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

RESPONDENTS' BRIEF

NATURE OF CASE

This action was filed to review the decision of the State Engineer approving Change Application No. a-4448 filed by the Cottonwood-Gooseberry Irrigation Company for a change in point of diversion and manner of use of the water right evidenced by Diligence Claim No. 197. Plaintiffs also challenged the quantity and extent of the diligence right established by the Cottonwood-Gooseberry Irrigation Company.

DISPOSITION OF THE TRIAL COURT

The trial court held that Cottonwood-Gooseberry Irrigation Company had established a valid diligence

claim for 3020 acre-feet as evidenced by Diligence Claim No. 197. The lower court also affirmed the decision of the State Engineer approving Change Application No. a-4448 with certain conditions.

RELIEF SOUGHT ON APPEAL

The defendants submit that the decision of the District Court should be affirmed.

STATEMENT OF FACTS

Where the word defendant or respondent is used in the singular in this brief, it refers only to the Cottonwood-Gooseberry Irrigation Company. When the plural form defendants or respondents is used it will refer to both the Irrigation Company and the State Engineer.

Respondents feel that an additional statement of facts is necessary to clarify and supplement some of the statements made in Appellants' brief.

This lawsuit involves a dispute over water rights in the Fairview Lakes area in central Utah. Although the dispute originally involved only the question of whether defendants' Application for a Change of Point of Diversion and Nature of Use should be granted, it was expanded by Appellants to challenge the extent of the water right of the Cottonwood-Gooseberry Irrigation Company to store and use water from the upper regions of Gooseberry in the Price River drainage and from

the Boulger Creek in the San Rafael drainage. Through feeder canals, defendant intercepts and collects water on the eastern slope of the Wasatch Range above Fairview, Utah, principally from Gooseberry Creek, a tributary of the Price River and Boulger Creek, a tributary of Huntington Creek. After impounding the water in two adjacent reservoirs called Fairview Lakes, defendant conveys the water by means of a canal over the divide into Sanpete County for agricultural use. The Fairview Lakes consists of two adjacent storage reservoirs separated by a narrow earthen dam and regulated by a gate so that water can be retained in either area or both. The transmission system consists of an earthen canal, for the most part, over porous soil and broken rocky places, resulting in substantial losses from seepages estimated at from 40% to 75%. There may also be some leakage from the lake.

The plaintiffs claim water rights in the Price River and its tributaries, including Gooseberry Creek and assert that they are entitled to the water that has seeped from defendant's canal. However, plaintiffs have failed to show that they ever received this water or placed it to beneficial use.

Defendant Cottonwood-Gooseberry Irrigation Company claims a right to 3,020 acre-feet of water with an 1869 priority. On March 10, 1955, it filed with the State Engineer's Office a Statement of "Water User's Claim of Diligence Rights." (File No. 197) This claim established a prima facie right for Defendant to use this quantity of water for irrigation purposes. This diligence

claim was filed pursuant to the provisions of 73-5-13, Utah Code Annotated, 1953, which provides:

> *"All claimants to the right* to the use of water, including *both surface* and underground, *whose rights are not represented by certificates of appropriation issued by the state engineer,* by application filed with the state engineer, by court decrees or by notice of claim heretofore filed pursuant to law, *shall file notice of such claim* or claims with the state engineer on forms furnished by him setting forth such information and accompanied by such proof as the state engineer may require, including but not limited to the following:
>
> "The name and post-office address of the person making the claim; the quantity of water claimed in acre-feet; and/or the rate of flow in second-feet; the source of supply; the priority of the right, the location of the point of diversion with reference to a United States land survey corner, the place ,nature, and extent of use; the time during which the water had been used each year and the date when the water was first used. *A notice of claim may be corrected by filing with the state engineer and corrected notice designated as such and bearing the same number as the original claim.* No fees shall be charged for filing a corrected notice of claim.
>
> *"Such notices of claim, or claims, as provided in this section, shall be prima facie evidence of claimed right or rights therein described."* (Emphasis added)

The Diligence Claim filed by Defendant fully complies with the foregoing statutory provisions. A number of affidavits of early settlers and residents in the area

were filed with the claim giving documentary support to its validity.

