

1972

**State of Utah, By And Through Its Road Commission v. Dennis K. Blackner And Bertha Mae Blackner, His Wife; Veterans Administration : Brief of Respondents**

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# IN THE SUPREME COURT OF THE STATE OF UTAH

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STATE OF UTAH, by and through  
its ROAD COMMISSION,

*Plaintiff-Appellant,*

vs.

Case No.  
12867

DENNIS K. BLACKNER and  
BERTHA MAE BLACKNER, his  
wife; VETERANS ADMINISTRATION,  
*Defendants-Respondents.*

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## BRIEF OF RESPONDENTS

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Appeal from the Judgment of the District Court  
Davis County, Utah  
Honorable Thornley K. Swan, Presiding

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Clerk, Supreme Court, Utah

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## BRIEF OF RESPONDENTS

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### STATEMENT OF CASE AND FACTS

Respondent is in agreement with the introductory material contained in appellant's brief relating to the Statement of the Case and the basic Statement of the Facts. Since respondent's brief and argument is directed solely to taking issue with Judge Swan's ruling, which was based on factual findings on two issues, this brief will be directed toward a more detailed elaboration of the facts which support the lower Court's ruling.

## ARGUMENT

### POINT I

**THE BOUNDARY OF THE SUBJECT LAND DID NOT CHANGE WHEN THE 1952 FLOOD CAUSED THE WEBER RIVER TO CHANGE ITS COURSE.**

The dispute in this litigation arose when plaintiff sought to condemn lands along the Weber River in Davis and Weber Counties for the purpose of constructing a portion of the Interstate Freeway between the mouth of Weber Canyon and the community of Riverdale in Weber County. The Weber River constitutes a substantial portion of the boundary line in the general area between Davis and Weber Counties, and the freeway generally follows along the southerly bank of the river.

When condemnation papers were served defendants raised the issue in their Answer (R. 13) that the ownership of lands in the area which were taken or damaged by the freeway was substantially greater than that indicated in the Complaint. Subsequently, Interrogatories were submitted to defendants and they again asserted in their Answers thereto (R. 25) that they owned specific areas of land which plaintiff had attributed to other property owners. As a matter of passing interest, the conflict area had been previously acquired by plaintiff via a Quit Claim Deed.

The call of the defendant's deed and that of the various conveyances transferring title to the subject

lands over many years identified the northerly boundary of the Blackner lands as being that part of the NE<sup>1</sup>/<sub>4</sub> of the SE<sup>1</sup>/<sub>4</sub> of Section 27, Township 5 North, Range 1 West, Salt Lake Base and Meridian, U.S. Survey, which was “. . . south of the south bank of the Weber River.” Lacking a more precise tie to fixed monuments or to specific distances and courses, it evolved upon the lower court to determine where the northerly boundary of the Blackner property was. Plaintiff contended, as it does in its brief, that the now located channel of the Weber River constituted the boundary; Blackners, on the other hand, contended that a different channel of the Weber River lying farther to the north constituted the northern boundary of their properties. Their contention was that in the year 1952 a major flooding of the Weber River during the spring run-off caused a sudden, or avulsive, change in the river course.

Blackners are in agreement with the plaintiff that the law governing the boundary dispute is stated in 49 Am. Jur., States, Territories, and Dependencies, Section 21, pertinent portions of which state—

*“Sec. 21 — Changes in Channel as Affecting Boundary.*

The effect upon boundaries of a state, where such boundaries are fixed by the middle of the main channel of a river, by changes in that channel through processes of accretion and avulsion is dependent upon the gradualness or suddenness of the change; when the course of the river and its channel changes gradually, the boundary follows the channel, but if the river suddenly

changes its course or deserts its natural channel, the boundary remains where it was before, that is, in the middle of the altered or deserted river bed. The boundary of a state along a river is not changed by a sudden change of the channel so as to cut an island from the mainland. In fixing the boundary along a main navigable channel which has been left dry by avulsion, all that is required is such certainty as is reasonable as a practical matter, having regard to the circumstances.”

\* \* \*

“In a case where a river has subsequently turned its course, and runs on the other side of an island, the boundary between the states remains as before, and the island does not, in consequence of this action of the water, change its owner.”

Other pertinent sections of the same topic which are of assistance are 22, 23, and 24.

