12-9-1983

Broyles v. Ft. Lyon Canal Co.

IN THE SUPREME COURT FOR THE STATE OF COLORADO

Case No. 83 SA 351

ANSWER BRIEF OF APPELLEE SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT

JAKE O. BROYLES,

Applicant-Appellant,

vs.

FORT LYON CANAL COMPANY, SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT, and ROBERT JESSE, Division Engineer for Water Division No. 2, State of Colorado,

Objectors-Appellees.

HONORABLE JOHN R. TRACEY
WATER JUDGE

FAIRFIELD AND WOODS
Kevin B. Pratt
1600 Colorado National Bldg.
950 Seventeenth Street
Denver, Colorado 80202
(303) 534-6135

Attorneys for Appellee
Southeastern Colorado Water
Conservancy District

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

1. Must the trial court follow the direction of this Court as stated in this Court's prior decision in this case?

2. May Appellant re-appeal the same issue heard and decided by this Court in the prior appeal in this case?

STATEMENT OF THE CASE

On November 16, 1981, this Court issued its opinion in Broyles v. Fort Lyon Canal Co., Colo., 638 P.2d 244 (1981). Applicant (Broyles) petitioned for rehearing and rehearing was denied December 7, 1981. This Court's opinion states at 638 P.2d 249:

> We conclude that the February 14, 1975, decree, taken together with the statutory definition of "replacement well," imposed upon Broyles the obligation to abandon the replaced wells upon completion of the replacement wells.

On January 15, 1982, the Fort Lyon Canal Company filed in the Water Court its Motion For Order to Plug Well. On April 27, 1983, the Southeastern Colorado Water Conservancy District also filed in the Water Court its Motion For Order to Plug Wells. Hearing was held on those motions July 1, 1983, and on July 13, 1983, the Water Court ordered that "Applicant shall abandon and plug his wells in accord with the requirements of Section 5, Rules and Regulations of the State of Colorado, Division of Water Resources, State Board of Examiners, Water Well and Pump Installation Contractors."

Applicant (Broyles) now appeals from the Water Court's Order, denying that he is required to abandon and plug his wells.

STATEMENT OF FACTS

The nature of the case was previously stated by the Supreme Court and the portions quoted below state the basic facts applicable to the present appeal:

> Some history relating to Broyles' wells is necessary to an understanding of the matters in dispute. Before March, 1972, Broyles had six irrigation wells which had been drilled pursuant to permits issued by the Colorado State Engineer (state engineer). Beginning in that month Broyles applied for and received well permits from the state engineer authorizing him to drill five new wells as replacement wells for the existing six . . . All are near the Arkansas River or derive their supply of water from the unconsolidated alluvial aquifer supporting the river.
>
> After receiving the replacement well permits, Broyles filed an application for water rights pursuant to section 37-92-302, C.R.S. 1973. Based on that application, the water court entered a decree on February 14, 1975, awarding absolute and conditional water rights to the wells, including the following:
>
> Well Number 2
> Absolute: 710 g.p.m.
> Conditional: 1290 g.p.m.
> Maximum Annual Production: 1325 acre-feet
> Priority (both awards): June 6, 1955
>
> Well Number 3
> Absolute: 900 g.p.m.
> Conditional: 1100 g.p.m.
> Maximum Annual Production: 1325 acre feet
> Priority (both awards) June 13, 1955
>
> Well Number 4
> Absolute: 1025 g.p.m.
> Conditional: 975 g.p.m.
> Maximum Annual Production: 1325 acre feet
> Priority (both awards): March 24, 1964

Well Number 5
Absolute: 700 g.p.m.
Conditional: 1300 g.p.m.
Maximum Annual Production: 1325 acre feet
Priority (both awards): January 11, 1961

The decree reflected that the wells are replacement wells; the following notation for well number 2 is illustrative: "STATE ENGINEER'S WELL NUMBER: 10072, replaced by RF 1099."

