

1961

J. De.mar Kirk v. Wayne D. Criddle et al : Brief of Appellant

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Kirk v. Criddle*, No. 9517 (Utah Supreme Court, 1961).
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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
OCT 11 1961

In re: Water User's Claim No. 502, Underground Water Claim No. 16409, Claimant J. Delmar Kirk, Executor of the Estate of D. E. Kirk, Deceased,
J. DELMAR KIRK, Executor of the Estate of D. E. KIRK, Deceased,

Clerk, Supreme Court, Utah

No. 9517

Plaintff and Appellant

vs.

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

Defendants and Respondents

APPELLANT'S BRIEF

ON APPEAL FROM THE DISTRICT COURT OF THE
FIFTH JUDICIAL DISTRICT OF THE STATE OF
UTAH, IN AND FOR IRON COUNTY

HON. WILL L. HOYT, *Judge*

SAM CLINE,

Attorney for Appellant

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No. 9517

APPELLANT'S BRIEF

STATEMENT OF THE CASE

This cause is before this Court as an intermediate appeal or an appeal from an interlocutory order made and entered by the Fifth Judicial District Court of the State of Utah, in and for Iron County, involving a well and underground water right of the appellant.

The trial court made and entered an order dismissing the protest of appellant to the State Engineer's disallowance of his well and water right.

Appellant seeks a reversal of the Order of Disallowance and a mandate from this Honorable Court requiring the reinstatement of the said well and underground water right.

As indicated by the title of the case, a proceeding was originally initiated as a general adjudication of all the rights to the use of water in the Escalante Valley Drainage Area in Utah, which includes the Milford Underground water basin immediately south of the City of Milford in Beaver County.

After complying with the provisions of *Chapter 4 of Title 73, Utah Code Annotated, 1953*, and after completion of a hydrographic survey of the area, the State Engineer on or about the 1st day of April, 1949, served and filed in the District Court of Iron County, his Proposed Determination of Water in said area.

In due course of said general adjudication proceedings, the then owner of the tract of land upon which the water right involved in this action, to-wit, Water User's Claim No. 502, was located, filed his statement of Water User's Claim in this proceedings as provided by statute, and the Clerk of the District Court assigned No. 502 to said statement. Thereafter by the said proposed determination the claim was wholly disallowed by the State Engineer. Thereupon a protest against the disallowance was filed by the then owner of the premises and well right, claiming that he was the owner of certain lands and that in the year 1922, his predecessor in interest caused a well to be drilled thereon and thereafter irrigated a certain acreage and used the water from such well beneficially during certain years following.

On December 10, 1959, a hearing was duly held by the District Court upon the said protest, after which the Court made and entered what is denominated "Order Dismissing Protest" (Tr. 13), which actually incorporates findings, conclusions, and the order of dismissal. The order is "that the protest against the disallowance of Claim No. 502 is hereby dismissed."

A petition for interlocutory appeal from said order was filed in accordance with and as provided by the Utah Rules of Civil procedure (Tr. 15 to 21), which appeal was duly allowed and granted by order of this Court (Tr. 14).

STATEMENT OF FACTS

In the following statement of facts it is not deemed necessary to re-state those which are incorporated in the foregoing statement of the case.

A hearing concerning this claim was held on the objections and protest on December 10, 1959, at which time a group calling themselves "Milford Primary Rights Pumpers Association" and being an unincorporated association of some sort, represented by their counsel, E. J. Skeen, Esq., appeared in opposition to the allowance of any water to this appellant. They participated in said hearing, although they had not theretofore entered any appearance by the filing of any formal pleadings in opposition to the claim or in support of the position of the State Engineer in disallowing the claim. However, since this association did participate in the said hearing it has been joined as a defendant and respondent in this appeal.

At the hearing, one George C. Goodwin, a witness called by the pumpers association, testified that thirty acres of land upon which the well was located had been irrigated in 1922 (Tr. 4 and 6).

The Court found, as shown by its said Order that:

(a) The well or sump involved in the claim was dug in the year 1922 and that approximately 30 acres of land was irrigated from the well in that year and possibly

two or three years thereafter, but that there has been no irrigation of any of the land from the well since the year 1925.

(b) That no underground water claim or any notice of claim for the well or for a water right upon the land involved in the claim was filed until January 3, 1938 (Tr. 13).