On March 3, 1964, Defendant filed Change Application No. a-4448 with the State Engineer's Office, asking for a permanent change of point of diversion and manner of use of this right. This application sought to change the point of diversion of Diligence Claim No. 197 so as to make use of a tunnel to be built through the mountain for the purpose of conveying its storage water across the divide, replacing the leaky canal which had heretofore been in use and which had required considerable maintenance and repair. Change Application No. a-4448 proposes to release the water placed in storage in the Fairview Lakes, just as the company had done in the past, and discharge it into the natural channel of Gooseberry Creek, thence to be conveyed down the natural channel for approximately one and a half miles where it will be rediverted through the tunnel and discharged into Cottonwood Creek on the western slope of the mountains. Respondents emphasize that *there is no change in the manner in which the water is stored in the Fairview Lakes.*

The Change Application was advertised and subsequently protested by Appellants. After holding a hearing on the matter on August 24, 1964, the State Engineer rendered his decision approving the Change Application and authorizing the rediversion of the water subject to certain conditions (R. 5, 6). Plaintiffs thereafter appealed this decision to the District Court in connection with which Plaintiffs attacked Defendant's diligent claim.

After a trial of the matter which lasted several days, the District Court affirmed the decision of the State Engineer. In doing so the Court found, among other things:

> "3. . . . In said Statement of Water Users Claim said Defendant further claims all of the water in the drainage area hereinafter described which flows into the feeder canals and into the storage reservoirs of the Defendant Cottonwood-Gooseberry Irrigation Company known and described as the Fairview Lakes. Said claim sets forth the information required by Section 73-5-13, Utah Code Annotated, 1953 and is a sufficient notice of claim for all purposes provided for by said statute."

> "5. At all times since the construction of the original storage reservoir and feeder canals Defendant Cottonwood-Gooseberry Irrigation Company and its predecessors in interest have maintained said system so as to capture part of the natural flow and run-off waters within the drainage area hereinfater described during the entire twelve months of each year and have released from time to time during the irrigation season from May 15 to September 5 of each year such amounts of water as they deemed necessary as a primary and supplemental supply to irrigate lands belonging to stockholders of said Defendant Cottonwood-Gooseberry Irrigation Company and its predecessors in interest. . . ."

> "7. . . . Earthen ditches and dams have been and still are in common use in the locality to collect and convey water to the place of ultimate use; and Defendant Cottonwood-Gooseberry Irrigation Company and its predecessors in interest have since the construction of said transmission system from year to year continuosuly been improving the

efficiency of the same by lining portions of the channel with clay, cementing some sections, replacing areas of the open channel with metal pipe, and otherwise using measures to cut down transmission losses."

"9. . . . Although a considerable amount of such water has been consumed by evaporation, transportation and seepage, in collecting, holding and transporting the water across the divide, because of the efforts made by Defendant from year to year to eliminate waste and the economics involved in the local area, the Court finds that the total supply of water diverted is beneficially used by said Defendant."

"10. A substantial portion of the water now being lost in the ditch transporting the water from the Fairview Lakes across the divide is consumed by plant life, evaporation and by percolation to the sub-strata from whence it enters the underground water supply. Some of this water later appears on the western slope of the mountain in Sanpete Valley. *The water thus lost into the sub-strata has not been a source of supply to the Plaintiffs in this action.*" (Emphasis added)

"14. The Court further finds that there has been no five year period when the water available in said drainage area, above the Fairview Lakes and feeder canals of the Defendant Cottonwood-Gooseberry Irrigation Company, has not been diverted and beneficially used by said Defendant and its predecessors, in diverting, storing or carrying the same across the divide for ultimate use and consumption in the irrigation of lands in Sanpete Valley and that said Defendant Cottonwood-Gooseberry Irrigation Company has not lost any water rights by abandonment or non-use." (Findings 3, 5, 7, 9, 10, 14) (R. 102-107)

It is significant to note that Appellants have not challenged any of the foregoing Findings.

