9-9-1985

# 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.

# BRIEF FOR CO-APPELLANT

District Court of Water Division No. 3, 82CW35

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## ISSUES PRESENTED

1. Was notice by publication of the Water Division Resume adequate, where the Applicant refused to give notice by mail to persons upon whose land wells were proposed to be constructed and whose interests would be affected, in spite of the fact that the Applicant had identified those persons and submitted a tabulation of their names and addresses to the Court?

2. Did the failure to identify in the Resume the nontributary character of the water involved constitute a flaw in notice such that the Court lacked jurisdiction to enter a decree in Case No. W-3038?

3. Did the failure to identify in the Resume the point of diversion or rate of flow of any of the wells constitute a flaw in notice such that the Court lacked jurisdiction to enter a decree in Case No. W-3038?

4. If the water of the Closed Basin were tributary and Resume notice had been adequate in all regards, should the application in Case No. W-3038 have been denied on the basis of the Shelton Farms doctrine?

## STATEMENT OF THE CASE

On December 22, 1972, the Rio Grande Water Conservation District (hereafter "District"), filed for the Closed Basin Project an Application for Water Right in the District Court in and for Water Division No. 3. That Application, in Case No. W-3038, claimed a water right whose source was "the sump area of the Closed Basin, not

tributary to any stream." Record at 355, emphasis added. The Resume of Water Applications, which gave notice of the District's Application made no mention of the nontributary character of the water which was the subject of the District's claim. Record at 359. The Resume gave notice that the District sought to construct approximately 150 wells within an area comprising approximately 140,000 acres, without giving any notice of the proposed location of any well or of the diversion or withdrawal rate of any well. On April 21, 1980, the Court entered a Conditional Judgment and Decree, granting the District water rights in waters of a natural surface stream system. Record at 445-455.

On May 21, 1980, Closed Basin Landowners Association, et al., filed a Complaint in Case No. 82CW35 for a determination that the decree in Case No. W-3038, described above, was void for lack of jurisdiction, based on inadequacy of notice. A.Z.L. Resources, Inc. intervened in the case as a party plaintiff and the Colorado Water Conservation Board and the United States of America intervened as parties defendant. The Defendant and Defendant-Intervenors jointly filed a Motion for Summary Judgment with supporting brief asserting that the Court had jurisdiction to enter the decree in Case No. W-3038 and that the Resume publication gave adequate notice of the District's claim. In opposition to Defendants' position, Plaintiffs and Plaintiff-Intervenor asserted inadequacy of notice on several bases. On November 29, 1984, the Court entered a Memorandum and Order granting the Motion for Summary Judgment and dismissing the Complaint. The Court further denied the motion of Plaintiff-Intervenor to alter or amend the judgment.

In addition to the facts set forth above in the description of the course of proceedings, the following facts are relevant to the issues presented for review:

1. At a Referee's hearing regarding the Application, it was disclosed that a number of the proposed wells would be located on private lands. The Referee determined that owners of the property on which wells were proposed to be located should have notice of that fact and required the Applicant to provide the names and addresses of owners of the lands affected. Record at 389. The Applicant submitted a tabulation of landownership for tracts on which the wells were proposed to be located. Record at 413-426. A.Z.L. Resources, Inc. appeared on that tabulation. Record at 422. The Applicant objected to giving special notice to the landowners or amending the Application to specify the locations of the proposed diversions as suggested by the Referee. The trial court denied the suggestion of the Referee, finding that the original Resume publication provided proper and sufficient notice. Record at 397.

2. Lindell H. Elfrink, the project engineer for the Closed Basin Project stated in his deposition that the water which would be developed by the Project is neither tributary to the Rio Grande nor to any other stream. Record at 244-245. He further stated that the pumping of those wells would never have any impact on the Rio Grande or any other stream system. Record at 250-251.

3. In its Response In Opposition To Motion For Summary Judgment, the Plaintiff-Intervenor submitted affidavits of engineering personnel who asserted that, as a matter of fact, the

description of the proposed well location contained in the water division Resume was inadequate to meet the minimum standards of accuracy sufficient to allow an engineer to determine whether the proposed application would cause injury to his client's water rights. Record at 178-184. In his deposition, the project engineer, Mr. Elfrink, also admitted that to determine what drawdown might occur at any point, an individual would need to know the distance from the well and the rate that the well would be pumping. Record at 259.

