2-9-1983

Aspen v. Colorado River Water Conservation Dist.

SUPREME COURT, STATE OF COLORADO

Case No. 82 SA 478

REPLY BRIEF OF APPLICANTS-APPELLANTS

CITY OF ASPEN
BOARD OF COUNTY COMMISSIONERS OF PITKIN COUNTY,

Applicants-Appellants,

v.

COLORADO RIVER WATER CONSERVATION DISTRICT

Objector-Appellee,

UNITED STATES OF AMERICA
EXXON COMPANY, U.S.A.

Appearants-Appellees,

LEE ENEWOLD,
DIVISION ENGINEER FOR WATER DIVSION NO. 5,

Appellee.

APPEAL FROM THE DISTRICT COURT, WATER DIVISION NO. 5, STATE OF COLORADO

HONORABLE GAVIN D. LITWILLER, WATER JUDGE

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II. INTRODUCTION

This case presents an important crossroads. On one path, Objector Appellee, the Colorado River Water Conservation District [hereinafter River District] seeks a conditional water right based on the re-survey of Ruedi Reservoir in the dead of winter, and on the generalized intent to use the water stored in that existing facility by refilling for "the benefit of the entire Western Slope." (Appellee's Answer Brief, p. 7). On the other, Applicants-Appellants, the City of Aspen and the Board of County Commissioners of Pitkin County [hereinafter Aspen and Pitkin County] ask that their definite need, fixed intent, and steady, overt effort to put Ruedi Reservoir refill water to beneficial use be recognized as giving rise to a conditional water right, even though they did not undertake any work on the land. Aspen and Pitkin County submit that the River District's path is a path with brittle, artifical props which turns away from the substance of water rights in Colorado, and that Aspen and Pitkin County's path, in the uncommon circumstances of this case, remains true to the beneficial use of water.

III. ARGUMENT

A. THIS COURT HAS NEVER APPLIED A HARD AND FAST RULE THAT AN ACT ON THE LAND IS THE ONLY WAY IN WHICH THE INTENT TO APPROPRIATE WATER CAN BE MANIFESTED.

In its Answer Brief the River District first asserts that an appropriation of water can only be initiated by an act on the land and offers a half-page string of citations in

support of this proposition. (Appellee's Answer Brief, pp. 9-10). In fact, not one of these cases stands for such a simplistic notion. The last and earliest case in the string citation, Larimer County Reservoir Company v. People ex.rel.Luthe, 8 Colo. 614, 9 P. 794 (1886), makes no reference to an act on the land, in either the presentation of the facts or the legal analysis. The relator in that case argued that a corporate franchise to utilize the bed of a non-navigable stream for a reservoir was illegal because, under the constitution, a corporation could only acquire the right to divert water from a stream, not a right to use the stream for a place of storage. In rejecting this argument, this Court said:

> The supreme court of California (MacDonald v. Bear River, etc., Co., 13 Cal. 220) defines the word "appropriation," in this connection, as follows: "This appropriation is the intent to take, accompanied by some open physical demonstration of the intent and for some valuable use." We consider these definitions applicable to appropriations of water in this state;

Id. at 796. Emphasis added. This is not a formula to which an act on the land is the only solution. It is a broad principle, which requires a careful, case-by-case analysis of whether alleged appropriative activity is in fact related to the diligent beneficial use of water.

This Court's prudent adherence to this analytical approach and its unwillingness to adopt a hard and fast rule is best illustrated by the cases of Elk Rifle Water Company

v. Templeton, 173 Colo. 438, 484 P.2d 1211 (1971), and Twin Lakes Reservoir and Canal Company v. City of Aspen, 192 Colo. 209, 557 P.2d 825 (1977), both of which are included in the River District's string citation. In Elk Rifle, this Court held that an appropriative intent was manifested largely by in-house investigations which preceeded the actual decision or formulation of intent to undertake a water project. The visual, on the ground inspection of a reservoir site was not the fundamental act which evidenced the initiation of the appropriation in that case. It was the continuum and definiteness of the investigations, and the immediate and resolute way in which these investigations were followed up.

In Twin Lakes it was not at all clear when 100 cfs of extra capacity had been built into a transmountain collection and diversion system. But this Court nonetheless held that an appropriative intent was manifested upon the discovery of this extra capacity. The central fact was that the extra capacity had been built at some point, and it only remained for the Twin Lakes Company to determine how to fully utilize this existing system. This Court did not insist that the Twin Lakes Company manifest its intent to appropriate another 100 cfs by a further, artificial gesture in the field. Such an act would not have provided any greater evidence of the Company's appropriative intent than was already apparent.