POINTS I and II

DEFENDANT COTTONWOOD-GOOSEBERRY IRRIGATION COMPANY HAS PLACED TO BENEFICIAL USE THE 3,020 ACRE FEET OF WATER IT CLAIMS BY REASON OF ITS DILIGENCE RIGHTS.

We believe that this Point covers both Points No. I and No. II in Plaintiffs' Brief.

Plaintiffs' principal argument apparently recognizes and admits the Diligence Claim of the Defendants, but challenges the finding of the trial court that the evidence supports the claim of 3,020 acre feet of water per year.

Plaintiffs rely almost entirely on Exhibit No. 9 to support their claim that the award of a maximum of 3,020 acre feet to Defendant is not supported by the evidence. However, this Exhibit shows only the amount of water measured at the United States Geological Gauging Station located on the divide between the Price River and the San Pitch River drainage areas. Such summary shows for a 15-year average 1,350.5 acre feet of water. It should be noted, however, that the witnesses testified that records were not made at the Gauging Station until after the heavy spring run-off so that the quantity of water measured by the United States Geological Gauging Station would be less than the amount actually conveyed across the divide. In this connection, the trial court found:

> "Although accurate measuring devices have not been in use to measure the amount of water stored by Defendant in the Fairview Lakes and diverted across the divide, in at least one year in excess of 2,410 acre feet were actually conveyed out of the Gooseberry and Boulger drainage areas into Sanpete Valley after deducting all losses for evaporation, seepage and other conveyance losses." (Finding 12, R. 106)

Thus the lower court not only determined that the United States Geological Gauging Station could not be relied upon to show the total volume of water, but that in excess of 2,410 acre feet had been taken across the divide in at least one year — this after deducting all losses for evaporation, seepage and other conveyance losses. However, even if we were to assume that the figures on Exhibit No. 9 reflected the quantity of water delivered across the divide, it would still not be for the total acre feet that must have been discharged from the reservoir under Plaintiff's theory of the case. Using the average of 1,350.5 acre feet per year and assuming that the minimum loss, (as claimed in the brief submitted by the Plaintiffs), was 40% for conveyance, this would mean that there would have been a total of at least 2,250.85 acre feet at the reservoir. In the event carriage loss was 75% (as argued and referred to by the Plaintiffs) this would increase the total acreage stored and used to the figure of 5,402 acre feet. Defendant can't be penalized for bad water years. Water rights are not based on an average flow. In the good water years, such as 1952 and 1957, Defendant received 2,060 and 2,410 acre feet respectively at the divide, which would represent substantially more than 3,020 acre feet before carriage loss on the basis of the minimum loss of 40%.

The evidence introduced by Plaintiffs as well as the evidence introduced by the Defendants in this case clearly supports the Court's finding and demonstrates that the figure of 3,020 acre feet is less than the normal yield in the Fairview Lakes drainage area. The Plaintiffs' own Exhibit 16 discloses that the average annual yield is 4,100 acre feet. This was further corroborated by Plaintiffs' witness, Win Templeton, who testified that the amount would be about right for the average annual yield (Tr. 178, 187, 191). Defendants' witness, Creighton Gilbert, not only testified that the average annual yield would be 4,133 acre feet (Tr. 290), but further testified that in good runoff years this amount could be substantially higher and that in the year 1952 approximately 8,900 acre feet of water was developed in the Fairview Lakes drainage (Tr. 292). Again in this connection the Court found:

> "In some years upwards of 9,000 acre feet of water is developed in the area of drainage above Defendant's reservoir." (Finding No. 9, R. 105)

Again, this finding is not assailed by Appellants. The Defendant Cottonwood-Gooseberry Irrigation Company has at all times (both prior and since 1903) claimed all of the water developed above the Fairview Lakes drainage and, as found by the Court, has made all reasonable efforts to capture and use this water.

