10-25-1977

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, vs. THE UNITED STATES OF AMERICA, Defendant.	CERTIFICATE TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF AMICI
SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT
COLORADO RIVER WATER CONSERVATION DISTRICT
SOUTHWESTERN COLORADO WATER CONSERVATION DISTRICT
LOWER SOUTH PLATTE WATER CONSERVANCY DISTRICT

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The Southeastern Colorado Water Conservancy District, pursuant to the Order of this Court, files this Brief of Amici. The Colorado River Water Conservation District and the Southwestern Colorado Water Conservancy District and the Lower South Platte Water Conservancy District, pursuant to the Order of this Court, join in and adopt the Brief.

STATEMENT OF ISSUES

Pursuant to Colorado Appellate Rule 21.1, the following question of law was certified to the Supreme Court of the State of Colorado by the United States Court of Claims:

QUESTION

> 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?

This general certified question generates certain more particular subsidiary issues which we discuss in our brief.

1. Is "silt," "water" within the meaning of the Colorado Constitution, Article XVI, §5 and 6?

2. Is the use of silt to plug a leaky ditch a "beneficial use" of water, under CRS 1973 37-92-103 (4) which requires "reasonably efficient practices" and prohibits "waste"?

3. Does silt which slowly accretes to the property of the United States belong to the United States?

4. Is silt a "pollutant" within the definitions of the Colorado Water Quality Control Act, C.R.S. 1973 §25-8-103 (11), and the Federal Water Pollution Control Act, 33 U.S.C. 1362 (6); and would the deliberate release of this pollutant violate those Acts?

5. Do the Colorado Water Quality Control Act, Federal Water Pollution Control Act, and Fryingpan-Arkansas legislation "regulate" the Arkansas river in a constitutional manner under the police and commerce powers; or do they unconstitutionally take Bessemer's property?

STATEMENT OF THE CASE

The Southeastern Colorado Water Conservancy District (SECWCD) has contracted with the United States government and the United States Bureau of Reclamation to construct the Fryingpan-Arkansas Project, and for SECWCD to repay the United States. The Contract is not a fixed sum contract. The ultimate cost of the project works upon completion (the project was reauthorized in 1974 at an estimated then cost of $432,000,000) includes, in addition to the classic costs of construction of facilities, all incidental costs, such as rights-of-way, contractors' claims, and (according to the United States) claims of third parties against the United States, such as the Bessemer claim. The Secretary of the Interior, upon completion of the project, will determine the final reimbursable cost, which will determine the cost per acre foot of water delivered to the SECWCD. The SECWCD, in turn, having purchased the water from the United States, allocates the waters to the various water users, collects the purchase price thereof, and remits that money to the United States. In addition, the SECWCD pays to the United States annually a sum raised by taxation of all property within the boundaries of the SECWCD, equal to nine-tenths of one mil. The assessed valuation of the SECWCD in 1976 was $1,232,843,732.

The Bessemer claim and the question certified to this Court challenge a basic principle of western irrigation, i.e., the right of water storage in times of plenty, for use in times of drought. If storage creates a liability for precipitating sediment, it creates liability for increasing salinity, which would include the claims of Mexico against the United States, of the Lower Basin against the Upper Basin of the Colorado River, of West Slope against East Slope, of downstream users against upstream users, whenever and wherever water is stored, or used. No federal or state statute or decision exists which explicitly determines the question certified.

Some perspective is essential to a proper understanding of the issues and, believing that a broader view of the problem may aid this Court, Amici offer in addition to the body of the brief, an Appendix giving in its first pages additional background information and, in later pages, texts of relevant statutes and other legal materials. Each statement, citation, or chart referred to there is substantiated by official publication, recognized texts, or public documents. Wherever not substantiated by citation, the matters are of such character that the Court can take judicial knowledge of the basics involved. Counsel have briefed, or caused to be briefed, all of such publications cited.

SUMMARY OF ARGUMENT

In order to recover in the Court of Claims, Bessemer must show that its "property" has been "taken" for public use. Bessemer claims that the property right being taken is the right to have the Arkansas River maintained full of silt, i.e. dirty polluted water. Under the water pollution acts, silt is a water pollutant.

Neither Bessemer nor anyone else has the right to demand polluted water, because the silt is not "water" and not subject to "appropriation." Silt, in contrast to water, belongs to the person on whose property it settles. In the past, dirty water has plugged the Bessemer's leaky ditch, but Bessemer has no right to maintain such an unreasonably inefficient and wasteful means of diversion, because this is not a "beneficial" use under Colorado law.

Bessemer cites various water pollution cases where parties have added pollutants to water and degraded it. The cases are inapposite, and in fact, are controlled by the policy of cleaning up water.

There has been no "taking" of property of Bessemer, but at most regulation of the Arkansas, demanded by expressed public policy documented by the federal Fryingpan-Arkansas legislation, the Federal Water Pollution Control Act, the Colorado Water Quality Control Act, the state police power, the Water Conservancy District statute, the commerce clause, and the navigational servitude.

ARGUMENT

I. IN ORDER TO RECOVER IN THE COURT OF CLAIMS, BESSEMER MUST SHOW THAT ITS "PROPERTY" HAS BEEN "TAKEN." BESSEMER CLAIMS THAT THE PROPERTY RIGHT BEING TAKEN IS THE RIGHT TO HAVE THE ARKANSAS RIVER MAINTAINED FULL OF DIRTY AND POLLUTED WATER.

Bessemer's case, alleging rights to the dirt or silt in water is brought under 28 U.S.C. 1491, which states:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, ... or any express or implied

contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort....

Bessemer states in its Petition:

> This is a civil action brought by Plaintiffs against the United States of America under the Fifth Amendment to the Constitution of the United States and upon an implied contract with the United States for the ascertainment and award of just compensation to the Plaintiffs for property owned by them taken and damaged by the United States. (Pleadings, Motions and Orders Accompanying Certified Question, hereafter Pl., 76.)

The Fifth Amendment of the U. S. Constitution says "nor shall private property be taken for public use without just compensation." The "private property" alleged to have been "taken" is the turbidity or silt from water. (Pl. 79.) Bessemer has been delivered the full quantities of its water under its decrees since Pueblo Dam and Reservoir were built, and complains only about the lack of dirt or silt, and the receipt of "clear water." (Id.)

It is important to remember, from the onset, that this dirt and silt is pollution in law and fact. Under the Colorado Water Quality Control Act, C.R.S. 1973 § 25-8-101 et seq. (CWQCA), § 25-8-103 (11) and (12):

> (11) "Pollutant" means dredged spoil, dirt, slurry, solid waste, incinerator residue, 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 water.

(Unless otherwise specified, all emphasis other than certain headings found in quotations are added by amici.)

Thus one of the key questions in the case is whether this Court will encourage the continued pollution of the state's water for the alleged benefit of one party.

II. NEITHER BESSEMER NOR ANYONE ELSE HAS THE RIGHT TO DEMAND POLLUTED WATER, BECAUSE THE SILT IS NOT "WATER," AND NOT SUBJECT TO "APPROPRIATION."

A. SILT IS NOT "WATER."

Colorado water law derives from the Colorado Constitution. Article XVI, § 5 provides:

> 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.

Reading the language closely, one sees that it is not the pollution, not the silt, not even the natural stream that is subject to appropriation, but only the water.

This fact, of itself, distinguishes and rationalizes most of the cases cited both by Bessemer in its brief, and by Judge Arraj in his Memorandum Opinion and Order of May 8, 1973 (Appendix to Motion to Certify Question To Colorado Supreme Court, hereafter App., 51, 57-59.) Pollution cases have almost exclusively been brought by persons claiming the defendant has added a pollutant to the water which has destroyed the water and its value. Such plaintiffs have often prevailed, and the degradation or contamination of the water which is the plaintiff's property has been condemned by the courts. (See the discussion below at III, showing that Bessemer's cases are inapposite, and indeed show that water should be cleaned up.)

In contrast to cases where the complaints have been against the polluter adding pollution are the cases where a party has claimed some benefit from pollution and requested its continuance,

as Bessemer does here. We have found no case in which such a party has prevailed.

The most illuminating cases are the Utah salt cases. In Deseret Livestock Co. v. State, 110 Utah 239, 171 P.2d 401 (1946), the plaintiff claimed that the salt and minerals in the Great Salt Lake were beneficial to him, and filed an application for 22 second feet of water for the purpose of extracting the salt and minerals. Utah, after plaintiff's application but before the decision cited, passed a statute claiming the salt, and conditioned plaintiff's application upon a royalty agreement. Plaintiff objected to the condition, saying the statute was either not retroactive, or an unconstitutional taking of plaintiff's salt; and that the statute did not own the salt in the water. The court said at 403:

> Our appropriation laws apply to water as such, and not to minerals valuable for their own sake which may be found therein. By the provisions of Section 100-1-1, R.S.U. 1933, as amended by Chapter 105, Laws of Utah 1935, now Section 100-1-1, U.C.A. 1943, all waters in the state were dedicated to the public subject to existing rights to the use thereof.

