

1961

# Maybeth Farr Reimann and Paul E. Reimann et al v. W. B. Richards, Jr., et al : Brief of Respondent, Utah State Engineer

Utah Supreme Court

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# In the Supreme Court of the State of Utah

MAYBETH FARR REIMANN  
and PAUL E. REIMANN,

*Plaintiffs, Respondents  
and Cross-Appellants,*  
vs.

W. B. RICHARDS, JR., A. Z.  
RICHARDS, A. Z. RICHARDS as  
"agent for applicants in  
Application No. A-1810 on file  
in the Office of State Engineer  
of Utah"; and J. ROY FREE,

*Defendants, Appellants  
and Cross-Respondents.*

Civil Nos. 107,485; 107,486 and 112,261

A. Z. RICHARDS, A. Z. RICHARDS  
as agent for Applicants in Applica-  
tion No. A-1810 on file in the office  
of the State Engineer of Utah; and  
W. B. RICHARDS, JR.,

*Plaintiffs, Appellants  
and Cross-Respondents.*  
vs.

PAUL E REIMANN, MAYBETH  
FARR REIMANN, his wife, GLEN  
E. YOUNG and WAYNE D.  
CRIDDLE, State Engineer of the  
State of Utah,

*Defendants, Respondents  
and Cross-Appellants.*

Civil No. 112,596

BRIEF OF RESPONDENT, UTAH STATE ENGINEER

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Case No. 9340

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BRIEF OF RESPONDENT, UTAH STATE ENGINEER

## PRELIMINARY STATEMENT

The State Engineer of the State of Utah, hereinafter referred to as the "State", is a respondent herein, and believes it advisable to set out the facts which relate to the actions of the State in this controversy, to clarify the State's position.

It should be noted at the outset that this appeal involves not only action taken by the State, but also matters strictly between the parties and that the two were joined in one lawsuit. As to those matters between the private parties to this litigation, the State has no direct interest and, therefore, has no comment on the Court's decision.

## STATEMENT OF FACTS

The first matter involving the State to which a brief statement will be made is the action taken by the State upon the eight applications in question and the subsequent rulings of the trial court on these applications. It was agreed at the pretrial conference by all of the parties that the court should try the State's actions on all eight of these applications in this one trial and make one set of findings and one decree covering the court's decision on the eight applications. (R. 159).

The State approved Applications Nos. 27404 and 27410 filed by Paul E. Reimann and the trial court affirmed this approval (R. 119). The State Engineer had indicated to applicant by letter dated April 24, 1957, that Applications

Nos. 27770 and 28106, filed by Paul E. Reimann, were going to be approved and it was agreed at the pretrial by the parties that this letter should be amended to include Application No. 28555 (R. 157), and it was stipulated that the action by the State on these three applications should be tried as a part of this lawsuit (R. 158). The trial court affirmed the approval of these three latter applications in paragraphs 8 and 9 of the judgment (R. 118 and 119). The State rejected Application No. 24531 filed by Maybeth Farr Reimann, and Applications No. 24532 and 27987 filed by Paul E. Reimann; the trial court upheld the rejection of Application No. 27987 but reversed the decision of the State Engineer as to Applications Nos. 24531 and 24532 and ordered these two applications approved.

The State does not appeal the court's order approving Applications Nos. 24531 and 24532 because as indicated in the State's memorandum decision (R. 18, 19 and 20) rejecting these applications, they involved questions of non-use, adverse use and the effect of a prior court decree which were problems which could ultimately be decided only by the court. The State, therefore, left the parties status quo to enable the court to properly determine these matters. A similar decision was rendered by the State in the case of Application No. 27987.

The approval by the State of the other applications in the group was based on the theory that these were developed spring areas and, therefore, applicants were not taking water tributary to Mountair Creek. This was one of the basic issues at trial (R. 160-161) and goes ultimately to the question of whether there is in fact unappropriated

water in Mountair Canyon. It was the State's intention to leave this matter to the parties (R. 185). However, the State did, at the request of the court, (R. 907), make additional studies in the area during the trial of this case, which led to the State's concern as to how the determination of the rights of these parties might affect or interfere with lower rights in the drainage basin below Mountair Canyon.

It was realized that the problem of lower users was not then before the court, and would only be brought before the court at a later date, within the context of a general adjudication of all the water in this area. However, the State believes the court has judiciously provided for such later adjudication in paragraphs 10 and 11 (R. 119) of the judgment and decree wherein it is provided that the applications and the court's decision thereon are subject to all existing vested water rights in this source and that the judgment is without prejudice to any third party rights which may be determined in any future general adjudication proceedings in this drainage area.

Under these circumstances the State believes its interests as to the eight applications in question are fully protected by the trial court and will, therefore, leave any further comment on these rights to the parties.

However, the State believes it is in a somewhat different position in regards to the determination by the court that a flow of 650 gallons per day is adequate to supply one home in this area. The courts finding was based on information supplied by the State in their study

noted above, (R. 907). The State presented testimony at trial to sustain the figure of 650 gallons per day per cabin and the court adopted this figure as the reasonable beneficial requirements of one home in this canyon. The State will confine its argument to this single point.

## STATEMENTS OF POINTS

### POINT I.

THE TRIAL COURT WAS CORRECT IN FINDING THAT THE WATER USERS IN MOUNTAIR CANYON COULD ONLY BENEFICIALLY USE A MAXIMUM OF 650 GALLONS A DAY PER HOME FOR DOMESTIC PURPOSES.