The appropriative activity of Aspen and Pitkin County in the instant case is no less substantial, and they are no less entitled to a conditional water right decree than the Socony

Mobil Oil Company in Elk Rifle or the Twin Lakes Company in Twin Lakes. The River District concedes that Aspen and Pitkin County have a definite need for Ruedi Reservoir refill water, and have fixed their intent to put this water to beneficial use. (Volume 1, p. 16). Aspen and Pitkin County have also manifested their intent to apply Ruedi Reservoir refill water to beneficial use in a continuous, purposeful, and publicly overt course of action.

Like the Socony Mobil Company in Elk Rifle, Aspen and Pitkin County have followed through. Since the date of the trial below, Aspen and Pitkin County have completed their feasibility study on the installation of a hydroelectric facility at Ruedi Reservoir, have confirmed that such a project is indeed quite feasible, and will be submitting their application for a final license from the United States Federal Energy Regulatory Commission (FERC) in February, 1983. They have also continued their active and public involvement in the development of a permanent operational plan for the Reservoir. As in Twin Lakes, the initiation of the appropriation in this case is not concerned with the construction of a new storage facility, but with the increased utilization of an existing one. In such uncommon circumstances, Aspen and Pitkin County's regulatory and operational efforts have a much greater bearing on the diligent beneficial use of Ruedi Reservoir refill water than any on-the-ground survey or construction work, and are a much truer manifestation of appropriative intent than any superfluous act on the land.

Even the case of Central Colorado Water Conservancy District v. City and County of Denver, 189 Colo. 272, 539 P.2d 1270 (1975), does not fit in the pigeon hole pressed by the River District. The precise holding in that case is that the filing of a map and statement with the State Engineer is not sufficient to manifest the initiation of an appropriation where the claimant has disavowed the survey work on which the map and statement was based and has done nothing else to begin the diversion of water to beneficial use and to put others on notice of a fixed and definite appropriative intent. In so holding, this Court did not announce a per se rule that an appropriation could only be initiated by work on the land. Nor did this Court address the unique issue posed by the instant case. The issue in the Central Colorado case was whether the filing of a map and statement, without more, evidenced an intent to put water to beneficial use by constructing a new storage facility. The issue here is whether several public filings, which capped a steady course of action by Aspen and Pitkin County, were sufficient to manifest their intent to put additional water to beneficial use by refilling an existing reservoir. The Central Colorado case does not provide a ready-made answer to this question.

This Court should once again decline to set a hard and fast rule, and should not permit the River District's clamor for such a rule to distract it from the substantial relationship between the steps which Aspen and Pitkin County took in this case and the diligent beneficial use of Ruedi Reservoir refill water.

B. SERVICE OF AN EXPLICIT NOTICE OF AN INTENT TO APPROPRIATE IS NOT REQUIRED; IT IS ONLY NECESSARY THAT THE INTENT BE MANIFESTED BY ACTIVITY WHICH IS GENUINELY RELATED TO THE BENEFICIAL USE OF WATER, AND WHICH IS THEREBY SUFFICIENT TO PUT OTHERS ON NOTICE OF THE INTENDED BENEFICIAL USE.

The River District spends a good part of its Answer Brief arguing that Aspen and Pitkin County did not give actual notice of their appropriative intent because none of the stipulated documents expressly announced this intent. (Appellee's Answer Brief, pp. 13-16). This argument is misdirected. Under Colorado law, the initiation of an appropriation is not manifested by serving or posting an explicit notice; nor is it necessary that the initial acts of appropriation actually be seen by someone. It is only necessary that the intent be manifested by activity which is sufficient to put other parties on notice of the appropriative intent. And the reason that certain activity is sufficient to put others on such notice, while other apparently similar activity is not, depends on the strength of the relationship between the activity and the diligent beneficial use of water. The test is not whether a claimant has professed his intent to others, but whether a claimant has acted on his intent and set out on a course which will realize the beneficial use of water.

In Fruitland Irrigation Company v. Kruemling, 62 Colo. 160, 162 P. 161 (1916), this Court noted that the posting of a notice was not required to establish a conditional water right in Colorado, and said:

> Certainly the first step demanded by the rule is nothing short of an open and notorious physical demonstration, conclusively indicating a fixed purpose to diligently pursue and, within a reasonable time, ultimately acquire a right to the use of water, and as its primary function is to give notice to those subsequently desiring to initiate similar rights, it must necessarily be of such character that they may fairly be said to be thereby charged with at least such notice as would reasonably be calculated to put them on inquiry of the prospective extent of the proposed use and consequent demand upon the water supply involved.

