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Carbon Canal Company, A Corporation, et al. v.
Cottonwood-Gooseberry Irrigation Comp Any,
Inc., A Corporation, et al. : Appellant's Brief

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IN THE SUPREME COURT OF THE STATE OF UTAH

CARBON CANAL COMPANY,
a corporation, et al,
Plaintiffs and Appellants,

- vs. -

COTTONWOOD-GOOSEBERRY
IRRIGATION COMPANY, INC.,
a corporation, et al,
Defendants and Respondents.

NO. 10599

F I L E D

NOV 14 1966

APPELLANTS' BRIEF Supreme Court, Utah

Appeal from the Judgment of the
Seventh Judicial District for Sanpete County,
Honorable Maurice Harding, Judge

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APPELLANTS' BRIEF

STATEMENT OF THE KIND OF CASE

This is a suit (1) to determine the nature and extent of the rights of the defendant, Cottonwood-Gooseberry Irrigation Company, Inc., to the use of the waters of Gooseberry and Boulger Creeks and (2) to review the decision of the state engineer approving change application No. a-4448, which permits the diversion of

water through a tunnel from the Price River drainage to the Sanpitch River drainage.

DISPOSITION IN LOWER COURT

The trial court determined that the defendant, Cottonwood-Gooseberry Irrigation Company, Inc., had a right to divert and use a maximum of 3020 acre-feet of water measured at a certain point and approved change application No. a-4448 subject to specific conditions.

RELIEF SOUGHT ON APPEAL

The plaintiffs seek modification of the amended findings of fact and conclusions of law and of the amended judgment to reduce the award to the defendant, Cottonwood-Gooseberry Irrigation Company, Inc., of a maximum of 3020 acre-feet to a right limited by the maximum quantity of water it has actually diverted out of the Price River drainage area.

STATEMENT OF FACTS

The record in this case involves many issues and facts which were satisfactorily resolved by the trial court at the hearing on the plaintiffs' motions for a new trial and to amend the original findings of fact, conclusions of law and judgment. This statement will be confined to facts which we consider pertinent to the one issue as to the extent and nature of the water rights of the Cottonwood-Gooseberry Irrigation Company, Inc.

The word, "defendant" when used in this brief will refer to the defendant, Cottonwood-Gooseberry Irrigation Company, Inc., and the word, "plaintiffs" will refer to all of the plaintiffs in this action. When reference is made to the defendant, state engineer, in this brief he will be referred to as "the state engineer." The word, "ditch" will refer to the transmountain ditch from the Fairview Lakes to the Sanpitch River drainage.

Gooseberry Creek heads in the high mountains east of Fairview, Utah, and is a tributary of the Price River. Boulger Creek heads in the same mountains but is in the San Rafael River drainage area and is directly tributary to Huntington Creek. Many years ago the defendant's predecessor constructed a ditch which intercepts the waters of Boulger Creek at a high elevation and conveys them to the Fairview Lakes which are in fact reservoirs located in the Gooseberry Creek drainage. Water from both Boulger Creek and Gooseberry Creek is stored in the winter months and is released from storage during the period May 15 to September 5 into a ditch which carries it over the divide into the Sanpitch River drainage area where it is used for irrigation in the vicinity of Fairview, Utah.

The right claimed by the defendant to collect, divert and store the water in the Fairview Lakes and to release it from the lakes for irrigation use in Sanpete County is evidenced by a document entitled, "Statement of Water User's Claim to Diligence Rights," Claim No. 197, filed in the State Engineer's Office on May 10, 1955. (Plaintiffs' Exhibit 4).

There is and has been for many years a United States Geological Survey gaging station located in the ditch at or near the divide between the Price River and Sanpitch River drainage areas. (Tr. 14). The daily flows of water in the ditch are shown on Exhibit 8 and a summarization of the total acre feet of water carried out of the drainage area and maximum flows for the years 1949 to 1963 inclusive appears on Planitiffs' Exhibit 9, as follows:

Year	Total Acre Feet	Max. Flow CFS	Yearly Mean Flow CFS
1949	806	14.4 (35-days)	9.24
1950	1490	11.0	2.06
1951	1820	14.0	2.51
1952	2060	14.0	2.84
1953	1700	13.00	2.35
1954	1000	11.0	1.38
1955	1280	13.0	1.77
1956	1540	14.0	2.12
1957	2410	17.0*	3.33
1958	1650	13.0	2.28
1959	665	11.0	0.92
1960	720	10.0	0.99
1961	596	11.0	0.82
1962	1500	11.0	2.07
1963	1020	8.3	1.41
Total	<hr/> 20,257	<hr/> 185.7	
Average - 15 Year	1,350.5	12.4	

*2 days only"

There is evidence in the record that an unknown quantity of water has been diverted through the ditch before the U.S.G.S. gages were activated. (Tr. 336, 337). Witness Mower testified that the time the gage is activated in the spring depends on snow conditions. (Tr. 338).

