3-2-1971

CF & I Steel Corp. v. Rooks

NO. 24929

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

IN THE MATTER OF THE PETITION OF CF&I STEEL CORPORATION TO CHANGE THE POINT OF DIVERSION OF CERTAIN WATER RIGHTS IN WATER DISTRICT NO. 12 OF THE STATE OF COLORADO

CF&I STEEL CORPORATION,

Appellant,

v.

WILLIAM F. ROOKS, S. PARKER WOOLMINGTON, JOSEPH COGAN, GLEN McMURRY, RALPH L. SCANGA, MALCOLM A. McDOUGALL, JOHN TANCIK, R. R. MORRIS, GEORGE E. EVERETT, DONALD MUMMA, J. H. LIONELLE, EDWARD KOCHMAN, DELBERT SACK, and the DIVISION ENGINEER FOR WATER DIVISION NO. 2 IN THE STATE OF COLORADO,

Appellees.

Appeal from the
District Court
of the
County of Fremont
State of Colorado

HONORABLE
Max C. Wilson
Judge

BRIEF OF THE APPELLEES

WITTY & SANDELL
108 "F" Street
P. O. Box 843
Salida, Colorado 81201
Attorneys for Appellees

Table of Contents

Table of Authorities

NO. 24929

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

IN THE MATTER OF THE PETITION OF CF&I STEEL CORPORATION TO CHANGE THE POINT OF DIVERSION OF CERTAIN WATER RIGHTS IN WATER DISTRICT NO. 12 OF THE STATE OF COLORADO ——————— CF&I STEEL CORPORATION, Appellant, v. WILLIAM F. ROOKS, S. PARKER WOOLMINGTON, JOSEPH COGAN, GLEN McMURRY, RALPH L. SCANGA, MALCOLM A. McDOUGALL, JOHN TANCIK, R. R. MORRIS, GEORGE E. EVERETT, DONALD MUMMA, J. H. LIONELLE, EDWARD KOCHMAN, DELBERT SACK, and the DIVISION ENGINEER FOR WATER DIVISION NO. 2 IN THE STATE OF COLORADO, Appellees.	Appeal from the District Court of the County of Fremont State of Colorado HONORABLE Max C. Wilson Judge

BRIEF OF THE APPELLEES

STATEMENT OF THE CASE

The Statement of the Case by the Appellant is agreed to by the Appellees, but we wish to add this additional statement to help clarify the controversy.

The Petitioner proposes to change the point of diversion of 5.7 cubic feet of water per second of time decreed to the Oak Creek Mining and Irrigating Ditch from its present point of diversion near Parkdale, downstream a distance of approximately 14 miles, to the headgate of the Minnequa Canal, and through the Minnequa Canal a distance of approximately 46 miles, to then be used in the Pueblo plant, and returned to the Arkansas River by means of Salt Creek. (ff.280-282)

There is a transportation loss in the 14 miles downstream of .004 cubic feet per second. There is an additional average loss through the Minnequa Canal bypass during the last twelve years of 8.04 per cent, and during the last year a loss of a little over 5 per cent of water transported through the Canal. (ff.283-284)

From the records maintained on the consumptive use of this water right at Parkdale, the consumptive use varied from 10 per cent as a minimum to 30.8 per cent as a maximum. (ff.285-286)

The water not consumed was returned to the river in a distance ranging from 5 to 600 feet downstream from the point of diversion. (ff.288)

Joe Cogan, William F. Rooks and Delbert Sack own water rights upstream which are junior in point of time to the Oak Creek Ditch. This water is being used by them for irrigation, principally for native hay, small grain and alfalfa. (ff.432-435, 502-504, 530, 536-538)

There are a number of decrees lying between Parkdale and the CF&I Salt Creek return point, which have a priority date junior to the priority date of December 15, 1881, which is the historical priority date given to the Oak Creek Mining and Irrigating Ditch. (Protestants' Exhibit No. 1)

INTRODUCTION

The two major arguments presented by the Appellant appears to be the claim that the Protestants did not prove their ownership of vested water rights and that there would be no injury to anyone.

If we attempt to specifically answer each minor point of Appellant's Brief it would make the factual situation tedious and muddled. We feel that by a presentation of our position that all of the contentions of the Appellant in its Brief are clearly answered.

SUMMARY OF ARGUMENT

I
PROTESTANTS ARE INJURED AS UPSTREAM JUNIOR APPROPRIATORS.

II
ALL UPSTREAM JUNIOR APPROPRIATORS ARE INJURED.

III

STIPULATION DOES NOT REMEDY INJURY.

ARGUMENT

I

PROTESTANTS ARE INJURED AS UPSTREAM JUNIOR APPROPRIATORS.

