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J. Delmar Kirk et al v. Wayne D. Criddle et al : Appellants' Reply Brief

Utah Supreme Court

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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.

FILED
JUN 6 - 1961

In re: Water Users' Claims Nos.
551, 479, 611, 612 and 1342,

J. DELMAR KIRK, Executor of
the Estate of D. E. KIRK, De-
ceased, et al.,

Plaintiffs and Appellants

vs.

WAYNE D. CRIDDLE, State En-
gineer of the State of Utah; and
MILFORD PRIMARY RIGHTS
PUMPERS ASSOCIATION; an
unincorporated association,

Defendants and Respondents

Clark, Supreme Court, Utah

No. 9283

APPELLANTS' 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 Appellants

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APPELLANTS' REPLY BRIEF

It becomes apparent from a reading of respon-
dent's brief that the respondents entirely ignore the
fact that the trial court rejected the protests and claims

of appellants upon the ground of non-use, and ignore the fact that the trial court expressly and specifically found (Finding No. 8, Abs. 50) as follows:

“That no contention is made by any party that any claimant intended to abandon the use of water from any of said wells and no finding is made as to abandonment.”

Moreover, respondents entirely ignore the legal principle that “the burden is on the person asserting abandonment to prove it.” This principle is announced in the case of *Wellsville East Field Irr. Co. vs. Lindsay Land and L. Co.*, 104 Utah 448, 137 Pac. 2nd 634, at page 643. In that case this Court also held that the claim or abandonment must fail if there is no showing of actual intent to abandon.

Such intent is not made out merely upon a time element and non-user. *Gill vs. Malan*, 29 Utah 431, 82 Pac. 471 at page 473; *Hammond vs. Johnson*, 94 Utah 20, 66 Pac. 2nd 894 at page 899.

On page 3 of respondents’ brief it is stated that evidence was presented to the court without written pleadings and the court made its ruling without argument; *and no opportunity was given to contend that water rights had been lost by intentional abandonment.*

Such an assertion is, to say the least, without any foundation whatsoever, either in the record in this case

or in the entire adjudication proceedings and must be made by respondents "with their tongues in their cheeks."

Sec. 73-4-14, U. C. A. 1953 provides that:

"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 * * * the filed statements of claimants shall be competent evidence of the facts therein unless the same are put in issue."

The matter of intentional abandonment was never put in issue. Counsel for Milford Primary Rights Pumpers Association was in court during the hearings on the protests; he made preparations in advance of the hearings to present proof which resisted the protests; he participated in the trials of the issues and had every opportunity at such times to present proof as to abandonment if it was then intended to rely thereon. He had every opportunity to be heard in argument; he was present in court when counsel for the State Engineer announced that the claims were rejected solely upon the ground of non-use; he was in court when the court announced its conclusion that the rights were lost by virtue of the 1945 amendment dealing solely with non-use and not abandonment; he was in court when counsel for the State Engineer advised the court that the State Engineer had no further basis for ob-

jecting to the use of water in view of the Cook case (*Cook vs. Tracy*, 6 Utah 2nd 344, 313 Pac. 2nd 803). He was served with a copy of the findings, conclusions and order and made no objection to the court's finding "that no contention is made by any party that any claimant intended to abandon the use of water." Not the slightest effort was made by the Pumpers Association, either by way of presenting evidence, argument to the court, or in any way, manner or form, which attempted to make an issue of abandonment. The State Engineer made no issue of abandonment, but on the contrary took the position throughout the hearings that he did not contend for abandonment, and the rejection of the claims was solely on the basis of non-use, and that such rejection was no longer tenable after the Cook case was decided.

As a matter of fact it is difficult to know how a water claimant could negative the idea of voluntary abandonment in a more positive manner than by filing his underground water claim almost immediately after the enactment of the underground act (*Ch. 105, Session Laws of Utah, 1935, Sec. 100-5-12*). This section provides that all claimants to rights to the use of underground water should file notice of such claim or claims with the State Engineer and that failure to file such notice would be evidence of intent to abandon such claimed rights. All claims were filed. Later, when the

general adjudication proceedings were initiated and in due time, water user's claims by all claimants then owning the water rights involved in this cause, were filed. When the claims were rejected on the ground of non-use, every claimant filed his written protest and thereafter urged the hearings on such protests. In fact right up to and including the present time and by this intermediate appeal claimants have shown every intention to preserve their water right.

CONCERNING POINT I OF RESPONDENTS' BRIEF

Concerning Claim No. 551, appellants contend the trial court erred in not finding that twenty acres had been irrigated. The case of *Mayer vs. Criddle*, 355 Pac. 2nd 64, — *Utah* —, cited by respondents, is not in point. In the Mayer case the trial court awarded only five acres based upon the State Engineer's finding and allowance for the irrigation of only five acres. This court held that under the circumstances present in that case the appellate court is reticent to upset a finding of a lower court where a view of the premises by the trial court has been had and where the State Engineer has made a determination as to the acreage.