The trial court found in finding of fact No. 7:

“. . . The transmission system from the storage reservoirs across the divide makes use of earthen ditches for the most part over porous soil and broken rocky places, resulting in losses from seepage, the amount of loss being dependent on the quantity being transported in the canal. There is also some leakage from the Lakes, which leakage, together with the ditch losses, augments the water available to lower users, including the Plaintiffs, in the Price River System. . .” (R. 104).

This finding of fact is supported by the testimony of the president of the defendant. (Tr. 244, 245, 298). The court further found that the defendant has appropriated and beneficially used since 1869 and is presently entitled to collect and divert through its existing storage reservoirs and feeder canal system so much water from both sources as can be captured in said existing works and is necessary to provide not more than 3020 acre-feet of water collected and diverted in the existing reservoirs and ditches and measured at a described point on the transmountain ditch. (Finding of Fact, No. 13, R. 106). This point is located in the Gooseberry Creek drainage. In effect the court held that the defendant not only beneficially used the water it succeeded in capturing and holding in its ditch, but also water which

seeped and leaked out before reaching the Price River -- Sanpitch River divide.

The amended judgment of the court quiets the defendant's title to the right to the use of water collected in and diverted into the present ditch, measured at a specific point below the Fairview Lakes not exceeding, however, 3020 acre-feet. This appeal is from the amended judgment.

STATEMENT OF POINTS

1. Water leaking out of the ditch enroute to its place of use was not beneficially used by the defendant.

2. The award to the defendant of a maximum of 3020 acre-feet collected in its present reservoirs and ditches is not supported by any competent evidence.

3. There is no competent evidence supporting Finding of Fact No. 11 that surface water which seeps from the defendant's system and drains into the plaintiffs' source of supply is in excess of the plaintiffs' right to use water and is not a part of their appropriated rights.

ARGUMENT

1. WATER LEAKING OUT OF THE DITCH ENROUTE TO ITS PLACE OF USE WAS NOT BENEFICIALLY USED BY THE DEFENDANT.

Section 73-1-3, Utah Code Annotated, 1953, provides:

“Beneficial use shall be the basis, the measure and the limit of all rights to the use of water in this state.”

This court has held that the doctrine announced in this section is declaratory of existing law.

Sigurd City vs. State, 105 Utah 278, 142 P.2d 154.

The evidence in this case is that 40% to 75% of the water turned into the transmountain ditch seeps or leaks out before it is released for irrigation use. (Tr. 94, 274). The testimony is that in certain bad places in the ditch the water runs out in holes as big as an arm — four or five inches in diameter. (Tr. 227). Efforts have been made over a period of many years to prevent the escape of the water on the Price River side of the divide. (Tr. 227-228).

The trial court held that not only the water that the defendant succeeding in getting over the divide into the Sanpitch River drainage was beneficially used, but also the water that leaked out of the ditch and ran down into Gooseberry Creek was beneficially used and was subject to the defendant's right. In Finding of Fact No. 9, the court found that the total supply of water diverted is beneficially used by the defendant. (R. 105). The conclusion based on this finding that the defendant is entitled to use all of the water it diverts into its ditch at a certain point is contrary to law.

In the case of *Dannenbrink vs. Burger*, (Cal) 138 P. 751, the facts were that an appropriator of water by means of a dam and ditch permitted a portion of the

water so diverted to seep and leak out of a flume and to return to the stream from which it was diverted. The condition prevailed for some 25 years. The owner then removed the flume and tightened the ditch so that it would no longer leak. Meanwhile, during the 25-year period of leaking into the channel, the water was diverted from the channel and beneficially used by the defendants. The question was presented as to whether the plaintiffs could by repairing his ditch salvage the water and prevent it from going down to the defendants. The trial court held for the defendants and the plaintiffs appealed. The Supreme Court affirmed holding:

“. . . It cannot, of course, be questioned that an appropriator may at all times keep his ditch and its essential equipments in such repair as will preserve to him all the waters he has rightfully appropriated and which are required for the legitimate or beneficial purposes to which he applies them. The question presented for solution on this appeal, however, is not whether he may repair his ditches, flumes and dams or maintain them in proper condition for the purpose of conserving the full measure of water to which he is lawfully entitled by virtue of his appropriations, but whether, as a prior appropriator, he may so change or reconstruct his ditch, flumes, and dam as to prevent waters seeping through his ditch from discharging into the original stream from which they were thus taken after such discharge of such waters has continued uninterruptedly for a period of time sufficient to establish a prescriptive title thereto in one who had actually appropriated and continuously used such seepage waters during all of such period of time? The question thus propounded must, upon sound and

well-settled principles, be answered in the negative. . . ”

It will be noted that the facts in the Dannenbrink case are essentially the same as in the case before the court. Here the trial court held that the defendant could enlarge its right by adding to the water which was diverted over the divide, the water which escaped from the ditch into the Price River system. In effect the trial court held that water which leaks from a ditch and runs back into the stream, is beneficially used! This is not the law.

