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A-B Cattle Co. v. U. S.

IN THE SUPREME COURT OF THE STATE OF COLORADO

Case No. 27714

A-B CATTLE COMPANY, et al., Plaintiffs, v. THE UNITED STATES OF AMERICA, Defendant.	CERTIFICATE TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF THE UNITED STATES OF AMERICA

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I

QUESTION CERTIFIED BY THE UNITED STATES COURT OF CLAIMS TO THE COLORADO SUPREME COURT

Under Colorado law, does the owner of a decreed water right to divert and use water from a natural stream have a right to receive water of such quality and condition, including the silt content thereof, as has historically been received under that right?

II

INTRODUCTION

This action was brought by the stockholders of the Bessemer Irrigating Ditch Company (Bessemer) in the United States Court of Claims to recover for the alleged loss of silt in the water diverted by Bessemer from the Arkansas River for irrigation, domestic, municipal, and other uses. The silt carried by the Arkansas River Streamflow, which historically has been in the water diverted by Bessemer during periods of high runoff now settles in the Pueblo Reservoir, which inundated Bessemer's diversion works on the river. This reservoir was built by the United States under a contract with Southeastern Colorado Water Conservancy District as part of the Fryingpan-Arkansas Project. The United States has condemned Bessemer's diversion works and the upper 5.3 miles of its ditch and has reimbursed Bessemer and its stockholders for the property taken by condemnation. The United States now delivers a volume of water equal to Bessemer's direct flow rights to Bessemer's guaging station directly out of Pueblo Reservoir at no expense to plaintiffs.

There has been no trial to determine any of the facts in this case. The facts upon which there is agreement and the contentions of the parties are set forth in the certificate to this Court of a question of Colorado water law by the Court of Claims in this case. Since the proceeding in this Court is for the resolution of a pure question of Colorado law, which will have application under any set of similar circumstances, no additional facts should be necessary for this proceeding.

In its Brief, Bessemer has set forth its version of the factual background of this dispute. Since the issue to be considered by this Court is purely legal, it is surprising to observe that nearly one-half of Bessemer's presentation is devoted to treatment of the facts. While some of these facts have their foundation in the Statment of Facts contained in the Court of Claims' certification, many of the assertions made are merely statements of Bessemer's contentions which purport to be backed up by certain affidavits which they have attached to their brief.

It is the position of the United States that facts not contained in the agreed statement are unnecessary to resolution of the legal question submitted to this Court. In view of the fact, however, that Bessemer has chosen to base so much of its argument upon its version of the facts in this case, as presented in the affidavits accompanying its Brief, and in order to avoid the possibility that the Court might be misled into making bad law by the apparently hard facts of this case, the United States feels compelled to point out that many of the facts asserted by Bessemer are vigorously disputed by the United States. To illustrate some of the major disagreements, we have attached hereto an affidavit of Mr. Larry R. Dozier, an engineer from the Bureau of Reclamation, detailing some of the results of his extensive study of the Bessemer Ditch system and the conclusions he has drawn from this investigation.

This affidavit demonstrates that there is disagreement as to the extent of the increase in the ditch loss of water between Bessemer's guaging station and the place of use resulting from the delivery of clear water to Bessemer; the portions of the year in which Bessemer received silty water in their ditch prior to closure of Pueblo Dam; whether Bessemer did not have extensive problems

with leakage and seepage from their ditch before they began receiving water from Pueblo Reservoir; and how long the silt coating deposited on the bed and banks of the ditch during periods of high runoff continued to have a sealing effect on the ditch after the silt load in the river water dropped during periods of low runoff.

If the seepage losses in Bessemer's ditches and laterals are as high as plaintiffs claim, they indicate an inefficient, leaky ditch system that was kept operable only by the continued recoating by silty water being run through it. To continue the conditions providing this silty water would preclude any further developments on the stream or in the watershed that would reduce the silt load in the stream.

III

SUMMARY OF ARGUMENT

This is not a pollution case--it is exactly the opposite. It is an attempt to make the United States (and, indirectly, the water users from the Fryingpan-Arkansas Project) pay Bessemer Ditch Company approximately $113,000,000 for cleaning up its water supply. It is an attempt by a senior, direct flow appropriator to establish a precedent that will effectively prevent the construction of future storage facilities by junior appropriators in the State of Colorado. It is an attempt to erode the key principle of Colorado law which directs maximum utilization of the scarce resource of water by attaching discredited and unacceptable riparian precepts to established appropriation doctrines. It is an attempt to command the unimpeded flow of the stream to facilitate the transportation of water to the place of use through an old, wasteful, and inefficient irrigation system with senior rights at the expense

of a junior storage appropriator in derogation of the concept of maximum utilization of the resource. It is an attempt to return to law appropriate to an era of nearly one hundred years ago when all appropriations were of the direct flow type to present physical conditions and pressures on our limited water supply that clearly will not tolerate such simplistic approaches.

Sections 5 and 6 of Article XVI of the Colorado Constitution establish that waters in public streams belong to the public and are dedicated to use by the people of the state. Further, the Constitution provides that the right to divert unappropriated waters is never to be denied. Under these great and historic principles, an appropriator acquires only a usufructuary right. This means the appropriator has only a right to use water with all members of the public having correlative rights to acquire similar interests in the common resource free of any obligation to compensate prior appropriators for inconvenience or detriments from the exercise of such rights. This court has held that the basic rule is maximum utilization and that the direct flow appropriator is entitled to water for direct and immediate application to beneficial use measured by rate of low, not acre feet.

The present demands for water in the Arkansas Valley and, indeed, throughout the State of Colorado are such that conservation through the construction of storage reservoirs is the only way that most citizens and farmers of this state are able to survive. The laws of this state have accordingly looked with favor on construction of storage projects.

Two key precepts emerge from these general concepts. First, an appropriator gets the right to use public water--H_2O--and nothing more from his appropriation. There is no provision

in the Colorado water law for the appropriation of water of a given quality. Colorado water law does however provide for appropriation of water for a particular purpose or use. The water now received by plaintiffs is suitable for the uses for which plaintiffs have appropriated the water, i.e. irrigation, domestic and municipal. Second, the concept of maximum utilization has as its foundation the seemingly contradictory concepts of protection of vested senior rights combined with freedom of others to make junior diversions and uses so that there is a maximum utilization of water. This rule is really one of mutual accomodation of senior and junior appropriators so that neither suffers unreasonably from the actions of the other. In other words, both senior and junior appropriators must give a little so that the over-riding public policy of maximum utilization can be achieved. Plaintiffs' position herein violates this because it would inhibit maximum use of public waters from the common good by, in effect, economically prohibiting junior storage appropriations.

The construction of Pueblo Reservoir has resulted in considerable benefit to Bessemer, as will most reservoir storage projects benefit senior direct flow right appropriators. These benefits include flood protection, a much superior diversion facility through a headworks in Pueblo Dam which will cost Bessemer nothing for construction and operation and maintenance, and free operation and maintenance of over one mile of ditch (just below the Dam) which has historically been a problem to the company. These facilities replace an old diversion facility and four miles of ditch, both of which were difficult and expensive to maintain. We submit that these benefits, among others, are more than adequate compensation for the alleged detriment of delivery of clear water.