In the case at bar the State Engineer made no determination as to the acreage previously irrigated but rejected the claim in toto because of a claimed non-

user. Upon the trial of the protest concerning this particular claim the State Engineer did *not* resist the claim in light of the Cook case and made *no* determination and expressed *no* opinion about the claimed twenty acres. It was the Pumpers Association who attempted to limit the acreage to ten acres and that by the proof only of one witness who after twenty years *estimated* ten acres but said it could have been twenty and he would not dispute twenty. The court's finding of ten acres is based entirely on one statement of the witness Goodwin, who when asked if he could estimate the acreage replied "*not more than about ten, I don't think.*" (Tr. 7). Mr. Lambert, Deputy State Engineer, when testifying did not express any opinion about previously irrigated acreage but admitted that conditions he found in 1942 would not preclude irrigation "perhaps 14 years earlier" (R. 10).

This Court can easily determine from the record whether it should sustain the finding of only ten acres, and it would be an idle and useless thing to remand the case with a direction to the trial court to take further evidence when both sides have already presented the available evidence and rested on that question.

CONCERNING POINT II OF RESPONDENTS' BRIEF

In presenting their argument that the evidence

sustains the interlocutory order on the theories of both non-use and abandonment, respondents ignore the case of *Cook vs. Tracy*, 6 Utah 2nd 344, 313 Pac. 2nd 803. All of the claims involved in this cause were disallowed by the State Engineer as to irrigation because of non-use of water after 1930. The disallowances were made for the same reason that the Cook claim involved in the Cook case was disallowed. The Cook case was a test case to determine the precise question of whether the non-user statute could be invoked against underground water rights prior to five years after the effective date of the underground non-user statute on May 15th, 1945. This Court in that case held:

No one advanced the philosophy that one could lose such rights by non-user, since it was believed that one might use the underground water as he saw fit, without losing his proprietary therein, just as he would not lose his land by non-user during any period of time.

The State Engineer, in all fairness, advised the trial court that in light of the Cook case he made no further contention that well rights were lost through non-user, and in all fairness and candor did not urge or even suggest to the trial court the disallowance of these claims, admitting that the previous disallowance by him was on the basis of non-use. The hearings proceeded on the basis of a determination of acreage previously under irrigation.

Respondents, however, choose to ignore the Cook case and grasp at straws in attempting to argue all around it.

For instance, it is said on page 6 of respondents' brief that the first action taken concerning these claims was the filing of protests by claimants, and this occurred from June through October, 1950, more than five years after the amendment—(referring to the statute providing for non-use as against underground water, effective May 15, 1950). The fact is, ignored by respondents, that all claimants filed underground water claims shortly after the enactment of the 1935 statute requiring filing of such claims. Thereafter and well within the time permitted in the general adjudication proceedings, water users' claims were filed. It was not until April of 1949, when the proposed determination was formulated and published that claimants had any knowledge that their claims had been disallowed.

It is stated in respondents' brief on pages 6 and 7 that the extension of time to file protests in the matter of the proposed determination can no more excuse the performance of a duty to use water than it would excuse any other duties imposed by separate acts of the legislature. Such statement has nothing to do with the present situation. What the respondents choose to overlook is that the rejection of the claims in the pro-

posed determination not only *excused* the use of water thereafter, but made further non-use mandatory.

It is stated in respondents' brief on page 7 that the legislature provided a specific means whereby the five year period of non-use might be extended. It would be a foolish and idle thing for a water claimant to apply for an extension of time within which to "re-sume" use of water concerning a water right that had previously been disallowed, could not be exercised, and had no legal standing at that time.

Then again, on page 7 of respondents' brief it is said that there is no showing that the State Engineer actually denied the use of water or undertaken the distribution of water between April, 1949, and May 15, 1950, *Section 100-4-11, U. C. A. 1943*, now *Sec. 73-4-11, U. C. A. 1953*, provides the State Engineer shall distribute the water in accordance with the proposed determination or modification thereof by court order until the final decree is rendered. *Section 73-1-14, U. C. A. 1953*, makes it an unlawful act to interfere with any person authorized to apportion water while in the discharge of his duties, punishable as a misdemeanor. Why should it be necessary for a water claimant to make a showing that the State Engineer had undertaken the distribution of water when the statute makes such duty upon the part of the State Engineer mandatory?

On page 8 of respondents' brief the statement is made which sums up their position and the statement is quoted verbatim:

“The significant point to be remembered is that the appellants have not used this alleged water right for almost 30 years and have specifically failed to perform any overt act during the five year period from May, 1945, to May, 1950, which would indicate actual resumption of use or even an intention to resume use.”

No matter how high-sounding and impressive the foregoing sentence and expressions may be, the very simple fact remains:

(a) From April, 1949, when the proposed determination was issued and which rejected the water claims in question, the claimants were legally barred from using water;

(b) The statute making underground water subject to non-use and doing away with the previous exemption of underground water from non-use (*Ch. 134, Session Laws of Utah, 1945*, amending the previous *Sec. 100-1-4 U. C. A. 1943*) became effective May 15, 1945, and the five year non-user period became effective May 15, 1950;

(c) The Cook case effectually decides that prior to the statute making underground water subject to non-use, the then existing non-use statute did *not* apply

to underground water;

(d) The date, therefore, when non-user could be invoked against the claimants, to-wit, May 15, 1950, had not been reached when the proposed determination precluded these claimants from legally taking any water from their wells.

CONCLUSION

Plaintiffs and appellants therefore respectfully submit that the interlocutory order of the trial court should be reversed and set aside and the well rights for irrigation purposes be held not forfeited and lost.

Respectfully submitted,

SAM CLINE,

Attorney for Appellants