***

The Fort Lyon Canal Company (Ft. Lyon) and Southeastern filed statements of opposition to Broyles' May 9, 1979, water court application. They contend that Broyles was required to plug and abandon the replaced wells and so could not rely upon production from those wells to make his decreed conditional water rights absolute. The objectors find the source of that requirement in the definition of "replacement well" in section 37-90-103(13), C.R.S. 1973, which mandates abandonment of the original well upon completion of a replacement well.

***

The water court concluded that the February 14, 1975, decree reflected a judicial determination that the original wells had been replaced by wells number 2 to 5, that the definition of "replacement well" in section 37-90-103(13) mandates abandonment of a replaced well upon completion of a replacement well, and that under the doctrine of res judicata Broyles is bound by the abandonment requirement.

***

Broyles contends that the trial court erred in holding that the 1975 water court decree barred his subsequent use of the replaced wells as alternate points of diversion for the rights decreed to the replacement wells. We address this contention in part IA of this opinion.

Broyles v. Fort Lyon Canal Co., 638 P.2d 244, 245-247 (1981).

This Court confirmed Broyles' obligation to abandon the replaced wells in the following language:

> The February 14, 1975, decree by which water rights were decreed to these wells also explicitly reflects that they are replacement wells. We conclude that the February 14, 1975, decree, taken together with the statutory definition of "replacement well," imposed upon Broyles the obligation to abandon the replaced wells upon completion of the replacement wells. See Bubb v. Christensen, Colo., 610 P.2d 1343 (1980).
>
> It does not necessarily follow, however, that the old abandoned wells could never be used in the future as alternate points of diversion for the water rights decreed to wells number 2 to 5. Rather, the abandonment simply places those well locations on a par with all other possible alternate points of diversion. Before they could be so used, permits must be requested from the state engineer pursuant to section 37-90-137, C.R.S. 1973 (1980 Supp.). Such permits have been obtained as to the wells replaced by wells number 2, 3, and 4. Additionally, as we shall demonstrate in section 1B of this opinion, Broyles must obtain a decree for a change of water right which establishes the old wells as alternate points of diversion. It is the failure to obtain such a decree which is fatal to Broyles' position on this appeal.

Id., 249-250. Broyles has not obtained a decree which establishes the replaced wells as alternate points of diversion.

Broyles did not abandon his replaced wells subsequent to the Supreme Court's decision; therefore, both the Fort Lyon Canal Company (Fort Lyon) and the Southeastern Colorado Water Conservancy District (Southeastern) filed motions that the wells be plugged (Vol. 1, pp. 108-111). On July 1, 1983, the Water Court in Water Division 2 heard argument on the motions that the wells be plugged and ordered that the wells be abandoned and

plugged in accord with the appropriate administrative regulations governing the abandonment of wells (Vol. 1, pp. 134-136).

On June 30, 1983, Broyles filed an Application for Change of Water Rights which involves the replaced wells (Water Division No. 2, Case No. 83CW73). Statements of Opposition have been filed to that application and to date Broyles has pursued that application no further.

Subsequent to the Water Court's order to abandon and plug the wells, the Water Court ordered the May 9, 1979, application dismissed and the water rights involved here cancelled, based upon Broyles' failure to file the May 9, 1979, application within the statute of limitations. That dismissal is on appeal in Case No. 83SA456.

SUMMARY OF ARGUMENT

This Court directed abandonment of the wells in its earlier decision in this case. The Water Court's order to abandon and plug complies with that decision. Implicit in this Court's direction to abandon is the requirement that abandonment be done in accord with applicable state regulations and that abandonment be done promptly.

This Court's prior direction to abandon the wells is the law of the case. Broyles should not be allowed to re-appeal and re-argue the issue here.

ARGUMENT

I. THIS COURT HAS DIRECTED ABANDONMENT OF THE WELLS AND THE TRIAL COURT PROPERLY FOLLOWED THAT DIRECTION.

This Court directed abandonment of Broyles' replaced wells. It could have been no more explicit:

> We conclude that the February 14, 1975, decree, taken together with the statutory definition of "replacement well," imposed upon Broyles the obligation to abandon the replaced wells upon completion of the replacement wells. (Emphasis added.)

