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Carbon Canal Company, A Corporation, et al. v. Cottonwood-Gooseberry Irigation Comp Any, Inc., A Corporation, et al. : Appellants' Reply Brief

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

APPELLANTS' REPLY BRIEF

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

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APPELLANTS' REPLY BRIEF

In this brief the word "plaintiffs" will refer to all appellants and the word "defendant" will refer to the respondent, Cottonwood-Gooseberry Irrigation Company, Inc.

ERRONEOUS STATEMENTS OF FACT IN THE RESPONDENTS' BRIEF

The defendant in its brief has made several misstatements of the record which we desire to call to the attention of the Court. It should be noted that the defendant has also failed to comply with Rule 75(P)(2) Rules of Civil Procedure, which requires citation of the record to support statements of fact. *The only reference to the record in the defendants' entire "statement of facts" appears on page 5 of their brief.* This is a reference to the state engineer's decision (R. 5, 6). The statements of fact in the argument are also, with few exceptions, unsupported by any citation of the record.

Under the heading "Disposition of the Trial Court" the defendant asserts:

> "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". (Resp. Cr. pp. 1, 2).

The court did not so hold. The court held that the defendant had established a right "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 annually . . . ," measured at a described point on the transmountain ditch. (Finding of Fact No. 13, R. 106).

In its partial recitation of the trial court's findings of fact, pp. 6 and 7, the defendant significantly left out the following finding:

> "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). (Emphasis added).

On page 8 of the respondents' brief appears the following statement:

> "Such summary shows for a 15-year average 1350.5 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 measured by the United States Geological Gauging Station would be less than the amount actually conveyed across the divide." Emphasis added).

The portion in italics is not supported by, but is contrary to the evidence. See the transcript at pp. 336-339. Exhibit 8 indicates that except in 4 years of 16 the gauge record begins by measuring a very small quantity of water, in many instances less than one second foot. A reading of this exhibit will show when the high water flow occurred and that substantially all water was measured.

The error in the defendant's unsupported statement in italics above is clear.

On page 11 of the respondents' brief appears a statement that "the evidence is undisputed that the feeder canals, reservoirs and diversion ditch capture to the extent possible all of the waters in the drainage area above; that the period of storage is for the full twelve months of the year. . . "

The part of the statement quoted above preceding the semi-colon is not correct because in 1952 of 8900 acre-feet in the watershed (Tr. 292), only 2060 reached the divide (Exhibit 9), and 2000 acre-feet could be stored. The defendant's works obviously failed to capture several thousand acre-feet of the claimed available supply.

The part of the statement that the period of storage is for the full twelve months of the year is contrary to the Diligence Claim, No. 197, Exhibit 4, which states, "6 (f) Period of storage, September 5 to May 15."

The quotation from the transcript on pages 15, 16, 17 and 18 of the respondents' brief ignores cross examination, (Tr. pp. 266-278), in which the expert admitted that loss of water to plant life would occur along the new ditch and channel to the tunnel (Tr. pp. 268, 269) and that the aspens and conifers would not die if the use of the Fairview ditch was discontinued.

STATEMENT OF POINTS

1. Water which has heretofore leaked out of the Fairview Ditch cannot be transported out of the watershed to the prejudice of downstream rights.

2. The burden of proof of non-interference with down-stream rights is on the defendant.

3. The existence of unsatisfied downstream rights is a matter of record and not opinion.

ARGUMENT

1. WATER WHICH HERETOFORE LEAKED OUT OF THE FAIRVIEW DITCH CANNOT BE TRANSPORTED OUT OF THE WATERSHED TO THE PREJUDICE OF DOWNSTREAM RIGHTS.

The defendant attempts to support its claim to a maximum of 3020 acre-feet of water on the theory that it has put to beneficial use not only the water which was transported over the divide into the Sanpitch River drainage, but also water which leaked in large streams and seeped out of the Fairview Ditch on the Price River side of the divide. It is also argued on highly speculative evidence, that some water leaked out of the ditch and appeared in springs on the western slope of the mountains in Sanpete Valley in obvious defiance of the law of gravity.

In support of its position the defendant cites the following cases:

> Big Cottonwood Tanner Ditch Co. vs. Moyle, 109 Utah 213, 174 P.2d 148; Big Cottonwood Tanner Ditch Co. vs. Shurtliff, 49 Utah 569, 164 P. 856; and Weber Basin Water Conservancy District vs. Gailey, 8 Utah 2d 55, 328 P.2d 175.

