11-7-1977

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

NO. 27714

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

A-B CATTLE COMPANY, et al,

Plaintiffs,

v.

THE UNITED STATES OF AMERICA,

Defendant.

AMICUS BRIEF
BY THE
STATE OF COLORADO

CERTIFICATION OF QUESTION
TO THE COLORADO SUPREME COURT
FROM THE UNITED STATES COURT OF CLAIMS

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I N D E X

CASES

STATUTES

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FROM THE UNITED STATES COURT OF CLAIMS

The State of Colorado joins in and adopts the brief, excluding the appendix, of the Southeastern Colorado Water Conservancy District. The State files this amicus brief as a supplement to the brief filed by the Southeastern Colorado Water Conservancy District.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The State adopts the Southeastern Colorado Water Conservancy District's statement of the case and the statement of the agreed facts contained in the court of claims certification to this court.

SUMMARY OF THE ARGUMENT

The doctrine of maximum utilization, coupled with the state's prohibition of waste of its water resources and the state's policy to treat water for the removal of pollutants, demonstrates that the owner of a decreed water right to divert and use water from a natural stream does not have a right to receive water with a silt content which might have existed at the time of appropriation or during use.

ARGUMENT

I.

THE DOCTRINE OF MAXIMUM UTILIZATION REQUIRES THE CONCLUSION THAT THE OWNER OF A DECREED WATER RIGHT DOES NOT HAVE A RIGHT TO A SILT CONTENT WHICH EXISTED AT THE TIME OF APPROPRIATION OR DURING USE.

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 (1968), as follows:

> All the surface flow in the Arkansas River during each irrigation season has 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 overappropriated. On June 24, 1966 the Ft. Lyon Canal, whose head gate is about 33 miles down the stream from defendant's well, was receiving only 272 cu. ft. 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.

Id. at 988.

Water has become an increasingly scarce resource in Colorado. This growing scarcity has had at least two results: first, an integration of water administration for surface

and ground water through the Water Rights Determination and Administration Act of 1969; secondly, this court's articulation and development of the doctrine of maximum utilization.

Maximum utilization, on the federal level, was perhaps first recognized in Schodde v. Twin Falls Land and Water Company, 224 U.S. 107 (1911). The court there rejected plaintiff's claim of a right to the river current which had been turning water wheels for purposes of diversion. This is not unlike plaintiff's claim in the instant case to the silt content in the water.

The The Colorado doctrine of maximum utilization had its roots in Colorado Springs v. Bender, 148 Colo. 458, 366 P.2d 552 (1961). The Bender court, adopting the Schodde rule, held that a senior user with an inefficient means of diversion could not require the entire flow, or maintenance of an unrealistically high water table, to the detriment of downstream juniors, in order to satisfy his senior rights.

The doctrine of maximum utilization made its formal debut in Fellhauer v. People, 167 Colo. 320, 447 P.2d 986 (1969). The court there recognized that the administration of water, as a progressively scarce resource, requires the integration of surface and ground water under one set of rules; and that successful administration of the rules depends on a balancing of the interests between senior surface and junior ground water users. In speaking to the constitutional ramifications of its analysis, the Fellhauer court stated:

> It is implicit in these constitutional provisions, along with vested rights, there shall be maximum utilization of the water in this state. As administration of water approaches the 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.

Id. at 336. No clearer statement could have been made that in view of the scarce resources and growth potential in Colorado, the precepts of vested rights in appropriations must be balanced with and permitted to coexist along with the doctrine of maximum utilization.

The Colorado legislature responded to the Fellhauer decision and its twin mandates of protecting vested rights and achieving maximum utilization by enacting various amendments to the 1969 Water Right Determination and Administration Act. Colorado Revised Statute 37-92-101(1) incorporates the Fellhauer principle of maximum utilization. Paragraph (2) thereof states:

> ... the future welfare of the people of the state, and the future welfare of the state depends upon sound and flexible integrated use of all the waters of the state.

Paragraph 2(b) is a codification of Colorado Springs v. Bender, supra which states: "He is not entitled to demand the whole flow of the stream merely to facilitate his taking the fraction of the whole flow to which he is entitled." Paragraph 2(c) is a codification of the doctrine of futile call which further facilitates maximum utilization to the extent that no reduction of a diversion is required unless such reduction would, in a reasonable time, increase the amount of water available to and required by water rights having senior priorities. The futile call doctrine permits utilization of water by an upstream junior appropriator notwithstanding a call by a downstream senior when in practical effect the water, if released by the upstream junior, would not reach the downstream senior appropriator. The entire tenor of the Water Administration Act is to recognize that blind adherence to the principle of first in time, first in right must be ameliorated in view of the increased scarcity

of water resources in the state.

In the instant case, an upstream junior is attempting to maximize the water resources of the state by building a reservoir for storage capability. The storage facility will allow for flood control and storage of available water for use during periods when water is scarce. The storage capability is of tremendous benefit to water users on the Arkansas River and does, in fact, benefit the plaintiff. Plaintiff's insistence on a right to silty water is in direct conflict with a right to store water in a reservoir. As the velocity of water decreases to zero in a storage facility, the suspended particles (silt) settle to the bottom and water released to a downstream senior is relatively clean water. If the operator of a reservoir is required to somehow provide silty water, in derogation of the natural process which takes place during storage, or is required to pay millions of dollars in compensation (113 million dollars as prayed for in the instant case) the construction and operation of storage facilities becomes unfeasible, thereby frustrating maximum utilization.

Maximum utilization is further facilitated by establishment of water conservancy districts.