The matter of the ownership of the disputed area, which constituted approximately six acres of land, was set for non-jury hearing before Hon. Thornley K. Swan, District Judge. This matter was heard independently of the condemnation valuation case on October 29, 1971, and again on March 1, 1972.

Blackners took the position at the hearing that prior to 1952 the main channel of the Weber River ran somewhat to the north of where it was located in more recent years and that a disastrous flood condition in the spring of 1952 caused the river to change its main channel to the south and around a goose-neck area, thus creating an island of approximately six acres

of land. They contended that the island area was then and for a great many years past a part of their farm holding and that of their predecessors in interest. In support of their position that the Weber River had made a sudden, or avulsive change, they relied primarily upon the testimony of local residents of the community of South Weber.

Mr. Glen Ray, a 68-year-old resident of South Weber, testified that he had occupied numerous positions with various irrigation companies in the area over a substantial number of years while residing in the area and that he was very familiar with the irrigation ditch systems and the river in general (Tr. 6). From his personal experiences and observations he testified that it was a common practice for many years prior to 1952 to place a dam in the river just immediately to the east of the Blackmer property and to divert the waters from the then channel of the river to the south around the goose-neck area where the river now runs by means of a dam utilizing trees, pea vines and similar materials (Tr. 7). Mr. Ray indicated that he was very familiar with the disputed area from observations over the years and related to the court the various former owners of the Blackner farm (Tr. 7).

Mr. Ray explained that the heavy runoff caused by the snow melt in the year of 1952 was so great as to wash out all of the diversion works of the irrigation companies along the Weber River as well as much of the ditch system which has previously been used. He



explained that the features of the area were so obliterated that it was necessary to go far up the river to the east and to create an entirely new ditch system for the various irrigation companies serving the south Weber area in lieu of the route formerly utilized in securing irrigation water from the Weber River (Tr. 8, 10, 13). Specifically, he stated that the 1952 flood forced the entire flow of the Weber River to be diverted to the south around the island area via the gooseneck which constitutes the present channel of the Weber River and which in prior years had served as a convenience channel for the diversion of irrigation water (Tr. 22).

Mr. Ray further testified that prior to the time of the '52 flood the Weber River originally split its flow at the easterly end of the island and that the "major part of the water" went across the northern end of the island to where it connected with the present stream location. He took a green marker pencil on a plastic overlay on Exhibit 1-A and marked the location of the original stream bed (Tr. 8, 9, 14, 17, 19). He indicated that he had observed the water running in the channel across the north side of the island and that the channel was well-defined and contained numerous trees (Tr. 14). In fact, on the various exhibits subsequently introduced there was no question but what the channel has always existed and that, even in recent years, evidence of some water can be detected at times flowing in the old channel bed.

Dennis Blackner testified that the disputed area

was commonly called the "island" among the residents of South Weber (Tr. 28), and further gave undisputed testimony that there existed an old fence in the area identified by Mr. Ray as being along the south bank of the former channel of the Weber River. Blackner testified that there remained in recent years a substantial number of old black railroad tie posts marking the existence of the fence (Tr. 25).

The evidence was completely lacking as to the claim or claims of the plaintiff derived from any of its predecessors in interest as to either the history of the 1952 flood or of any adverse claim of any kind to the disputed area. Plaintiff seemed to stand solely on its Quit Claim Deed, plus the testimony of Mr. Neiman and Mr. Eardley. However, neither of the State's two indicated expert witnesses had secured independent information in the vicinity nor had they made any investigation on the ground. Both of them simply gave opinions as to where the old channel of the river was, based upon their study of aerial photographs. As a matter of observation it is interesting to note that the examination of any aerial photograph prior to 1952 would have detected water in the present channel area of the Weber River for the simple reason that the prior diversion from the original channel prior to the 1952 flood forced water down around the goose-neck area to the south of the disputed island so that it could be taken out and placed in irrigation ditches. Judge Swan made this observation from the bench in his attempt to reconcile the conflicting testimony of the litigants.

