

Re: Price River
Cont

IN THE DISTRICT COURT OF SANPETE COUNTY

STATE OF UTAH

CARBON CANAL COMPANY, et al,
Plaintiffs,

Civil Case No. 5357

vs.

MEMORANDUM DECISION

COTTONWOOD-GOOSEBERRY
IRRIGATION COMPANY, et al,
Defendants. :

The Cottonwood-Gooseberry Irrigation Company, Inc., the primary defendant herein, is the owner of a water right which was initiated in 1869 and is more fully described in diligence claim No. 197, on file in the office of the Utah State Engineer, which the Court finds to be sufficient to comply with the provisions of Sec. 73-5-13, U.C.A., 1953.

This Company intercepts water on the eastern slope of the Wasatch Range above Fairview, Utah, principally from Gooseberry Creek, a tributary of Price River, and Boulder Creek, a tributary of Huntington Creek, impounds it in two lakes or reservoirs and in feeder canals and transports it over a divide to the western slope of the mountains and uses it to produce agricultural crops in Sanpete County. The transmission system makes use of earthen ditches for the most part over porous soil and broken rocky places, resulting in substantial losses from seepage, estimated at from 40% to 75%. There is also some leakage from the lakes.

The plaintiffs' water rights are supplied from Price River, and they are the beneficiaries of any water that escapes from defendants' facilities and finds its way into the Price River System. They are, therefore, interested in having as little water as possible transported over the mountain and used in Sanpete County.

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.

The evidence in this case is fraught with many uncertainties. Accurate measuring devices have not been used until recent years, and the devices have not been installed until after the water has been flowing for a short time each spring, so that all the water taken over the divide has not been measured. Where the water goes that is lost from the defendants' trans-mountain ditch is the subject of conflicting and speculative testimony.

The findings of fact herein specified and inferences to be drawn therefrom appear to be reasonable and to be supported by the preponderance of the evidence.

The Court finds that the defendant irrigation company has been making continuous and substantial efforts since 1869 to improve its water transmission system and to prevent loss of water therefrom.

If defendants' transmission ditch lost 40% of the water conveyed in it from the lakes to the point where it passes over the divide into Cottonwood, then it required a diversion at the lakes of more than 4000 acre feet to make 2410 acre feet at the divide in the year 1957. Defendants' diligence claim is for 3020 acre feet of water each year, of which it beneficially used about 1950 acre feet in the irrigation of 1600 acres of land. Using the 40% transmission loss factor, this would indicate that about 3250 acre feet of water was diverted at the lakes during the years specified in the claim. If transmission losses were greater than 40%, the diversions must have been proportionately greater.

The defendant irrigation company now seeks to further improve its transmission facilities by diverting its water from the lakes to the natural channel of Gooseberry Creek, flowing the water in this creek for a short distance, and then taking it from the creek

and running it through a tunnel which has been drilled through the mountain to the western slope, thereby saving a great amount of the water formerly lost in the old ditch and using such salvaged water in Sanpete County.

The amount of and the transportation of this salvaged water out of the watershed are among the issues in this case.

The defendant claims to be entitled to all the water supplied by nature in the drainage area described in its diligence claim, and to all the salvaged water. As a matter of common knowledge, we know that the amount of precipitation varies from year to year. The evidence indicates that in some years upwards of 9000 acre feet of water is available in the area claimed by defendant. In years of exceptionally heavy precipitation, such as the year 1952, a great deal more water would be available. Governor Clyde's report states that most of the available water is not intercepted by defendants' lakes or feeder canals; that as the snow melts the water sinks into the soil more deeply than the bottom of the feeder canals and passes below them to lower natural channels. The Court finds that defendants' claim to all the water available in the area described in its diligence claim is not supported by the evidence.

As to the amount of water beneficially used, the Court concludes that where from 40 to 75% of the diverted water is lost because of evaporation, transpiration, and seepage from the ditch, but reasonable efforts, according to the practices obtaining and the economics involved, in the local area, have been made to eliminate waste, it should be held that the total amount of water diverted is beneficially used.

An instructive discussion of this matter is contained in Hutchings, "Selected Problems in the Law of Water Rights in the West," at pages 306-7-8 and 9. Also, see Thayer v. California Development Co., 128 Pac. 21, page 29, and Witherill v. Brehm, 240 Pac. 529 (1925), and 279 Pac. 432 (1929); and the dissenting

opinions in Little Cottonwood Water Co., v. Kimball, 76 Utah 243, 299 Pac. 116.

The present case is distinguishable on the facts from the Dausenbrink v. Burger Case.

The Court finds that the defendant irrigation company has lost no water rights because of non-use, even though the losses from evaporation, transpiration, seepage, and breakage of the ditch banks have been severe; and that there has been no five-year period when the water available in the Fairview Lakes and the feeder canals has not been diverted and beneficially used in the irrigation of crops and in carrying the water to the place of ultimate use and consumption by the defendant company.

The water salvaged by means of artificial improvements belongs to the one making the improvements, provided, that the rights of others are not impaired. See Hutchings at Pages 372-373, and cases cited.

The Court finds that the defendant company has appropriated and beneficially used the 3029 acre feet as set forth in its diligence claim, but its claim is limited to that amount as a maximum.

The Court further finds that the rights of the plaintiffs will not be impaired by the salvage of the seepage water from the defendant's ditch by the defendants. It appears that a substantial portion of such lost water is consumed by plant life, evaporation, and percolation to the sub-strata, from whence it enters the underground water supply, some of it appearing in a spring on the western side of the mountain into which it seeped, and any remaining water that drains into the plaintiffs' sources of supply is in excess of their rights to use water from such source.

The Court also finds that Change Application No. 2-6448 as approved by the State Engineer should be allowed, subject to the conditions imposed by the State Engineer, and subject also to the following:

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(a) Any channel losses from conveyance of the defendant's water in the natural stream that is tributary to Gooseberry Creek.

(b) That the defendant's right is limited to 3020 acre feet diversion at the point where the water from defendant's canal is discharged into the above-mentioned natural channel.

(c) That an approved measuring device be installed, and maintained as required, at or near the east portal of defendant's tunnel, and that the water discharged by defendant into the natural canal, less channel losses, be measured to defendant, and if there be at that point any excess over the amount released by defendant into the natural channel, less channel losses to that point, such excess be turned back into the natural channel.

Counsel for defendant irrigation company will prepare the necessary findings, conclusions, and decree to give effect to this decision.

Dated this 22nd day of April, 1965.

Maurice Harding
Maurice Harding, Judge