Although there was some evidence to show that the maximum capacity of the lake storage is approximately 2,000 acre feet (the claim specifies 2,200 acre feet), the evidence is undisputed that as the lake storage fills the water is diverted out into the Fairview Ditch so that

the water is being used during the same period of time that the water is being stored in the reservoir. In fact, the evidence is undisputed that the feeder canals, reservoir and diversion ditch capture to the extent possible all the waters in the drainage area above; that the period of storage is for the full twelve months of the year and that the period of use is during the normal irrigation season commencing about May 1st, depending upon when the snow begins to melt in the spring. (See Finding No. 5)

The principle of law that diversion and beneficial use of water prior to 1903 establishes a valid right to such water has been recognized by the Utah Courts many times. This principle was clearly stated in the case of *Bishop v. Duck Creek Irrigation Company* (1952), 121 Utah 290, 241 P. 2d 162, at page 164, as follows:

> "Since there are no filings with the State Engineer either by Bishop or his predecessors, whatever right he has to the water must necessarily rest upon appropriation by beneficial use before 1903. Prior to that time the law allowed appropriation by such use, and statutes enacted that year preserve such appropriations. See Laws of Utah 1903, Sec. 72, Ch. 100; Patterson v. Ryan, 37 Utah 410, 108 P. 1118; Jensen v. Birch Creek Ranch Co. v. Lindsay Land & Livestock Co., 104 Utah 448, 137 P. 634."
>
> "It is established by the evidence without dispute that the irrigation company and its predecessors, both long before and ever since 1903, by means of the two upper dams, did impound, control and use all of the ordinary flow of the stream, and also diverted and used a portion of the high water to pasture land; and that the only use of waters of Duck Creek by the plaintiff and his

> predecessors was that in times of high water the excess which was not so caught and used by the irrigation company naturally escaped down the stream and on to the plaintiff's lower land to the west and was there used."

The statute provides that the filing of a diligence claim "shall be prima facie evidence of claimed right or rights therein." (73-5-13, UCA 1953)

"Prima facie evidence" means evidence which standing alone and unexplained maintains a position and warrants the conclusion to support the fact for which it is introduced.

Gemma v. Rotondo, 62 RI 293, 5 A 2d 297, 122 ALR 223; *Cook v. Farm Service Stores,* 301 Mass. 564, 17 NE 2d 89; *McKenzie v. Standard Acc. Ins. Co.,* 198 SC 109, 16 SE 2d 529; *McCall v. Asbury,* 190 Ga. 493, 9 SE 2d 765, Cases cited, *Vol.* 3, *Words & Phrases, Perm Ed., "Prima Facia Evidence."*

According to Mr. Justice Story, writing for the Supreme Court in the case of *Crane v. Morris,* 31 U.S. (6 Pet.) 598, 611, 8 L.Ed 514, prima facie evidence of a fact is such evidence as, in the judgment of the law, is sufficient to establish the fact, and if not rebutted remains sufficient for that purpose.

Again, in the case of *Kelly v. Jackson,* 31 U.S. (6 Pet.) 622, 8 L.Ed. 523, the Supreme Court held that in a legal sense prima facie evidence in the absence of all controlling evidence or discrediting circumstances becomes conclusive of the fact; that is, it should operate on the trier of the fact as decisive.

See also *Bozicevich v. Kenilworth Mercantile Co.*, 58 Utah 458, 199 P. 406, 17 ALR 346; *Griffin v. Prudential Insurance Company,* (1943), 102 Utah 563, 133 P.2d 333; and *State v. Potello,* (1911), 40 Utah 56, 119 P.1023.

In the present case, there is no evidence which would tend to reduce in any way the amount of Defendants' claim. Plaintiffs have completely failed to overcome the prima facie burden placed on them by the Utah statute. On the contrary, the evidence discloses that Defendant's right is in excess of the amount claimed.

Defendants readily admit that the right to the use of water in this State is subject to the water being placed to a beneficial use (Section 73-1-3, U.C.A. 1953). However, the Cottonwood-Gooseberry Irrigation Company claims that the water lost on the transmountain ditch by reason of seeps or leaks was beneficially used by it as carrier water. Rather than having this carrier water lost Defendant now seeks to put such water to the more beneficial purpose of raising crops and not having it lost in the normal conveyance of the other water.