More basically, however, the issue is conservation. Without storage facilities, the people of this state have not, cannot and will not live and prosper because they will have lost the principal available means of conservation.

Lastly, it must be said that Bessemer cannot disguise the fact that the cornerstone of their case is waste. What they are really asking for is that this Court protect and legitimize and old, wasteful and inefficient irrigation system by requiring that the United States compensate it because its ditch has excessive leakage. Bessemer does not discuss its position in this context because it knows full well that the rule in this state is that direct flow appropriators are entitled only to the right to use a rate of flow measured at their point of diversion and not to a specified number of acre feet per year. It has no right to any specific water or any specific property thereof as long as the water delivered is suitable for irrigation domestic and municipal purposes.

We submit that the law of Colorado is clear and that this Court should answer the certified question with a firm and resolute "No."

IV

MAXIMUM UTILIZATION

One of the basic concepts upon which Colorado water law, as well as the water law in other western states rests, where water is in short supply, is that water may not be wasted where it can be utilized by others. From this, in the State of Colorado has evolved the doctrine of maximum utilization. It began with Sections 5 and 6 of Article XVI of the Colorado Constitution which provide:

> Section 5. Water of streams public property. The water of every natural stream, not heretofore appropriated, within the State of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.
>
> Section 6. Diverting unappropriated water--priority preferred uses. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using water for domestic purposes shall have the preference over those claimed for any other purpose, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes. [Emphasis added.]

Analyzing the above sections, there are certain key concepts that appear. One is that the water is in the ownership of the public; two, that there is a dedicated right of the public to use unappropriated waters; and three, this right to divert unappropriated water shall never be denied. Under these sections and the doctrines they stand for, an appropriator acquires only a usufructuary right (as conceded by Bessemer). Hutchens at page 441 of Volume 1 of Water Rights Laws In The Nineteen Western States describes usufruct and states:

> The appropriator acquires no specific property in the particles of water -- the corpus of the water while flowing in the stream. What he acquires is a right of diversion and use of some specific quantity of water that at that time may be flowing in the stream. The right of usufruct of the appropriator is subject to a reasonable use and consumption of the water for beneficial purposes.

See a similar definition in Arizona v. California, 283 U.S. 423, 459 (1931). There are numerous cases to the same effect, some of which emphasize that an appropriator does not acquire an ownership of any particular water or any part of a stream. See, e.g., Mitchell Irrigation District v. Sharp, 121 F.2d 964 (C.A. 10, 1941); Red River Valley Company, 51 N.M. 207, 182 P.2d 421 (1947); Snow v. Abalos, 18 N.M. 681, 140 Pac. 1044 (1914).

An appropriator accordingly acquires the right to use water, with all of the members of the public having correlative rights to acquire similar interests in the common public resources free of obligation to compensate prior appropriators for inconveniences or detriments from the exercise of such rights.

The Court must also keep in mind that the question referred to it pertains to an arid area and a river which has been heavily overappropriated. The acute water supply situation in the Arkansas River Valley is well described by this Court in the case of Fellhauer v. People, et al., 167 Colo. 320, 447 P.2d 986, 988 (1968), as follows:

> All of the surface flow in the Arkansas River during each irrigation season had been appropriated and placed to a beneficial use long before defendant's well was drilled in 1935. These surface appropriations have adjudicated priority rights and there is not enough surface water in the river to satisfy these decreed rights. In other words, the Arkansas River is very much over-appropriated. On June 24, 1966 the Fort Lyon Canal, whose head gate is about 33 miles downstream from defendant's well, was receiving only 272 cubic feet of water per second of time of the 760 second feet decreed to it with priority date of March 1, 1887, and six days later there was no water whatsoever for its use.

Particular attention is called to the statements concerning the Fort Lyon Canal which are roughly parallel to Bessemer (which has 70 cfs of pre-1882 rights and 322 cfs of 1887 rights).

The United States Supreme Court dealt with a specific problem of this kind in Schodde v. Twin Falls Land and Water Company, 224 U.S. 107 (1911). In this case, the plaintiffs had appropriated water out of the Snake River in an area where there were high banks along the river and had built several water-wheel diversion facilities to raise the water out of the stream. Defendant built a dam downstream from plaintiffs' water-wheels which raised the level of the stream in that vicinity to the point that the current no longer flowed. The Court rejected plaintiffs' contention that they were entitled to a right to have the current continue to turn their water-wheels to divert water from the stream.

Colorado has specifically adopted the Schodde rule. An early Colorado case involving the same type of problem is Empire Water and Power Company v. Cascade Town Co., 205 Fed. 123 (C.A. 8, 1913). In this case, Cascade had constructed a large improvement at the site of a falls on Cascade Creek. Water from the falls sprayed on the adjacent lands which produced extensive and luxuriant growth of flora. Cascade had built up a substantial tourist attraction based on the resulting pleasant surroundings. Empire sought to divert a substantial portion of Cascade Creek above the falls. The trial court found that such diversion would largely, if not wholly, destroy the pleasant surroundings and would have the effect of putting Cascade largely out of business. The Circuit Court upheld Empire's right to divert, without compensation to Cascade, citing the Schodde case with approval and stating that a landowner could not hold all the water in a stream to water the vegetation along the banks.

The common thread that runs through Schodde and Empire and other cases which could be cited is that the courts have rejected claimed rights of the type asserted by plaintiff herein for the control of the major portion of the stream to facilitate their utilization of a fraction of the stream, which would inhibit development of public waters for the common good.

Two very significant Colorado cases with respect to this issue are The City of Colorado Springs v. Bender, 148 Colo. 458 366 P.2d 552 (1961), and Fellhauer v. People, 447 P.2d 986 (1969). The Fellhauer case involved an underground user which sought to enjoin the State Engineer from shutting down his well for the alleged purpose of supplying water to senior surface appropriators during a time of shortage. The Court described the general legal posture of the disputes of this kind as follows, including quoting with favor from the Bender case, supra (447 P.2d at 993):

> For nearly a century the waters of the Arkansas River have been used and re-used many times over as they procede from the elevations exceeding 12,000 feet to 3,375 feet at the state line. These uses and similar uses on other rivers, have developed under Article XVI, section 6 of the Colorado constitution which contains inter alia two provisions: "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose;"
>
> Under those provisions and the statutes enacted thereunder a great body of law has been established. In the six briefs, all ably written, sixty Colorado cases have been cited. These decisions are concerned primarily with respective priorities of vested rights which had been established. It is implicit in these constitutional provisions that, along with the vested rights, there shall be maximum utilization of the water of this State. As administration of water approaches its second century the curtain is opening upon the new drama of maximum utilization and how constitutionally that doctrine can be integrated into the law of vested rights. We have known for a long time that the doctrine was lurking in the backstage shadows as a result of the accepted, though oft violated, principle that the right to water does not give the right to waste it. Colorado Springs v.