The Colorado Constitution (Art. XVI, Sec. 5-6) and statutes are very similar in these respects. The court took "judicial knowledge of the fact that Great Salt Lake is a navigable body of water...[and held] that the state as the owner of the beds of navigable bodies of waters is entitled to all valuable minerals in or on them." (403). The court held that the statutes were not an unconstitutional taking "because they take no right which could have been acquired by the filing of an application for the appropriation of water before their enactment..." (404).

If this Court substitutes an "i" (silt) for an "a" (salt), and follows Deseret, its decision will be correct. Judge Arraj purported to distinguish the Deseret case (App. 58), "since the very question to be decided here is whether Bessemer has a property right in silty water." This is no distinction, because the very question decided in Deseret was that the plaintiff had no property right in salty water. Judge Arraj went on, "Moreover, plaintiff here does not argue that it has a right to appropriate water for the purpose of extracting the silt, but only that silty water is more valuable than clear water for an otherwise recognized beneficial use." (App. 58). This attempted distinction also fails. Bessemer wants to extract the silt in its leaky ditch. In Deseret the court held where the salty water is more valuable than clear water for an otherwise recognized beneficial use (and use of a reasonable amount of water for salt precipitation would be a "beneficial use" according to the Deseret court at 403) the applicant loses, because he does not own the salt. The "beneficial use" Bessemer has is a use of "water" under the Constitution, not of silt.

Further, later Utah cases hold against claimants where the question is specifically the comparative values of less or more salty water. In Morton International Inc. v. Southern Pacific Transportation Company, 27 Utah 2d 256, 495 P.2d 31 (1972) cert. denied, 409 U.S. 934, 93 S. Ct. 278, 34 L.Ed. 2d 189, the court said that Morton, which had been using salt since 1903 (long before the statute) was required to pay the royalty required by the statute, and had no cause of action for serious dilution of the salt water at Morton's location either against the state or

a railroad building a causeway across the Great Salt Lake which caused the dilution.

Hardy Salt Co. v. Southern Pacific Transportation Company, 501 F.2d 1156 (10th Cir. 1974) discusses the same causeway. Plaintiffs, injured by the diluted water, sued the railroad for nuisance, waste, interference with business interests, and under the Rivers and Harbors Act of 1899, 33 U.S.C.A. § 401, et seq. The type of appropriation (before or after Utah's permit system for water appropriation), and time of starting extraction (before or after the royalty statute) was confirmed unimportant. Here the Court also found that the location of diversion (fixed or flexible), time of royalty agreement (before or after construction of the causeway) and navigability or non-navigability of Great Salt Lake was unimportant.

A final case involving the Great Salt Lake is Solar Salt Company v. Southern Pacific Transportation Company, ___ Utah ___, 555 P.2d 286, (1976), in which the salt extractor claimed the causeway across the Lake caused a public nuisance, and "pollution" of the Lake, which decreased the salt level, and prevented the survival of certain brine shrimp and algae. The statute provided:

> "Pollution" means such contamination, or other alteration of the physical, chemical or biological properties, of any waters of the state,...as will create a nuisance or render such waters harmful or detrimental or injurious to...industrial...uses....

Regarding the brine shrimp, the Court held "Plaintiff's interest in brine shrimp is nil," and the same regarding the algae. Concerning the pollution issue, the court said (at 289):

> In order for this statute to apply in this case it would be necessary for the defendant to alter the physical property of the water of the lake so as to create a nuisance or to render the water harmful, or detrimental, or injurious to the salt extracting processes used by the plaintiff. Nothing here is harmful, detrimental, or injurious to the extraction of salt. All that is done by lowering the salt content is to require the sun to evaporate more water in order to obtain a given amount of salt. The statute says nothing about it being a nuisance if salt is removed from water. If it meant that when the salt content of water was lowered a public nuisance would result, then it is obvious that the Solar Salt Company itself is guilty of a public nuisance, for it is also removing salt from the lake and thus leaving less salt for its competitors.

Removal of salt or silt is not a nuisance and not pollution, whether done by Bessemer or the United States, and a water appropriator does not own the salt or the silt.

The facts in these Utah cases differ and this Court will find some inconsistency in the bases for decision, but the results are uniform--one has no ownership in the salt or minerals in water under an appropriation doctrine state. This result logically derives from the basic premise, under Utah's Constitution (Art XVII, § 1) and statutes (See Utah Statutes § 73-1-1, 3, 5) as well as Colorado's Constitution (Act XVI § 5 and 6), and statutes. Water is the commodity appropriated, not anything else. In the Water Right Determination and Administration Act of 1969 definitions, C.R.S. 1973 § 37-92-103; "Appropriation" is of "waters" (subsection 3); "beneficial use" is of an "amount of water" (4); "diversion" means removing "water" (7); "underground water" "means that water in the...sand, gravel, and other sedimentary materials (note "in," not "and") (11); a "water right" relates to "a certain portion of the "waters" (12); and "waters of the state" means "water."

Bessemer cites three Utah cases for the proposition that Utah provides a vested right in the quality of water, all relating to polluters who degraded the water. (Bessemer brief at 20). The above cases show that improvement in quality (i.e. reduced salt content) gives no right for damages against him who improves it.

B. SILT IS OWNED BY THE PERSON ON WHOSE PROPERTY, STREAM BED, OR LAKE BED IT SETTLES, NOT ANY WATER RIGHTS OWNERS.

One case we have found directly decides the issue of who owns sedimentary sand and gravel settling out on the bed of a watercourse before it reaches the headgate of a mutual irrigation company which claims title to the sediment. In facts, this may be the closest case we have found to the instant case. Nephi Irr. Co. v. Bailey, 111 Utah 402, 181 P.2d 215 (1947).

The ditch company [c.f. Bessemer] claimed that the upstream owner defendants [U.S.] converted sand and gravel which had settled in the channel of the stream passing through the owner's property [Pueblo Reservoir], and which had then been cleaned from the stream by the ditch company and piled along the sides of the stream. The upstream owner had then taken the sand and gravel (which undoubtedly also contained some silt) for his own project. The ditch company had always previously claimed and used this material. At 216 the court said:

> This raises the sole question before us: Who has title to the sand and gravel?
>
> Undoubtedly, defendants owned the stream bed, for title to land under non-navigable waters passes from the United States to the grantee of the upland as incident to the grant, where title is acquired by patent from the Federal Government. Anderson-Prichard Oil Corp. v. Key Okla. Oil Co., et al., 1931, 149 Okl. 262, 299 P.850.

> When the gravel settled in the bed, it thereupon became defendant's property. Defendants' counsel contends that they acquired title to the gravel under the doctrine of "accretion." That is not correct. "Accretion" is defined in 1 Words and Phrases, Perm. Ed., page 576 as follows:
>
> "To constitute 'accretion', there must be gradual and imperceptible addition of soil to shoreline by action of water to which land is contiguous." (Italics added.)
>
> We do not have a shoreline problem here at all. The distinction is pointed out by Tiffany (The Law of Real Property, 3rd Ed., Sec. 1221):
>
> "* * * if the owner of the bank or shore does own the bed of the stream * * * of water * * * any vertical addition to the bed, whether or not sufficient in depth to appear above the water, belongs to him not by reason of the doctrine of accretion, but because his ownership extends upwards as well as downwards * * *. Such new land belongs to him merely because it is within the boundaries of his land * * *."
>
> It is under this latter principle that defendants acquired the title to the alluvial deposits.
>
> Plaintiff did not get title to the sand and gravel merely by the act of scraping it up onto the banks.

Thus, title to the silt is in the United States, owners of the upstream, on-channel settling area, (bed of Pueblo Reservoir) regardless of Bessemer's past use of it, regardless of alleged economic loss, regardless of whether the silt settles at the banks by accretion or on the bottom of the channel.

See also Miramar Co. v. City of Santa Barbara, 23 Cal. 2d 170, 143 P.2d 1 (1943), London Extension Mining Co. v. Ellis, (Colo. 10th Cir. 1943), 134 F.2d 405, 410, holds:

> When tailings are permitted to pass by stream or seepage on to another tract, they become an accretion to the latter and belong to the owner thereof.

In general, the title to silt and river alluvium has been determined by the law not of water rights but of "the doctrine of accretion and reliction [which] applies in Colorado (see Hall v. Brannan Sand and Gravel Co., 158 Colo 201, 405 P.2d 749

(1965) and Smith v. Town of Fowler [138 Colo. 359, 33 P.2d 1034 (1959)]..." Thompson v. Clarks, 162 Colo. 506, 512; 427 P.2d 314 (1967).