The Protestants, Cogan, Rooks and Sack, testified as to their ownership and use of water rights upstream which were junior in time to the Oak Creek Mining and Irrigating Ditch, which is certainly a proper way of showing their ownership. Bates v. Hall, 44 Colo. 360, 98 P. 3.

It is apparent that the Petitioner well knew the water rights of the appearing Protestants, as well as the water rights of non appearing Protestants who entered into the original Protest filed with the Court. Having taken the Written Interrogatories of all Protestants, the Petitioner then prepared exhibits, particularly petitioner's Exhibit "G" which clearly showed its investigation of all water rights of Protestants. The Petitioner's claim of non ownership by the Protestants is nothing more than a red herring to detract from the real issues of the case before the court.

It is clear that the burden is upon the Petitioner to show that the proposed change will not impair vested rights. City and County of Denver v. Colorado Land and Livestock Co., 86 Colo. 191, 279 P. 46; Cache La Poudre Res. Co. v. Water S & S Co. et al, 25 Colo. 161, 53 P. 331; New Cache La Poudre Irr. Co. et al v. Water S & S Co., 49 Colo. 1, 111 P. 610.

Junior appropriators have a vested right in the continuance of conditions existing on the stream at the date of, and subsequent to their appropriation as against injurious changes. City and County of Denver v. Colorado Land and Livestock Co., supra; Vogel et al v. Minn. Canal and Res. Co. et al, 47 Colo. 534, 107 P. 1108; Farmers-Highline and Res. Co. et al v. Wolf et al, 23 Colo. App. 570, 131 P. 291.

The transportation loss and consumption loss would approximate 11.5 per cent or .5 cubic feet per second based on the twelve year average as testified to by Ralph W. Adkins, and there could be no question but what this amount of water should be deducted if any change were ever allowed.

Ralph W. Adkins also testified that the consumptive use of this water at Parkdale had a minimum of approximately 10 per cent and a maximum of 30.8 per cent and illustrative figures were used throughout the trial of this case based on an average of approximately 20 per cent loss with the conversion of 5.7 cubic feet of water returning 4.7 cubic feet of water to the stream.

As this return flow was added to the river five to six hundred feet downstream, it immediately became available for use by any appropriator entitled thereto. It is thus clear that this same water would be used, returned to the stream, and again used, numerous times in the fourteen miles downstream, as well as the forty-six mile stretch of bypass proposed by the Petitioner.

Protestants' Exhibit 1 shows the decrees with a

priority date junior to the Oak Creek Ditch. It is clear that if this change of point of diversion is allowed, that the return flow of this water will not be available to the junior appropriators downstream, and that it will thus place a demand on the users upstream, which could not happen if the condition as it now exists on the stream continued as it is.

As shown by the Stipulation, Petitioner's Exhibit "A", the Lincoln Park Pump Ditch is entitled to 3 cubic feet per second with a priority date of March 4, 1882. Delbert Sack testified that he owned 5.7 cubic feet of water in the North Fork Ditch, and as shown by Petitioner's Exhibit "G" this is entitled to a priority date of March 13, 1882, which is a junior decree to the Lincoln Park Pump Ditch.

Should the transfer be allowed, the Lincoln Park Pump Ditch by allowing the 1881 water to go by its headgate, could still make a demand on Delbert Sack for his North Fork Ditch water as the priority date is earlier than the date of Delbert Sack. The Petitioner continually argues that this is not a valid example and could not happen because of the practical administration of the water of the Arkansas River by past experience. Certainly, as a legal proposition, the Lincoln Park Pump could call for the water of Delbert Sack, or any other user upstream who was using water with a date junior to the March 4, 1882 date.

A tributary from which a junior appropriator takes must first answer to a senior appropriator from the main stream. Water Supply and Storage Company v. The Larimer and Weld Reservoir Company,

25 Colo. 87, 53 P. 386, Comstock v. Larimer & Weld Reservoir Co., 58 Colo. 186, 145 P. 700.

It is true that because of the small volume of water here involved it becomes difficult to illustrate the damage which is occurring because of the practical application of any river calls; however, this court has held that no injury should be allowed, and that any time there is a general injury to the stream that if it is multiplied it would become very serious.

This principle is set forth in the case of Farmers Highline Canal & R. Co. v. City of Golden, et al, 129 Colo. 575, 272 P.2nd 629. In this action the City of Golden was changing a point of diversion, and in referring to the proposed transfer the trial court had held that if any injury did result therefrom, it would be a general injury to the stream and could not affect any of the respondents specifically, but the court there held:

> "The fallacy of such presumption is readily apparent. When any injury is permitted under the assumption that it is general to the stream, it immediately becomes clear that such instances multiplied might become very serious. Where general injury would result to the stream by the transfer, the change could not be authorized without injury to junior appropriators because it is their rights, proportionate with senior rights, that consume the whole stream."

