

IN THE DISTRICT COURT OF THE SIXTH JUDICIAL DISTRICT OF NEW MEXICO,
WITHIN AND FOR OTERO COUNTY.

The Tularosa Community Ditch, et al,
Plaintiff.-

vs.

The Tularosa Land and Cattle Company, et als
Defendants.-

12/24/08

No. 295.

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This cause was filed in the District Court of Otero County, November 29th, 1904 and more than a year and a half was taken up in preliminary motions, demurrers, etc, the issues not being fully made up until James A. Carroll and the Mescalero Indians filed their Answer on May 15th, 1906, and replies thereto were afterwards filed by plaintiffs and the cross complainants, a referee was thereupon appointed by the Court, and a portion of the testimony taken when the first referee resigned after reporting the testimony taken by him another was appointed in December 1907, and it was not until February 17th, 1908 that the final testimony was taken.

By stipulation of counsel and subsequent agreements time was allowed and taken for the filing of briefs until the final briefs were filed in November, 1908, nearly four years after the commencement of the suit. The seeming delay was no doubt due to the extreme difficulty involved in getting at the somewhat complicated state of facts, and from the fact that the numerous counsel engaged were scattered over the entire Territory, thus making it extremely difficult for them to arrange their affairs so as to be present at the many hearings before the Referee.

After reading all the evidence offered, and from an examination of all the exhibits, maps, plats, deeds and other documentary evidence filed in the case, the Court finds: the main facts upon which a decision of the matters involved must rest to be:

First . That the Tularosa River, or creek, is a natural stream arising at a point known as the Head Springs, in township fourteen

south of range twelve east on what is now the Mescalero Apache Indian Reservation, and about three and a half or four miles above the present location of the Agency Buildings; that said stream flows in a general westerly direction for a distance of eighteen or twenty miles, through a canyon in the mountains, varying in width from a few hundred yards to a half mile or more, partially in its natural channel and partly in artificial ^{ditches} disthces to Tularosa, which is situated below the mouth of the canyon on the plains, the stream is fed by various springs, both above and below the west line of the reservation and from Cienegas or swampy marshes at different parts of the canyon.

Second. That in the year 1862 some mexican families, perhaps forty families or more, and comprising perhaps two or three hundred souls, founded the settlement of Tularosa and began using water out of the Tularosa River for the irrigation of their lands. That at that time the Mescalero Apaches were hostile savages and that the native or mexican people who established the settlement of Tularosa were compelled to fight these Indians at various times, in much the same manner as shown in the history of early settlement of all this country. That more settlers from the Rio Grande Country came to Tularosa from year to year and cultivated and irrigated acerage of lands in the Tularosa Community increased until a thousand acres or more were reclaimed and cultivated. That these people from year to year ~~marked~~ on the river and ditches cleaning out tules or flags, and other growth and drift and debres, which accumulated in the stream above, draining marshes and buildangs ditches to change the course of the s tream so that the flow of the water would be unimpeded, until it is practically impossible to tell what portion of the stream now follows its natural channel and what portion flows through artificial channels in many places. These native or mexican people followed the system of their ancestors and their work was done and their rights acquired under the community ditch system in vogue in all that part of the Territory taken from Mexico at the close of the Mexican War, by the Treaty of Guadalupe Hidalgo, and the subsequent treaties. It is absolutely impossible to detornibe how much land was reclaimed and irrigated prior to the establishment

of the Mescalero Indian Reservation, some of plaintiffs witnesses being positive that it was much more than now, and some of defendants witnesses being equally positive that it was much less. The evidence on that proposition being vague and depending wholly on the recollection of witnesses who were accustomed to the Mexican Vara as a measurement of land, and who even as yet have but a limited idea of an english acre, I think it is safe to say that the acreage cultivated at Tularosa at the time the water commenced to be used above by the settlers and Indians was about the same as at present, which according to the measurements of Mr Robertson, who is the only witnesses professing to give accurate figures, is 1070.73 acres,

Blazer
Third. The Court further finds that one, J.H. Blazer settled on the headwaters of the river prior to the settlement of the Tularosa Community and put in a mill and ditch and cultivated same land, opening up more from time to time, until in 1877 he had under irrigation from said stream on his own place and the place known as the Hedges place, something like 122.02 acres, all inside of the Mescalero Reservation, and which he and his heirs have held until the present time without any legal title, but under a claim of right which does not seem to have been disputed by the Government.