In Brannon, supra, for example, plaintiff alleged trespass and damage for the taking of "quantities of sand, gravel, and valuable earths." (At 202). The question was who owned the alluvial material, and finding accretion of the material, this Court found in favor of the owner on whose property the material settled.

There is no difference in the result when the material accumulates on the bed of the river or reservoir instead of along the bank, because the United States, as owner of the banks of Pueblo Reservoir, is the owner of the bottom of the river or reservoir too. Nor is this result changed because a dam caused it to settle. 93 C.J.S. Waters § 108. If the Arkansas here is held, for this purpose, to be non-navigable, then the ownership extends to the center line of the river, as this Court held concerning the Arkansas in Smith v. Town of Fowler, supra at 363, quoting Hanlon v. Hibson, 24 Colo. 284, 51 P.2d 433 (1897).

If the Arkansas is held navigable for this purpose, then the owner is also the United States under the navigation easement.

Similar results obtain where sedimentary materials are at stake in navigational streams or along coastlines. Thus where a federal project changed coastal currents and eroded and deprived an owner of 300 feet of beach which required him to build a seawall and groin to protect his house (c.f. Bessemer lining its ditch), no compensation was due. Pitman v. U.S., 198 Ct.Cl. 82, 457 F.2d 975 (1972). In W. A. Ross Const. Co. v. Yearsley, 103 F.2d 589 (8th Cir. 1939), government dikes and deliberate use of paddle wheels of steamboats redirected the current of a stream, eroded 95 acres of an owner's land, and prevented new sediment deposition. No compensation was owed.

C. THE SILT IS NOT WATER SUBJECT TO APPROPRIATION FOR A "BENEFICIAL USE." BESSEMER'S DITCH IS NOT "REASONABLY EFFICIENT" NOR "WITHOUT WASTE" WHICH ARE REQUIRED OF BENEFICIAL USES.

Colorado's second key Constitutional provision is Article XVI, Section 6, saying in part: "The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied." Here again, we note that it provides for appropriation of waters, not silt. It limits appropriation to "beneficial uses."

The statutory definitions of "appropriation" and "beneficial use" require reasonably efficient practices" and prohibit "waste" at C.R.S. 37-92-103 (3) and (4):

> (3) "Appropriation" means the application of a certain portion of the waters of the state to a beneficial use.
>
> (4) "Beneficial use" is the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made and, without limiting the generality of the foregoing, includes the impoundment of water for recreational purposes, including fishery or wildlife....

Recent Colorado water law has largely revolved around the effort to "maximize beneficial use of all the waters of this state." C.R.S. 1973, 37-92-102(1). The future of Colorado's water law was summed up by Justice Groves in Fellhauer v. People, 167 Colo. 320, 336, 447 P.2d 986 (1969):

> It is implicit in these constitutional provisions that, along with 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. (Emphasis in original.)

Concurrently, and sometimes seen in opposition to maximum utilization has been the recognition of "the need to correlate the activities of mankind with some reasonable preservation of the natural environment..." C.R.S. 1973, 37-92-102 (3), the

"Legislative declaration" prefacing the Water Right Determination and Administration Act of 1969. The tensions among maximum utilization, integrated use of water, and the environment have generated the recent decisions in Fellhauer, Southeastern Colorado Water Conservancy District v. Shelton Farms, 187 Colo. 181, 529 P.2d 1321 (1975); Kuiper v. Well Owners Conservation Assn., 176 Colo 119, 490 P.2d 268 (1971); Hall v. Kuiper, 181 Colo. 30, 510 P.2d 329 (1973); Kuiper v. Lundvall, 187 Colo. 40, 529 P.2d 1328 (1975); Cache La Poudre Water Users Association v. Glacier View Meadows, ___ Colo. ___, 550 P.2d 288 (1976); and Kelly Ranch v. Southeastern Colorado Water Conservancy District, ___ Colo. ___, 550 P.2d 297 (1976).

In Fellhauer, the Court attempted to insure reasonable regulation of ground water, allowing some use without destroying surface appropriators, and integrating the uses. The three Kuiper cases defined the limits of ground water integration with surface water, maximizing use up to those limits. In Shelton, the need to integrate water priorities and preserve the environment won out over maximum utilization by cutting phreatrophytes. In Glacier Meadows and Kelly, maximum utilization prevailed over concerns of problems of integrating priorities and environmental degradation by repeated water use.

Fortunately, this case is not so difficult as some of the above. Concerns for maximum utilization of water, for integration of uses of water, and for the environment all argue against Bessemer. Bessemer attempts to weave environmental arguments, repeatedly mentioning quality of water, in order to justify the

wastefulness of its diversion facility. However, concerns for the environment demand clean water, maximum utilization cannot tolerate wasteful facilities; and integrated and repeated uses of water require clean water suitable not just for Bessemer, but for the greatest number of people for the greatest number of uses.

Undoubtedly, with sufficient quantity of diversions to run through its leaky ditch, Bessemer could be happy, but Colorado law as expressed above requires "reasonably efficient practices to accomplish without waste the purpose," of irrigation (C.R.S. 1973 § 37-92-103 (4)). Can it be said that when Bessemer can cite no case of recovery by any ditch for loss of sealant silt in the history of the United States that all the rest of the world is out of step, and it is reasonably efficient? We think not.

Fellhauer points out that the first act in the drama of maximum utilization is prevention of waste, continuing at 336:

> Colorado Springs v. Bender, 148 Colo. 458, 366 P.2d 552, 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 water course, 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., 224 U.S. 107, 119, 32 S.C. 470, 56 L. Ed. 686. This principle applied to diversion of underflow or underground water means that priority of 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 adequate supply for the senior's lawful demand."

Under Colorado Springs v. Bender, a shallow well may be wasteful, and not a beneficial use. A leaky ditch is to surface diverters what a shallow well is to underground diverters.

Schodde v. Twin Falls Land & Water Co., 224 U.S. 107, 32 S.C. 470, 56 L. Ed. 686 (1912), supra, was decided under Idaho's appropriation doctrine, and is one of the most illuminating cases we cite. Schodde diverted his water from a shallow canyon and up to his fields by means of water driven water wheels. Later downstream appropriators built a dam which slowed the flow until it would not drive the water wheels. Schodde claimed damages against the defendant dam builder, claiming his water rights included the right to continue his old means of diversion, the right to the river as it had been, and the right to the current in the river which drove his water wheels (c.f. the current carrying Bessemer's silt which plugged its ditch). Because the analogy is so close, we quote the U. S. Supreme Court opinion at length beginning at 117. Note the similarity of issues concerning the required reasonable efficiency of the means of diversion of an agricultural appropriation, the demand of the senior diverter for maintenance of the river as it was in order to allow an inefficient diversion, the threat to governmental dam building projects, and the diverter's selfish claim in face of public rights.

> The trial court...dismissed the complaint on the ground that there was no right under the constitution and laws of the State of Idaho to appropriate the current of the river so as to render it impossible for others to apply the otherwise unappropriated waters of the river to beneficial uses....
>
> The [trial] court said:....

"As by Art. 15, Sec. 3, Constitution of Idaho, all unappropriated waters are subject to appropriation, it follows that all water that plaintiff has legally appropriated belongs to him, but all other is subject to appropriation. It is unquestioned that what he has actually diverted and used upon his land, he has appropriated, but can it be said that all the water he uses or needs to operate his wheels is an appropriation? As before suggested, there is neither statutory nor judicial authority that such a use is an appropriation. Such use also lacks one of the essential attributes of an appropriation; it is not reasonable."

After pointing out the limited right of appropriation for beneficial use which had been exercised considering the quantity of water actually appropriated and the use to which that water was put, the court came to state the vast extent of the incidental appropriation, having no proper relation to beneficial use, which would result from admitting the theory that the plaintiff, because of his limited appropriation for a named beneficial use, had the power to appropriate the entire current of the river for the purpose of making his actual and limited appropriation and meager beneficial enjoyment fruitful. The court said:

"The only way in which his wheels can be used for the purpose he intended them, is to preserve the river in the condition it was when he erected them. And with what result, it may be asked. It may be stated as a fact that the banks of the river and the adjacent country sustain such relations to each other, that the later cannot be irrigated by ditches cut from the river in its natural state and the erection of dams becomes a necessity, which of course changing the surface elevation of the water affects the plaintiff's premises and all others similarly situated. Then without the dam the Twin Falls scheme with all its present great promise fails. Not only this, but the Government is now constructing a dam across the river some distance above plaintiff for another extensive irrigating scheme, known as Minidoka Project, which will take a large amount of the water and so much that probably there will not be enough left, especially at low stages of the river, for the full operation of the plaintiff's wheels...."