Id. at 249. Broyles petitioned for rehearing; rehearing was denied.

After this Court's decision, Broyles did not voluntarily comply with this Court's direction and, therefore, Southeastern and Fort Lyon filed their motions that the wells be abandoned and plugged. The Water Court understood this Court's language directed abandonment of the replaced wells and so ordered (Vol. 1, pp. 134-136).

A. THIS COURT'S DIRECTION TO ABANDON THE WELLS IMPLIES THAT THE ABANDONMENT BE DONE IN ACCORD WITH APPLICABLE REGULATIONS.

When this Court concluded that Broyles had the "obligation to abandon the replaced wells," the necessary implication was that the abandonment must be done consistent with applicable regulations. The State of Colorado's Division of Water Resources, on November 29, 1972, promulgated Rules and Regulations through the State Board of Examiners, Water Well and

Pump Installation Contractors (Vol. 1, pp. 162-174) (hereafter "Well and Pump Rules").

The Well and Pump Rules, at Section 5, set forth precise instructions under the caption "Abandonment Regulations." The appropriate method of abandonment for large irrigation wells, such as are involved here, located a short distance from the Arkansas River and pumping from the Arkansas River alluvium, is described in the Well and Pump Rules under Section 5(2)(b):

> Large diameter wells formerly producing from unconfined material shall be abandoned by filling with sand or gravel to the top of the water level, with inert material to the surface and by installing a permanent cover of adequate strength water-tight on top of the casing. On farm lands the top five feet of casing shall be removed, the hole filled with sand or gravel to the top of the water level, with inert material to within five feet of the surface, and shall be capped with concrete or steel five feet below the surface.

This is the "plugging" which abandonment implies and which was required by the Water Court in its Order of July 13, 1983.

The Well and Pump Rules on abandonment are expressly authorized by the General Assembly. The Water Well and Pump Installation Contractors statute, 1973 C.R.S., § 37-91-101, et seq., mandates compliance with those rules:

> [N]o water well shall be located, constructed, repaired, or abandoned and no pump or pumping equipment shall be installed or repaired, contrary to the provisions of this article and applicable rules of the board promulgated to effectuate the purposes of this article. (Emphasis added.)

1973 C.R.S. 37-91-109.

Broyles argues in his opening brief that abandonment would destroy his wells. Indeed, the incapacitation of the wells is exactly what abandonment means; the Division of Water Resources determined that in 1972. When Broyles opted to install replacement wells pursuant to permit from the State Engineer and when replacement permits were granted conditioned upon abandonment of the replaced wells, Broyles necessarily proceeded with appreciation of the Well and Pump Rules for abandonment of wells. If Broyles did not intend to comply with the Well and Pump Rules, he could have and should have objected to their promulgation in 1972.

Broyles' opening brief implies that this Court's language that "the abandonment simply places those (replaced) well locations on a par with all other possible alternate points of diversion" means that the State Engineer and the Water Court have no power to direct the plugging of the replaced wells. Broyles' argument denies meaning to the Supreme Court's use of "abandonment" and ignores the Well and Pump Rules specifying the method of abandonment. Plugging a well does not physically prevent drilling a new well. One is able to drill a well physically at any location. A new well can be drilled at the location of an abandoned well as easily as a new headgate can be constructed at the location of an abandoned headgate.

Broyles confessed to using water pumped from the replaced wells in the prior appeal of this case. That use of water was in

violation of the Water Court's 1975 decree and the conditions of the replacement well permits. There was no right to take that water before. Broyles now still seeks to avoid physically incapacitating the wells. What is to keep Broyles from once again plugging in the pumps in these replaced wells and pumping on the sly? He did so from 1972 to 1979 and tried to obtain a decree on the basis of that pumping. The logical extension of Broyles' argument is that a clean and operable well with a functional pump in place is "abandoned" when the owner unplugs the pump motor from the electrical outlet. That kind of "abandonment" is blatantly unadministrable and unenforceable.