Fourth. That beginning about the year 1870 settlers began taking up lands in the canon above the community of Tularosa, and below the present Indian Reservation, and taking water from the Tularosa River for the irrigation of said lands. Here again the Testimony as to the exact times and the amounts cultivated and irrigated by each of these settlers is vague and impossible of determination. It seems reasonably sure however, that for many years, at least ten or more, there has been cultivated and irrigated of such lands 537.62 acres, the amount now so irrigated and cultivated according to Mr Robertson's measurements. Of this amount the Tularosa Land and Cattle Company own 253.92 acres, and the other settlers in the canyon proper, now on the reservation, or in the Tularosa Community 283.70 acres.

Fifth. That in the year 1866 the Legislature of the Territory of New Mexico past an act making it a penal offense for any person to take water out of the Tularosa River above the community or settle-

ment of Tularosa, and making such interference or use^s of the waters except for mill or machinery purposes, subject to a fine of ~~were~~ not less than ten dollars or more than fifty dollars, to be imposed by the Justice of the Peace of Tularosa Plaza or Village, which act has never been repealed. That by a decree of Court which had jurisdiction in the premises, and by stipulation filed in this case the Tularosa Land and Cattle Company is entitled to ten-twenty fourths of the water which is claimed by the Tularosa Community.

Sixth. The Court further finds, that the Mescalero Apache Indian Agency was first created by a proclamation of the President, May 29th, 1873, and the next year, (1874) the boundaries were changed to the present boundaries of said reservation. That some time soon thereafter the Mescalero Apache Indians were removed to this reservation and kept there until the present time in charge of an Agent, under the Bureau of Indian Affairs, Department of the Interior. That thereafter, beginning in 1884 or 1885, the Indians under the supervision of the Agent began to take out water from the Tularosa River and to farm small patches of land which they have increased until now there is cultivated and irrigated from said stream on the reservation, (including the Blazer lands,) according to Mr Robertson's measurements ^{326.13} 470.04 acres. From the evidence it appears that perhaps the greater portion of the Indian land so irrigated had been brought under irrigation since 1893 or 1894.

Seventh. The Court finds that the waters used by Andrew Wilson, the brothers Jose and Selso Talles and Agustin Davoles in Nogal Canyon was developed by them and that the ordinary flow from such springs did not reach the main Tularosa Canyon, and that the injunction should be dissolved as to them, except that at all times, when not engaged in necessary irrigation of their now cultivated lands, they should allow the same to flow down into said Tularosa Canon.

Eighth. That the average normal flow of the Rio Tularosa at the Blazer Mill is about eleven feet per second of time, and at the west line of the Reservation about nineteen feet per second. When all the water of the stream is flowing therein, which is probably increased further down by springs and ciegegas, so that when the water arrives at the Tularosa Community there is probably a flow of twenty second feet or more, allowing for seepage and evaporation.