These cases do not involve a dispute between a water user seeking to improve its ditch to the prejudice of downstream users on a river system. For this reason they are not in point. Certainly, we do not question the right of a ditch owner to line his ditch and salvage water which runs to waste. But in this case, admittedly the water leaking out of the ditch does not go to waste, but part runs into Cottonwood Creek for the benefit of defendants (if the speculative testimony of the defendant's expert is accepted) and part runs into Gooseberry Creek for the benefit of the plaintiffs and other downstream users. Lee C. Mower, president of defendant, testified as follows:

> "Q. Now, Mr. Mower, you have testified about the repair work on the canal, and the leakage. Where does the water go that leaks out of the canal that you see on the surface?
>
> A. If it's caused by a rodent and it's in the outer bank, sometimes it will appear on the surface.
>
> Q. If it appears on the surface, where would it go?

A. It would go in the natural drainage.

Q. It goes down Gooseberry Creek?

A. Yes. But the water that goes in the crevices and the rocks, we can't locate that and we don't know where it goes. Nobody can tell you that, because you can't find evidence of it below the ditch.

Q. Now, the water that goes into the rocks, how far below the divide would that be in elevation? Two hundred feet, five hundred feet, or some other figure?

A. Between 200 and 500 feet, Mr. Skeen. It depends on the length out toward the top of the ditch. The lower it gets the less would be the elevation.

Q. But the severely losing part of the ditch is along the west side, is from two to five hundred feet from the divide, below the divide?

A. Yes, sir.

Q. If you thought the water was leaking from that ditch down into Cottonwood, why, you would be happy about it and you wouldn't bother cementing it, would you?

A. No, because at the time there were two companies, and we had to maintain that water to identify it. And so we wouldn't let it go down, because we couldn't identify it.

Q. The water that got into Cottonwood Creek—

A. We have to identify the Company's water.

Q. But now you are in one company, are you not?

A. Now we are in one company.

Q. And if it's leaking through the mountain and gets down into Cottonwood Creek, it would get in the same source of supply?

A. If it all went down there, yes." (Tr. pp. 241-242).

A change cannot be made in the diverting works by re-routing, lining ditches or otherwise if the effect thereof is to decrease the needed supply of downstream users. We quote from the Utah Law of Rights by Wells A. Hutchins assisted by Dallin W. Jensen, p. 83:

> *"Waste and seepage waters tributary to stream.* — Once waste and seepage waters pass from the control of the original appropriator, return to the natural channel and become a part of the supply for downstream users, the landowner cannot, by change application, change his point of diversion, place of manner of of use if it interferes with the rights of the downstream user. An appropriator is entitled to rely on stream conditions remaining substantially as they were when he made his appropriation. This, the Utah court concluded, was distinguishable from the cases where the original users had maintained control of these waters and not allowed their return to the watercourse.
>
> The same rule applies where a junior appropriator diverts water from the stream and the waste and seepage water return to the channel is needed to make up the supply for a downstream prior appropriator. The junior appropriator cannot capture these waters where it deprives a prior appropriator of water. In an

earlier case the court concluded that where a ditch, in close proximity to a natural water channel intercepted and carried to the prior appropriator's land a substantial flow of seepage water, the trial court erred in not awarding this water to the prior appropriator since it was tributary to the main stream used by him."

In the same text on page 76, it is stated:

"Where it takes approximately 323,000 gallons of water per day through a ditch to make available 20,000 gallons at the place of use because of excessive channel losses a third party will be allowed, at his own expense, to substitute another means to getting the water to the prior appropriator *if he can do so without interfering with the prior rights. . . .* " (Emphasis added).

See also East Bench Irrigation Co. vs. Deseret Irrigation Co., 2 Utah 2d 170. 271 P.2d 449, in which this Court held:

" . . . The lower users have acquired a vested right to use all the unconsumed waters which would come down the stream to them under the use made of the water by the upper users and the conditions existing at the time they made their appropriations. The upper users cannot by a change in place of diversion or by a change in the place or nature of use consume more water than would have been consumed without the change and thereby deprive the lower users of their right to use such waters without impairing the vested rights of such lower users. This is almost universally recognized. Hutchins " * * * The Law of Water Rights * * * " page 378, says:

"The appropriator is entitled to have the stream conditions maintained substantially as they existed at the time he made his appropriation. This applies equally to senior and junior appropriators; the junior appropriator initiates his right in the belief that the water previously appropriated by others will continue to be used as it is then being used, and therefore has a vested right, as against the senior, to insist that such conditions be not changed to the detriment of his own right. This applies specifically to a change in place of use or diversion the effect of which will be to injure the holders of established rights. It is therefore a condition precedent to the right to make any change in diversion, place of use, or character of use, that the rights of existing water users be properly safeguarded from injury resulting from the change. * * * . . . ' "

The evidence in the record as to prior rights on Gooseberry Creek will be discussed under Point 3.