B. THIS COURT'S DIRECTION TO ABANDON THE WELLS IMPLIES THAT THE ABANDONMENT BE DONE PROMPTLY.

Broyles has repeatedly failed to abandon his replaced wells. Fort Lyon's and Southeastern's Motions to Plug Wells were filed to force Broyles to deviate from his pattern of ignoring the courts and administrative agencies of this state. It was beginning in March of 1972 (Id. at 245) that Broyles applied for replacement well permits. Those permits explicitly and implicitly required that the replaced wells be abandoned. In 1975, Broyles obtained a decree from the Water Court. That decree awarded rights to wells as replacement wells (Id. at 245-246) and that decree implicitly required that the replaced wells be abandoned. On May 13, 1980, the Water Court again recognized

the abandonment requirement of the permits and the 1975 decree. In 1981, this Supreme Court affirmed that the replaced wells must be abandoned. On July 13, 1983, the Division 2 Water Court, for the third time, required abandonment of the wells. Applicant's reticence to comply with the statutes, with the opinion of this Supreme Court, with the decrees of the Water Court, and with the rules and regulations of the State of Colorado is incomprehensible. Broyles must promptly plug his wells.

C. BROYLES CANNOT EVADE THE DIRECTION OF THIS COURT.

Broyles has begun a new maneuver to evade the requirement that he plug his replaced wells. On the afternoon before the July 1, 1983, hearing in the Water Court on the Motions to Plug, Broyles filed an Application for Change of Water Right in Water Division 2. That new application requests that the replaced wells be made alternate points of diversion. Broyles' action was intended to dissuade the Water Court from issuing a third decree requiring abandonment of the wells. The filing of the application was not convincing to the Water Court. Statements of opposition have been filed to the application and the application has proceeded no further. As the Water Court recognized, "Applicant is far from obtaining a decree" (Vol. 1, p. 134).

While this Court countenanced use of replaced wells as alternate points of diversion, that countenance was premised on the applicant's obtaining valid well permits and a decree. Since

1972, Broyles has taken only one of the steps. Permits were obtained in 1979, (although no statement of beneficial use was filed on one of the permits and that permit has now expired) (Vol. 1, p. 161). No decree has been obtained between 1972 and now. This Court was clear: "Broyles must obtain a decree for the change of water right which establishes the old wells as alternate points of diversion" (emphasis added). Id. at 249. Yet, there is no decree, only the filing of an application the night before hearing. This Court has already declared its position on the effect of failing to obtain such a decree: "It is the failure to obtain such a decree which is fatal to Broyles' position on this appeal" Id. at 250.

II. BROYLES CANNOT RE-APPEAL AN ALREADY DECIDED ISSUE.

A. BROYLES SEEKS TO RE-APPEAL THE SAME ISSUE HEARD AND DECIDED BY THIS COURT IN THE PRIOR APPEAL OF THIS CASE.

The abandonment of the wells was an issue in the prior appeal of this case. In reviewing the arguments of the parties, this Court's opinion, at 246, reflects that:

> The Fort Lyon Canal Company (Fort Lyon) and Southeastern filed statements of opposition to Broyles' May 9th water court application. They contend that Broyles was required to plug and abandon the replaced wells and so could not rely upon production from those wells to make his decreed conditional water rights absolute. The objectors find the source of that requirement in the definition of "replacement well" in section 37-90-103(13), C.R.S. 1973, which mandates abandonment of the original well upon completion of a replacement well. (Emphasis added.)

Indeed, the Water Court judgment from which Broyles appealed mandated abandonment:

> The water court concluded that the February 14, 1975, decree reflected a judicial determination that the original wells had been replaced by wells number 2 to 5, that the definition of "replacement well" in section 37-90-103(13) mandates abandonment of a replaced well upon completion of a replacement well, and that under the doctrine of res judicata Broyles is bound by the abandonment requirement.