4. The Closed Basin Project is designed to salvage water presently begin lost from the Closed Basin area to surface evaporation and evapotransportation, by lowering the water table within the Project boundaries. See Conditional Judgment and Decree entered in Case No. W-3038, paragraph 4(e), Record at 448-449. See also deposition of Lindell H. Elfrink, Record at 243-244.

## ARGUMENT

### Summary of Argument

It is axiomatic that in order for the Water Court to have jurisdiction to enter a decree, adequate notice of the claim of the Applicant must be given to those whose rights may be affected thereby. The only source of such notice in this case was the water division Resume. That notice was inadequate upon three bases: 1) where the names and addresses of parties whose interests would be affected by the Application had been identified and submitted in a tabulation to the Court, notice by publication was inadequate as

measured against the federal constitutional standard of the Fourteenth Amendment; 2) even if Resume publication were not constitutionally inadequate, the Resume gave no notice of the nontributary character of the water involved; and 3) even if the water of the Closed Basin were tributary, the Resume was inadequate for failure to identify the point of diversion or rate of flow of any of the wells through which the water would be withdrawn.

Finally, if the water of the Closed Basin were tributary and Resume notice had been adequate in all regards, the Application in Case No. W-3038 should have been denied on the basis of the Shelton Farms doctrine.

## I. RESUME NOTICE WAS INADEQUATE IN THIS CASE AS MEASURED AGAINST THE FEDERAL CONSTITUTIONAL STANDARD.

The only source of notice upon which the Court relies is the publication of the water division Resume. At page 10 of its Memorandum and Order (Record at 219), the Court cites Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), as the constitutional standard against which the adequacy of that notice must be measured. The Mullane standard, however, has been recently modified. In Mennonite Board of Missions v. Adams, 462 U.S. 791 (1983), the United States Supreme Court addressed the issue of when notice by publication, rather than by personal service is constitutionally adequate. The Court held:

> Notice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interest of any

> party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable.

It is unnecessary to address the impact of the Mennonite Board holding on water adjudication in general. There is no question here, as there would be in most Water Court proceedings, concerning whether the names and addresses of parties whose property interests would be affected were reasonably ascertainable. By order of the Referee, the Applicant had submitted to the Court the names and addresses of all landowners upon whose lands wells were to be located. That tabulation was part of the record before the Court. See SCHEDULE "B" of the Referee's Report and Ruling. Record at 413-426. In spite of the fact that the names and addresses of landowners whose property would be affected were known and tabulated in the records of the Court, the Applicant refused to give them notice by mail and the Water Court upheld that refusal. A.Z.L. was among the parties listed in that tabulation; yet A.Z.L. received no notice of the action.

The holding of the United States Supreme Court in Mennonite Board makes it clear that notice by publication in this case does not meet the requirements of the Due Process Clause of the Fourteenth Amendment. Therefore, the Mullane case has been misapplied and is not controlling. Notice by publication was inadequate in the unique facts of this case.

II. THE COURT LACKED JURISDICTION IN CASE NO. W-3038 SINCE THE RESUME NOTICE FAILED TO MENTION THE NONTRIBUTARY CHARACTER OF THE WATER WHICH WAS THE SUBJECT OF THE COURT'S DECREE.

A. The water of the Closed Basin is nontributary.

Lindell H. Elfrink, Project Engineer for the Closed Basin Project, in deposition, flatly confirmed that the water to be developed by the Closed Basin Project is not tributary to the Rio Grande or to any other stream. He further confirmed that the pumping of the Project wells would never have any impact on the Rio Grande or any other stream system. It is simply a fact that the water which was the subject of the application in Case No. W-3038 is nontributary in every sense of the word. A review of the record in that case reveals no evidence which is inconsistent with the open admission of Elfrink that the water to be developed by the Project is nontributary.

B. Where the resume failed to give notice of the nontributary character of the water, the notice was inadequate as a matter of law.

At page 12 of the Court's Memorandum and Order, in footnote 2, the Court recognized that failure to mention a critical aspect of the case, such as the nontributary character of the water, renders the notice inadequate. The Court cited Stonewall Estates v. C.F.& I. Steel Corp., 197 Colo. 255, 592 P.2d 1318 (1979), which upheld a challenge to a water court decree asserting "that the failure of the notice to mention that the water was nontributary was such a defect as to preclude the court from having jurisdiction." 197 Colo. at 258.

III. EVEN IF THE WATER OF THE CLOSED BASIN WERE TRIBUTARY, THE RESUME NOTICE WAS INADEQUATE TO ALLOW EVALUATION OF INJURY.