If Plaintiffs' position were upheld it would force the continued use of water for the non-productive use of carrier water without any showing of injury to other users. That Defendant may improve its canals to save water otherwise lost through seepage and evaporation has been clearly upheld by this Court in the case of *Big Cottonwood Tanner Ditch Company v. Moyle, et al,* (1946), 109 Utah 213, 174 P.2d 148.

In that case, the Plaintiff, Big Cottonwood Tanner Ditch Company, had an easement for its ditches and

canals extending across lands owned by Defendants. Plaintiff brought an action to enjoin Defendants from preventing it from entering upon their lands for the purpose of cementing and water-proofing its ditches. Defendants objected on the grounds that beautiful flora and trees had grown up around the stream "as a result of water seepage from said streams," which flora and trees enhanced the value of their properties and of their residences.

This Court held that even though a previous irrigation ditch incidentally benefitted land of the servient estate because seepage water therefrom enabled trees and plants to grow along the banks of the ditch, the action of Plaintiff in cutting out seepage water by waterproofing the ditch added no additional burden to the servient estate. The Court further stated during the course of its opinion that the prescriptive easement acquired by the water company to convey water in ditches included the right, in the interest of water conservation, to improve the method of carrying irrigation water. The Court stated that the owners of the servient estate failed to establish that the proposed method of improvement was unreasonable or would unnecessarily damage them, and evidence showed that the irrigation company had adopted the only practicable means possible for the improvement of its ditches.

In the instant case before the Court Plaintiffs have failed to show that they have ever put to use any of this water which is lost as carrier water or in any manner how they will be damaged by the change in point of

diversion which will result in a more economical use of the water appropriated by Defendant. The evidence in this case shows that the water lost by seepage from the canal was consumed by phreatophytes, some went down the Gooseberry drainage and some went to bedrock which naturally slopes to the west so that the water would ultimately percolate into the San Pitch drainage. Harold T. Brown, a hydrologic engineer with the Soil Conservation Service testified as follows:

"Q. Now, did you make such a study and computation in reference to the phreatrophytes which you saw and observed on your two field inspections along the Fairview Ditch, between the Lakes and the gauging station?

"A. Yes, I did.

"Q. And did you, from your studies and survey, come up with a computation of the consumptive use of the phreatophytes of the water that was seeping out of the canal?

"A. Yes, we did.

"Q. And will you state what that was?

"A. For the area below the Fairview Ditch and above a point that I had selected as the confluence that the drainages of the Fairview Ditch is in, I determined that there was 245 acres of plant life that could be classed as phreatophytes. And these plants were using 578 acre feet of water annually.

"Q. And would this consumptive use of 578 acre feet be water which thereupon would not go down into the natural drainage of the basin?

"A. Yes, that is correct." (Tr. 265)

Furthermore, other witnesses for the Defendant testified that springs on the west side of the mountain were affected (and at times dried up) when the water was turned out of the ditch. (See Lawrence E. Larson, Tr. 225 to 227; Lee Mower, Tr. 240; Leland Hansen, Tr. 313 and 314)

We particularly direct this Court's attention to the testimony of Leland A. Hansen, a consulting geologist, who had made a study of the sub-strata in the area of the open ditch, including a personal inspection of the tunnel. He testified:

> "Q. Now, in what direction is the dip of the sub-strata bed or limestone formations you have described?
>
> "A. The beds in general in the area of the tunnel and the area in question here dip roughly to the northwest at about three or four degrees. Some will be more and some less. (Tr. 311)
>
> . . .
>
> "Q. Did you observe whether there were any losses in the quantity of water as it proceeded north from the lakes to the gauging station?
>
> "A. Yes, considerable.
>
> "Q. And did you form an opinion as to where that water was going?
>
> "A. Yes.
>
> "Q. Would you state what that opinion is?
>
> "A. My opinion was that the water is being lost through seepage into cracks and fractures of the formation and where it traversed any of the sandy formations, was being lost into the aquifer.

"Q. And then did you form an opinion as to in which direction the water would go upon reaching this aquifer that you have described?