Id. at 247. Broyles argued the abandonment in this Court last time:

> Broyles contends that the trial court erred in holding that the 1975 water court decree barred his subsequent use of the replaced wells....

Id. at 247. The abandonment and plugging of the wells was briefed in 80 SA 328 by Southeastern (Brief for Appellee and Cross-Appellant, Southeastern Colorado Water Conservancy District at pp. 13-16) and by Fort Lyon (Answer Brief for Appellee The Fort Lyon Canal Company at pp. 3-8). Broyles responded to the argument in both his Brief for Appellant and Reply Brief for Appellant and argued the replacement well definition had no application in a water rights adjudication proceeding.

This Court's conclusion was quite explicit:

> We conclude that the February 14, 1975, decree, taken together with the statutory definition of "replacement well," imposed upon Broyles the obligation to abandon the replaced wells upon completion of the replacement wells. (Emphasis added.)

Id. at 249. Broyles petitioned for rehearing, but this Court confirmed its original decision and denied rehearing.

Broyles now quibbles with the Supreme Court ruling.

B. THIS COURT'S DIRECTION TO ABANDON THE WELLS IS THE LAW OF THE CASE AND CONTROLS.

The Water Court's Order to abandon and plug the wells is consistent with the Supreme Court's mandate in the first appeal in this case. The Supreme Court's judgment is the law of the case and will not be departed from upon a second appeal. Morton v. Laesch, 52 Colo. 541, 125 P. 498 (1912). The facts and evidence are the same and the decision on the first review is conclusive. Trinchera Ranch Co. v. Trinchera Irr. Dist., 89 Colo. 170, 300 P. 614 (1931).

In United States National Bank v. Bartges, 122 Colo. 546, 224 P.2d 658 (1950), cert. denied, 340 U.S. 957, the Colorado Supreme Court reviewed a controversy for the second time and would not further consider questions already decided. Quoting from Ginsberg v. Bennett, 106 Colo. 285, 104 P.2d 142 (1940), the Court stated:

> Every question now raised by plaintiffs was presented in their original briefs and motion for rehearing in Case No. 13,883, and therein were determined adversely to them. Under such circumstances it is not permissible to resubmit questions previously decided in the former proceeding in error, since the opinion therein and the judgment entered in conformity therewith constituted "the law of the case," which must control. [Lengthy citations omitted.]

Id. at 549. Because the Supreme Court is controlled by its initial holding, no purpose can be served by this second appeal except delay and potential, unauthorized taking of others' water by the applicant.

CONCLUSION

The Southeastern Colorado Water Conservancy District respectfully requests that the order of the Water Court that Broyles' wells be abandoned and plugged be affirmed.

Southeastern also respectfully submits that Broyles' appeal is frivolous and vexatiously instituted, and that it be awarded its costs and attorneys' fees pursuant to London v. Allison, 87 Colo. 27, 284 P. 776 (1930) and C.A.R. 38.

Respectfully submitted,

FAIRFIELD AND WOODS

By _____

Kevin B. Pratt, #9328
1600 Colorado National Building
950 Seventeenth Street
Denver, Colorado 80202
(303) 534-6135

Attorneys for Appellee
Southeastern Colorado Water
Conservancy District

CERTIFICATE OF MAILING

I hereby certify that on the 8th day of December, 1983, I served a true and correct copy of the foregoing ANSWER BRIEF OF APPELLEE SOUTHEASTERN COLORADO WATER CONSERVANCY DISTRICT by mailing a copy thereof, postage prepaid, to:

Mr. Wayne B. Schroeder
Calkins, Kramer, Grimshaw & Harring
Attorneys at Law
One United Bank Center
1700 Lincoln Street, #3800
Denver, Colorado 80203

Mr. John J. Lefferdink
Lefferdink & Davis
Attorneys at Law
Post Office Box 110
Lamar, Colorado 81052

Mr. Carl M. Shinn
Attorney at Law
Post Office Box 390
Lamar, Colorado 81052

Ms. Paula C. Phillips
Assistant Attorney General
Natural Resources Section
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203