1965

Orderville Irrigation Company, A Corporation, et al. v. Glendale Irrigation Company and Wayne D. Criddle : Supplemental Brief of Appellants

IN THE SUPREME COURT

OF THE STATE OF UTAH

ORDERVILLE IRRIGATION COMPANY, a corporation; MT. CARMEL IRRIGATION COMPANY, a corporation; HENRY CARROLL, MERRILL MacDONALD, HOWARD SPENCER, LYLE CHAMBERLAIN, M. G. HOLGATE, GRANT HEATON, FRED MAJOR, DUKE AIKEN and DUNCAN MacDONALD, Plaintiffs and Respondents,	Case No. 10325
vs.	
GLENDALE IRRIGATION COMPANY, and WAYNE D. CRIDDLE, Utah State Engineer, Defendants and Appellants	

SUPPLEMENTAL BRIEF OF APPELLANTS

This Supplemental Brief of Appellants is being filed pursuant to Rule 75 (p) (2) of the Utah Rules of Civil Procedure. In conjunction with submitting this supplemental brief appellants have left with the Clerk of this Court a copy of a decree signed by Judge Thomas H. Burton, dated August 21, 1926, which incorporates the Decreed Schedule of Rights on the Virgin River System. (See paragraph IX). The Decreed Schedule of Water Rights was submitted by stipulation of the parties at the oral argument of this appeal. The Judge Burton Decree of August 21, 1926, was not a

part of the files of the lower court as an exhibit and during the oral argument this court announced that the proffered decree could not be considered in resolving this dispute. However, this decree is on file and is a part of the official records in the office of the State Engineer and appellants respectfully submit that this court may take judicial notice of it.

As noted in paragraph 1 of the Decreed Schedule of Water Rights the rights to the use of the waters of the Virgin River System were adjudicated under the provisions of Chapter 67, Laws of Utah 1919 and 1921.

The procedure for the adjudication of the rights on a river system is set forth in Sections 20 to 40, inclusive, of Chapter 67. Section 37, Chapter 67, provides that a record of the rights awarded will be kept in the office of the State Engineer.

> If no appeal is taken from said judgment within six months after the same has been entered, or, if the case is appealed, within thirty days after the final judgment on appeal is entered, it shall be the duty of the clerk of the district court to issue to each person, corporation or association having been awarded the use of water by said judgment, a certificate in triplicate attested under the seal of the court, setting forth the determination of said water right, as specified in Section 33.

> Three copies of said certificate shall be transmitted, in person or by registered mail, to the appropriator, who shall, within thirty days, have one of the same recorded in books especially provided for that purpose in the office of the county recorder of the county in which the water is diverted from its natural channel, one in the county where the water is applied, and the other shall be delivered to the State Engineer, and filed in his office as part of the records thereof. Said certificate shall supersede any certificate thereon issued by the State Engineer. (Emphasis Added)

This section was rewritten in 1937 in its present form, Section 73-4-17, Utah Code Annotated, 1953, which states:

> Within thirty days after the entry of final judgment of the district court, or if an appeal is taken to the Supreme Court, within thirty days after the final judgment on remittitur is entered, it shall be the duty of the clerk of the district court to deliver to the state engineer a certified copy of such judgment and to cause a certified copy thereof to be filed with the county recorder of each county in which the water adjudicated is diverted from its natural source and each county where the water is applied. No

> filing fee shall be charged by either the state engineer or the county recorder. (Emphasis Added)

It is apparent that the legislature intended that the State Engineer's Office be one of offices of record for the adjudicated rights in a statutory determination proceedings. This court has on a number of occasions ruled that it may take judicial notice of the records in the State Engineer's Office. In McGarry v. Thompson, 114 Utah 442, 447, 201 P. 2d 288 (1948) the records in the State Engineer's Office were considered by this court in resolving the dispute although the Engineer's records had not been introduced into evidence:

> The record on appeal fails to show that Hintzen's application to appropriate was ever approved. However, the records of the State Engineer's Office show that it was approved on March 19, 1947, long after both of these assignments had been made and after the State Engineer had approved Thompson's change application. Since the records of the State Engineer's Office are public records, we take judicial notice thereof. (Emphasis Added)

In the subsequent decision of Lehi Irr. Co. v. Jones, 115 Utah 136, 143, 202 P. 2d 892 (1949) it was held:

> None of these records of others were ever put before the trial court.

> By virtue of Section 104-46-1, U.C.A., 1943, sub-section (3) as interpreted in State Board of Land Commissioners v. Ririe, 56 Utah 213, 190 P. 59, and McGarry v. Thompson, 114 Utah 442, 201 P. 2d 288, it is clear that judicial notice may be taken of these documents as public records. Thus it is immaterial that they were not introduced in evidence.

Also see American Fork Irr. Co. v. Linke, 121 Utah 90, 96, 239 P. 2d 188 (1951). The appellants urge that under the rule announced in these prior decisions this court may take judicial notice of the decree signed by Judge Thomas H. Burton on August 21, 1926. We would specifically like to direct the court's attention to paragraph X which appears on the last page of the decree and provides how the waters of this system are to be distributed in times of storage:

> When there is not sufficient water in the Virgin River and its tributaries to supply all the rights hereby decreed, the available water shall be distributed to the various appropriators in accordance with their respective priorities as herein fixed, and no appropriator, except as specified herein, shall be entitled to divert and use water hereunder for any purpose until said prior appropriators shall have been satisfied in full. Where there are several rights of equal priority and

> there is not enough water to supply all the rights having such priority, the available water shall be prorated among such appropriators of equal priority in the proportion which the quantity to which they are entitled bears to the entire flow available to the rights of the priority in question. (Emphasis Added)

This provision makes it clear that the class of rights for distribution purposes set forth in the Decreed Schedule of Water Rights does not have the effect of nullifying the priorities of the individual rights as contended by respondent. We submit that this paragraph leaves no doubt as to meaning of the priorities for the individual rights or how the waters of this system are to be distributed in times of storage.

Respectfully submitted,

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