The court concluded:

“That by reason of such period of non-user and by reason of no notice of claim being filed within the period required by *Sec. 100-5-12 of Chapter 105, Laws of Utah, 1935*, the said water claim was properly disallowed” (Tr. 13).

STATEMENT OF ERRORS RELIED ON

1. The trial court erred in concluding that by reason of a period of non-use the claim was properly disallowed.

2. The trial court erred in concluding that because no notice of claim was filed within the period required by *Sec. 100-5-12 of Chapter 105, Laws of Utah, 1935*, the water claim was properly disallowed.

3. The trial court erred in making and entering its interlocutory order dismissing the protest of appellant, and in effect sustaining the State Engineer's disallowance.

ARGUMENT

POINT No. 1

At the hearing before the trial court, Mr. Robert B. Porter, then assistant attorney general representing the State Engineer, announced to the court that the State Engineer had disallowed the claim from the standpoint there had been non-use, and that he would have no basis at that time in view of the Cook case (*Cook vs. Tracy*, 6 Utah 2d 341, 313 Pac 2d 803), for contending appellant would not be entitled to have the claim allowed for thirty acres unless some evidence was presented to the court to show a lesser acreage (Tr. 3). The court found that thirty acres had been irrigated, and this finding is based upon the testimony of the witness for the pumpers association.

It would be an imposition upon this Court to belabor the point that non-use cannot be charged against this claim, because the situation is precisely as that involved in the Cook case cited above, and again involved in the case of *Kirk vs. Criddle*, — Utah —, 363 Pac 2d 777, decided only about two months ago.

The holding in the above two cases, directly in point in the instant case is controlling.

POINT No. 2

The trial court found that no underground water claim or any notice of claim for the well or for a water

right was filed until January 3, 1938 (Tr. 13), and therefore concluded that because of the provisions of Sec. 100-5-12 of Chapter 105, Laws of Utah, 1935, the claim was properly disallowed.

Appellant has no quarrel with the finding. The record (Tr. 3) shows that the underground water claim was filed on Jan. 3, 1938.

A reading of the reporter's transcript of the hearing (Tr. 1 to 15), which is very short, will show that the assistant attorney general representing the State Engineer and Mr. E. J. Skeen, representing the pumpers association did not at any time urge upon the court or even suggest the fact that failure to file an underground water claim prior to January 3, 1938, was reason to disallow the claim.

It is true, of course, that Sec. 100-5-12 of Chapter 105, Laws of Utah, 1935, provides that within one year after the date of the approval of the act, all claimants to rights to the use of underground waters shall file notice of such claim or claims with the state engineer on forms furnished by him setting forth such information as the state engineer may require; and that failure to file notice of claim or claims shall be prima facie evidence of intent to abandon such claimed right or rights. The act took effect upon approval and was approved March 22, 1935.

However, the trial court either overlooked the fact, or chose to ignore it, that *Chapter 111 of the Session Laws of 1939 (100-5-13)* extended the time for filing notices of claims, by specifically providing as follows:

“The time for filing notice of claims to underground waters as provided by Section 100-5-12 is extended to March 22, 1940, and all notices of claims filed with the State Engineer after March 22, 1938, but prior to the enactment hereof, shall have the same force and effect as if filed in time.
* * * * ,”

The underground water claim in this case, having been filed on January 3, 1938, was well within the period given by the 1939 statute, which period expired March 22, 1940. It is obvious, therefore, that this underground water claim was filed within the time allowed by law, and it was never disallowed by the State Engineer because not filed in time.

It is interesting to note that the *Session Laws of 1941 Chapter 96, Sec. 100-5-13*, again extended the time for filing notices of claims, and the *Session Laws of 1945, Chapter 134, Section 100-5-12* again extended the time to file such notices, and the *Session Laws of 1955, Chapter 160, Section 73-5-13* gives underground water users the right to file notices without any limitation of time.

POINT NO. 3

For the reasons set forth under Points Nos. 1 and 2, it must necessarily follow that the trial court erred

in making and entering its order dismissing the protest of appellant and in not making and entering its order allowing the appellant the thirty acre water right claimed in his underground water claim and his water user's claim.

CONCLUSION

Plaintiff and appellant herein respectfully submits that the interlocutory order of the trial court dismissing the protest of appellant and holding that the water claim No. 502 was properly disallowed should be reversed and set aside and the well right ordered allowed.

Respectfully submitted,

SAM CLINE,

Attorney for Appellant.