2. THE BURDEN OF PROOF OF NON-INTERFERENCE WITH DOWNSTREAM RIGHTS IS ON THE DEFENDANT.

The defendant claims that although the water in dispute leaks out of the ditch in the Gooseberry Creek drainage it does not return to Gooseberry Creek. It then argues that it can double its take by salvaging water which has heretofore leaked out of the ditch.

The burden of proof was on the defendant to show that the changes in the diverting works and the salvag-

ing opertaion would not result in taking water from the downstream users.

In the case of Peterson vs. Wood, 71 Utah 77, 262 P. 828 this Court held:

> " . . . The rule is well settled in this jurisdiction that whoever claims he has developed water in close proximity to the source of a stream, previously appropriated by others, is charged with the burden of proving that his alleged development of water does not interfere with the waters theretofore appropriated. Mountain Lake Mining Co. vs. Midway Irr. Co., 47 Utah, 346, 149 P. 929; Bastian vs. Nebeker, 49 Utah, 390, 163 P. 1092; Snake Creek Mining & Tunnel Co. vs. Midway Irrigation Co., 260 U.S. 596, 43 S. Ct. 215, 67 L. Ed. 423. Therefore, we hold that as to whether or not there was a break in the clay stratum or strata between the clay stratum of appellant's trenches and the clay stratum of the Wood tunnel, it was a question as to which the appellant had the burden of proof. . . " (p. 831).

In the Utah Law of Water Rights, supra, p. 77, the rule is stated:

> "The burden of proof rests upon the party claiming to have salvaged water to prove that his proposal will in fact effect a savings."

See also the early case of Howcroft vs. Union and Jordan Irr. Co., 25 Utah 311, 71 P. 487.

This rule is clearly applicable to this case. Here the leaking ditch is from 200 feet to 500 feet below

the top of the mountains which form the West side of the canyon. The physical facts would indicate that water would follow the line of least resistance and would drain into Gooseberry Creek. These facts alone should give rise to a presumption in favor of the plaintiffs and would impose the burden of proof on the defendant.

There is no evidence in the record to sustain the position of the defendant that so-called carrier water can be taken out of the watershed without impairing the downstream rights.

3. THE EXISTENCE OF UNSATISFIED DOWNSTREAM WATER RIGHTS IS A MATTER OF RECORD AND NOT OPINION.

The plaintiffs argued in their opening brief that approved and certificated water right, Application No. 1035, Exhibit 7, for 12020 acre-feet of Gooseberry Creek water exceeds the yield of Gooseberry Creek drainage for the year 1952 established by the testimony of derfendant's own expert, Creighton N. Gilbert (Tr. 279-305). Mr. Gilbert testified that 1952 was one of the best water years of record. We quote from the transcript:

> "Q. You picked 1952, which is the next highest yield of the ditch, according to the records, did you not?
>
> A. I picked 1952.
>
> Q. And that has been one of the high water years in the history of this area?

A. I was attempting to pick the highest." (Tr. p. 296).

The plaintiffs also called attention to the Morse Decree which awards to Mammoth Reservoir Company "all of the waters of Gooseberry Creek." (Exhibit 6, page 7).

The defendant's answer in respondents' brief is evasive. It is asserted on page 22 that applications Nos. 1035 and 8989a are satisfied by the storage of water in Scofield Reservoir. No mention is made of the fact of record that application No. 1035 *is a filing on Gooseberry Creek water* for 12020 acre-feet which has priority over Sanpete's Application No. 9593. No mention whatever is made of the award in the Morse Decree "of all of the water of Gooseberry Creek" to Mammoth Reservoir Company. At the oral argument when questioned by the Court about the water right situation, a statement was made by the defendant's counsel that in the opinon of John Bradshaw of the Soil Conservation Service the water right was adequate for the proposed North Sanpete Work Plan. Water rights are matters of record and are not matters of opinion. The record is clear that the water rights of the plaintiffs are valid and existing rights, and according to the defendant's own expert will require more than the entire yield of Gooseberry Creek to satisfy them. It is therefore clear that any water which leaked out of the Fairview Ditch and reached Gooseberry Creek went to satisfy the plaintiffs' water rights.

CONCLUSION

The Amended Findings of Fact and Conclusions of Law must be modified to eliminate from the award to the defendant the water which was never captured and put to beneficial use, but was permitted to leak out of the ditch before reaching the gauging station at the divide.

Respectfully submitted,

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