In response to the Motion for Summary Judgment, A.Z.L. Resources, Inc. submitted affidavits to establish the fact that absent notice as to well locations and pumping rates, it would be impossible for anyone to determine the impact of the Project upon other water rights. In his Deposition, Elfrink openly admitted that information as to the distance from a well (therefore requiring information as to its location) and information concerning the pumping rate for the well would be among the information necessary to determine the drawdown that would occur as a result of that well's pumping. Thus, Elfrink confirmed the fact that, even assuming that the waters of the Closed Basin were tributary, the resume notice which gave no location for any of the wells and gave no pumping rate for any of the wells was entirely inadequate. The affidavits and Elfrink deposition testimony at least raised an issue of fact regarding adequacy of notice. For the Court to have entered a summary judgment against the Plaintiffs and Plaintiff-Intervenor was improper.

IV. IF THE WATER OF THE CLOSED BASIN WERE TRIBUTARY AND RESUME NOTICE HAD BEEN ADEQUATE, STILL THE APPLICATION IN CASE NO. W-3038 SHOULD HAVE BEEN DENIED ON THE BASIS OF THE SHELTON FARMS DOCTRINE.

The Closed Basin Project is designed to salvage water presently being lost from the Closed Basin area through surface evaporation and evapotranspiration, by lowering the water table within the Project boundaries. See Conditional Judgment and Decree entered in

Case No. W-3038, paragraph 4(e). Record at 448-449. See also Deposition of Lindell H. Elfrink, pages 3-4. Record at 243-244. The Project necessarily contemplates a drastic modification of the natural conditions of the Closed Basin and the creation of water rights based upon such action. In Southeastern Colorado Water Conservancy District v. Shelton Farms, Inc., 187 Colo. 181, 192, 529 P.2d 1321 (1975), this Court held that "[u]ntil such time as the legislature responds, action such as [Applicant's] should not be given court sanction."

More recently, the Court rendered a decision in R.J.A., Inc. v. Water Users Association of District No. 6, 690 P.2d 823 (Colo. 1984), wherein the Court reaffirmed the Shelton Farms doctrine, stating a clear prohibition against the acquisition of rights to water which is salvaged through alteration of the natural vegetation or other physical characteristics of the land.

In R.J.A., the applicant appealed a lower Court's judgment denying its application for a developed water right. Applicant's claim was based on a project that would reduce water loss from a marshy meadow by removing the underlying peat moss so as to eliminate the saturated condition, thereby reducing evaporation from the surface and soil and evapotranspiration from grassy vegetation. 690 P.2d at 824. In affirming the lower Court's dismissal of Applicant's claim to the salvaged water, this Court noted that:

> The water rights sought here are based upon alterations of long existing physical characteristics of the land. Alteration of natural conditions and vegetation in order to save water carries with it the potential for adverse effects on soil and bank stabilization, soil productivity,

> wildlife habitat, fisheries production, water quality, watershed protection, and the hydrologic cycle.

Id. at 828. The Court reasoned:

> Whether to recognize such rights, and thus to encourage innovative ways of reducing historical consumptive uses by modifying conditions found in nature, is a question fraught with important public policy considerations. As such, the question is especially suited for resolution through the legislative process.

Id.

It is beyond dispute that the Closed Basin Project is designed to salvage water presently being lost from the Closed Basin area through surface evaporation and evapotranspiration, by lowering the water table within Project boundaries. It necessarily contemplates a drastic modification of the natural conditions of the Closed Basin. The potential for "widespread destruction of plant life, with attendant likelihood of irreparable erosion and the creation of a barren wasteland" (Id.) is as real, with the respect to the over 100,000 acres of land within Project boundaries, as that at issue in the R.J.A. case. This Court has stated that actions such as these shall not receive court sanction in the absence of affirmative legislative endorsement of a comprehensive scheme for developing this kind of water supply. The legislature has not so acted. Unless and until it does, the Closed Basin Project can acquire no right, under state law, to the water which it is designed to salvage through alteration of long-existing physical characteristics of the land.

## CONCLUSION

For the reasons set forth above, A.Z.L. 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. Therefore, the Court should declare the decree entered in that case to be null and void. If the Court finds the notice to be adequate in all regards, then it is respectfully requested that the decree which was entered be stricken as a violation of the Shelton Farms doctrine which was recently confirmed in R.J.A.

RESPECTFULLY submitted this 9th day of September, 1985.

By Melvin B. Sabey

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## CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September, 1985, a true and correct copy of the foregoing BRIEF FOR CO-APPELLANT was placed in the United States mail, postage prepaid, addressed to the following:

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