Bender, 148 Colo. 458, 366 P.2d 552 (1961) might be called the signal that the curtain was about to rise. There it was stated as follows:

> At his own point of diversion on a natural watercourse, each diverter must establish some reasonable means of effectuating his diversion. He is not entitled to command the whole or a substantial flow of the stream merely to facilitate his taking the fraction of the whole flow to which he is entitled. Schodde v. Twin Falls Land & Water Co. (citation omitted). This principle applied to diversion of underflow or underground water means that priority or appropriation does not give a right to an inefficient means of diversion, such as a well which reaches to such a shallow depth into the available water supply that a shortage would occur to such senior even though diversion by others did not deplete the stream below where there would be an inadequate supply for the senior's lawful demand . . . .
>
> * * *
>
> A determination of these questions is necessary. The Court must determine what, if anything, the plaintiffs should be required to do to make more efficient the facilities at their point of diversion, due regard being given to the purposes for which the appropriation had been made, and the 'economic reach' of the plaintiffs. The plaintiffs cannot reasonably 'command the whole' source of supply merely to facilitate the taking by them of the fraction of the entire flow to which their senior appropriation entitles them. On the other hand, plaintiffs cannot be required to improve their extraction facilities beyond their economic reach, upon a consideration of all the factors involved. [Emphasis by the Court.]

In the Bender case, the Court, in defining a direct flow right stated:

> Another principle to be remembered in a fact situation such as that presented here, is that appropriations are all made for direct and immediate application to beneficial use. In this jurisdiction, such appropriations are for a rate of flow, and not for a prescribed quantity of water. Rate of flow is not measured in acre-feet. The appropriator becomes entitled to take water for a beneficial use under direct appropriation, during whatever period he can made beneficial use of the water, at the rate of flow to which he has become entitled. If the period during which the water is needed in a particular year is short, then the total volume of water taken will be small. If the period is long and the water is needed in a particular year is short, then the total volume of water taken will be small. If the period is long and the water continues to be available within the date of priority of the water right, then the amount taken will be larger. "Acre-foot" limitations, or awards so measured, are not applicable to appropriations for direct and immediate use. No appropriation for storage purposes is involved in this litigation and for that reason references to volumetric awards and limitations involved in storage rights are neither appropriate nor applicable. [366 P.2d at 555; emphasis by the Court.]

We submit that Bender and Fellhauer establish a doctrine of correlative rights in Colorado. Under this doctrine, vested senior rights are protected but there is allowed freedom of others to make junior diversions and uses so that there is a maximum utilization of water. This rule is really one of mutual accomodation of senior and junior so that there is a maximum utilization of the limited resource as long as neither senior nor junior suffers unreasonably from the actions of the other. In other words, both senior and junior must give a little so that the overriding public policy of maximum utilization can be achieved. Plaintiffs' position herein violates this because it would inhibit maximum use of public water for the common good by, in effect, economically prohibiting junior storage appropriations. Although plaintiffs are not monopolizing the entire flow of the stream to facilitate their diversion of the fraction of the flow to which they are entitled, they are claiming a right to the unimpeded flow to carry the intermittant silt load to facilitate the transportation of their water through an inefficient, leaky ditch to the place of use and the principle and the results are the same.

The Colorado Assembly recognized the importance of this doctrine in 1969 when it enacted the Water Right Determination and Administration Act of 1969 (1973 C.R.S. Sec. 37-92-102). It provided, among other things, the following:

> 37-92-102 Legislative declaration
> (1) . . . As incident thereto, it is the policy of this state to integrate the appropriation, use, and administration of underground water tributary to a stream with the use of surface water in such a way as to maximize the beneficial use of all the waters of this state.
>
> (2) (b) . . . each diverter must establish some reasonable means of effectuating his diversion. He is not entitled to command the whole flow of the stream merely to facilitate his taking the fraction of the while flow to which he is entitled.
>
> 37-92-502 Orders as to waste, diversion, distribution of water
>
> (4) . . . Each plan for augmentation shall be administered to accomplish the maximum economic use of and benefit from water which may be available or developed . . . .
>
> 37-92-307 Special procedures with respect to plans for augmentation
>
> (1) In recognition of the fact that plans for augmentation as defined in this article may be utilized in connection with the matter of intergrating ground and surface waters and the maximizing of the benefcial use of all waters of the state and in further recognition of the fact that plans for augmentation which may be proposed may affect one another, the following special procedures are prescribed:
>
> (a) . . . .
>
> (b) . . . state engineer and division engineers . . . to allow continuance of existing uses and to assure maximum beneficial utilization of the waters of this state. [Emphasis added.]

Recent Colorado case which recognized this doctrine is Southeastern Colo. Water Conservancy District v. Shelton Farms, Inc., 529 P.2d 1321 (1975), in which this Court stated at page 1327:

> We are not unmindful that the statute speaks of the policy of maximum beneficial and integrated use of surface and subsurface water . . . . The waters of Colorado belong to the people, but so does the land. There must be a balancing effect, and the elements of water and land must be used in harmony to the maximum feasible use of both.

If the policy of maximum utilization does not preclude commanding the unimpeded flow of the stream in order to include an intermittant silt load in the water diverted by a senior diverter with direct flow rights, then there are many storage projects and proposed storage projects both in Colorado and in the other western states that are in jeopardy. This would mean the Court is turning back the clock to a time when only direct flow type projects were built.

It is submitted that the policy of mutual accommodation, which is the cornerstone of the concept of maximum utilization, is also supported by reference to analogous situations. In particular, attention is called to any early dispute between a ditch company and adjacent landowners wherein the landowners claimed damages for seepage from the ditch. The Court dismissed the damage claim and stated the following policy:

> All irrigation canals must of necessity seep more or less along this portion of their lines, and will so continue until prevented by other means than ordinary diligence in their construction, and we do not think the time has yet been reached in this state when the owners of such enterprises can be held to such a high degree of diligence in their construction as to be compelled to prevent them from seeping at all, or be subject to successive suits for any injury which is not practicable to remedy, and which logic would mean to prevent the construction of a large number of ditches and reservoirs and thus retard the development of our state, as the result of such a rule would mean in most cases that the costs or means to prevent the seepage would be far in excess of the value of the property so damaged; [Emphasis added.]

The name of the case is Middelkamp v. Bessemer Irrigating Ditch Co., 46 Colo. 102, 102 P. 280, 283 (1909).

We submit that just as the adjacent landowners have been required since 1909 to accomodate Bessemer's ditch and submit to the inconvenience of the seepage without compensation in order that Bessemer could appropriate water and put it to beneficial use, so must Bessemer now accomodate the Pueblo Dam and reservoir and submit without compensation, to the inconvenience of the loss of silt in order that the waters of the Fryingpan-Arkansas Project may be appropriated and put to beneficial use in the water short Arkansas Valley.