Illustrating the subject, the court said:

"Suppose from a stream of 1000 inches a party diverts and uses 100, and in some way uses the other 900 to divert his 100, could it be said that he had made such a reasonable use of the 900 as to constitute an appropriation of it? Or, suppose that when the entire 1000 inches are running, they so fill the channel that by a ditch he can draw off to his land his 100 inches, can he then object to those above

him appropriating and using the other 900 inches, because it will so lower the stream that his ditch becomes useless? This would be such an unreasonable use of the 900 inches as will not be tolerated under the law of appropriation. In effect this is substantially the principle that plaintiff is asking to have established."

The Court of Appeals, in affirming the decree of dismissal, did so for substantially the reasons which controlled the trial court. The Court of Appeals said (p. 44): "....Is this [river] current and the means adopted for the diversion of the appropriated water part of or attached to plaintiff's right of appropriation? It is contended on the part of the plaintiff that the current of the river is necessarily appurtenant to the water location and that the means of utilizing that current is attached as an appurtenance to the appropriation. We have not been referred to any case--and we know of none--where either of these propositions has been upheld."

After elaborately reviewing the general principles upon which the law of appropriation rested, and referring to provisions of the constitution and statute law of Idaho and the decisions interpreting and enforcing the same, it was held that the extent of beneficial use was an inherent and necessary limitation upon the right to appropriate....

And in this connection, in conclusion, it was observed (p. 47):

"There is, furthermore, the general principle that the right of appropriation must be exercised with some regard to the rights of the public. It is not an unrestricted right.

In Basey v. Gallager, 20 Wall. 670, 683, the Supreme Court of the United States said: 'Water is diverted to propel machinery in flour-mills and saw-mills, and to irrigate land for cultivation, as well as to enable miners to work their mining claims; and in all such cases the right of the first appropriator, exercised within reasonable limits, is respected and enforced. We say within reasonable limits, for this right to water, like the right by prior occupancy to mining ground or agricultural land, is not unrestricted. It must be exercised with reference to the general condition of the country and the necessities of the people, and not so as to deprive a whole neighborhood or community of its, use and vest an absolute monopoly in a single individual....'

We have freely excerpted from the opinions of the courts below because, in our judgment, they so clearly portray the situation and correctly apply the law...."

Schodde is truly in Fellhauer's spirit, and is appropriately cited there. Appropriation requires, in both Colorado and Idaho,

reasonable use, beneficial use with reasonably efficient means of diversion. Neither preservation of the river as it was, nor damages, will be required of the dam builder whose project will benefit many water users but is complained of because the dam slows the river's current to the alleged damage of the complainant. Neither the current nor silt is appurtenant to the water rights of complainant because beneficial use is an inherent and necessary limitation on the right to appropriate, and because the rights of appropriation must be exercised with reference to the general condition of the country and the necessities of the people. This Court would have to overrule Fellhauer's approval of Schodde to rule for Bessemer.

Empire Water and Power Co. v. Cascade Town Co., 205 F. 123 (Colo. 1913) involved the Cascade Resort, built around waterfalls whose water, spray and mist produced very luxurious vegetation around which the town and its tourist trade were built. Defendant Empire sought to build a dam above the water user (Cascade) which would destroy the falls and growth, to the user's damage. The court held at 129:

> The laws of Colorado are designed to prevent waste of a most valuable but limited natural resource, and to confine the use to needs. By rejecting the common-law rule they deny the right of the landowner to have the stream run in its natural way without diminution. He cannot hold to all the water for the scant vegetation which lines the banks but must make the most efficient use by applying it to his land.... Undoubtedly a landowner may rely upon an efficient application by nature, and need do no more than affirmatively to avail himself of it (Thomas v. Guiraud, 6 Colo. 530; Larimer, etc., Co. v. People, 8 Colo. 614, 9 Pac. 794); but the use in that way should not be unnecessarily or wastefully excessive.... If nature accomplishes a result which is recognized and utilized, a change of process by man would seem unnecessary. But the trial court based its decision of this branch of the case largely upon the artistic value of the falls, and made no inquiry into the effectiveness of the use of the water in the way adopted as compared with the customary methods of irrigation.

What is the standard for "reasonably efficient practices"? There are several applicable statutes:

> C.R.S. 1973, §7-42-108. Shall keep ditch in repair. Every ditch corporation organized under the provisions of law shall be required to keep its ditch in good condition so that the water shall not be allowed to escape from the same to the injury of any mining claim, road, ditch, or other property. . . .
>
> C.R.S. 1973, § 37-84-101. Maintenance of embankments and tail ditch. The owners of any ditch for irrigation or other purposes shall carefully maintain the embankments thereof so that the waters of such ditch may not flood or damage the premises of others, and shall make a tail ditch so as to return the water in such ditch with as little waste as possible into the stream from which it was taken.
>
> C.R.S. 1973, § 37-84-107. Owner of ditch must prevent waste. The owner of any irrigating or mill ditch shall carefully maintain and keep the embankments thereof in good repair and prevent the water from wasting.
>
> C.R.S. 1973, § 37-84-109. Penalty for violation of sections. Any person who willfully violates any of the provisions of sections 37-84-107 and 37-84-108, upon conviction thereof, shall be fined not less than one hundred dollars. Suits for penalties under sections 37-84-107 and 37-84-108 shall be brought in the name of the people of the state of Colorado.
>
> C.R.S. 1973, § 37-84-119. Ditches to be kept in repair. The owners, or persons in control, of any canal or ditch used for irrigating purposes shall maintain the same in good order and repair, ready to receive water by April first in each year, so far as can be accomplished by the exercise of reasonable care and diligence....

It is obvious, from these statutes and the cases cited thereunder, that the primary responsibility in maintenance of ditches is the owner's. The standard is for careful maintenance of the ditch in good order and repair, so that water may not escape, waste, flood onto, or damage others. Failure to comply leads not only to civil, but criminal, liability. Ditches may need to be built where soil is porous, or tight. Many ditch owners

have shouldered whatever burden it is to have a sealed and non-wasteful ditch. Why should Bessemer get a free ride? Schodde did not. Cascade did not. Bender did not. They all had to improve their diversion facilities. Bessemer has been leaking water onto its neighbors for eighty years. Middlekamp v. Bessemer Irrigating Co. 46 Colo. 102, 104, 103 P. 280 (1909). Four generations of leaky ditch are enough!

Interestingly, if Bessemer lets its ditch leak, Bessemer itself, and the 950 other plaintiffs may be the primary beneficiaries of this waste. The seepage will go primarily to subirrigation of Bessemer owners, as the water returns to the river. That water which does not naturally subirrigate the plaintiffs' fields may be pumped by plaintiffs through their numerous irrigation wells. If Bessemer loses this case, it will have the incentive to make the most cost effective changes in its operations, by improving its ditch and laterals, changing farming practices, changing irrigation practices (e.g. installing sprinklers) or obtaining better well productivity. If the United States were found liable, no such cost efficiencies would be anticipated.

The Court will want to consider two decisions of the California Supreme Court which have been important in shaping maximum utilization and minimum waste of water under California law. They also hold that a downstream appropriator has no right to compensating damages or to the maintenance of silt, sand, and gravel flow onto his land in the event of construction of dams and reservoirs upstream. Joslin v. Marin Municipal Water District, 60 Cal. Rptr. 377, 429 P.2d 889 (1967), and Peabody v. City of Vallejo, 2 Cal.2d 351, 40 P.2d 486 (1935).

In Joslin, plaintiffs claimed damages in inverse condemnation arising from the construction of the municipal water district's dam and reservoir upstream, saying that the slower flow prevented the deposition of suspended rock, sand and gravel on plaintiffs' lands, where it was sold by plaintiffs as a business. The court had to consider whether any property right of plaintiffs had been damaged, at 894 et seq.

> Although, as we have said, what is a reasonable use of water depends on the circumstances of each case, such an inquiry cannot be resolved in vacuo isolated from state-wide considerations of transcendent importance. Paramount among these we see the ever increasing need for the conservation of water in this state, an inescapable reality of life quite apart from its express recognition in the 1928 amendment . . . .
>
> It is "reasonable." then, that the riches of our streams, which we are charged with conserving in the great public interest, are to be dissipated in the amassing of mere sand and gravel which for aught that appears subserves no public policy? We cannot deem such a use to be in accord with the constitutional mandate that our limited water resources be put only to those beneficial uses "to the fullest extent of which they are capable," that "waste or unreasonable use" be prevented, and that conservation be exercised "in the interest of the people and for the public welfare." (Cal. Const., art. XIV, § 3.) We are satisfied that in the instant case the use of such waters as an agent to expose or to carry and deposit sand, gravel and rocks, is as a matter of law unreasonable within the meaning of the constitutional amendment. . . .
>
> . . . .
>
> Assuming arguendo the unreasonableness of their use of the stream, plaintiffs contend that in any event they are entitled to be compensated for the damage to their property interests. . . .
>
> While plaintiffs correctly argue that a property right cannot be taken or damaged without just compensation, they ignore the necessity of first establishing the legal existence of a compensable property interest. Such an interest consists in their right to the reasonable use of the flow of the water. . . . There is now no provision of

law which authorizes an unreasonable use or endows such use with the quality of a legally protectible interest merely because it may be fortuitously beneficial to the lands involved.