Conserving the water resources of the state and providing for the greatest beneficial use of these waters is an announced state policy. This policy is codified in C.R.S. 1973, 37-45-101 et seq. and effectuated by the authorization of water conservancy districts. One of the most important features of this act mandates that the Conservancy Districts cooperate with the United States to construct "works" as defined in said article. Works as defined in C.R.S. 37-45-103(10) means dams, storage reservoirs ... necessary or convenient for supplying water for domestic ... and all other beneficial uses.

II.

THE POLICY OF THE STATE OF COLORADO TO IMPROVE THE QUALITY OF ITS WATER RESOURCES REQUIRES THE CONCLUSION THAT A DECREED WATER RIGHT HOLDER DOES NOT HAVE A CONSTITUTIONAL OR STATUTORY RIGHT TO A POLLUTANT CONTENT, SUCH AS SILT.

Plaintiffs argue that section 37-80-120 of the Water Right Determination and Administration Act support their position that they are entitled not only to the quantity of water but also the pollutant -- silt or dirt existing in the water prior to the construction of the dam. Specifically, plaintiffs point to the statutory language which states that substituted water must be of a quality so as to meet the requirements of use to which the water has normally been put." (plaintiff's brief, p. 19).

This argument is fallacious in at least two particulars. First the water released from the reservoir is not substituted water, rather the water impounded is the same water as plaintiff would normally receive minus the dirt.

Assuming arguendo that there is no operative difference between "substituted water" and "upstream storage" water, and there is no question as regards the quantity of water released, the question becomes what is meant by the word quality in the above cited phrase? Since the term quality is nowhere specifically defined in the water right laws, we submit that its definition can be arrived at through statutory construction.

The cornerstone of statutory construction is that statutes are presumed to be legally and logically consistent with other statutes. See Colorado S Ry. v. Dist. Court, 177 Colo. 162, 493 P.2d 657 (1972); Howe v. People, 178 Colo. 248 P.2d 1040 (1972). This consistency is effectuated by a series of presumptions. Among the relevant presumptions are:

(1) compliance with the constitutions of the State of Colorado and the United States is intended;

(2) a just and reasonable result is intended;

(3) public interest is favored over private interest.

See C.R.S. 1973, 2-4-201.

Further, Colorado Revised Statutes 2-4-203 states that if statutes are ambiguous the court, in determining the intention of the general assembly, may consider the consequences of a particular construction. We submit that all these provisions militate against plaintiff and in favor of the State's position.

The State's position is that when the term "quality" is referred to in both statutes it means that one cannot intercept water belonging to a senior appropriator and subsequently provide the senior with water that is degraded by addition of pollutants. The senior water rights holder is thus provided with a protection against receiving polluted water which he would not have otherwise received.

Prior to the passage of section 37-80-120, the legislature had enacted C.R.S. 1963, 60-28-1 regarding water pollution, which in part states:

> Whereas the pollution of the waters of this state constitutes a menace to public health and welfare,creates public nuisance, is harmful to wildlife, fish ... and whereas it is the public policy of this state to conserve the waters of the state and to protect, maintain and improve the quality thereof ...

(emphasis added). The superceding statute, C.R.S. 1973, 25-8-102(2) and (3) 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 supplies, for 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 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 this state.

(emphasis added).

Silt or dirt is a pollutant as defined in C.R.S. 1973, 25-8-101(11). We submit that the only logical manner to read 37-80-120 and 37-92-305(5) is to construe it to mean that if substituted water, stored water, or water released from a reservoir is provided to a downstream senior it cannot be of a degraded quality. To construe the statutes otherwise would be contrary to stated legislative intent in the water pollution statute, because it would preclude or restrict treatment for dissolved or suspended solids in the stream. The operator of the reservoir would be required to add a pollutant to the water released contrary to the state policy of promoting clean water to other users on the stream.

We therefore submit that consideration of the subject statutes in pari materia requires the conclusion that the term "quality" fosters the removal, not the preservation, of pollutants in the stream and was not meant, in the context of the water rights statutes, to guarantee a pollutant level to an appropriator of water.

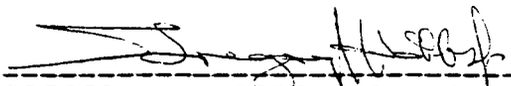
CONCLUSION

By virtue of their senior water rights, plaintiffs have a usufruct in the water, subject to the state statutes and common law evidencing a policy toward clean, not polluted water. Ownership of the waters resides in the people. There is no right to specific water and there is no right to specific effluents or deposits contained in the water. In the wake of rapid growth and increased demand for water Colorado has adopted the doctrine of maximum utilization and prevention of waste to deal with the problem. The Bender and Fellhauer decisions and their progeny, plus their subsequent codification in the state statutes, stand in recognition of these principles. Maximum utilization is simply an application of the principle of the greatest good for the greatest number of people. Water conservation districts, whose statutorily ordained purposes is to maximize utilization and to develop the water resources of the state, would be forced to repollute waters released from a reservoir for the benefit of a few users to the detriment of the majority. Such is not the law of the state of Colorado.

The state submits that the owner of a decreed water right to divert and use water from a natural stream does not have a right to receive water with a silt content which existed or has existed during appropriation and use.

For the foregoing reasons, the State respectfully requests that the certified question from the United States Court of Claims to this court be answered in the negative.

FOR THE ATTORNEY GENERAL



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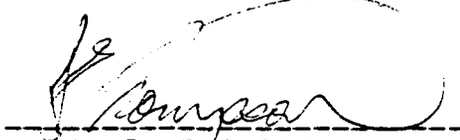

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within AMICUS BRIEF upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 7th day of November, 1977, addressed as follows:

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