V

THE USE OF STORAGE PROJECTS IS SUPPORTED BY THE COURTS, THE STATES AND THE UNITED STATES

The plaintiffs' position carried to its logical extension would require that every reservoir owner compensate downstream owners from cleaning up their water supply. This runs contrary to another basic concept of Colorado water law which is that the conservation of water through the construction of reservoirs is an encouraged practice. Colorado statutes not only provide for a State Water Conservation Board, but also for the establishment of conservancy districts and water conservation and irrigation districts. Taxes are reduced for lands on which reservoirs are constructed for the impoundment of unappropriated waters (Sec. 37-87-187, 1973 C.R.S.). The only way that most flood waters can be saved is through the construction of storage reservoirs. In effect, therefore, plaintiffs' assertion would penalize conservation of water rather than encourage it as is clearly the intention of the law.

From the very earliest times, the use of storage projects has been supported by this State through its Courts and its legislative bodies and by the United States, due to the arid condition of most of the land in Colorado and in the West.

Bessemer cited Larimer County Reservoir Co. v. People, 8 Colo. 614, 9 Pac. 794 (1886) for the theory that senior appropriators have vested rights over junior storage rights. We have no quarrel with this as a general proposition, but the citation and the quotation relied upon beg the question: Does Bessemer have a vested right to the former silt content? Certainly Larimer does not settle this but, as conceded by Bessemer, it did permit the construction of an on-stream reservoir. In so doing, the Court also stated:

> 1. The important question presented by the pleadings for determination in this court relates to the right to utilize the bed of a non-navigable natural stream, upon the public domain, as a reservoir for the purpose of storing and preserving water that would otherwise run to waste. The theory of relator is that such act is illegal per se, and that whether or not injury results to other persons therefrom is a matter of secondary importance. He concedes that the constitution and statutes recognize the right to construct and maintain reservoirs, and thereby preserve water at certain seasons of the year for use at other seasons; but contends that this right can only be exercised by the construction of such reservoirs at a distance from the stream, and a diversion of water into the same by means of ditches or other contrivances adequate for the purpose. In the absence of any written law upon the subject, a person would have the legal right to construct his dam in a non-navigable stream upon the public domain, and thus preserve water for useful purposes, so long as he did not in any way encroach upon the superior rights or interests of others. The government alone could complain. But in this part of the country the policy of the governments, state and federal, has always been to encourage the preservation of water for irrigation and other useful purposes. The rainfall is comparatively light, the soil, without additional moisture, generally unproductive, and therefore a peculiar necessity exists for carefully husbanding water. There is nothing in the unwritten law which countenances interference by government with the application of the foregoing principle. [9 Pac. at 795, emphasis added.]

In upholding the on-stream storage facility against attack that such did not accomplish a "diversion" under Section 6 of Article XXI, the Court went on to say:

> We think there may be a constitutional appropriation of water without its being at the instant taken from the bed of the stream. This court has held that "the true test of the appropriation of water is the successful application thereof to the beneficial use designated, and the method of districuting or carrying the same or making such application is immaterial." Thomas v. Guiraud, 6 Colo. 530. (9 Pac. at 796, emphasis added.)

We submit that the latter quoted language is particularly pertinent here where the alleged damage is to the "immaterial" method of distribution and carriage.

In a later case, The People v. Hinderlider, 57 P.2d 894 (1936), Judge Butler in his concurring opinion stated at page 898:

> The territorial legislature passed two Acts to prevent the waste of water . . . . The Act of 1876 (Sess. Laws p. 78) made it unlawful for any person to run through his irrigating ditch any greater quantity of water than is absolutely necessary for irrigating his land tor domestic and stock purposes. There are times, for instance in flood time, when more water is available than is needed by the appropriators. With knowledge of that fact and of the Acts of 1872 and 1876, the General Assembly of 1879, it is not unreasonable to suppose, intended by the provision now under discussion that the owner of a reservoir for irrigation purposes shall have the right to take and store unappropriated waters, and also waters that already have been appropriated by others, but that are not at the time needed by such prior appropriators for immediate use for domestic or irrigation purposes. Such storage would save water from going to waste, a most desirable object in this "dry and thirsty land," where every drop of water is sorely needed. . . .

In 1938, this Court set forth the importance of storage projects in this State. At pages 280 and 281 of People v. Letford, 79 P.2d 274 (1938), the following concise statement was made:

It is a matter of common knowledge that, due to climatic conditions, except in a few limited areas agricultural crops cannot be produced in Colorado except by irrigation of the land . . . Notwithstanding these accomplishments, for many years it has been apparent in Colorado, as well as other states in the arid regions of the west, that neither the resources of the farmers nor the facilities of private capital were able to finance the major irrigation projects commonly involving great dams, tunnels, and extensive diversion works required to meet the increasing demands of the population and of the agricultural market in providing water from distant sources for the thousands upon thousands of acres of virgin lands within this area. In recognition of this situation the federal government inaugurated the Bureau of Reclamation and the Congress of the United States appropriated large sums of money for federal reclamation projects which now are scattered through the West. By the circumstance that Colorado is traversed by the Rocky Mountains, forming the Continental Divide between the Atlantic and Pacific Oceans, and upon the crest of which the snow falls abundantly in the winter months and where the summer rainfall is heavier than in the adjacent arid plains regions, several of the largest and most important streams in the southwest have their beginning within our state. As time passed the people in our neighboring states have appropriated and put to a beneficial use a large amount of the waters of these streams and this subject has been a cause of vexatious litigation between them and Colorado. Recently, upon several of these interstate streams and beyond the boundaries of Colorado large and expensive works had been completed or are in the course of construction, which have for their purpose the diversion and beneficial use in other states of waters originating in this state and by virtue of which vested rights will accrue to the inhabitants of these states to the impairment of Colorado's development. It also is well known that in many parts of Colorado the waters of our streams have been overappropriated to the great distress of the inhabitants of those regions and the economic detriment of the state generally. It is reasonably asserted by competent engineering authority that, by the construction of adequate water storage and diversion systems, water may

> be carried from regions within our state having a surplus to those suffering from the lack of a sufficient supply, and by this process our statewide water supply made to do full duty before flowing from our borders. Such a program of conservancy is eminently a matter of state-wide concern.

The Colorado General Assembly expressly enacted the Water Conservancy District Law which is found at Section 37-45-101 in order that the State of Colorado might set up districts that could contract with the United States pursuant to the Federal Reclamation Laws, in order that storage projects could be constructed and that the Conservancy Districts could take advantage of the water provided in such storage projects to carry out a system of irrigation. The Colorado-Big Thompson Project and the Fryingpan-Arkansas Project are both examples of the results of the State of Colorado providing the means in which these districts had authority to contract with the United States. The Colorado General Assembly also passed statutes covering reservoirs, beginning with Section 37-87-101 which provides the right to store waters. This statute states:

> Persons desirous to construct and maintain reservoirs for the purpose of storing water have the right to store therein any of the unappropriated waters of the state not thereafter needed for immediate use for domestic or irrigating purposes, and to construct and maintain ditches for carrying such water to and from such reservoirs, and to condemn lands required for the construction and maintenance of such reservoirs and ditches in the same manner as now provided by the law; except that after April 18, 1935, the appropriation of water for any reservoirs hereafter constructed, when decreed, shall be superior to an appropriation of water for direct application claiming a date of priority subsequent in time to that of such reservoirs.