"A. I was never able to find a dip, contrary to the dip that I expressed in my report to the northwest, and therefore, my conclusion was that any water that found its way into the substrata would either be forced out on the thin right hand layer or east side of the ridge, or sink into the formation and naturally fall to the west in the dip of the formation. (Tr. 313)

. . .

"Q. What is your opinion, then, based upon the studies you have made and the information which you had as to the ultimate disposition of the water that was seeping into the substrata along the course of the ditch?

"A. On theory there would be a small portion that might find its way into the Gooseberry Valley, depending on the proximity of the water to the surface, or to an opening where it would flow more easily into the Valley than through the fractures. But the majority of it would course westward on the down dip of the formation and should reappear on the western slopes of the ridge as was manifest in the tunnel itself.

"Q. Now, insofar as reappearing, would it necessarily reappear in any large quantity or volume, or could it just be lost into the subsurface?

"A. On theory it should appear in various places along the western face, the lower erosional face of the ridge in various places near the sandstone. Let's say it should be near the sandstone.

"Q. Would it be possible to theorize whether it would appear in sufficient quantity to be economically useable in a stream or course?

"A. Basically, I would say that it would take a rather unusual situation in the North Horn formation to gather enough of the water to seep into the aquifer to bring it out in one head and make it economical. Otherwise, it would be lost as insignificant seeps in the little springs seeping possibly during the period of plentiful supply in the formation itself." (Tr. 318, 319)

From this and other evidence, the Court found:

"A. A substantial portion of the water now being lost in the ditch transporting the water from the Fairview Lakes across the divide is consumed by plant life, evaporation and by percolation to the sub-strata from whence it enters the underground water supply. Some of this water later appears on the western slope of the mountain in Sanpete Valley. The water thus lost into the substrata has not been a source of supply to the Plaintiffs in this action." (Finding No. 10)

This Finding is not questioned by Appellants.

The case of *Sigurd City v. State,* 105 Utah 278, 242 P.2d 154, cited by Appellants is clearly distinguishable from the case at hand. In the *Sigurd City* Case, the City was attempting, by right of eminent domain, to condemn water rights belonging to the Defendants. A conflict arose as to whether or not the water taken by the City ever reached Defendants' land. This Court held that determination of whether or not the City had deprived the Defendant of any rights would depend upon the dif-

ference between the volume and amount of water which would have actually reached the Defendants' ranches had the Plaintiff not taken the water at Rose's Creek and the volume and amount of water which actually reached the Defendants' ranches after Plaintiff had taken such water. In other words, the Court determined that the Defendants had no right to be compensated for water unless they proved that such water had actually reached their property. We submit that in the instant case there is no evidence whatsoever to show that all or any part of the carrier water being lost by seepage was ever placed to beneficial use by Plaintiffs. Thus, the holding of Judge Harding is totally in accord with the *Sigurd City* Case cited by the Plaintiffs herein.

Plaintiffs have cited and relied upon *Dannenbrink v. Burger,* 23 Cal. App. 138 P. 751. This case is distinguishable because the Defendant in that case clearly showed that he had captured and used the seepage water. In fact, he had actually made measurements of it for 25 years. In this case Appellants have failed to show that any of the water lost through seepage was ever used by them under their rights. The Dannenbrink case was subsequently cited in a case in which the fact situation was comparable to what we have in this case. In the case of *Ward v. City of Monrovia,* 16 Cal. 2d 815, 108 P.2d 425, the California Court held:

> "(1) He claims that the evidence shows that the city had lost its prescriptive rights to the use of all the waters of Sawpit and Maple canyons by a nonuser for a period of over five years of a portion of said waters, and by a change in the location of the pipe line. The plaintiff bases his