At the further hearing held on March 1, 1972, plaintiff called a Mr. Cecil Kapp, a resident of the area, in an attempt to refute the testimony of Mr. Glen Ray and that of Mr. Blackner. An examination of the testimony of Mr. Kapp on both direct and cross examination makes it abundantly clear that he did not have the background, knowledge and experience exhibited by Mr. Ray, particularly since his various remarks were qualified and prefaced with statements such as "an approximation" of the location of the irrigation dam (Tr. 10), that he had difficulty in reading a 1964 map because things had "changed over the years" (Tr. 11), that he was not familiar with the goose-neck area (Tr. 12), and that he actually didn't know where the "island" is because he didn't have any business being over into that area (Tr. 14). On cross-examination he admitted that he had never been in the area identified by Mr. Ray as being the old channel bed of the Weber River along the north side of the island area (Tr. 17). Actually, in attempting to locate the obliterated area where the dams were previously placed in the Weber River for diversion purposes, Mr. Kapp produced diversion records from the State Engineer's office, and the measurements placed on Exhibit KA (Tr. 18, 19, 20 and 21), together with his testimony, substantially verified the information previously given by Mr. Ray.

The writer suggests that a careful examination of the testimony of Mr. Ray, compared with the testimony of Mr. Kapp, plus the very questionable nature of the foundation given by the two expert opinions for

the plaintiff, should furnish ample grounds to support the finding of Judge Swan (R. 79, 80, 81, 82) that Blackners were the owners of the island area lying to the south of the "green line" placed on Exhibit 1-A by Mr. Ray. Plaintiff is seeking to have this court substitute its judgment for that of the trial judge on a factual issue involving several witnesses and a great many exhibits. This Court has consistently refused to do so where substantial evidence supports the ruling as it does here.

## POINT II

### DEFENDANTS AND THEIR PREDECES- SORS HAD ALTERNATIVELY ESTAB- LISHED ADVERSE TITLE TO THE ISLAND AREA.

As previously indicated, the hearing on the title dispute was notable for the complete lack of any evidence submitted by plaintiff from prior owners of the bordering tract of land on the Weber County side of the river. Plaintiff sought to stand on its Quit Claim Deed and to attempt to destroy the strength of the evidence submitted by the Blackners. Nor did the property taxing authorities of Weber and Davis Counties contribute any light on the matter inasmuch as the amount of property taxed in the direction of the river by each county was so insufficient in acreage as to raise the conclusion that neither county had actually taxed the island area (Exh. 2-Tr. 42 and R. 82). However,

it did appear that when Mr. Blackner purchased the property in 1959 he caused an extensive survey to be made of his holdings and for approximately four years prior to the commencement of the condemnation action he had paid taxes to Davis County on approximately 29.2 acres, which amount of land would include the area in dispute (Tr. 26, 27, 30, 35).

By way of further elaboration as to the history of the island area Mr. Ray pointed out that the predecessors of the Blackners crossed the present river channel in the goose-neck area when it was being used for the diversion of irrigation water with horses and wagons and that a substantial portion of the island area was used to raise peas, alfalfa and other crops (Tr. 11, 12). He explained that the irrigation channel was approximately 20 feet wide and that it could be crossed by the indicated means. Further, he pointed out which of the Blackner predecessors had so used the area and indicated that this had been an annual policy without adverse interference from any other property owner to the north of the river on the Weber County side. He testified that the area had ditches and that the crops were irrigated from river water and that before the 1952 flood the area had "real good soil on that island."

Dennis Blackner testified that during the time he owned the properties his livestock grazed the island area, and that there was no conflict with such use from any other property owner on either the Weber or Davis side of the river and that only occasionally would a

stray animal come into the area (Tr. 24). As previously stated, Blackner further testified as to the location of the old railroad-tie fence and that quite a few of the posts were still in existence up to the time of the trial (Tr. 25).

It is quite evident that the indicated details of adverse possession and use, coupled with the finer points found throughout the testimony of the various witnesses, are completely adequate to sustain the finding by the Court that Blackners and their predecessors in interest had been in continuous, open and notorious possession and occupation of the island area for more than 40 years past (R. 80, 81) by means of fencing, irrigation ditches, crop raising, pasturage and other incidents of ownership such as would adequately meet the statutory requirements of a title claimed upon adverse possession under our Utah Code.

Since the determination on the adverse possession phase of the Quiet Title proceeding also involves factual findings based upon the evidence, defendants again contend that the evidence is ample to support the findings of the lower Court.

## CONCLUSION

The defendants contend that the lower Court had ample evidence to support its Decree resolving ownership of the six-acre island area in them since the facts amply substantiate ownership based upon the avulsive

change in the channel of the Weber River and, alternatively, adverse possession by defendants and their predecessors for substantially more than the required period of time.

Respectfully submitted,

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