This Court again in 1957 in the case of Hill v. District Court, 134 Colo. 369, 304 P.2d 888 (1957), recognized the importance of the Water Conservancy Act and the storage projects constructed pursuant to that Act when it stated at page 890:

> The Water Conservancy Act is but one of many wisely designed by the legislature to preserve water as our most precious natural resource. We are accordingly obligated to proceed with great caution in seizing upon any isolated portion of such legislation to defeat its over all purpose.

Speaking to the same subject, this Court stated in People v. South Platte Water Conservancy District, 139 Colo. 503, 343 P.2d 812 (1959) at page 823:

> It is patent that the legislature, as a matter of public policy, believed that the formation of a conservancy district under the standards set forth in the Act would further the public interest. Otherwise the legislation would never have been enacted.

The Reclamation Act of June 17, 1902 (32 Stat. 388), as amended, which affects the 17 western states, shows that the United States is very interested in storage projects to solve the problems found in this arid part of the United States.

The Supreme Court recognized the problems of the arid West and the value of dams and storage projects in Arizona v. California, 373 U.S. 546 (1963). In discussing the importance of Hoover Dam to the problems of the Southwest and the Colorado River, it stated at page 553:

> Nor were droughts the basin's only problem, spring floods due to melting snows and seasonal storms were a recurring menace, especially disastrous in California's Imperial Valley where, even after the Mexican canal provided a more dependable water supply, the threat of flood remained at least as serious as before. Another troublesome problem was the erosion of land and the deposit of silt which fouled waters, chocked irrigation works, and damages good farmland and crops. [Emphasis added.]

From the above we must conclude that the courts the State of Colorado and the United States look favorably on storage projects. Therefore, construction of such projects must not be

stifled by subordination to the convenience of direct flow senior appropriators. A finding that a direct flow water right holder has a right to the unimpeded flow of the entire stream to carry the silt he wants in the portion he diverts from the stream would be in direct conflict with this policy of encouraging reservoirs to stroe water at times when there is a surplus for use when there is a shortage.

More broadly, however, under the concepts of maximum utilization and conservation, a mutual accommodation of rights is required under which both must yield somewhat so that these policies become capable of accomplishment. As noted elsewhere, the Government has here supplied flood protection, a cost-free diversion facility and free maintenance of a one-mile reach of ditch. In return, Bessemer should accept both the benefits and minor inconveniences involved in receiving constant deliveries of clear water rather than the intermittent cycle of clear and silty waters delivered by the river itself.

VI

NO LIABILITY TO LOWER APPROPRIATORS FROM REASONABLE USE OF WATER BY UPPER APPROPRIATORS

The United States submits that a downstream appropriator in Colorado has no right to damages because of a reasonable use by an upper appropriator of water. As the plaintiffs quoted in their brief from Cushman v. Highland Ditch Company, 3 Colo. App. 437, 33 P. 344 (1893), dealing with a junior appropriator who sought to flush accumulated alkalis from its reservoir by draining the reservoir, which caused senior downstream appropriators to seek to enjoin the proposal on the grounds it would give them water carrying a load of alkali, the Court, in denying the injunction, stated in its headnote at page 437.

> Prior appropriators of water are entitled to have the same flow unimparied in quantity and without permanent or unreasonable deterioration in quality.

The key words in this ruling are "unreasonable deterioration in quality." The clear water that the plaintiffs receive is of the quality that is widely used for irrigation throughout the West, particularly where storage facilities have been constructed. The storage of water in Pueblo Reservoir for use when needed in the Arkansas Valley is not only reasonable but highly desirable. It is plaintiffs' claim of a right to an unimpeded flow in the stream to provide silt to facilitate transportation of their water through an inneficient, leaky ditch to the place of use that is unreasonable.

The concept of reasonable use adopted by Cushman accords with the doctrines of maximum utilization and mutual accommodation set out in Colorado Springs v. Bender and Fellhauer v. People, supra. Clearly if one is to have maximum utilization and mutual accommodation, then reasonability of use of both senior and junior are required. In other words, both senior and junior must give a little so that the limited resource may be fully and mutually utilized. Otherwise, the senior right preempts the possibility of a junior by "commanding the whole" in derrogation of the rule of the Schodde and Empire cases.

These precepts find significant support in rulings from other states. A Washington case of importance to this issue is Naches and Cowiche Ditch Company v. Weikel, 151 P. 494 (1915). This decision involved a complaint by lower users of the silt coming from the upper users' irrigation of land which, in the process, fouled up the lower users' irrigating canals and pipes. The Court held as follows:

> And so, in this case, this natural stream is a natural outlet for the drainage of waters from these highlands. The proprietors of these highlands adjoining this natural outlet have the same right to drain their lands into this creek that the plaintiff does to take the water from the creek; and so long as the defendants make a reasonble use of the stream, and are not negligent in conveying wastewaters into the stream, we are satisfied, under the authorities above quoted, that the plaintiff has no right to complain of the reasonable use of the stream by the upper proprietors, even though there is a slight damage to it by reason of the water being slightly polluted. The plaintiff must accommodate its appliances for irrigation to the conditions which a reasonable use may require. As we have indicated above, the only damage that is shown by the appellant is that some silt has settled in its canal and in the pipes used for irrigation. Until the plaintiff can show an unreasonable use by the defendants in conveying wastewaters into this creek, there is clearly, we think, no cause for injunction. [Emphasis added.]

A California case that discusses reasonable use and involves silt was Peabody v. City of Vallejo, 40 P.2d 486 (1935). This case involved a riparian owner whose lands in natural state formed a delta at about sea level. He brought a suit against the City to keep it from building a dam on the river that flows through his land. The owner wanted to have the full flood flow of the stream to overflow his lands for the purpose of depositing silt thereon which the owner felt was a benefit. The court ruled in favor of the City asserting that this right claimed by the owner involves an unreasonble use or an unreasonable method of use or an unreasonable method of diversion of water as contemplated by the California Constitution. The court stated the rule of reasonable use of water applies to all water rights, whether grounded on riparian rights or the right of overlying landowner, or percolating water rights or appropriative rights.

The Government submits that what we have here is a reasonable use by an upper, junior appropriator (the United States and the Fryingpan-Arkansas Project water users) and an unreasonable demand by the lower senior appropriator (Bessemer) for the unimpeded flow of the entire stream to provide silt to facilitate the transportation of their water to the place of use. Secondly, the actions of the Government do not result in an unreasonable deterioration in the quality of the water which the plaintiffs receive. The clear water which the plaintiffs receive can be used for irrigation. Further, as stipulated, some of Bessemer's water is used for municipal and domestic purposes for which clear water is more suitable than is silty water. This again gets us back to our main thesis that there should be a maximum utilization of this scarce natural resource that is available to the people in southeastern Colorado and all appropriators must give a little so that there can be a mutual accommodation to attain this objective.

