) for the same reason, where during the prescriptive period, there has been water enough for all users. (Quaere, whether this applies to adverse use against a riparian proprietor, the invasion of whose right does not depend upon the fact that he has enough for his present use.) "A mere scrambling possession of the water or the obtaining of it by force or fraud gives no prescriptive right; nor can this right be acquired if, during the time in which such right is claimed to have accrued, there has been an abundant supply of water in the stream or river for other claimants." In *Morris v. Bean* it is said that the aid of the statute of limitations has occasionally been invoked with success, but not in cases of a scrambling possession, and the burden is upon the adverse claimant to bring himself within the statute, and the proof must be clear before a prescriptive right will be enforced.

An analysis of the evidence will reveal that not only did the Bullocks and Olsen fail to prove that the taking of water

invaded the rights of others, but on the contrary proved by the testimony of Larry Bullock and Orval Reuben Ivory that water was diverted and used *only when it was not required by other users on the stream*. There was plenty of water to go around. Larry Bullock testified as follows:

Q. What is the usual way in which the Whipple Ditch was handled?

A. Well, I went up in the early spring, as soon as ice and snow was out of the ditch, I would say the last of April of the first part of May and turned water in the ditches at the head, all the water the ditch would pack, and that water remained in the ditch as long as there was sufficient amount of water in the creek to have it there, as long as it never interfered with the people below.

Orval Rueben Ivory said:

Q. When you talk about the distribution of the water, did that occur generally during the high water run-off in the spring of the year?

A. Oh, we had water—we had water there nearly always as long as we needed it.

Q. Did you?

A. Out of that ditch.

Q. Did the Harry Bullock place and the Alan Bullock place have all the water they needed all the time?

A. You might hit one of those dry years that it don't rain and some of your meadows will burn, but if you took care of the water, you could nearly always have enough water.

Q. That was true of both ranches, wasn't it?

A. Oh, sure.

Q. There was plenty of water to go around in those days.

A. Yes sir. There might be some high bumps, and if it don't rain, then it will—your high bumps will burn, and you might say, "We ain't got enough water" and like that but if you took care of the water, there was enough water to get around.

Q. And that was your experience during the whole time you lived there?

A. Yes. (Tr. 99)

This Court has held that ordinarily there can be no adverse use by lower appropriators against upper users.

Wellsville East Field Irrigation Co. v. Lindsay Land & Livestock Co., *supra*.

In Wiel, Sec. 58, p. 637, the rule is stated as follows:

There can be no adverse use by lower claimants against those above; since a use below can in no way interfere with the flow above (omitting cases of "backing" the water and flooding; it is no possible invasion of the right of the upper owner. Lower use is not adverse. Nor is the use of a surplus above the appropriator adverse to him, since it leaves the amount to which he is entitled uninvaded. No right by adverse use can hence result from use below, or from use of surplus above.

In this case the following major ditches used by the appellants are located upstream from the Whipple Ditch.

Bullock Ditch

New Hickey Ditch

Parley Madsen Ditch

East Hickey Ditch (See map exhibit P-1)

The appellants' water rights to the extent of 12.31 second feet are in the upper ditches listed above. The priority schedule does not disclose whether the points of diversion of many other rights owned by the appellants are above or below the intake of the Whipple Ditch. The respondents failed to offer proof on this phase of the case.

Obviously under the well settled rule against adverting upstream the Bullocks and Olsen have not adversed the rights of the appellants in the ditches listed above. The following questions are not answered by the evidence or by the decree:

Assuming for purposes of argument only that rights by adverse use were established, whose water rights were adversed by the Bullocks and Olsen?

What is the priority of a right by adverse use?

Does the adverter get the priority of the right which is adversed?

Is a right by adverse use a new and independent right?

If so, would the priority date back to the date when the first invasion of a right of another took place?

The alleged adervers had the burden of proof, and under the evidence viewed in the light most favorable to the respondents there is no proof whatever of anything but water use dating back to about 1925 (except for the Bullock right for 2 second feet based on the notice of appropriation, which is not contested).

There is no proof that the use was hostile, that water was used when it was required by the owner, or that it was under

claim of title exclusive of any other rights. There is proof only that the ditches were filled and water used in the spring of the year, and thereafter when such use, to quote, "never interfered with the people below" (Tr. 67). Absent proof of actual invasion of the rights of others, this use would never ripen into a right by adverse use.

The judgment must be reversed.

Respectfully submitted,

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