10-3-1978

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

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IN THE SUPREME COURT

OF THE STATE OF COLORADO

CASE NO. 27714

IN RE QUESTION SUBMITTED BY THE UNITED STATES COURT OF CLAIMS IN ITS PROCEEDING NO. 105-75 ENTITLED

A-B CATTLE COMPANY, et al.,

Plaintiffs,

v.

UNITED STATES OF AMERICA,

Defendant.

CERTIFICATION OF QUESTION PURSUANT TO C.A.R. 21.1

BRIEF OF AMICI ON REHEARING
COLORADO RIVER WATER CONSERVATION DISTRICT
AND
SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT

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AND
SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT

GENERAL STATEMENT

The Colorado River Water Conservation District (hereinafter River District) and the Southwestern Colorado Water Conservation District (hereinafter Southwestern District) Amici, are submitting this supplemental brief on rehearing in support of the position of the United States of America.

We are not unmindful of the inconsistency of the previous opinion of the Court with state and federal laws regarding pollution, but, anticipating others will exhaustively brief and argue this point, leave the subject to others. The impossibility of a fair determination of damages (or, phrased otherwise, of determination of the quantity of natural silt in the water at the time of the original appropriations) is likewise left to others, as we believe such subject presumes responsibility for damages. Our brief confines itself to the sole question of liability for the removal of silt from water.

QUESTION PRESENTED

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 CONTAINING THE NATURAL SILT HISTORICALLY RECEIVED UNDER THAT RIGHT?

ARGUMENT

UNDER COLORADO LAW, THE OWNER OF A DECREED WATER RIGHT TO DIVERT AND USE WATER FROM A NATURAL STREAM DOES NOT HAVE A RIGHT TO RECEIVE WATER CONTAINING THE NATURAL SILT HISTORICALLY RECEIVED UNDER THAT RIGHT.

We have elected to state and argue the question presented as did the Court in its opinion of August 21, 1978. Without reiteration here, though later addressed, of the reasoning of the Court in previously answering the above question in the affirmative, we submit such result, under Colorado law, to be in error.

In its previous opinion the Court concluded the United States had, by the construction and operation of Pueblo Reservoir, reduced the amount of water available for use in the Bessemer Ditch, by reducing the silt in the same amount of water historically received in priority. The silt reduction admittedly does not reduce the quantity of water available in priority at the headgate. The reduction in quantity occurs <u>at the place of use</u>. Thus the Court held a subsequent appropriator must respond in damages (since the damage is continuing, an injunction might lie[1/] for altering, by his diversion, the quantity of silt in river water reaching the senior.

1/ 43 C.J.S., §25, p. 451, 452, 455.

We seriously question whether silt was the subject matter of the phrase "seriously impair its quality" when Larimer Co. Res. Co. v. People ex. rel. Luthe, 8 Colo. 614, 9 Pac. 794 was decided in 1885. Appellee there, and the question decided by the case, contended onstream reservoirs to be illegal per se. This Court said no, and the quoted language, if applied to silt, is a dictum.

It is impossible to distinguish between the case at bar and Schodde v. Twin Falls Land and Water Co., 224 U.S. 107, 32 S.Ct. 470, 56 L.Ed. 686 (1911). Both involved the quantity of water to which an appropriator is entitled at his point of diversion, not the place of use. Schodde really turns on the question of maximum utilization of water as does Fellhauer v. People, 167 Colo. 320, 447 P.2d 986 (1968). It was this important basic principle which necessitated the substitution of the appropriation doctrine for the riparian doctrine. Coffin v. Left Hand Ditch Company, 6 Colo. 443 (1882).

Without the storage of water, the use thereof cannot be maximized; indeed, waste results. People ex rel., Park Reservoir Company v. Hinderliter, et al., 98 Colo. 505, 514, 57 P.2d 894 (1936). There this Court, at 514, said:

> . . . Such storage would save the water from going to waste, a most desirable object in this "dry and thirsty land," where every drop of water is sorely needed. . .

And, further, at 518, said:

> . . . In the dissenting opinion in Fort Morgan Reservoir & I. Co. v. McCune, 71 Colo. 256, 272, 206 Pac. 393, is the following statement of the place that storage rightly occupies in the agricultural development of the state: "* * * the future of the state rests largely upon agricultural development, and this in turn upon irrigation by storage. The waters of the state have been so generally appropriated that the day of direct irrigation enterprises is closing, while that of storage has scarcely more than dawned."

In our petition for rehearing, concern was voiced as to the effect of the then decision on other not yet completed projects. Since the matter is before the Court on allegations, as distinguished from facts established by trial, we consider it proper to here make allegations of the consequences probably arising from an affirmative answer to the submitted question.

The Frying Pan-Arkansas Project is a Reclamation project constructed at the initial expense of the United States with a substantial portion of the costs to ultimately be repaid by the water users of the area. Plaintiffs desire to spread their alleged loss over all water users of the area receiving benefits from the project. While such desire is understandable, we believe the result to be contrary to the doctrine of prior appropriation upon which all project planners rely.

All projects, privately or Federally financed, must be financially feasible, the Federal test being generally more difficult of a favorable result. Though Pueblo Reservoir has a large silt-entrapping dead storage pool, the costs or effect of silt removal was only computed in connection with the construction cost of that dead storage pool. No cost was computed for replacement of that silt in the water, or damages for its removal. All of the Federal projects presently under construction or awaiting construction funds, include storage facilities in the reach of the involved stream or river plagued with suspended solids, and the involved storage facilities have large silt entrapment or dead storage capacities.

It may well be that one or more or all will be rendered financially infeasible by a requirement that, in addition to

the cost of silt entrapment, the project cost would have to include the possibility of damages payable to downstream ditches for loss of silt in the water. In fact, the reservoir construction could conceivably be enjoined, because of this anticipated continuing interference with senior water rights. The barring of storage construction by the rule of law proposed by plaintiffs, has been and is wholly without precedent in Colorado.

CONCLUSION

On reconsideration of the question herein presented these Amici respectfully urge the Court to answer the question certified in the negative as being against the longstanding public policy in Colorado forbidding waste and maximizing the use of water.

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CERTIFICATE OF MAILING

I do hereby certify that I served copies of the foregoing BRIEF OF AMICI ON REHEARING on the following parties by depositing true and exact copies thereof in the United States mail this 3rd day of October, 1978, and with sufficient postage thereon so as to insure delivery addressed as follows:

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