

1961

Piute Reservoir & Irrigation Co. et al., v. West Panguich Irrigation & Reservoir Co., et al. : Petition For Rehearing

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Recommended Citation

Petition for Rehearing, *Piute Reservoir & Irrigation v. West Panguich Irrigation*, No. 9411 (1961).
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IN THE SUPREME COURT
of the
STATE OF UTAH

PETTE RESERVOIR & IRRIGATION
COMPANY, et al.,

Plaintiffs and Appellants,

—vs.—

WEST PANGUITCH IRRIGATION &
RESERVOIR CO., et al.,

Defendants and Respondents.

No. 9411

PETITION FOR REHEARING

Plaintiffs and appellants respectfully petition the Court for a Rehearing in the above entitled cause on the ground that all the testimony adduced at the trial of this case was to the effect that there is definitely a return flow to the Sevier River from the winter application of waters to the lands under the West Panguitch canals; that the opinion of this Court adopts the trial court's findings that "there is reason to believe that there is no . . . contribution of underground flow" to the Sevier River, when such finding is wholly unsupported and completely preponderates against the evidence.

Dated this 13th day of September, 1961.

SAM CLINE

THORPE WADDINGHAM

MARR, WILKINS, & CANNON

RICHARD H. NEBEKER

A member of the firm

BRIEF IN SUPPORT OF PETITION FOR REHEARING

Appellants petition the court for a rehearing on the ground that all the testimony adduced at the trial of this case was to the effect that there is definitely a return flow to the Sevier River from the winter application of waters to the lands under the West Panguitch canals.

The appellants stressed the fact in Points I and II of their brief that the evidence completely preponderates against the trial court's finding, to wit, that there is no contribution or underground flow from Panguitch Creek to the Sevier River and that the impounding of waters will not materially affect the time of return flow to the Sevier River if there be any such return flow. Appellants did not take issue with appellants' Points I and II. The lack of sustaining evidence on this finding has been conceded. The findings of fact and this court's opinion are contrary to the facts stated at trial. The well known truth is that the waters of Panguitch Creek do return to the Sevier River. No witness testified otherwise. The application to store winter waters was approved by the State Engineer on the theory that the damages to the downstream storage rights were only "de minimus." Yet Mr. Hubert Lambert, Deputy State Engineer, testified that:

"Some of that we can say and I think we have figured in round very intelligent guesses that that return flow may be as much as four hundred acre feet out of say 700." (91)

The opinion of this court does not recognize nor give legal approval to the "de minimus" theory of damages

as concoted by the State Engineer, but the opinion fails to state the facts, as testified to, that 400 acre feet out of 700 acre feet, would reach the river by return flow. Appellant did not produce a single witness to substantiate the finding that "there is reason to believe that there is no contribution of underground flow" to the Sevier River.

The opinion of this court fails to state that the storage season of Piute Reservoir commences October 1st and ceases March 31st. There is no possible way to conclude that 700 acre feet from Panguitch Creek can be stored in the winter time and not released until July and August without taking such waters from the winter storage rights. Mr. Hubert Lambert testified on cross examination that the return flow from water released in the summer as a supplemental irrigation supply would go to fulfill the rights of the downstream primary users and none of it would accrue to the benefit of the storage companies. He admitted this result was possible (94, 95). Mr. John Ward testified that the vested rights of lower users would be adversely affected, both as to amount, and change of time of return flow. The whole "de minimis" concept admits that vested rights will be impaired. But the opinion of this court would cause the reader to believe that there was some competent testimony to sustain the finding that "there is reason to believe that there is no such contribution of underground flow." In its brief respondent cites no testimony as supporting this finding. How can this all important testimony of Mr. Lambert be completely overlooked? At the time of

trial in June 1960 there was 17 second feet of water "made" in the 4 mile stretch of the Sevier River bordering applicant's lands. Common sense dictates that percentage wise the volume of return flow in the winter exceeds the amount of return flow in the summer.

Applicant wholly failed to present any evidence to substantiate that there is reason to believe that there is no return flow to the Sevier River from Panguitch Creek. The applicable law is correctly stated in the court's opinion, but the facts brought out at trial are completely contrary to the conclusion reached. Appellants respectfully petition the court for a rehearing and an opportunity to point out the lack of evidence to sustain the judgment.

Respectfully submitted,

SAM CLINE

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