. . . .

. . .[I]n Gin S. Chow v. City of Santa Barbara, supra, 217 Cal. 673, 22 P.2d 5 . . . the court stated: "There is a well recognized and established distinction between a 'taking' or 'damaging' for public use and the regulation of the use and enjoyment of a property right for the public benefit. The former falls within the realm of eminent domain, and the latter within the sphere of the police power.

. . . .

From the foregoing we arrive at the conclusion that since there was and is no property right in an unreasonable use, there has been no taking or damaging of property by the deprivation of such use and, accordingly, the deprivation is not compensable. (Emphasis partially in original.)

Judge Arraj cited, and attempted to distinguish this case, saying (App. 58):

The California doctrine of "reasonable use" between riparians and appropriators, however, can have no application to the ownership of water rights in Colorado, which follows the doctrine that an appropriator has a right to such water as he may divert and beneficially use. . . . [Then in his footnote, as follows.] The Joslin court, in fact, indicated that it might have reached the opposite result if it were faced with an attempt by a government entity to condemn plaintiff's right, rather than with a conflict between private riparians and appropriators. 429 P.2d at 895-896.

Let us consider Judge Arraj's distinctions. California's Constitution had been recently amended to include the doctrine of "reasonable use," which

"requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use hereof. . . ." (Joslin at 893, n.5)

Colorado's law, at C.R.S. 1973 37-92-103(4) states "beneficial use"

> is the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purposes for which the appropriation is lawfully made. . . .

The distinction is not obvious. Indeed, the language is nearly identical. And if, in this drought year, Judge Arraj meant that a Coloradoan can legally waste more water than a Californian, we respectfully suggest he errs. As for Judge Arraj's footnote, it is incorrect. Joslin's action was "in inverse condemnation for damages" (at 890) from a governmental entity, and there is no such indication. If Judge Arraj is relying on Los Angeles Co. F. C. Dist. v. Abbot, 24 Cal. App. 2d. 728, 76 P.2d 188 (1938) discussed there, the court disagrees with the alleged proposition of the case; points out that it relied on a case which forced the constitutional amendment to overturn it, ignored the controlling California Supreme Court decision; and concludes that anything in it contrary to Joslin "is disapproved." (896).

An important aspect of Joslin is its holding that the sand collector's privilege was not legally compensable in inverse condemnation; that regulation, not taking had occurred. See below our conclusion that any damage to Bessemer results from regulation rather than taking.

Important in Joslin's opinion is its reliance on the very similar case of Peabody v. City of Vallejo, 2 Cal. 2d 351, 40 P.2d 486 (1935) in which a downstream user sought to enjoin Vallejo's storage of water behind its dam because Peabody used the water to overflow his land and deposit silt, and to wash the salt out of lands bordering the San Francisco Bay. The Court clearly favored the

new California Constitutional Amendment of 1928, saying it moved California law much closer to the appropriation doctrine of the western states. (490) Epitomizing the Amendment (at 491) in terms very close to 37-92-103(4), the Court then held against the downstream owner (at 492):

> The asserted right of a riparian owner, whose lands in a state of nature form a delta at about sea level, to have the full flood flow of the stream to overflow his lands for the purpose of depositing silt thereon, or by artificial check dams and levees to remove the saline content of the soil which in a state of nature are salt marsh lands, cannot be supported. So far as we are advised, this asserted right does not inhere in the riparian right at common law, and as a natural right cannot be asserted as against the police power of the state in the conservation of its waters. This asserted right involves an unreasonable use or an unreasonable method of use or an unreasonable method of diversion of water as contemplated by the Constitution.

III. BESSEMER CITES VARIOUS WATER POLLUTION CASES WHERE ONE HAS ADDED POLLUTANTS TO WATER AND DEGRADED IT. THEY ARE INAPPOSITE, AND IN FACT, ARE CONTROLLED BY THE POLICY OF CLEANING UP WATER.

The pollution cases cited by Bessemer are inapposite because they all deal with court efforts to improve water quality by preventing addition of pollutants, while Bessemer attempts to prevent the improvement of water by requiring addition or maintenance of pollutants. Bessemer cites several Colorado pollution cases, some of which were also cited by Judge Arraj (App, 59). Wilmore v. Chain O'Mines, 96 Colo. 319, 44 P.2d 1024 (1934); Humphreys Tunnel and Mining Co. v. Frank, 46 Colo. 524, 105 P. 1093 (1909); Slide Mines v. Left Hand Ditch Co., 102 Colo. 69, 77 P.2d 125 (1938) (all being complaints against addition of mine tailings to water); Farmers Irrigation Co. v. Game and Fish Commission, 149 Colo. 318, 369 P.2d 557 (1962); Game and Fish Commission v. Farmers Irrigation Co., 162 Colo. 301, 426 P.2d 562 (1967) (both cases involving release of putrid fish hatchery return flow); Mack v. Town of Craig, 68 Colo. 337, 191 P. 101 (1920) (town's release of untreated sewage to streams); Cushman v. Highland Ditch Co., 3 Colo. App. 437, 33 P. 344 (1893) (anticipated release of alkalai).

Everyone recognizes that these cases are not controlling. As Judge Arraj said (App. 58-59):

> Quite expectably, we have found no Colorado case involving the question of whether an appropriator is entitled to silty, rather than clear water....
>
> All of these cases, of course, were instances where the defendant changed the quality of the water by adding some form of impurity, and they reflect the habit of thinking that the most desirable water is that which does not contain any foreign matter. The case at bar presents the novel question of whether removing impurities can likewise give rise to an actionable wrong.

Beyond the fact that the cases are not controlling, Bessemer cites them for dicta which are contrary to the policy controlling the result of the cases, of cleaning up Colorado's streams. This can be illustrated by the leading Colorado pollution case, followed in most of the above cited cases, Suffolk Gold Mining and Milling Co. v. San Miguel Consolidated Mining and Milling Co., 9 Colo. App. 407, 48 P. 828 (1897). San Miguel diverted water which had been polluted by the Suffolk stamp mill, which released silt comparable in size (45 or 55 mesh) to the silt requested by Bessemer. The silt destroyed the pipeline nozzle and Pelton wheel used by San Miguel to furnish power and light. This confirms the statements in our Appendix about the destructiveness of silt for general water users. Suffolk, the senior appropriator, claimed it was entitled to maintain the stream as silty as it had been when San Miguel initiated its use, saying, like Bessemer, the junior appropriator is entitled to the same quality water as when he initiated his appropriation. The Court said at 415-16:

> It was the law with respect to riparian owners that their use was subject to certain limitations, among which was the preservation of the general volume of the stream for the lower riparian owners, who had the right to receive that volume of water unpolluted, and in its natural condition of purity. It must remain fit for the use of the lower riparian owner. The subject has been discussed in many cases, and in all English-speaking countries the rights of the parties may be deemed to have been settled by a long series of adjudications. The question has arisen in numberless controversies where the questions were of a varying and diverse character. The lower owners were entitled to have the waters preserved in their purity, that fish might swim, that their stock might drink, and that the water might be applied to domestic uses. Parties have been restrained from carrying on a business on the banks of a stream whereby polluting matter would by natural seepage, from rains or from any extraneous cause, to be carried into the general volume of the water, and diminish its purity and its usefulness.

The Court then adopted the same rule for Colorado as an appropriation state. (417) Here the reasoning is explicit, it is purity that the Court is demanding, and demanding at the expense of a senior who desired maintenance of a silty stream. If continuance of (bad) water quality for the benefit of the senior were the rule, Suffolk and its progeny would have been decided differently.

Now let us apply this reasoning to Bessemer's pollution cases.

Wilmore, supra, is a case where a mine was enjoined from releasing tailings also similar in size to those here. In Wilmore 30.9% of the silt would pass a 200 mesh screen (at 323) (the standard definition used now for "silt" is for a 230 mesh screen). Wilmore shows that what is sauce for the goose is not sauce for Bessemer. Wilmore (at 323) complained about many of the same properties Bessemer lauds in silty water (see Pl. 79-80):

> The nature of the claimed damage to plaintiffs' ditches, water rights, lands, crops and proper use, may be stated briefly as follows: Tailings and slimes close and seal the pores of the soil; prevent aereation 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 away many loads of tailings from ponds and ditches; lower productivity of the soil; increases the necessity for fertilization; lessens marketability of strawberries and other products, after tailings water has run over them they are not fit for use; requires many times more water for irrigation, one irrigation with pond water equaling six irrigations with tailings water; fills reservoirs and lessens the value of lands so irrigated.

