1-10-1986

Closed Basin Landowners Asso. v. Rio Grande Water Conservation Dist.

SUPREME COURT
STATE OF COLORADO

No. 85SA214

CLOSED BASIN LANDOWNERS ASSOCIATION,

Plaintiff/Appellant,

and

A.Z.L. RESOURCES, INC.,

Plaintiff-Intervenor/Co-Appellant

v.

RIO GRANDE WATER CONSERVATION DISTRICT,

Defendant/Appellee,

and

COLORADO WATER CONSERVATION BOARD and the UNITED STATES OF AMERICA,

Defendant-Intervenors/Appellees,

and

STEVE VANDIVER as Division Engineer,

Appellee.

REPLY BRIEF OF CO-APPELLANT

DISTRICT COURT OF WATER DIVISION NO. 3, 82CW35

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ARGUMENT

Appellees' voluminous brief makes it abundantly clear that it is Appellees' intent to sidestep Co-Appellant's jurisdictional challenge to the Water Court decree entered in Case No. W-3038 by diverting the Court's attention from that primary issue by their arguments pertaining to timeliness, res judicata, statute of limitations and waiver. A jurisdictional challenge, however, can be made any time. If the Water Court lacked jurisdiction, any determinations and, most importantly, the Conditional Judgement and [Water] Decree which is challenged here are null and void and can have no impact whatsoever on the parties before the Court in this appeal.

Pivotal to the jurisdictional question raised by AZL is the issue of adequacy of resume notice in Case No. W-3038, determination of which can only be accomplished by thoughtful analysis of two distinct subissues: 1) Was notice by publication adequate and reasonable in view of the facts of that case? 2) If adequate, did the content of the published resume notice substantially comply with Colorado's statutory resume notice requirements and was there sufficient information from which Appellants could evaluate the impact of the Application?

Since there is genuine dispute regarding the issue of jurisdiction, an issue which necessarily involves both questions of law and fact, the dismissal of this collateral challenge to the decision in Case No. W-3038 by summary judgment was inappropriate.

I. JURISDICTION CAN BE CHALLENGED AT ANY TIME IN A PROCEEDING.

The haze which Appellees attempt to cast over this appeal seems to hang on the argument that Appellant, and AZL in particular, have waived any right to challenge jurisdiction--that there is a point beyond which the fundamental question of jurisdiction cannot be raised. However, that posture is contrary to the weight of authority in Colorado which holds that since subject matter jurisdiction is fixed by statute or constitution, it can neither be conferred nor conferred waived by the parties. McCoy v. McCoy, 139 Colo. 105, 336 P.2d 302 (1959); Lien v. Gertz, 158 Colo. 416, 407 P.2d 328 (1965). More importantly, it can be raised at any stage of a proceeding including, even for the first time, on writ of error to this Court. Meyers v. Williams, 137 Colo. 325, 324 P.2d 788 (1958); Triebelhorn v. Turzanski, 149 Colo. 558, 370 P.2d 757 (1962); and Maniatis v. Karakitsios, 161 Colo. 378, 422 P.2d 52 (1967). Thus, the fundamental issue of the Court's jurisdiction in Water Case No. W-3038 remains open to challenge.

II. THE WATER COURT IN CASE NO. W-3038 DID NOT HAVE JURISDICTION OVER AZL; NOTICE BY PUBLICATION WAS INADEQUATE.

Appellees admit that "the Water Court must have had jurisdiction over AZL if the decree in Case No. W-3038 is to be binding on it." Yet, there is no question that the Water Court did not have jurisdiction over AZL since AZL was never a party to that case despite the fact that its interests would be

significantly affected by that adjudication process. Why was AZL not a party? Because Appellees stubbornly refused to mail notice to the affected landowners whose names and addresses were specifically gathered by Appellees at the request of the Water Court Referee a full two years before the Conditional Judgment and Decree was rendered.

Appellees' Brief has not dealt squarely with the holding in Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983), which clearly states that notice by mail or other means as certain to insure actual notice is the minimal constitutional requirement in a proceeding which will adversely affect a property interest where the name and address of a party is reasonably ascertainable. Appellees realize they cannot deny that such information was ascertainable and thus have instead taken the stance that AZL did not possess a property interest that would be significantly affected in the water adjudication proceeding.