Ninth. That there is water enough in said Tularosa River to properly irrigate all of the lands now under cultivation and irrigation on the entire stream, if properly and economically used, and that the waters should be divided pro-rata inpoint of time, allowing it to be used certain hours: 1st. By the Indians, and others on the Reservation. 2nd. By the settlers and the Tularosa Land and Cattle Company, and 3rd. By the Tularosa Community Ditch, in proportion to the lands of each so cultivated and irrigated, for example basing the division upon a basis of fourteen ^{days} hours, according to Mr Robertson's figures and measurement, we find:

	Acres.	Per cent of total.	Hours of run on basis of 14 days hours division.
✓ Indian Reservation.	470.04	22.611	76.00 ✓
✓ Tularosa Land & Cattle Company,	253.92	12.220	45.80 ↶
✓ Settlers in canon,	283.70	13.646	41.05 ↶
✓ Tularosa Community,	1070.73	51.523	173.15
	<u>2078.39</u>	<u>100.000</u>	<u>336.00</u>

From the foregoing statement of facts, the Court announces the following,

) CONCLUSIONS OF LAW.

First. That James A. Carroll, and his successors and the Mescalero Apache Indians under his or their control, are the appropriators and users of the waters of the Tularosa river and that the United States is not such appropriator and therefore not a party to this suit. That this Court therefore has jurisdiction to prevent such Agent and the Indians under his control, from interfering with acquired and vested rights of persons, individual and corporate, who are citizens and whose 'acquired and vested rights are subject to the jurisdiction of this Court.

Second. That the Tularosa Community Ditch, as now organized, under statutes, is now and has always been under the laws of New Mexico, vested with the power and authority to appropriate water for

the irrigation of the lands of the Community, and that the title of the lands of the individual members of the community cannot be raised by the defendants in this case.

Third. That the Tularosa Community ditch is entitled to sufficient water to irrigate all its cultivated and irrigated lands, now under cultivation and irrigation, from the Tularosa River at the time, and during the hours hereafter to be decreed by this court, and to sufficient water for domestic purposes at all times.

Fourth. That by the stipulation and former decrees of the Court herein, the Tularosa Land and Cattle Company are entitled to the use of the waters of said stream at the times and during the hours hereinafter to be decreed by the Court.

Fifth. That the Statute of 1866 was not a Statute of Limitation, and did not prevent the settlers of Tularosa Canyon from acquiring rights of the Tularosa River, but that said settlers below the west line of said reservation have by more than ten years continuous, adverse and notorious user of the waters of said stream, and by the application thereof to the irrigation of their said lands, acquired the right to irrigate 237.62 acres of land, said water to be used by them at the time and during the hours hereafter to be decreed by this Court.

Sixth. That the Indians on said Mescalero Apache Indian Reservation by their various agents and under the supervision of said agents, together with said Almer N. Blazer, have appropriated, and are entitled to the use of sufficient water to irrigate 470.04 acres of land from said Tularosa River, by more than ten years open, notorious and adverse user, said water to be used in the manner and at the hours as to be hereinafter decreed, and without waste and to be returned to the main channel of the Tularosa River when not in use, under the decree hereinafter to be rendered.

Seventh. That Andrew Wilson, Celso Telles, Jose Telles, and (Augustin) Davokes are entitled to the water of the Nogal Canyon for the irrigation of their lands, said irrigation to be without waste and all surplus water to be turned into the main channel of the Tularosa River, except when being actually and necessarily used for their lands

now actually under cultivation and irrigation.

St. A
Eighth. That the use of all water in such stream for irrigation purposes should be strictly economical and without waste, and all water not being actually and necessarily used for irrigation purposes should be permitted to flow down the main channel of said stream, and that the distribution of such water should be made by a Commissioner, to be named annually by this Court, his compensation to be borne by all the water users from said stream pro-rata.

(Signed) Edward A. Mann,

Judge.

Alamogordo, N.M.

Dec. 24th, 1908.

Exhibit B.

No. 293

Tularosa Community Ditch

et al

-VS-

Tularosa Land & Cattle Company

et al

FINDINGS OF FACT

CONCLUSIONS OF LAW.
FEB 23 1911

OFFICE OF TERRITORIAL ENGINEER
SANTA FE, NEW MEXICO

F I L E D

Dec. 24, 1908.

Chas. P. Downs, Clerk.

Handwritten signature