Thus, if both Wilmore and Bessemer can successfully complain about the same size silt, one because it is present, and one because it is absent, the U. S. is punished by either the fryingpan or the fire.

Bessemer cites Wilmore for the following dicta:

> For the purposes of this case, the word "pollution" means an impairment, with attendant injury, to the use of the water that plaintiffs are entitled to make. * * * In reality, the thing forbidden is the injury; (Emphasis added by Bessemer.)

(Bessemer Brief at 25.) Bessemer carefully avoids the immediately following language, saying "one introducing such extraneous matter into this stream" must prevent damage or "answer at his peril" (at 331). Bessemer also avoids Wilmore's citation of Suffolk for the importance of purity, fish swimming, stock drinking and domestic use (325-26), which in Wilmore as in Suffolk overrode the senior's claim to a right of maintenance of the stream in its former silty condition.

The facts and results in Humphreys and Slide Mines, supra, are essentially identical, except that in Humphreys, the complainant was the senior appropriator and in Slide Mines, the Court does not say who was senior. The point is that whether the silt benefits the senior or junior, it cannot be maintained for the alleged benefit of him who wants it, even where, as in these cases, he claims great financial damage. To the same effect, see another attempt to enjoin release of mine tailings in Atchison v. Peterson, 87 U.S. (20 Wall.) 507, 22 L.Ed. 414 (1874).

The two cases involving Farmers Irrigation Company (at 149 Colo. 318, 369 P.2d 557 (1962) and at 162 Colo. 301, 426 P.2d 522 (1967)), supra, confirm that one may not add pollutants to Colorado's streams. The pollutants were stated at 149 Colo. at 320:

> "...that defendants, in their operations, have placed large quantities of ground liver, flesh, and similar substances and other protein matter used for fish feed in the water diverted into and through said hatchery. Said feed becomes putrid and causes the odor of said water to become offensive, and likewise causes said water to become unwholesome and unfit to use for domestic purposes. Said water is turned back into the channel of Rifle Creek without the impurities, putrid flesh, and foreign matter being removed therefrom."

In these opinions, this Court allowed judgment for damages and injunction against the polluter. However, to compare the United States here with the hatchery there is silly.

Mack v. Town of Craig, 68 Colo. 337, 191 P. 101 (1920), reversed the condemnation of landowner's stream for the purpose of dumping and carrying the town's "raw and untreated sewage" to the Yampa or Bear River. Not only was the town denied its condemnation, the Court held it would be criminally liable if it polluted "such public waters by discharging sewage or any other obnoxious substance." (At 341.) (See our discussion below concerning the liabilities operators would face for deliberate pollution of the Arkansas with silt.) For Bessemer to assert that the effects of Craig's activities and Pueblo's Reservoirs are the same for the appropriator (Bessemer Brief at 30), is to fail to see the difference between polluting the river and cleaning it up.

Changes in the stream regimen resulting in increased seepage do not confer rights to a ditch owner who is injured thereby. In Brighton Ditch Co. v. Englewood, 124 Colo. 366, 237 P.2d 116 (1951), ditch owners complained that proposed change in point of diversion for some of the ditch's water would injure them because of increased seepage losses.

> The loss of water by seepage or evaporation, after diversion from the stream to a ditch, is not an injury to, or loss of, a water right as between ditch cotenants. [373] . . . . The limitation upon such change is not the mere inconvenience in use or even loss to others resulting thereby, but injury affecting "the vested rights of others in and to the use of water." [373]

The Court held that a requirement by the trial court that the person changing the water right improve the protestor's ditch was improper. (375) When a Bessemer owner obtains his water at the headgate, "the water he has taken is no longer a right, but a possession; it is not an interest in real estate, but personal property." (373) As such, seepage losses are his "mere inconvenience in use or even loss." (Id.)

In summary, Bessemer's cases do not mean that courts will mandate the continuance of a river in a silty condition for the benefit of a senior or junior appropriator. Instead they show that courts, with or without benefit of statutes requiring clean streams, will demand that polluters not make streams dirtier. The street is a one-way street. No courts have held that former polluters must resume pollution.

IV. THERE HAS BEEN NO "TAKING" OF PROPERTY OF BESSEMER, BUT AT MOST REGULATION OF THE ARKANSAS PURSUANT TO EXPRESSED PUBLIC POLICY DOCUMENTED BY THE FEDERAL FRYINGPAN-ARKANSAS LEGISLATION, THE FEDERAL WATER POLLUTION CONTROL ACT, THE COLORADO WATER QUALITY ACT, THE WATER CONSERVANCY DISTRICT STATUTE, THE STATE POLICE POWER, AND THE COMMERCE CLAUSE.

The Fryingpan-Arkansas project is the realization of enormous efforts of the whole Arkansas Valley and state of Colorado through its Congressional delegation for many years. Until this case the Bessemer Ditch Company and its owners have been among the project's strong supporters. After the Colorado Big Thompson project was authorized and the "Water Conservancy Act" (C.R.S. 1973, § 37-45-101, et seq.) was passed in 1937, Arkansas River Valley water users organized a water users assocation called the Water Development Association of South Eastern Colorado, and began planning this project. By 1951 plans had moved far enough to introduce a plan in Congress for a Bureau of Reclamation Project. The SECWCD was created in April 1958. Eleven years of lobbying was necessary before the Fryingpan-Arkansas Project Act, PL 87-590, 87th Congress, 76 Stat. 389, 43 U.S.C.A. 616, et seq., would pass.

Throughout this time acts existed which discouraged stream pollution, and after the Project passed Congress, even more stringent acts passed both the state and federal legislatures. Thus as we shall discuss, there are a number of statutes which justify and encourage the building of Pueblo Reservoir. Pueblo Reservoir serves many purposes, including, specifically, cleaning up the Arkansas River by capturing the sediment which was found by Congress to be destroying the value of the water for

many uses, including irrigation. In this broader context, the Court will see that even if Bessemer had a property interest in the silt, that interest has not been "taken," under the meaning of the Fifth Amendment of the United States. Legitimate regulation by the state and federal governments frequently, and inevitably, causes economic damage to parties, which is not compensable because of the necessity of protecting and regulating the public health, welfare, safety, commerce and navigation.

A. THE FRYINGPAN-ARKANSAS ACT.

August 16, 1962, the Fryingpan-Arkansas legislation (43 U.S.C.A. 616(a)) was passed,

> for the purposes of supplying water for irrigation, municipal, domestic, and industrial uses, generating and transmitting hydroelectric power and energy, and controlling floods, and for other useful and beneficial purposes incidental thereto, including recreation and conservation and development of fish and wildlife, the Secretary of the Interior is authorized to construct, operate, and maintain the Fryingpan-Arkansas project, Colorado, in substantial accordance with the engineering plans therefor set forth in House Document Numbered 187, Eighty-third Congress....

House Document 187 is a "Letter from Acting Secretary of the Interior transmitting report on the Fryingpan-Arkansas Project, Colorado, pursuant to Section 9 (A) of the Reclamation Project Act of 1939 (53 Stat. 1187), June 18, 1953." It specifies sediment control as an annual $141,000 benefit to the project. (At 112.) At 26 the report says:

> Mention has already been made of the acute sedimentation problem affecting irrigation in the main Arkansas Valley. At Pueblo the river annually transports about 944 acre-feet of sediment. Approximately 42 percent of that sediment is deposited in reservoirs, canals, and laterals; about 38 percent becomes undesired deposition on the irrigated lands. Aggradation of the river channel has made some irrigation diversion structures inoperative; other diversion structures have necessarily been raised. Removed sediment now lines some canal banks and further disposal has become very expensive. Canal sand traps have become inoperative. The only apparent immediate solution is provision of reservoir space specifically for the disposition of sediment.

The sediment problem was so severe that the Congress planned nearly one-fourth of the entire reservoir capacity to trap silt. At 68:

> Water released from the Arkansas Power Canal near Salida would flow down the Arkansas River Channel to the Pueblo Reservoir where it would be stored and released for municipal and irrigation use.... The dam would be an earth-fill structure 180 feet high above stream bed. Initial capacity of the reservoir would be 400,000 acre-feet with a surface area of 6,700 acres at elevation 4,902. At the end of 100 years the capacity is expected to be depleted approximately 94,400 acre-feet by deposition of sediment.