VII

INNEFFICIENT WATER SYSTEMS AND THE MUTUAL ACCOMMODATION DOCTRINE

An appropriator is not entitled to an inefficient irrigation system which commands the whole or a substantial portion of the flow of the stream merely to facilitate his utilizing the fraction to which he is entitled. Colorado Springs v. Bender, 336 P.2d 552 at 555 (1961), citing Schodde v. Twin Falls Land and Water Company, 224 U.S. 107 at 119 (1911). This concept, when applied to the plaintiffs' claim, means that the plaintiffs have no right to an inefficient ditch and laterals which commands the unimpeded flow of the stream to provide silt to facilitate the transportation of their water to the place of use and so cannot be compensated for loss or injury due to such a system.

The Colorado Court recognized this doctrine many years ago in the case of Town of Sterling v. Pawnee Ditch Extension Co., 94 P. 339, 42 Colo. 421 (1908), when it stated at pages 341 and 342:

> The law contemplates an economical use of water. It will not countenance the diversion of a volume from a stream which, by reason of the loss resulting from the appliances used to convey it, is many times that which is actually consumed at the point where it is utilized. Water is too valuable to be wasted . . . or by waste resulting from the means employed to carry it to the place of use, which can be avoided by the exercise of a reasonable degree of care to prevent unnecessary loss, or loss of a volume which is greatly disproportionate to that actually consumed. [Citation omitted.]
>
> An appropriator, therefore, must exercise a reasonable degree of care to prevent waste through seepage and evaporation in conveying it to the point where it is used. In cases where this question arises the purpose for which the appropriation is made and the proportion of the diversion actually applied to a beneficial use, as compared with the volume diverted, would doubtless be important matters to consider.

The Bender court balanced the inefficiency of the method against the "economic reach" of the diverter to determine the unreasonableness of the method. This resembles the correlative rights approach, allowing accommodation between junior and senior rights to achieve maximum utilization of the resource. See also, Kuiper v. Well Owners Conservancy Organization, 490 P.2d 268 at 283 (1971); Fellhauer v. People, 447 P.2d 986 at 994 (1968).

Although these decisions are based on conflicts between well owners or conflicts between well and surface rights, the principles of maximum utilization should be extended to conflicts between surface owners because the policy of conservation is very important. The doctrine of mutual accommodation should apply and the plaintiffs' claim to silty water to facilitate transportation through a leaky dtich should give way to accommodate the increased utilization of water, flood control and the amenity of clear water provided by storage in Pueblo Dam.

It should be noted that the water provided the plaintiffs from Pueblo Reservoir is still usable for irrigation. With the availability of storage water from Pueblo Reservoir, more people can irrigate and do it more efficiently because the water will be available during those times in the growing season that it is needed and when it would not be provided by direct flow. The plaintiffs' use has been inefficient because the water could only be applied directly from the river when the water was available under their priority right, which in many years was only during the spring-runoff since that is the only time when there was enough water in the river to allow the plaintiffs' priorities to come into use.

If the Court should find that plaintiffs had a vested right then it is in actuality penalizing the removal of pollution, and penalizing a more efficient and modern system of irrigation to benefit an inefficient and polluting method and system of irrigation.

VIII

STATE AND FEDERAL WATER QUALITY STANDARDS VERSUS SILT FOR BESSEMER

The United States submits that it is an anachronistic concept that one can acquire through appropriation a legal right to have a stream maintained in a polluted condition as against the right of the public to the amenity of clean streams.

The United States would be in a rather precarious position if the Court finds the plaintiffs are entitled to silt in the water delivered to them as a part of their water right. To illustrate the absurdity of such a result, it is pointed out that one method that the United States might adopt to mitigate its damages if the Court were to so rule would be for the Government to install facilities to add silt back into the water being discharged from Pueblo Reservoir into Bessemer's Ditch. If such

a course of action were attempted, the Government would be in violation of both Federal and State water quality laws. In fact, both the United States and the State of Colorado consider water quality as a matter of great importance, as shown by the Colorado Water Quality Control Act (C.R.S. 25-8-101 (1973)) and the Federal Water Pollution Control Act (33 U.S.C. 1251, et seq., as amended by Public Law 92-500).

Paragraph (a) of Section 1251 of the Federal Act provides that the objective of the Act is to restore and maintain the chemical, physical and biological integrity of the nation's waters. Some of the goals listed under this objective are, whenever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish and wildlife, and provides for recreation in and on the water. This goal is to be achieved by July 1, 1983. Another goal is that the discharge of pollutants in navigable waters be eliminated by 1985. Paragraph (b) provides that: "It is the policy of Congress to recognize, preserve and protect the primary responsibilities and rights of the States to prevent, reduce, and eliminate pollution." It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution, and to provide Federal technical services and financial aid to the State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

It is provided in section 1252 that "The Administrator shall, after careful investigation and cooperation with other federal agencies, state water pollution control agencies, . . . prepare or develop comprehensive programs for preventing, reducing, or eliminating the pollution of navigable waters and groundwaters and improving the sanitary condition of surface and underground waters. In the development of such comprehensive programs, due regard shall be given to the improvements which are necessary to conserve such waters for the protection and propagation of fish and aquatic life and wildlife, recreational purposes, and the withdrawal of such waters for public water supply, agricultural, industrial, and other purposes."

In Paragraph (c) there is provision for each planning agency to receive a grant under this subsection to develop a comprehensive pollution control plan for the basin or portion thereof which is consistent with any applicable water quality standards, effluent, and other limitations, and thermal discharge regulations established pursuant to current law within the basin. This planning agency also can recommend maintenance and improvement of water quality within the basin or portion thereof. The term "basin" as used in this subsection includes rivers and their tributaries, streams thereof as well as the lands drained thereby.

In Paragraph (e) of Section 1314 dealing with the identification and evaluation of sources of pollution, the following are described as causing pollution: (A) agricultural and silvicultural activites, including runoff of the fields and crop and forest lands, (B) mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines, and (C) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by construction of dams, levees, canals, causeways, or flow diversion facilities. The United States submits these regulations apply to discharge from Pueblo Reservoir.

Turning to Colorado law on this subject, which is in the Colorado Water Quality Control Act, the State Assembly made the following declaration in Section 25-8-102:

> (1) It is declared that the pollution of state waters constitute a menace to public health and welfare, creates public nuisances, is harmful to wildlife and aquatic life, and impairs domestic, agricultural, industrial, recreational, and other beneficial use of state waters and the problem of water pollution in this state is closely related to the problem of water pollution in the adjoining states.
>
> (2) It is further declared to be the public policy of this state to conserve state waters and to protect, maintain, and improve the quality

thereof for public water supply, for the protection and propagation of wildlife and aquatic life, and for domestic, agricultural, industrial, recreational, and other beneficial uses; to provide that no pollutant be released into any state waters without first receiving the treatment or other corrective action necessary to protect the legitimate and beneficial uses of such waters; to provide for the prevention, abatement, and control of new or existing water pollution; and to cooperate with other states and the federal government in carrying out these objectives.