In the case of *Siguard City vs. State of Utah*, 105 Utah 278, 142 P.2d 154, there was a question as to whether a water user owned water which escaped from a ditch between the point of diversion and the place of use. This court called attention to the fact that a water right is limited by *beneficial use* and held:

“. . . This was a misconception of defendants' property rights in that water. They were not the owners of the body of water taken by the plaintiff into their pipelines, they were merely the owner of the right to use such waters as reached their lands and had been put to beneficial use thereon. The water which was lost by seepage and evaporation before it got to their lands could not be beneficially used by them and the plaintiff by taking such waters could not deprive the defendants of such water. . . ”

2. THE AWARD TO THE DEFENDANT OF A MAXIMUM OF 3020 ACRE-FEET COLLECTED IN ITS PRESENT RESERVOIRS AND DITCHES IS

NOT SUPPORTED BY ANY COMPETENT EVIDENCE.

The defendant has based its claim to 3020 acre-feet of water on a "Statement of Water Users Claim to Diligence Rights," No. 197, Exhibit 4. This statement of claim was filed pursuant to Section 73-5-13, Utah Code Annotated, 1953. That section provides in part as follows:

"... Such notices of claim, or claims, as provided in this section, shall be prima facie evidence of claimed right or rights therein described."

It will be noticed that in paragraph 4 of the statement of claim, Exhibit 4, appears the following:

4. Nature, Amount and Annual Period of Use
(by month and day)

"Irrigation

Sec. Ft. 10 from July 5 to Aug. 5 Ac. Ft. 600

Sec. Ft. 20 from May 15 to July 5 Ac. Ft. 2,000

Sec. Ft. 7 from Aug. 5 to Sept. 5 Ac. Ft. 420
Ac. Ft. 3,020*

Stockwatering

Sec. Ft. from to Ac. Ft.

Power

Sec. Ft. from to Ac. Ft.

*Note: The quantity and distribution are approximate and will vary with seasons, but 3020 Ac. Ft. is claimed for normal years over the irrigation season."

The figure of 2000 acre-feet is obtained by multiplying the number of days between May 15 and July 5, by the number of acre-feet per day, to-wit, approximately 40 acre-feet. Between July 5 and August 5 the figure of 600 acre-feet is obtained by multiplying the number of acre-feet per day, to-wit, approximately 20 by the number of days. Between August 5 and September 5 the same process is used, and in each case the results are rounded out. The total is 3020 acre-feet — the same as the maximum quantity awarded by the court to the defendant. Witness Bench who signed the statement of diligence claim testified that the figures in paragraph 4 quoted above were estimates of water that flowed into the Fairview Lakes. (Tr. 53-55).

The defendant introduced no evidence of use prior to 1903 except the statement of claim discussed above. No application to appropriate additional quantities of water has been filed by the defendant since 1903.

To overcome the prima facie evidence of the defendant's water right the plaintiff introduced as Exhibit 8 United States Geological Survey water flow records at a station described as "Fairview Ditch near Fairview, Utah" for the period 1949 to 1964, both inclusive. This is the station on the Price River-Sanpitch River divide. A study of these reports indicates that during the period from May 15 to July 5 for each year the maximum measured flow in second feet was as follows:

1949	No measurement	1957	17
1950	11	1958	12
1951	11	1959	11
1952	13	1960	10
1953	12	1961	11
1954	8.8	1962	10
1955	11	1963	6.5
1956	14	1964	6.1

It will be noted that in only one year, 1957, the flow even approached 20 second feet. An examination of the record shows that a flow of 17 second feet lasted for two days. The maximum delivered was in 1957 when 2410 acre-feet were measured through the gage. During the last six years of measurements 1959-1964 inclusive *the maximum was 1500 acre-feet and the average was 896 acre-feet.*

The actual undisputed records of measurement by the U.S.G.S. clearly overcome the presumption created by section 73-5-13. The statement of claim showed a grossly excessive and exaggerated claim to water, proved absolutely by actual water measurements and yet the trial court followed the statement of claim and disregarded the U.S.G.S. measurements.