The capacity of old reservoirs for sediment control was inadequate and Pueblo Reservoir was needed. At 85:

> The Upper Arkansas River is overappropriated. Decreed direct diversion rights from the main stem of the Arkansas River in Colorado total more than 7,400 second-feet--roughly 10 times the average flow of the Arkansas River at Pueblo. Virtually all tributary flow is likewise overappropriated.
>
> Present storage capacities of private reservoirs along the Arkansas River total about 80,000 acre-feet for reservoirs located above Pueblo and about 300,000 acre-feet for the 11 off-stream reservoirs located below that city. The capacities of these reservoirs are rapidly becoming depleted due to sediment deposition. The eventual result of such uncontrolled sedimentation will be a return to the river flow conditions that existed when the overappropriations were first apparent and the reservoirs were originally constructed. Both Colorado and Kansas will be affected by this situation because the water supply will be even more inadequate and unreliable than at present. In order to prevent this condition it is necessary to provide more storage to control sediment and to replace storage capacity being depleted.

The main discussion of the benefits of sediment control is found at pages 111-112, and because of its crucial importance and to avoid taking it out of context, we reproduce it in full here and in the Appendix:

CHAPTER VIII. SEDIMENT CONTROL

EXISTING SEDIMENT PROBLEMS

> In the diversion area and on the eastern slope above Canon City sedimentation is negligible. The irrigated section of the Arkansas River between Pueblo and the John Martin Reservoir, however, has many sediment problems. Sediment

that has been removed from canals now lines the canal banks and further disposal has become an expensive process. Aggradation of the river channel in the vicinity of diversion structures has either made those structures inoperative or necessitated their being raised. Various canal sand traps have been made inoperative. Reservoir capacities are being depleted and feeder canals supplying off-channel reservoirs have become clogged with sediment causing loss in canal capacities of as much as 50 percent in some instances. A considerable amount of sediment is being deposited in laterals and on the irrigated lands. Below the John Martin Reservoir very few sediment problems are evident.

POTENTIAL SEDIMENT CONTROL

In determining the average annual sediment yield that might be expected from the drainage area above the Pueblo Dam site, the flow-duration-sediment rating curve method of analysis was used. A rating curve of sediment discharge for given flows for the period of sediment data record and a flow duration curve of water discharges for the period of water record were developed. From these curves the average annual sediment load was determined. By preparing 2 flow duration curves, 1 for rain and 1 for snowmelt, and base flows, separate sediment load determinations were made. The computed sediment loads were then combined to give an estimated average total sediment load of 944 acre-feet per year at Pueblo Dam site with a suspended load of 834 acre-feet. Past diversions of the Bessemer ditch, which diverts above the damsite, averaged about 10 percent of the river flow at the damsite. As the new outlet for the ditch would be at the damsite, about 10 percent of the suspended load would be added to the 944 acre-feet of sediment contribution to the Pueblo Reservoir. Operation of the John Martin and other reservoirs by the Corps of Engineers, however, indicates that about 10 percent of the suspended sediment would be sluiced through the reservoir. Thus, the total annual sediment contribution to Pueblo Reservoir would remain 944 acre-feet and a total of 94,400 acre-feet of storage capacity would be required for the 100-year period.

Data from existing reservoirs in which sedimentation has occurred were used to estimate the manner in which sediment would be deposited in Pueblo Reservoir. At the end of 100 years sediment deposition at Pueblo Dam could be expected to be 15 feet above the original stream bed elevation. Based on a total capacity of 400,000 acre-feet, the allocation of capacity at the end of 100 years of operation would be as follows:

Flood control	93,000
Water conservation	210,600
Sediment	94,400
Dead storage[1]	2,000
Total	400,000

[1] 10,000 acre-feet less 8,000 acre-feet sediment in the dead-storage pool.

BENEFITS

> Of the 944 acre-feet of sediment which would enter Pueblo Reservoir annually, it is estimated that below that reservoir 751 acre-feet would be prevented from being deposited in the existing reservoirs, canals, laterals, and on irrigated lands. No attempt is made to evaluate benefits for preventing deposition on irrigated lands. Total annual benefits are estimated to be $141,300 (table 10). [Table 10 is on the following page of this Brief.]

The Court will note than in this House Document 187, which was statutorily designated as the engineering plans for the project, that the loss of silt to Bessemer was expressly mentioned, and the sediment control of the Pueblo Reservoir was expressly found to be a benefit. This is the Congress regulating the River for the benefit of all. If Bessemer felt this was not a benefit, its remedy was to protest the proposed legislation in Congress, not accept the legislation and now, fifteen years later, protest to this Court.

Report 694 (see p. 3-4) of the House of Representatives (87th Cong. 1st Sess., July 11, 1961, and Report No. 1742 (see p. 3) of the Senate (87th Cong. 2d Session, July 19, 1962), reported on the bill in the following language:

> Municipal water needs in the Arkansas Valley have become critical. Diminishing water supplies and the rapid population growth in Pueblo, Colorado Springs, and other valley cities and towns have contributed to this critical water supply situation. A U.S. Public Health Service study in 1957 indicated that the Arkansas River is one of the worst in the Nation from the standpoint of pollution, chloride content, alkalinity, hardness, and turbidity. Transmountain diversion is the only source of any appreciable amount of water to meet the municipal needs unless the already short agricultural water supply is diverted to municipal use, thus further disrupting the agricultural economy of the area. The new supply from the Fryingpan-Arkansas project would go a long way toward improving the water quality and meeting the critical need for additional municipal water.

TABLE 10 [from page 112 of House Document No. 187]

POINT OF DEPOSITION OR PICKUP	Dollar benefits per acre-foot sediment stopped from depositing	Estimated annual sediment stopped from depositing (acre-feet)	Annual benefits
Bedload pickup	(1)	110	-----
Suspended load pickup	(1)	83	-----
John Martin Reservoir:			
Irrigation storage	$329	104	$ 34,200
Flood control	43	52	2,200
Off-channel reservoirs	329	60	19,700
Canals	160	89	14,200
Laterals	800	89	71,000
Irrigated land	(2)	357	-----
TOTAL	-----	944	$141,300

(1) No benefits.
(2) Not evaluated.

> Sediment control, pollution control, protection and enhancement of fish and wildlife values, and additional recreational opportunities are also needs in the project area which will be fully or partially met through the construction of the Fryingpan-Arkansas project.
>
> In summary, it can be said that the most pressing and immediate needs of the Arkansas Valley can be met by construction and operation of the Fryingpan-Arkansas project as proposed in S. 284....

Thus sediment control, pollution control and flood control were among the express Congressional purposes for the Project. The Arkansas River had already been found to be one of "the worst in the nation from the standpoint of pollution, chloride content, alkalinity, hardness, and turbidity." The function of Pueblo Reservoir in reducing this turbidity and pollution was vital, and was to cost $37 million, one-fifth the cost of the $170 million Project. Now Bessemer sues for over $100 million, three times the then projected total cost of the Reservoir. If such a claim succeeds, who will ever again try to maximize beneficial use of Colorado's water with a major multipurpose dam?

B. THE COLORADO WATER QUALITY CONTROL ACT.

The Colorado Water Quality Control Act, (CWQCA), 1973 § 25-8-101 et seq. has many of the same features as the Federal Water Pollution Control Act, but goes even further, reflecting our General Assembly's concern with the fragile environment of our semi-arid state. The Court will want to read many sections of the Act for their unmistakable policy running directly contrary to Bessemer's position, particularly sections 102 (1), the legislative declaration "that pollution of state waters constitutes a menace to public health and welfare, creates public nuisances,

is harmful to wildlife and aquatic life, and impairs domestic, agricultural, industrial and other beneficial uses of state waters...." Under § 102 (2) "the public policy of this state [is] to conserve state waters...; to provide that no pollutant be released into any state waters without first receiving...treatment...; [and] to provide for the prevention, abatement, and control of new or existing water pollution...." The powers are exercised under the "police power" to protect "the health, peace, safety, and general welfare of the people of this state." [§ 102 (3)].

Pollutant is defined as: "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." [§ 103 (11)]. Pollution includes "man-induced or natural alternation of the physical, chemical, biological, and radiological integrity of water." [§ 103 (12)].

In classifying all state waters, the Water Quality Control Commission is to take into account "The existing extent of pollution or the maximum extent of pollution to be tolerated as a goal," the "need to protect the quality of the water for human purposes and also for the protection and propagation of wildlife and aquatic life," and the "flow, depth, stream gradient,...and daily or seasonal variability...." [§ 203].

Water quality standards may expressly be promulgated for "suspended solids." [§ 204 (2)(b)]. One of the specific measures

the Commission shall consider in formulating each control regulation is "requirements as to settling ponds, holding tanks, and other treatment facilities for water that will or might enter state waters." [§ 205 (2)(g)]. This measure shows that many sediment control features will now be required features.