(3) It is further declared that the protection of the quality of state waters and the prevention, abatement, and control of water pollution are matters of statewide concern, and affected with a public interest, and the provisions of this article are enacted in the exercise of the police powers of this state for the purpose of protecting the health, peace, safety, and general welfare of the people of the state."

In Section 25-8-103, the following definitions are given:

(11) "Pollutant" means dredged spoil, dirt, slurry, solid waste, incinerator residue, sewage, sewage sludge, garbage, trash, chemical waste, biological nutrient, biological material, radioactive material, heat, wrecked or discarded equipment, rock, sand, or any industrial, municipal, or agricultural waste.

(12) "Pollution" means the man-made, man-induced, or natural alteration of the physical, chemical, biological, and radiological integrity of the water.

If it assumed that an owner of a decreed water right to divert and use water from a natural stream has a right to receive water with the silt content he has historically received, it would naturally follow that he would have the right to have erosion conditions which generate the silt in the stream at his point of diversion continue and that any landowners upstream who instituted flood and erosion control measures on their lands which substantially reduced the silt load in the stream would be liable to the water right holder for the loss of silt. We have found no cases

which suggested such a right in the water user or such a burden on the upstream land owners. Such a right in the water user is clearly contra to the policy of the State of Colorado to protect the lands of the state from erosion. C.R.S. 35-70-102 provides:

> Legislative declaration. The general assembly finds and declares that the state of Colorado, through wind and water erosion and depletion of subsurface water resources, has lost for agricultural and livestock uses approximately six million acres, or one-tenth of the total area of the state; that these losses range from severe damage to complete destruction of the topsoils of these areas; that these losses have been caused by improper farm and range practices, by increasing the rate of withdrawal from underground water reserves without adequate attention to recharging such reserves, and by failure to conserve to the full the precious rainfall and snowpacks that could help replenish underground water reserves, and that the areas of land thus destroyed will increase until and unless a constructive method of land use providing for the conservation and preservation of natural resources, including adequate underground water reserves, the control of wind and water erosion, and the reduction of damage resulting from floods, is established by law over the entire state. It is to accomplish this purpose and to insure the health, prosperity, and welfare of the state of Colorado and its people that this article is created, and it shall be construed liberally in order that the purposes expressed in this article may be accomplished.

Plaintiffs' claim of a vested right to the silt content of the water diverted by it amounts to a contention that it has a right to have the Arkansas maintained in a polluted condition as against the right of the public to the amenity of clean streams. We submit that plaintiffs' contention is not only not the law but it is not a sound policy as well.

IX

ANALYSIS OF PLAINTIFFS' CASES

Plaintiffs argue that as senior appropriators they had a vested right in the stream as it existed including the silty condition of the water during periods of high flow. Numerous cases, Colorado, Federal and from other states have been cited by plaintiffs in support of the premise. Significantly, not a single case has been cited by plaintiffs which holds that a senior appropriator has a vested right to the silt content of the water as of the time of his appropriation or at any other time. Counsel for the United States have made an exhaustive search and have found no cases which so hold.

A careful analysis of the cases cited by plaintiffs discloses that they fall into two categories. Many of them are cases where the appropriation of the junior appropriator reduced the amount of water available at the senior appropriator's point of diversion below the amount the senior appropriator was entitled to receive. The other cases cited by plaintiffs are cases where the water available to the senior appropriator was rendered unfit for the purpose of his appropriation by the addition of pollutants to the water. Neither class of plaintiffs' cases are in point as to the case at bar. Plaintiffs in this case are receiving the full amount of water to which they are entitled at their gauging station. No pollutants have been added to their water. Rather, they have been removed. The water now received is fit for the purposes of plaintiffs' appropriations -- irrigation, municipal and domestic. Plaintiffs are claiming a vested right to silt in their water to facilitate its transportation through an inefficient, leaky ditch to the place of use. We are not aware of any cases where such a right has been upheld.

The plaintiffs in their brief have discussed the Wilmore v. Chain O'Mines (44 P.2d 1024 (1934)) case in great detail. They have left out an interesting discussion in that case concerning damage caused to the plaintiffs' ditches, water rights, lands, crops, due to the pollution that was deposited on their lands. The court described such damage at page 1026 as follows:

> . . . . Tailings and slimes close and seal the pores of the soil; prevent aeration of roots and plants; prevent water from seeping through the soil; great loss of water; clogs the ditches with deposits; increased labor in cleaning out ditches and hauling many loads of tailings from the ponds and ditches; lowers productivity of the soil; increases the necessity for fertilization; lessens marketability of strawberries and other products . . .; irrigation . . .; fills reservoirs and lessens the value of lands so irrigated. . . .

At page 1029 in this case the court stated, "for the purposes of this case pollution means an impairment, with an attendant injury to the use of the water that plaintiffs are entitled to make." (Emphasis added) We submit that plaintiffs are not entitled to the unimpeded flow of the stream to provide silt to facilitate the carriage of their water through a leaky ditch.

The cases of Moyle v. Salt Lake City, 111 Utah 201, 176 P.2d 382 and Shurtleff v. Salt Lake City, 96 Utah 21, 82 P.2d 561, cited by plaintiffs in their brief, both involved the condemnation by Salt Lake City of potable water from Cottonwood Creek and offering in exchange polluted water from Utah Lake which had an offensive odor and left a deposit on lands and ditches. The court held that condemnees were entitled to full value of the potable water taken by the City and they did not have to take the polluted water in exchange.

In the case of Salt Lake City v. Boundary Springs Water Users Assn., 2 Utah 2d. 141, 270 P.2d 453, cited by plaintiffs, the water users association applied for a change in point of diversion, from points on Mill Creek which had become contaminated to a point

where ordinary chlorination would not render it fit for human consumption, to Boundary Springs which were tributary to Mill Creek and were potable water. Salt Lake City protested because this would leave the water in Mill Creek at their point of diversion more contaminated. The court rejected the protest because even though the change left the water more contaminated at the City's diversion point it was still suitable for irrigation, for which the City was selling the water and it was not fit for municipal use without special treatment with or without the change proposed by the water users association.

In the case of Atchison v. Peterson, 87 U.S. 507 (1874), cited by plaintiffs, the Supreme Court upheld the trial court in refusing to enjoin mining activities above plaintiff's diversion on the ground that the deterioration of the water caused by defendant did not render it unfit for sale for use in mining operations, which was the purpose for which plaintiff had appropriated the water.