To support their argument, Appellees have relied upon State of Colorado v. S.W. Colo. Water Conservation (the "Huston" decision), 671 P.2d 1294 (Colo. 1983), cert. denied 104 S.Ct. 1929 (1984). However, this reliance is misplaced. Although the Huston decision held that an overlying landowner's property interest in the nontributary water beneath his land is not a property right coextensive with rights of ownership of other interests in real property, it is specifically identified as a property interest nonetheless. The Huston decision further

recognizes the legislature's regulation of nontributary underground water in C.R.S. § 37-90-137(4), which requires ownership of the overlying land or consent of the overlying landowner as a prerequisite to taking such ground water. Thus, Huston, far from denying the existence of a property right in underground water, confirms the right of use in the overlying landowner.

It is the very existence of a property interest which causes due process to attach. Accordingly, the holding in Mennonite Board is applicable and controlling.

III. EVEN IF NOTICE BY PUBLICATION WAS ADEQUATE, THE RESUME ITSELF DID NOT SUBSTANTIALLY COMPLY WITH STATUTORY REQUIREMENTS.

A. The water decree in water Case No. W-3038 is void ab initio.

This Court's decision in Pueblo W. Metro. D. v. S.E. Color. Water Con. ("Pueblo West"), 689 P.2d 594 (Colo. 1984), upon which Appellees rely extensively to support their argument that any challenge to the Water Court's determination of tributariness or nontributariness is barred by the statute of limitations and res judicata, is not applicable to the situation at hand. The plaintiffs in Pueblo West sought to challenge notice on the grounds that the source of the tributary water involved was not described with sufficient particularity in the published resume. However, there was no flaw in the resume notice in terms of the character of the water involved. Indeed, this Court distinguished the challenge in Pueblo West from that in Stonewall Estates v. CF&I Steel

Corp., 197 Colo. 255, 592 P.2d 1318 (1979), stating that the latter "involved a serious omission of material information from the application and resume, whereas in the instant case neither the application nor the resume prepared from it was in any way misleading as to the nature of the conditional storage right sought to be made absolute."

The serious omission in Stonewall Estates was that the resume did not advise of the nontributary nature of the water involved--precisely the omission which occurred in this case. By not mentioning the nontributary nature of the water right, the resume in Stonewall Estates did not substantially comply with the provisions of C.R.S. § 37-92-302(3)(a). This Court did not find the requirement of such a technicality superfluous in Stonewall Estates; nor should it here. The resume notice was plainly inadequate.

As a consequence of inadequate resume notice, a court lacks the requisite subject matter jurisdiction, or authority, to make any determinations; thus, any decree rendered would not be voidable at the option of a party but void ab initio and not subject to any rule of res judicata or any statute of limitations. Stonewall Estates, supra at 1320.

The Appellees argue that because the resume and the final decree were consistent in their characterization of the water as tributary water, no deficiency in notice exists. It is not consistency between the notice and decree which is the test for adequacy of notice. It was the misrepresentation of the actual

character of the water which rendered the notice inadequate and decree a nullity in Stonewall Estates. A further misrepresentation of the water's true character in the decree could not cure the inadequacy of notice or give life to a void decree.

Accordingly, the holding in Stonewall is directly applicable to the facts of this case and compels a determination regarding the Water Court's jurisdiction in Case No. W-3038.

B. There is no evidence to challenge the nontributary nature of the water involved in Case No. W-3038.

In its Opening Brief, AZL pointed out that the project engineer for the Closed Basin Project had testified that the water could be pumped by the Project is nontributary. It was further pointed out that there was no evidence introduced in Case No. W-3038 which is inconsistent with Elfrink's statement. It is interesting that Appellees have offered no challenge to those statements in Co-Appellant's Opening Brief. Rather, Appellees assert that Mr. Elfrink's deposition testimony should have been excluded based upon C.R.E. 804(b)(1). That same argument was made at hearings before the Water Court and was rejected. In any event, the rule of evidence relied upon is applicable to use of depositions at trial when the declarant in unavailable. It should be remembered that this case has not yet even proceeded to trial, since it was dismissed by trial court on Motion for Summary

Judgment. In the event of a trial it is anticipated that Mr. Elfrink would be available to testify, negating any need of reliance upon his deposition.