"No person shall discharge any pollutant into any state water from a point source without first . . . having obtained, a permit...." [§ 501 (1)].

"Every permit issued for a discharge from any facility, process, or activity that includes any dam, settling pond, or hazard within or related to its system shall include such terms and conditions as the division deems necessary to prevent or minimize the discharge of any pollutant into any state waters in potentially dangerous quantities." [§ 501 (7)].

Civil penalties include $10,000 fines per day. [§ 608] Cleanup orders can be required for accidental or purposeful spills [§ 608]. Restraining orders and injunctions are available [§ 607]. Criminal penalties up to $50,000 per day exist, along with jail terms up to one year. [§ 601, 609].

One caveat must be stated to our argument under the CWQCA and FWPCA below. The U. S. Supreme Court in E.P.A. v. Cal. Ex Rel St. Water Res. Control Bd., 426 U.S. 200, 96 S. Ct. 2022, 48 L.Ed 2d 578 (1976), held that 33 U.S.C.A. § 1323, which requires federal polluting facilities to "comply with federal, state, interstate, and local requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements," did not require federal polluting facilities to obtain a permit from the state, but instead from the E.P.A. Whether in our instance it would be the U. S. or Bureau of Reclamation as owner of the Reservoir who would apply to the E.P.A. or the Southeastern District

as holder of the water decrees who would apply to the state, or both, is not crucial. The point here is that both state and federal policy demand release of clean water in contradiction to Bessemer. The "police power" of the state demands that we not add to the "menace" of water pollution by discharging the "man-made, man-induced, or natural" pollutants including "dirt, slurry, rock, sand, or agricultural waste."

It is elementary that compliance with a statute passed under the police power of the state gives rise to no claims for damage or taking by third parties.

Swisher v. Brown, 157 Colo. 378, 402 P.2d 621 (1965) adequately illustrates Colorado's police power to regulate agricultural businesses. There, under an act passed under the police power to limit agricultural sales and increase profits, the state agricultural commissioner ordered specific lettuce producers to destroy their first grade quality lettuce already "in their fields ready to cut, pack, sell and market," with purchasers awaiting. (At 382). If this is not property subject to compensation, then surely Bessemer's is not. This Court properly held, however, at 386-7:

> Regulations imposed by a state in the exercise of its police power, when reasonable and adapted to the scope and objects sought to be accomplished, are not rendered unconstitutional even though private property is thereby injured or destroyed without the payment of compensation....
>
> The rule is aptly stated in 11 Am. Jur., Constitutional Law, Sec. 266, as follows:.... Such laws, when reasonable and adapted to the scope and objects covered by the police power, are not considered as appropriating private property for public use, but simply as regulating its use and enjoyment by the owner. If he suffers injury, it is either damnum absque injuria, or, in the theory of the law he is compensated for it by sharing in the general benefits which the regulations are intended to secure.

See also Oberst v. Mays, 148 Colo. 285, 365 P.2d 902 (1961), Peabody v. City of Vallejo, 2 Cal. 2d 351, 40 P.2d 486 (1935) supra, and Joslin v. Marin Municipal Water District, 60 Cal. Rptr. 377, 429 P.2d 889 (1967), supra; 16 Am. Jur. 2d Const. L. § 301.

C. FEDERAL WATER POLLUTION CONTROL ACT.

In 1972 Congress passed the Federal Water Pollution Control Act (FWPCA) 33 U.S.C. 1251 et. seq. - PL. 92-500, after which the CWQCA is modeled. The strength of its public policy is indicated by the fact it generated the largest public works program in the nation's history, to clean the nation's water. The objective of the Act is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters," and it "is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." [33 USC 1251 (a)(1)].

As with the CWQCA, silt is a pollutant, and the Arkansas is covered by the Act. [§ 1362 (6), (7)]. U.S. v. Holland, 373 F. Supp. 665, 675 (W.D. Fla. 1974). U.S. v. Ashland Oil and Transportation Co., 504 F.2d 1317, 1320 (6th Cir. 1974).

To skim read the act is to see how inimical to the nation's policy Bessemer's claim is. But we shall point only to a few sections. Sections 1252 (b) and 1252a specifically discuss the building of storage facilities by the Bureau of Reclamation to regulate streamflow and to improve water quality. We quote § 1252 (b) in part:

> In the survey or planning of any reservoir by the Corps of Engineers, Bureau of Reclamation, or other Federal agency, consideration shall be given to inclusion of storage for regulation of streamflow, except that any such storage and water releases shall not be provided as a substitute for adequate treatment or other methods of controlling waste at the source.

Section 1252(b)(2) and (3) specifically require determination of stream flow both for the need for and value of storage for regulating water quality and for non-water quality purposes.

Section 1252a (not 1252(a)) provides in part:

> In the case of any reservoir project authorized for construction by the Corps of Engineers, Bureau of Reclamation, or other Federal agency when the Administrator of the Environmental Protection Agency determines pursuant to section 1252 (b) of this title that any storage in such project for regulation of streamflow for water quality is not needed, or is needed in a different amount such project may be modified accordingly by the head of the appropriate agency and any storage no longer required for water quality may be utilized for other authorized purposes of the project when in the opinion of the head of such agency, such use is justified.

Thus the FWPCA specifically requires consideration and authorizes use of reservoirs such as Pueblo for regulating streamflow and storing water to improve water quality, and modification of projects where the reservoirs are not planned to optimize water quality.

The basic plan of the FWPCA, as the Court knows, is to require permits for all point source discharges of pollutants under § 1342. The permits are to be made progressively more restrictive, through requirements to apply "best practicable control technology currently available" by July 1, 1977 [§ 1311 (b)(1)(A)] and "best available technology economically achievable" by July 1, 1983 [§ 1311 (b)(2)(A)]. Polluters have compliance schedules, under their permits, which are enforced by stringent penalties under § 1319.

To refuse to trap the silt, or now to begin releasing it for Bessemer's benefit would require approval of authorities who would, we think, refuse to grant approval.

U.S. v. Ashland Oil and Transporting Co., 504 F.2d 1317, 1326 (6th Cir. 1974), quotes a case and discusses further problems of oil pollution as follows:

"The seaman lost his life on the tug Arthur N. Herron, which, on the night of November 18, 1952, while towing a scow on the Schuylkill River in Philadelphia, caught fire when an open-flame kerosene lamp on the deck of the scow ignited highly flammable vapors lying above an extensive accumulation of petroleum products spread over the surface of the river. Several oil refineries and facilities for oil storage, and for loading and unloading petroleum products, are located along the banks of the Schuylkill River. The trial court found that the lamp was not more than three feet above the water." Kernan v. American Dredging Co., 355 U.S. 426, 427, 78 S.Ct. 394, 395, 2 L.Ed.2d 382 (1958).

We also know (and we take judicial notice) that two of the important rivers of this circuit, the Rouge River in Dearborn, Michigan, and the Cuyahoga River in Cleveland, Ohio, reached a point of pollution by flammable materials in the last ten years that they repeatedly caught fire. Such pollution is an obvious hazard to navigation which Congress has every right to seek to abate under its interstate commerce powers.

Can there be any doubt as to the answer of this Court if Bessemer were a candle manufacturer who collected the oil from such streams and protested when a dam was built which prevented the flow of such oil to Bessemer's headgate? This point is further illustrated by U.S. v. Holland, 373 F. Supp. 665 (W.D. Fla. 1974). There the United States successfully enjoined the release of "sand, dirt, dredged spoil and biological materials into the man-made canals and into mangrove wetlands which are periodically inundated...." (At 667.) The court explains at length that navigable waters under the act means, as it says, "the waters of the United States,"--all the waters. (33 U.S.C.A. 1362 (7), Holland at 669-676.) In the final decree any releases were limited to a daily maximum of total suspended solids of 50 parts per million.

The scope of the Act is also shown by the following quotation from U.S. v. Phelps Dodge Corporation, 391 F. Supp. 1181, 1187 (D. Ariz., 1975):

> Thus a legal definition of "navigable waters" or "waters of the United States" within the scope of the Act includes any waterway within the United States also including normally dry arroyos through which water may flow, where such water will ultimately end up in public waters such as a river or stream, tributary to a river or stream, lake, reservoir, bay, gulf, sea or ocean either within or adjacent to the United States.

As might be expected, defendants have challenged the constitutionalty of the FWPCA, and it has been held constitutional, and to be a valid exercise of the commerce power and to protect the health and welfare of the United States. U.S. v. Ashland Oil and Transportation Co., 504 F.2d 1317, 1325, 1329, (6th Cir. 1974).

CONCLUSION

We are a rich and also a litigious society. This case proves it. Not every day does one encounter the case where the complainant says he has been damaged by $100,000,000--because of the receipt of clean water.

The answer to the certified question is "No."