10-4-1978

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

IN THE SUPREME COURT

OF

COLORADO

No. 27714

IN RE QUESTION SUBMITTED BY THE UNITED STATES COURT OF CLAIMS IN ITS PROCEEDING NO. 105-75 ENTITLED	)
A-B CATTLE COMPANY, et al.,	)
Plaintiffs,	)
v.	)
UNITED STATES OF AMERICA,	)
Defendant.	)

ORIGINAL PROCEEDING

BRIEF IN SUPPORT OF PETITION FOR REHEARING MADE BY THE LOWER SOUTH PLATTE WATER CONSERVANCY DISTRICT

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INTRODUCTION

Extensive statements of fact were filed with the original briefs in this proceeding and will not be repeated here. The Lower South Platte Water Conservancy District joins in briefs filed by other amici in this proceeding and wishes to add to those briefs by making the following additional arguments.

ARGUMENT

I. THE COURT'S INCLUSION OF SILT WITHIN THE "VARIOUS PROPERTY COMPONENTS OF A COLORADO WATER RIGHT" IS AN IMPROPER INTERPRETATION OF THE COLORADO CONSTITUTION, AND UNDERMINES BOTH STATE AND FEDERAL WATER POLLUTION CONTROL LAWS.

A. The Court Improperly Engaged In The Interpretation Of Unambiguous Words And Stretched The Meaning Of The Words "Water Right" To Include "Silt".

In arriving at its affirmative answer to the certified question, this Court resorted to a complex construction of the words "water right," so as to include silt as property protected by Article XVI, Sections 5 and 6 of the Colorado Constitution, provisions which clearly and unambiguously declare only water to be property. This Court stated:

> Although the various property components of a Colorado water right are not enumerated in our Constitution, statutory law, or case law, the substance of the right is indicated and defined by the protections afforded against specific types of injuries.

Slip Opinion, p. 11. Thus the Court construed the meaning of a "water right" by looking at "protections afforded against specific types of injuries." It concluded by this construction that "removal of a naturally - occurring beneficial element such as silt, also constitutes an injury." Slip Opinion, p. 12. Thus, this Court, solely by judicial construction, elevated silt to the same constitutional property status as water.

This Court should not have engaged in any construction whatsoever to define "water right" in this case, much less such a strained method of construction as was used in this case. The word "water" is unambiguous. The language of Article XVI, Sections 5 and 6, of the Colorado Constitution is

unambiguous and clear on its face. These constitutional provisions refer to "water", and "stream[s]" as being protected by the priority system. No where is any mention made whatsoever of "silt." The law in Colorado, as well as in other states is clear:

> If . . . words embody a definite meaning which involves no absurdity and no contradiction between different parts of the same writing, then that meaning, apparent on the face of the instrument, is the one which alone we are at liberty to say was intended to be conveyed. In such a case there is no room for construction. That which the words declare is the meaning of the instrument, and neither the courts nor legislatures have a right to add to or take away from that meaning. Cooley's Constitutional Limitations, 69, 70. (Emphasis Added)

The People ex rel. v. May, 9 Colo. 80, 85, 10 P. 641, 643 (1885). See also Wright v. U. S., 302 U.S. 583, 589 (1938); Valenti v. Rockefeller, 292 F.Supp. 851, 856 (S.D.N.Y., 1968), aff'd 393 U.S. 405; Civil Service Employees v. Love, 167 Colo. 436, 444-445, 448 P.2d 624 (1968); 16 Am.Jur.2d Constitutional Law §58, P.230. Here, the word "water" in the Colorado Constitution is clear on its face. It needs no interpretation. The construction to which the Court resorted in order to elevate "silt" to a "component of a Colorado water right" and thus a property right was unnecessary and erroneous as a matter of law.

B. The Court's Interpretation Of "Silt" As A Component Of A Colorado Water Right Is Diametrically Opposed To Water Pollution Control Statutes Enacted By Both The State And Federal Legislatures.