At page 43 of their Brief, Appellees have narrowly focused on one small portion of Mr. Elfrink's testimony in their attempt to avoid the significance of his testimony. Not only was Mr. Elfrink queried regarding the surface flow of the water involved in the Closed Basin Project, but also regarding the impact of pumping this water on the Rio Grande and/or any other stream system:

> Q. And the pumping of those wells never would have any impact on the Rio Grande or any stream system; is that correct?
>
> A. That's correct.

Record at 250-251.

By virtue of Mr. Elfrink's response, the water in question is clearly nontributary for it falls precisely within the definition established by this Court in District 10 Water Users Ass'n. v. Barnett, 198 Colo. 291, 599 P.2d 894 (1979); nontributary water is water which, when pumped from wells, will not impact any stream for at least a century. Where there will never be any impact on stream flow, the water must be considered nontributary.

Although the water involved in the District 10 Water Users case was unquestionably water which would fall within the definition of waters governed by C.R.S. § 37-92-101 et seq., the Court held that the Constitution did not contemplate

governing those waters by surface stream doctrines if their pumping would not affect the stream within 100 years. Similarly here, where the pumping of wells in the Closed Basin Project would never have an impact on any stream, the Constitution did not contemplate their administration under the prior appropriation system and they must be treated as nontributary waters.

IV. EVEN IF THE WATER WERE TRIBUTARY, THE RESUME LACKED THE SPECIFICITY NECESSARY TO ALLOW EVALUATION OF INJURY.

As as been already discussed in Co-Appellant's Opening Brief, essential to the evaluation of injury is information regarding the location and pumping rate of each well. Appellees claim they did not seek a conditional water right for individual wells, but instead sought a conditional water right to the entire area of Tract A and the entire area of Tract B, an area of approximately 140,000 acres. The resume gave notice of Appellee's intent to withdraw 277 cubic feet of water per second through the placement of approximately 150 wells spread over the entirety of Tracts A and B. The obvious difficulty in evaluating the impact from such a description can be appreciated when it is likened to a general proposal to divert 277 cfs from 150 undisclosed points along the entirety of the South Platte River. Unless one knows the point of diversion, it would be fruitless to even attempt to evaluate the impact. Such is the case here where numerous individual landowners own parcels of land within and adjacent to Tracts A and B, each of

whom need sufficient information to evaluate the impact upon his own land and water rights.

V. THE ENVIRONMENTAL UNDERPINNING OF R.J.A., INC. MUST BE CONSIDERED.

Appellee's only substantive challenge to Co-Appellant's application of the Shelton Farms doctrine to the facts of this case is based on this Court's most recent opinion on the subject in R.J.A., Inc. v. Water Users Ass'n of District No. 6, 690 P.2d 823 (Colo. 1984). Appellees focus on the Court's language in R.J.A., Inc. which limits the Shelton Farms doctrine to alteration of natural conditions as a basis for a developed water right free from the priority system. However, Appellee's approach ignores the significant environmental underpinning of the R.J.A. case which is independent of any reference to the priority system. The same separate strand of analysis concerning environmental impact that supported this Court's decision in Shelton Farms also became a part of this Court's reasoning in R.J.A. The possibility of environmental harm from alteration of the physical characteristics of land as contemplated in the construction and operation of the Closed Basin Project is an issue which at least raises factual questions which have not been addressed.

CONCLUSION

Beneath all the subterfuge of Appellee's claims of res judicata and waiver lies the one issue which this Court cannot ignore: Did the Water Court in Case No. W-3038 have

jurisdiction to enter the conditional water decree rendered in that case? This is the key issue upon which all others hinge. AZL Resources, Inc. respectfully moves this Court to rule that notice of the application in Case No. W-3038 by publication of the Water Division resume was inadequate as a matter of law to confer jurisdiction upon the Court and its decree is therefore null and void.

Respectfully submitted this 10th day of January 1986.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 1986, a true and correct copy of the foregoing REPLY BRIEF OF CO-APPELLANT was placed in the United States mail, postage prepaid, addressed to the following:

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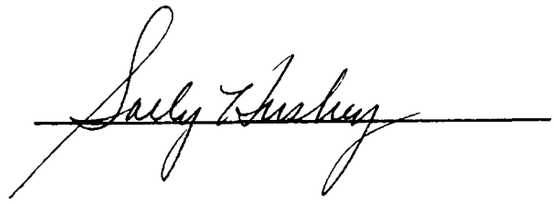

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