## ARGUMENT

### POINT I.

THE TRIAL COURT WAS CORRECT IN FINDING THAT THE WATER USERS IN MOUNTAIR CANYON COULD ONLY BENEFICIALLY USE A MAXIMUM OF 650 GALLONS A DAY PER HOME FOR DOMESTIC PURPOSES.

It is uncontested that the present use of water in Mountair Canyon is a beneficial one, the only question to be resolved by this court is the *extent* of such beneficial use. It is the contention of the State that the maximum possible beneficial use of water for any one home is 650 gallons per day.

That the beneficial use shall be the basis, the measure and the limit of the right to use water is one of the most fundamental principles of water law in the State of Utah, Section 73-1-3, U.C.A. 1953.



It is also the public policy in this state that conservation of water is of utmost importance to the public welfare, *Brian v. Fremont Irrigation Co.*, 112 U. 220, 186 P. 2d 558, and, further, that it is against the public policy of this state to permit the waste of water, *Little Cottonwood Water Co. v. Kimball*, 76 U. 243, 289 P. 116.

When an individual appropriates water in Utah, even if he has prior rights, he must use it in a reasonable manner and no more can be appropriated for a purpose than will reasonably meet the need. The Utah Supreme Court stated in *In Re Water Rights of Escalante Valley Drainage Area*, 10 U. 2d 77, 348 P. 2d 679, the following on the extent of a prior appropriator's rights:

"\* \* \* that a prior appropriator does not have an unlimited right to the use of water, but is subject to a reasonable limitation of his right for the benefit of junior appropriators. That it is necessary and proper to limit prior appropriators to the volume of water reasonably required to raise crops under reasonably efficient methods of applying water to the land. That beneficial use is the basis and the measure and the limit to the use of water and water used in excess of the amount reasonably necessary to produce crops is not beneficially used."

Although this case involved waters being applied for irrigation purposes, the same principle is involved in the instant case, and the State submits the finding of 650 gallons per day per home was correct and proper as the amount reasonably required to satisfy a home use.

It was the testimony of Hubert C. Lambert, Deputy State Engineer, that the State Engineer's Office had made

extensive studies on the amount of water needed for a family for domestic purposes (R. 1055). He stated that based on such studies his office had arrived at the figure of 650 gallons of water per day per family and that this took into account all of the inside household needs of the family, but did not take into consideration the water requirements of a lawn (R. 1056). He further testified that the figure of 650 gallons is the amount needed by the family to carry on normal activities whether consumed or used for non-consumptive purposes (R. 1057).

The State Engineer's Office did not consider the types of diversions in reaching its determination of household requirements of these homes inasmuch as its investigation was limited to a study of the beneficial use requirements of normal household use (R. 1058-1059).

Appellants express concern, on page 17 of their brief, at the State's failure to consider the nature of the diversion works and the absence of storage facilities for each of the cabins in its study. They also point out that other witnesses gave testimony that more water would be needed than 650 gallons and that this would be necessary at the peak flow rate of use. The citations to the record noted by appellants disclose no more than the opinion of certain witnesses which are not based upon any actual measurements by the witness as to beneficial use requirements.

The court had before it the opinion of appellant and of the State and it simply chose to take the State's opinion as the more sound. Appellants contend that they are entitled to a certain flow during the peak periods of the

day, and we agree that an appropriator is entitled to a flow of water in accordance with his appropriation, so long as that flow is reasonable and not excessive or wasteful. While flow must be determined in defining a water right in its entirety, and in any domestic system storage may be desirable to attain a constant flow, still the water user can only beneficially use a certain amount of water notwithstanding the rate at which the water is diverted.

The State feels that this flow is a distinct and separate problem and does not bear on a determination of the total beneficial use requirements for any given use of water once delivered. It is agreed that the use of water in a home is usually concentrated into peak use periods during the day; however, this fact is not peculiar to Mountain Canyon but is the universal rule in any domestic water system.

However, to take the peak uses of the water and times that by the number of hours in the day would be a completely erroneous method of arriving at the total beneficial use requirements of a home since there are great portions of the day and night when use in the home is relatively small and some periods where they may be no use at all. The flow is independent from how much water the home can beneficially use in one day once that water is delivered. We realize that in most homes the amount of water will probably vary somewhat from day to day, depending on what household activities are taking place. However, the figure submitted by the State Engineer's Office is calculated not on the average need but on that amount sufficient to satisfy any reasonable household need. (R. 1056).

One of the essentials of a valid appropriation of water is that a *definite* quantity of water be applied to a useful and beneficial purpose. *Wrathall v. Johnson*, 86 U. 50, 40 P. 2d 755. We contend that the definite quantity here appropriated could not exceed 650 gallons per day per home and still be beneficial. Any excessive award to these home owners would prove detrimental to this whole stream system, since these individuals would have paper rights to more water than they were actually beneficially using, and this would have the effect of discouraging further development of this water source by other appropriators contrary to the public policy of this state.

### CONCLUSION

The individual water user in the State of Utah can only gain a right to the use of water to the extent of his beneficial requirements thereof. The trial court had a sound basis upon which to make a finding that the beneficial requirements of a home were limited to 650 gallons per day. Therefore, the judgment of the trial court in this respect should be affirmed.

Respectfully submitted

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