The evidence is clear that in every year there has been more water in the Gooseberry Creek drainage area above the defendants collection system than is claimed by the defendants. This was obligingly proved by the defendants. (Tr. 291-292, 295, 300). Despite the availability of water the defendants failed to capture, hold

and transport to the gaging station at the divide more than 1500 acre-feet in any year during the five years preceding the filing of this suit. Under section 73-1-4, Utah Code Annotated, 1953, this failure to make beneficial use of the water resulted in a partial forfeiture of the right if indeed any right to divert and use more than 1500 acre-feet ever existed.

Torsak vs. Rukavina, 67 Utah 166, 246 P. 367;

Wellsville East Field Irrigation Co. vs. Lindsay

Land and Livestock Co., 104 Utah 448, 137 P.2d 634.

The trial court erred in holding that the defendant was entitled to capture and use a maximum of 3020 acre-feet of water in its existing collection system and ditches. With the prima facie evidence contained in the statement of claim overcome by evidence of actual measurement there is no evidence in the record to support the findings and judgment on this point.

3. THE COURT ERRED IN MAKING FINDING OF FACT NO. 11 THAT WATER SEEPING FROM THE DEFENDANT'S WORKS IS IN EXCESS OF THE PLAINTIFFS' APPROPRIATED RIGHTS BECAUSE SUCH FINDING IS NOT SUPPORTED BY ANY COMPETENT EVIDENCE.

Although finding of fact No. 11 to the effect that the water seeping out of the transmountain ditch and other parts of the defendant's collection system is not

a part of the plaintiffs' appropriated rights does nothing to support the defendant's claim for 3020 acre-feet of water, we wish to argue the point that it is not supported by the evidence. Our reason for arguing this point is to show that the plaintiffs will be prejudiced if the claim of ownership by the defendant of the water leaking from the defendant's water control facilities should be sustained.

The uncontradicted evidence is that the plaintiffs are the owners of rights included in the Morse decree, Exhibit 6 and approved and certificated water applications Nos. 1035, 1036 and 8989a. This fact is found by the trial court in finding of fact No. 2. It will be noted that application No. 1035 is filed on the water of Gooseberry Creek. This application covers 12020 acre-feet of water of Gooseberry Creek water to be stored in Scofield Reservoir. This exceeds by several thousand acre-feet the yield of the drainage area established by the defendant's own expert Witness, Creighton N. Gilbert (Tr. 279-305). It will be noted that Mr. Gilbert made calculations based on the records for the year 1952, (the year when 2064 acre-feet were measured over the divide) that the drainage area yielded 8900 acre-feet. (Tr. 293).

Application No. 8989a covers an additional storage right of 17980 acre-feet in Scofield and application No. 1036 covers a direct flow right of 125 second feet. See Exhibit No. 7. The "Morse decree" contains an award to Mammoth Reservoir Company of "all the waters of Gooseberry Creek." Exhibit 6, page 7.

In the case of *Tanner vs. Humphreys*, 87 Utah 164, 48 P.2d 484, the Supreme Court held that the trial court must assume that the rights granted by a decree still belong to the decreed owner. Any proof to the contrary would have to be adduced by the party attacking the decree. None was adduced.

That the enlargement of the defendant's water right from a right which has yielded a maximum of only 1500 acre-feet annually over the past six years to a right of 3020 acre-feet would impair vested rights below is clear in view of the language of the Supreme Court in the case of *Piute Irrigation and Reservoir Company vs. West Panguitch Irrigation and Reservoir Company*, 13 Utah 2d 6, 367 P.2d 855. Certainly, the award of *all of the water of Gooseberry Creek* to the Mammoth Reservoir Company mentioned above and the right evidenced by application No. 1036 would be impaired by such a change.

There is no evidence in the record that the single water right evidenced by application No. 1035 would not pick up all water yielded by the Gooseberry drainage.

Finding of Fact No. 11 is not supported by any evidence, but is contrary to the undisputed documentary evidence before the court.

CONCLUSION

The trial court erred in finding that water leaking out of the defendant's transmountain ditch before it reached the gaging station on the divide between the

Price River and Sanpitch River was beneficially used by the defendant. The court also erred in determining that the defendant is the owner of a right to collect in its present facilities and transport to its place of use a maximum of 3020 acre-feet of water annually in disregard of undisputed evidence that the maximum quantity ever transported over the divide was 2410 acre feet, and the maximum quantity diverted in the six years prior to the filing of this suit was 1500 acre-feet. The court also erred in finding that water that seeped from the defendant's facilities was not subject to the plaintiffs' water rights.

It is respectfully submitted that the amended findings, conclusions and judgment of the court should be modified to reduce the defendant's right to divert and use Gooseberry Creek water to 1500 acre-feet, measured at the divide.

Respectfully submitted,

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