claim of nonuser by the city on the state of disrepair of the system prior to its reconstruction and replacement by reason of which it is claimed that some of the water leaked through the pipe lines and flowed down the natural channel to the plaintiff's land. The evidence is sufficient to support the city's right to divert all of the waters. By the use herein of the term 'all of the waters,' no inclusion of the surplus waters as defined by the trial court is intended. The burden was on the plaintiff to prove his right to the use of any part of the waters seeping through the system and claimed to have been abandoned by the city. *Lema v. Ferrari,* 27 Cal. App. 2d 65, 73, 80 P.2d 157. There is no evidence of nonuser to the extent that it may be said the city's prescriptive right to divert all such waters had been lost by abandonment. On the contrary, the evidence shows that the city had been diligent in making repairs, and that only when the state of the system indicated that repairs would no longer be an economic method of maintaining it, replacement and reconstruction of the system was undertaken. The facts, therefore, are not such as to call forth the application of the doctrine successfully invoked in the case of *Dannenbrink v. Burger,* 23 Cal. App. 587, 138 P. 751. Here there was no seepage of water from the city's diversion and pipe line system which continued uninterruptedly for a period of time sufficient to establish a prescriptive title in one who had actually appropriated or used such escaping waters."

See also *Lindsay v. King,* 138 Cal. App. 2d 333, 292 P.2d 23.

The Defendants' use of this water in the subject case is more consistent with the law of the State of Utah than any theory permitting the water to be lost or wasted.

Certainly, the Defendant has made use of it by using it as carrier water and over the years (as found by the trial court) has tried to improve the system. It now desires to make further improvements to prevent the wasting of water, all of which is wholly in accord and consistent with this Court's prior decisions. See, *Big Cottonwood Tanner Ditch v. Moyle,* 109 Utah 213, 174 P.2d, 148; *Big Cottonwood Tanner Ditch Co. v. Shurtliff,* 49 Utah 569, 164 P. 856; and *Weber Basin Water Conservancy District v. Gailey,* 8 Utah 2d 55, 328 P.2d 175.

If the evidence shows that there is reason to believe that the proposed change can be made without impairing vested rights, the Application should be approved (*Salt Lake City v. Boundary Springs Water Users,* 2 U. (2d) 141, 270 P. 2d 453; UCA 1953, 73-3-3).

POINT III

FINDING NO. 11 BY THE TRIAL COURT IS SUPPORTED BY THE EVIDENCE.

The Court in finding No. 11 determined:

> "The Court further finds that any surface water seeping from the system of the Defendant Cottonwood - Gooseberry Irrigation Company, which drains into Plaintiffs' source of supply, is in excess of Plaintiffs' rights to use water from such source and is not a part of their appropriated rights." (R. 106)

This finding, although attacked by Appellants as being unsupported by the evidence is clearly supported by the testimony; and no evidence was submitted which would negative the same.

There is no dispute that Plaintiffs are the owners of certain storage and direct flow rights to waters in the Price River drainage, including storage rights evidenced by Application 1035 for 12,020 acre feet of water and Application 8989-a for 17,900 acre feet of water. Both of these Applications are satisfied by storage in the Scofield reservoir which has a capacity of 65,000 acre feet, whereas the total storage right is for only 30,000 acre feet.

Likewise, Defendant introduced in evidence as Exhibit 27 an application to appropriate 15,000 acre feet evidenced by Application No. 9593, which Application is presently in good standing in the Office of the State Engineer. (Tr. 343) This exhibit demonstrates that at the proposed cite for the construction of the narrows dam for the Gooseberry reservoir, there is unappropriated water, which according to the approval of the application would be subject to appropriation. Therefore, the Court properly found that any water which might otherwise seep from the Defendant's irrigation system would be in excess of Plaintiffs' right to use water from such source and not form a part of the appropriated rights of the Appellants.

As stated herein above the burden was upon the Appellants to prove by a preponderance of the evidence that their rights would be affected by the proposed change of point of diversion and in connection therewith it was Appellants' burden to prove that any water saved by the re-diversion of Defendants' water through the tunnel would have otherwise gone into the system and then used by Appellants in connection with their appropriated rights.

Appellants having failed to show this, the Court was justified in finding that any seepage water did not contribute to the source of supply of Appellants' water and in any event would be in excess of the amount of their appropriated rights.

CONCLUSION

The Court properly sustained Defendants' "Statement of Water Users Claim to Diligence Rights"; and the evidence adequately supports its findings in this respect. Also the approval of the Change Application No. 4448-a was proper and correct since the evidence shows that there was no impairment to vested rights by the change.

Respectfully submitted,

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