In the case of Farmers Irrigation Co. v. Game and Fish Commission, 149 Colo. 318, 369 P.2d 551, cited by plaintiffs, this court upheld a complaint which alleged that the activities of the Game and Fish Commission so polluted the stream as to render the water unfit for the purposes to which plaintiffs had applied it.

The case of Game and Fish Commission v. Farmers Irrigation Co., 162 Colo. 318, 426 P.2d 562, was a case where the court found that the addition of pollutants rendered the water unfit for plaintiffs' purposes. The cases of Humphreys Tunnel & Mining Co. v. Frank, 46 Colo. 524, 105 P. 1093; Mack v. Town of Craig, 68 Colo. 337, 191 P. 101; and Slide Mines v. Left Hand Ditch Co., 102 Colo. 69, 77 P.2d 125, all cited by plaintiffs were all cases involving the addition of pollutants to the water which rendered it unfit for the purposes of the downstream appropriators.

We do not see how cases which say a junior is liable for the pollution of water to the degree that it is no longer suitable for the purposes of the senior appropriators can be authority for the proposition that an appropriator has a right against the removal of pollution from his water, particularly where the unpolluted water is still suitable for his purposes but may cause some inconvenience in his transportation of the water because of an inefficient, leaky ditch.

The Arkoosh v. Big Wood Canal Co. (283 Pac. 522 (1930)) case was cited by the plaintiffs as a case showing that silt was considered of value and showing how valuable it was to downstream appropriators when it was removed from the stream. In this case the streambed ran through porous material but the silt in the streambed had reduced the seepage losses between defendant's dam and plaintiff's point of diversion. When the silt was removed from the streambed by a flushing action from releases from the reservoir, there was an increase in the seepage losses so that the quantity of water reaching downstream appropriators was much less. It was not the quality but the quantity of water that the appropriators downstream were complaining about. Quoting from the case on page 526:

> We believe that a proper interpretation of the Frost decree and determination of the rights of the parties in this action is that appellant's storage rights may only be exercised as long as respondents have at their headgates the amount of water to which they are entitled under their appropriations as the same would have naturally flowed the natural stream prior to the construction by the appellant and its predecessors in interest of their irrigation system. [Emphasis added.]

The cases of Armstrong v. Larimer County Ditch Co., 1 Colo. App. 49, 27 P. 235; Farmers Highline Canal & Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629; Larimer County Reservoir Co. v. People, 8 Colo. 614, 9 P. 794; and Vogel v. Minnesota Canal Co., 47 Colo. 534, 107 P. 1108, all

cited by plaintiffs are all cases involving a reduction, or threatened reduction in the quantity of water received by other appropriators at their points of diversion under their water rights and are not in point with respect to the question before this Court.

JUDGE ARRAJ'S RULINGS IN UNITED STATES v. 508.88 ACRES OF LAND (CIVIL ACTION C-1480, USDC COLO.)

The legal authority most nearly supporting Bessemer's position in this case is Judge Arraj's opinion of May 8, 1973. Understandably, therefore, plaintiffs' brief extensively quotes from this opinion.

In actuality, Judge Arraj rendered three opinions in United States v. 508.88 Acres of Land which are pertinent here. The first was May 8, 1973; the second was September 20, 1973; and the last was June 18, 1976. All three must be read to put the matter into proper context. As indicated by materials contained in Bessemer's Appendix, Bessemer first raised the matter of compensation for removal of silt in its answer of July 7, 1969. The government responded by moving to strike the answer as being legally insufficient on August 28, 1970. As the matter finally turned out, the government's motion to strike was granted by the June 18, 1976 order. Accordingly, all three opinions are dealing with questions raised by government's motion to strike.

In addition to a consideration of the substantive issue as to whether the removal of silt from the water being delivered to Bessemer was a compensable item in the condemnation case, Judge Arraj is also dealing with a complex jurisdictional issue. Clearly, the district court has authority to consider the question of proper compensation in a condemnation action filing by the United States (28 U.S.C.,1358). However, it has only limited jurisdiction to consider allegations that a taking of property not within the scope of the Declaration of Taking filed by the United States, has occurred without just compensation under the terms of 28 U.S.C. 1346

(jurisdiction being limited to claims under $10,000). On the other hand, the Court of Claims has unlimited jurisdiction to consider such claims (28 U.S.C.,1491).

Accordingly, in these three opinions, Judge Arraj has addressed not only the substantive matters but the jurisdictional issues raised by the parties. It is submitted that a careful reading of all three opinions will clearly indicate that the substance of Judge Arraj's rulings was that he was unwilling to refuse, as a matter of law, to consider Bessemer's contentions as to the compensability within the scope of the condemnation case, of the alleged damage caused by the government's delivery of water to Bessemer directly from Pueblo Reservoir without a trial on the merits.

Specifically, we submit that Judge Arraj's opinion of September 20, 1973, essentially reconsidered his May 8, 1973 opinion. Therein, he restricted his decision holding to a ruling that the court would hear evidence on the issue and that Bessemer would have to establish its entitlement to an award within the framework of the ordinary concept of severance damage. In other words, the court only held that "Bessemer was entitled to prove" that it had suffered a compensable loss.

Between the 1973 opinions and the 1976 opinion these plaintiffs filed in the Court of Claims. In his 1976 opinion, Judge Arraj noted this occurrence and concluded that the interests of justice would be best served by having the silt matter dealt with in the context of the Court of Claims action. He accordingly granted the Government's motion to strike subject to a consideration of the present issue within the context of the Court of Claims action. It is the government's position that, fairly considered, Judge Arraj's three opinions do not adopt plaintiffs' theory. Instead, we submit that he ruled only that he would receive evidence on the matter for later determination as to whether the plaintiffs legal theory had merit and, indeed, whether he had

jurisdiction to consider the issue. In the final analysis, his 1976 ruling concluded that he had no jurisdiction.

For these reasons, we submit that Judge Arraj's opinion of May 8, 1973, is not entitled to be accorded significant weight by this court in the consideration of the present dispute.

X.

CONCLUSION

Because Colorado water is based upon maximum utilization of all available waters and mutual accomodation between senior and junior appropriators to achieve this maximum utilization; because a finding that direct flow water rights holders have a vested right in the silt content in the natural flow of the stream would frustrate the utilization of unappropriated stream flow by the construction of storage reservoirs on those streams; because the storage of water during periods of surplus flow for use during periods of water shortage is not only reasonable but necessary if there is to be a maximum utilization of all the water available; because commanding the unimpeded flow of the stream to provide silt in the fraction used by a direct flow appropriator is unreasonable; because clear water is suitable for irrigation, domestic, municipal and other uses; because there is no provision in Colorado law for the appropriation of any particular quality of water; because maintaining streams in a silty condition is contrary to state and federal policies of cleaning up the streams and controlling erosion of the lands; the court should find that the owner of a decreed water right to divert and use water from a natural stream in Colorado has no right to receive water of any given quality or condition, including the silt content thereof; that the appropriative right is solely a right to appropriate water, not water plus silt or anything else but water suitable for the use for which it was appropriated.

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