Id. 163. This Court did not inquire as to what field work was actually observed by other appropriators in that case, but searched for the point at which, if observed, a definite enterprise toward the beneficial use of water could be recognized. In City and County of Denver v. Northern Colorado Water Conservancy District, 130 Colo. 375, 276 P.2d 992 (1954), Denver's survey work in the Williams Fork River Basin did not evidence its intent to appropriate from the Blue River because this work was not related to the diversion of water from the Blue River. On the other hand, specific and definite construction work on a transmountain tunnel from the Blue River would have manifested an intent to appropriate water from that source even if no one ever happened upon the construction work. In Elk Rifle it is unlikely that anyone ever saw Clifford Jex in the field, or that his subsequent meeting in Glenwood Springs with officials of the Socony Mobil Oil Company, in which the decision to proceed with the project was made, was a public meeting. Yet this Court was

convinced that the Socony Mobil Company had embarked on the construction of a water project and found enough overt activity afoot in that case to tip off others to this plan.

Nor was there anything close to an explicit notice in Twin Lakes. In that case, the Twin Lakes Company was unsure about whether the extra capacity in its transmountain system had been added by original construction or by subsequent cleaning and maintenance, and could not point to any specific act announcing its appropriative intent. Even if someone had observed the original construction of the system or the subsequent cleaning and maintenance and had inquired directly about the appropriative intentions of the Twin Lakes Company, they would not have been told about the extra capacity. Still, the Company's intent to appropriate an additional 100 cfs was apparent just in the existence of the extra capacity, and in the nexus between this extra capacity and the increased beneficial use of water.

The River District has therefore examined Exhibits M and N and the water right application in this case in the wrong light. The question is not whether these individual documents described and gave actual notice of Aspen and Pitkin County's plan of appropriation, but whether these documents manifested a definite course of action towards the beneficial use of Ruedi Reservoir refill water. Aspen and Pitkin County submit that these documents were just as sufficient as the manifestations of intent in Elk Rifle and Twin Lakes.

The River District has also examined these documents in isolation, and has purposefully ignored the fact that these documents were but the culminations of the initial appropriative effort. An appropriation is never initiated in single instant; as in Elk Rifle, the project unfolds in a stream of investigations, deliberations and actions.

In the instant case, Aspen and Pitkin County were first appraised about the potential for refilling Ruedi Reservoir in July, 1980 correspondence with the United States Bureau of Reclamation. (Volume 4, Exhibit I; copies of this correspondence were sent to the River District, among others). This potential was then a factor in a number of feasibility investigations and public meetings in the late summer and fall of 1980 concerning Aspen and Pitkin County's development of a hydroelectric power plant at Ruedi Reservoir and their use of the Reservoir for recreational and municipal purposes. (Volume 4, Exhibits HH and JJ).

Aspen and Pitkin County's September 30, 1980 Notice of Intent to File a Competing Application for a Preliminary Permit (Volume 4, Exhibit M) was the first milestone in this effort. It was, as the River District readily concedes, publicly filed with the FERC in Washington, D.C.. On October 24, 1980, after further public meetings and investigations, Aspen and Pitkin County filed their preliminary permit application with the FERC. (Volume 4, Exhibits N and HH). This open and public act again evidenced Aspen and Pitkin County's intent to use Ruedi Reservoir refill water for hydroelectric

power purposes. And while the FERC application itself was not published anywhere, a notice summarizing the application and announcing its availability for public inspection was published in a newspaper of general circulation in Pitkin County on December 25, 1980. (Volume 1, p. 25).

The River District argues that Aspen and Pitkin County's intent to use Ruedi Reservoir refill water for the generation of hydroelectric power cannot be implied from this filing because there was already a hydroelectric power decree for the Reservoir. (Appellee's Answer Brief, p. 14). If one works all the way through this argument, however, it makes Aspen and Pitkin County's point, rather than the River District's. If the FERC filing could prompt the River District or any other party to ascertain whether there was a hydroelectric power decree for Ruedi Reservoir, it would also be reasonable to expect that party to inquire as to who owned that decree and whether it covered water which could be stored in the Reservoir by refilling. Upon learning that Aspen and Pitkin County did not hold the existing hydroelectric power decree, and that it did not include refill water, it would be logical for that party to inquire whether a water right filing by Aspen and Pitkin County was in the offing.

The River District and Hydroelectric Constructors, Inc. also filed for preliminary FERC permits on Ruedi Reservoir, and both filed for Ruedi Reservoir water rights in short order. (Volume 1, p. 29). Three FERC applications, three

water right filings. The implication could not be more certain.