In the last 15 years, both the Colorado and federal legislatures have enacted statutes to regulate water pollution. The Colorado Water Pollution Control Act includes within its definition of a pollutant "dirt," "slurry," "rock," and "sand." C.R.S. 1973, §25-8-103(11). Silt certainly fits into one of

these four categories. The Colorado Water Pollution Control Act further provides that "no pollutant [is to] be released into any state waters without first receiving. . . treatment. . . ." C.R.S. 1973, §25-8-102(2). Thus, the Colorado Legislature has acted as though silt is not property or a component of a Colorado water right, under the Colorado Constitution, but is instead a pollutant which can be regulated under the police power. The Colorado Legislature's interpretation of the Colorado Constitution so as to not include silt within a water right is certainly entitled to some deference. "Such [an] interpretation is entitled to great weight." 16 Am.Jur.2d Constitutional Law §85, P. 267. Cf. Hudson v. Annear, 101 Colo. 551, 75 P.2d 587 (1938); Bedford v. White, 106 Colo. 439, 106 P.2d 469 (1940).

If this Court continues to insist that silt is a "component of a Colorado water right," then it will render meaningless both state and federal water pollution laws, for the state will be unable to compel removal of pollution such as silt, mining tailings, or any other element present in water at the time the water right was obtained, from water without payment of just compensation. It is well settled that "no interpretation of constitution or statute will be accepted which results in a palpable absurdity." Mahood v. Denver, 118 Colo. 338, 340, 195 P.2d 379 (1948). This Court's current construction of the Colorado Constitution to include pollution such as silt within the components of a water right has the practical effect of rendering the state's antipollution laws meaningless at the very time the legislature is taking concrete action to cope with the pollution problem. This could hardly have been the result which this Court intended.

II. THE MAJORITY DECISION IGNORES THE PERMITTED CHANGE INHERENT IN COLORADO'S PRIORITY SYSTEM OF WATER RIGHTS.

A. New Appropriations Of Water Change Stream Flows And Colorado Has Adopted The Doctrine Of Maximum Utilization Of Water To Require Adaptation To Such Changes.

Fellhauer v. People, 167 Colo. 320, 447 P.2d 980 (1968) is perhaps only the most important dramatic, recent holding that in order to fully utilize water resources available in this state senior appropriators will have to adapt to changing conditions. In Fellhauer, a junior well was taking water that would at some time have been available to seniors. Yet this Court permitted the diversion and announced a "new drama of maximum utilization" that said, in effect, change will occur, new appropriations will come and in order to permit these beneficial and efficient uses of water others, holding senior water rights, will have to adapt. This has been the history of Colorado water use, from direct diversions to the storage of water, to diversions by pump.

If this Court requires that the "natural quality" of "water as it existed at the time" of an appropriation must be protected the still evolving law for the use of Colorado water must necessarily be set aside. Curiously, it will be set aside, not to protect a senior water right, but to protect the silt content of water.

Such a conclusion does not square with this Court's decisions, the Constitution or the experience and expectations of more than 100 years of actual practice.

B. This Court Has Long Recognized That Even Changes In Established Water Rights, As Well As Their Administration, May Injure Other Water Users; Yet Such Changes And Administation Have Been Permitted.

A standard permitting changes in points of diversion and places of use only if they do not injure other water rights has long been modified by this Court to prohibit only "material" or "substantial" injury. See, e.g., Vogel

v. Minn Canal and Res. Co., 47 Colo. 534, 107 P.1108; Cache LaPoudre Water Users Ass'n v. Glacier View Meadows, ____ Colo. ____, 550 P.2d 288 (1976).

Even rules and regulations of the State Engineer refer to a "reasonable lessening of material injury" or "material injury" as a test to determine when wells will be curtailed. See, In the Matter of the Rules and Regulations Governing the Use, Control and Protection of Surface and Ground Water Rights Located in the South Platte River and its Tributaries: Amended Rules and Regulations of the State Engineer, March 15, 1974, Rule 2.

Many argue this history of decisions and rules has gone too far and that standards for administering the priority system and permitting changes in water rights must be more strict to protect senior water rights. However, it is totally incompatible with these standards and rules to impose a higher standard for silt than is now imposed for water. The majority decision in this proceeding incorrectly does just that.

CONCLUSION

The Lower South Platte Water Conservancy District urges that silt is not a property right and that it is entitled only to those protections or burdens that may be specifically provided by statute.

In the alternative, it is requested that a full evidentiary hearing be required before announcing any principle of law that establishes silt as a property right.

DATED: October 4, 1978.

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CERTIFICATE OF MAILING

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