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

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NO. 27714  
IN THE  
SUPREME COURT  
OF THE  
STATE OF COLORADO

FILED IN THE  
SUPREME COURT  
OF THE STATE OF COLORADO

OCT 28 1978

*David W. Brejia*

A-B CATTLE COMPANY, et al, )  
 )  
 )  
 Plaintiffs, )  
 )  
 v. )  
 )  
 THE UNITED STATES OF AMERICA, )  
 )  
 Defendant. )

REPLY BRIEF  
BY THE  
STATE OF COLORADO

---

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

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CERTIFICATION OF QUESTION  
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---

The State of Colorado appears in this case as a friend of the court. The State is concerned about the impact of the court's opinion on water resource development in the state and the state's water quality laws.

The plaintiffs have filed a voluminous sixty-four page answer brief. The State finds itself in agreement with part of what the plaintiffs say in their brief. The State agrees that a water right is a usufructuary right and that the measure of an appropriator's vested right is the use to which his water right is actually being put. The Colorado Constitution does not make silt a property interest which is appropriated by a water user. Therefore, if the plaintiffs have a cause of action for reduction in the silt content of water by a junior appropriator, it is because the common law or the statutes of Colorado provide an action

for interference with the use to which the water right is being put akin to the right of lateral support enjoyed by a real property owner. But to argue that because that has been an interference with the use made of a water right, there has been a taking of the water right begs the question. While it may be true as a general principle that material interferences with the use of a water right are actionable, the question before the court is whether in this particular case the interference is actionable under the common law or statutes of Colorado.

Only a brief section of the plaintiffs' answer brief specifically addresses itself to the issues raised by the State, but those issues are squarely joined and clearly presented to the court for consideration. The State and other amici argued that footnote 4 of the court's opinion was inconsistent with the court's holding. State of Colorado's amicus brief (Colo.) at 5-9; City of Trinidad's amicus brief (Trin.) at 6-10. In footnote 4 the court recognized that the principle of maximum utilization protects junior appropriators from liability for injuries which are caused solely as a result of the change in velocity of the stream due to the appropriation.

Junior appropriators reduce the water velocity and cause the silt concentration to decrease. Return flow, however, may increase the degree of silt concentration. Regardless of whether junior appropriations cause a net increase or decrease in silt concentration, senior appropriators cannot successfully allege injury in such a situation, since to do so would entail violation of the principle of maximum utilization of our scarce water resources.

Within the same footnote, however, the court said:

Senior appropriators are, however, entitled to that silt concentration which naturally results from the free flow of the natural stream in the quantity of their decrees.

The State pointed out that these statements cannot be

reconciled, (Colo. at 7-8), as did the City of Trinidad (Trin. at 8). If direct flow junior appropriators are protected from liability because of reductions in the velocity of the stream which cause a decrease in the silt content of the stream, then there is no principled way to distinguish between direct flow junior appropriators and reservoir storage junior appropriators (Colo. 7-8).

Plaintiffs implicitly admit the force of this argument because they argue that the court did not mean what it appeared to say in footnote 4, but only that

There may be a net reduction in quantity and a change in quality of the streams waters .... (but) ... The law does not (create liability for) any and every injury imaginable. To be objectionable, the change must cause an injury that is "material" or "substantial" in nature.

Plaintiffs' answer brief (P.) at 24-5. Here the plaintiffs squarely join issue with the State. The State does not believe that only de minimis reductions in the silt content which are the result of a decrease in the velocity of the stream caused by a junior appropriator are protected by the principle of maximum utilization. Nor does the State believe that that is what the court intended to say in footnote 4. Such has never been the law in Colorado. As the City of Trinidad correctly points out, such a ruling would emasculate section 6 of article XVI of the Colorado Constitution which states in part: "The right to divert the unappropriated water of any natural stream to beneficial use shall never be denied." Every upstream diversion or impoundment will result in an alteration of the silt content due to the decrease in the velocity of the stream. Carried to an extreme, an appropriator located in the lower reaches of a stream with a very early appropriation date could put a call on the river for the receipt of its natural silt concentration which would have the practical effect of halting all upstream

use and commanding the entire stream flow to satisfy his appropriation (Trin. at 6-7).

The State would also point out that such a decision would mean that an appropriator who effectuates a transmountain diversion which increases the salt concentration in the Colorado River by removing relatively clean water which has a dilution effect further downstream could be liable for damages to downstream senior appropriators. The same would be true on the eastern slope if the dilution effect of clean water from the western slope materially affects the silt content of the stream. The State believes that the principle of maximum utilization, which is rooted in the Colorado Constitution, section 6, article XVI, cannot be limited to de minimus effects, but protects all effects which result solely because of further appropriation of unappropriated water. Having embraced the principle of maximum utilization as the public policy of this state which can outweigh some injury to senior appropriators, this court cannot in a reasoned, principled way distinguish between direct flow appropriators and reservoir storage appropriators.

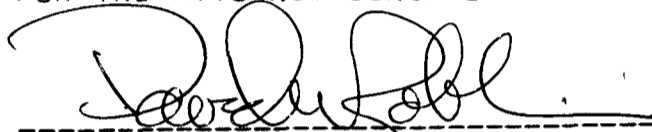
Finally, there is another impact of the court's decision that the State would like to court to consider. While in this case Bessemer claims naturally silty water, the court's rationale is based on the conditions at the time of appropriation on which the appropriator relied in making his investment. If every material impact on the quality of water which affects its use is actionable, the State can foresee that a future claimant will demand damages for the removal of some pollutant added to the stream which was present at the time of his appropriation and which is beneficial to his use. Such liability would seriously interfere with the goal of the State to eliminate discharges of pollutants into state waters. The State requests the court to confirm that the Constitution limits an appropriator's right to

rely on conditions existing at the time of appropriation to those conditions which are part of the quality of the natural stream, and that even if an appropriator benefits from a pollutant, he has no protected interest if that pollutant is removed at the direction of the state's water quality laws.

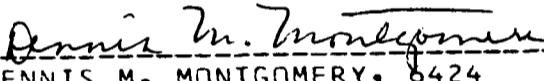
CONCLUSION

The State requests that the court, on reconsideration, answer the certified question in the negative.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within  
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