The minutes and records of the meetings of the governing bodies of Aspen and Pitkin County during this time period also reflect that the whole matter of how to maximize the beneficial use of Ruedi Reservoir was taken up at a plenary meeting on November 14, 1980 which was attended not only by members of the Aspen City Council and of the Pitkin County Board of Commissioners, but also by representatives from the United States Bureau of Reclamation, the Colorado Water Conservation Board, the Southeastern Colorado Water Conservancy District, and the River District. (Volume 4, Exhibit HH). The potential for refilling Ruedi Reservoir was discussed at that meeting, as were Aspen and Pitkin County's recent filings with the FERC. In late December, 1980, in follow-up correspondence with the Bureau, Aspen and Pitkin County were able to obtain a more definite quantification of the amount of water that might be available for refilling Ruedi Reservoir. (Volume 4, Exhibits J and K; a copy of this correspondence was sent to the Executive Director of the Colorado Water Conservation Board). Shortly thereafter, Aspen and Pitkin County filed for the right to refill Ruedi Reservoir, and interestingly enough, within the space of about a month, so did the River District. (Volume 3, page 28, lines 11-25).

The December 31, 1980 application in this case, then, was the last manifestation of Aspen and Pitkin County's

appropriative intent. (Volume 1, pp. 45-46). Even though a summary of this application was not generally published in the resume and local newspapers until about two weeks later, it was publicly available, like the FERC application, in advance of such publication. Even if no one had checked with the Water Clerk before then, the application still constituted yet another public manifestation of appropriative intent, which was sufficient to prompt further inquires and to expose the whole of Aspen and Pitkin County's appropriative activity.

The two FERC documents and the water right application punctuate Aspen and Pitkin County's steady activity. All of these documents were public manifestations of an appropriative intent to refill Ruedi Reservoir which, taken together, were sufficient to put others on notice of this intent. These manifestations were at least sufficient as anything in Elk Rifle or Twin Lakes. Most certainly, they were more substantial, and more sensibly geared toward the diligent beneficial use of Ruedi Reservoir refill water than the River District's re-survey of an existing reservoir in the dead of winter.

C. IT IS ERROR TO DENY AN APPLICATION FOR A CONDITIONAL WATER RIGHT BECAUSE SOMETHING MORE COULD HAVE BEEN DONE TO MANIFEST THE INITIATION OF THE APPROPRIATION.

The River District, like Judge Litwiller, asserts that Aspen and Pitkin County could have done something on the land to manifest their appropriative intent. (Appellee's Answer Brief, p. 17). It does not matter that something more could

have been done, only that the first step was taken. In Elk Rifle, the Socony Mobil Company directed Clifford Jex to undertake a detailed field survey and to make a map and statement filing with the State Engineer. This Court dated the conditional water right not from this additional follow-up work, but from Mr. Jex's earlier investigations and Mobil's decision to proceed. In Twin Lakes, this Court did not require additional field work for an existing facility.

In the instant case, it will not be necessary to enlarge the storage capacity of Ruedi Reservoir by one acre foot, and Aspen and Pitkin were able to lay-out their proposed hydroelectric plant based on "as-built" drawings for Ruedi Reservoir provided by the United States Bureau of Reclamation. A re-survey of all or any part of the existing reservoir would have been senseless. Similarly, a site inspection and geologic work would have been field trips without a purpose unless Aspen and Pitkin had been previously granted a preliminary FERC permit, and construction work on the hydroelectric plant would have been illegal without a license from the FERC. The first, and most fundamental step in making better use of the existing facility was the application for the preliminary FERC permit, and Aspen and Pitkin County's conditional water right is well grounded in that step. As in Elk Rifle and Twin Lakes, a further and artificial manifestation of Aspen and Pitkin County's appropriative intent should not be required.

IV. CONCLUSION

The River District seeks a hard and fast rule that the initiation of an appropriation can only be manifested by act on the land. This Court has always declined to adopt such a rule in the past and should not do so now, especially in light of the uncommon circumstances in this case where additional water can be impounded by refilling an existing reservoir without the enlargement of its present storage capacity, and where there is no question about Aspen and Pitkin County's fixed and definite intent to put the water so impounded to beneficial use. The River District further argues that other parties must have been given explicit notice of the intent to appropriate. This argument also misreads the law; it is only necessary that the initiation of the appropriation be manifested by activity which is indeed related to the beneficial use of water. Nor does it matter that Aspen and Pitkin County could have taken other, additional steps to manifest their appropriative intent. The issue is whether the steps which Aspen and Pitkin County did take were overt and concrete steps toward the beneficial use of Ruedi Reservoir refill water which were sufficient to put other parties on notice about such intended beneficial use. Aspen and Pitkin submit that they have so acted, and that they have initiated an appropriation in substance, if not in the rigid form espoused by the River District. Aspen and Pitkin County therefore respectfully request that the denial of their application be reversed.

Respectfully submitted this 7th day of February, 1983.

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Certificate of Mailing

This is to certify that I placed a copy of the foregoing Reply Brief this 7th day of February, 1983 in the United States mail, first class, postage prepaid, addressed to the following:

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