In the instant case, if the transfer were multiplied a hundred times, it immediately becomes appar-

ent that the transfer of 570 cubic feet of water a distance of sixty miles downstream, without the return flow being used again and again during that period of time, would be a most serious condition which could not be allowed. We do not feel that the fact that only 5.7 cubic feet of water per second of time as involved in this transfer in any manner changes the proposition that the junior appropriators upstream are injured by the transfer. The Supreme Court has recognized this principle before by the case cited and the trial court in this instance has followed the Supreme Court's direction.

In the above case, Farmers Highline Canal & R. Co. v. City of Golden, supra, the court also recognizes the importance of the return flow and we quote again from that case:

> "In addition to the duty of water in change of point of diversion cases, due consideration also must be had with the amount of return flow, both before and after the change, that the stream may remain as it was, and not suffer depletion, nor yet that the user at the point of changed location be obliged to add thereto. The first is not permissible and the latter not required."

As the average consumptive use of the Oak Creek Ditch was approximately 1 cubic foot of water per second of time when it was being used at Parkdale, it is apparent that the Protestants, nor anyone, could be injured by the transfer of 1 cubic foot of water. The conditions existing on the stream would re-

main the same even though the court allowed the transfer of 1 cubic foot of water per second of time which the court did and which is proper. It is apparent that any additional amount allowed to be transferred would cause injury to the junior appropriators upstream.

II

ALL UPSTREAM JUNIOR APPROPRIATORS ARE INJURED

If the proposed change of point of diversion is allowed, all upstream junior appropriators would be injured by the change. The Petitioner in its Brief contends that it must have the court consider only the impact upon those parties who have entered appearances and filed protests in this matter. We do not believe that this is the law as the burden is upon the Petitioner to show that the proposed change will not impair any vested rights.

We do not feel that the Petitioner must answer or anticipate injuries which are not before the court, but we do feel that when the Protestants appear and place before the court a situation showing injury to them as junior appropriators upstream, that the court must then consider the same complaint as to all junior appropriators upstream to determine whether or not Petitioner has sustained its burden upon not impairing vested rights.

In the case of the City of Colorado Springs v. Yust, 126 Colo. 289, 239 P.2d 151, the court says:

> "The burden of proof on petitioner in such a proceeding requires him to meet only the grounds of injury to protestants asserted by them."

The court then cites from a Utah case of Tanner v. Humphreys, 87 Utah 164, 48 P.2d 488, as follows:

> "It would be impractical to require the plaintiff to ferret out all of the ways in which the others might perchance be injured and offer proof in negation thereof as a part of its affirmative case. The general negative as against injury to the protestants is sufficient to carry the case over a motion for a nonsuit in that respect."

We feel that the general burden upon the Petitioner to show no injury applies to both appearing and non appearing Protestants. Certainly, the Petitioner cannot be asked to ferret out all the ways in which others might be injured, but the instant that an injury is shown as affecting the appearing Protestants, which also affects other upstream junior appropriators in that same class, it is clear that they have failed to sustain their burden that there will be no injury to anyone by the change of point of diversion which they request.

For this reason we feel that not only are the Protestants appearing before the court involved but that all of the upstream junior appropriators are involved and that the court must consider them under the Water laws of the State of Colorado.

III

STIPULATION DOES NOT REMEDY INJURY.

The Stipulation, Petitioner's Exhibit A, in effect makes the priority of the Oak Creek Mining and Irrigating Ditch junior in time to the Lincoln Park Pump, South Canon Ditch, Voris No. 1, McIsaac A and G Ditch, on two different prorities. It is clear however that the terms of this Stipulation can only be claimed and asserted and enforced by the owner or owners of the water rights involved in this Stipulation. This makes the Oak Creek priority junior only to the ditches that are a party to this Stipulation if they seek enforcement, and does not make any guarantee that this will be of any help to the junior appropriators upstream.

CONCLUSION

We feel that the trial court was correct in its decision and see no reason to set forth the judgment of the court, but a reading of the Findings of Fact, Conclusions of Law and Judgment appearing at ff.77-104 clearly shows that the trial court understood and grasped the situation. The trial court's decision is well written and well documented and shows why the trial court allowed the transfer of only one cubic foot of water per second of time which could not injure the Protestants, or anyone simiularly situate.

The judgment should be affirmed by this court.

Respectfully submitted,

WITTY & SANDELL

By Mack Witty

Attorneys for Appellees
108 "F" St.-P.O. Box 843
Salida, Colorado 81201
Telephone: 539-2578