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### A-B Cattle Co. v. U. S.

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IN THE SUPREME COURT  
OF  
COLORADO  
No. 27714

FILED IN THE  
**SUPREME COURT**  
OF THE STATE OF COLORADO  
SEP 5 1978

*David W. Bazila*

IN RE QUESTION SUBMITTED )  
BY THE UNITED STATES COURT )  
OF CLAIMS IN ITS PROCEEDING )  
NO. 105-75 ENTITLED )  
A-B CATTLE COMPANY, et al., )  
Plaintiffs, )  
v. )  
UNITED STATES OF AMERICA, )  
Defendant. )

ORIGINAL PROCEEDING

EN BANC

OPINION BY MR. JUSTICE ERICKSON

PETITION FOR REHEARING MADE BY THE  
COLORADO RIVER WATER CONSERVATION DISTRICT  
AND THE  
SOUTHWESTERN WATER CONSERVATION DISTRICT

DELANEY & BALCOMB  
Mr. Kenneth Balcomb  
P. O. Drawer 790  
Glenwood Springs, CO 81601  
(303) 945-6546

Attorneys for Amicus Curiae,  
The Colorado River  
Water Conservation District

MAYNES, BRADFORD & DUNCAN  
Mr. Frank E. Maynes  
P. O. Box 3420  
Durango, CO 81301  
(303) 247-1755

Attorneys for Amicus Curiae,  
Southwestern Water Conservation  
District

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The Colorado River Water Conservation District and the Southwestern Water Conservation District in support of this Petition for Rehearing respectfully suggest a majority of the Court has overlooked or misapprehended the following points of law and fact in arriving at the Opinion of the Court herein dated August 21, 1978. Such points are:

1. The Southeastern Water Conservancy District is directly involved by its contract with the United States to repay the Federal Government for the costs of construction of the Frying Pan-Arkansas Project, including Pueblo Reservoir. Other Amici are involved because of the effect of the decision of the Court's majority on current agricultural projects in their respective geographic areas.

2. The decree for Pueblo Reservoir from the Arkansas River is junior in point of time to those for Bessemer Ditch. Consequently, Pueblo Reservoir is entitled to the protection referred to in the Opinion of the Court at p. 14,

fn. 4. The footnote recognizes two well established legal principles, i.e., the senior cannot command the entire flow of the stream,<sup>1/</sup> and, a junior by his diversion may reduce the flow of the stream<sup>2/</sup> and the silt concentration thereby without responsibility for resulting injury to seniors. The results reached by a majority of the Court are, however, entirely inconsistent with such legal principles since a junior appropriator by a reservoir is constitutionally entitled to the same protection as one by a ditch.

The situation of a junior diminishing the quality of water by diversion (reducing the silt), his return flow (increasing the dissolved solids), transpiration and evaporation (concentration of dissolved solids), and storage (the question here) exists on every stream in Colorado. A veritable pandora's box of litigation is opened if the Court's opinion stands.<sup>3/</sup>

3. Practically speaking, it will be impossible to determine the monetary award which would be due to plaintiffs as a result of their entitlement to silt historically in the river, limited, of course, under the Opinion of the Court,

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1/ Schodde v. Twin Falls Land & Water Co., 224 U.S. 107, 32 S. Ct. 470, 56 L.Ed. 686 (Ida. 1912).

2/ Natural intermittent fluctuations in river flow often require changes in diversion works, and, together with diversion by juniors, subject seniors to recurrent headgate alteration expense. Query: Why should the expense of silt addition to ditch water or proper ditch construction be treated differently?

3/ The Court's conclusion that removal of silt is a reduction in water quality flies in the face of state and national policy as expressed in the water quality control acts. Silt is either a pollutant as set out in Federal or State law (extensively cited in the brief of Amici herein), or is a material beneficial to mankind. It is difficult to comprehend how it can be both deleterious and beneficial in the same circumstances.

to the amount of silt naturally<sup>4/</sup> fluctuating in amount in the quantity of water which plaintiffs are legally entitled to divert.<sup>5/</sup>

4. Again, speaking practically, the Opinion of the Court and the announced result spells the probably demise for future construction of reservoirs in Colorado.<sup>6/</sup> For example, the about to be funded West Divide Federal Reclamation Project contemplates the construction of at least two reservoirs on minor tributaries of the Colorado River below Glenwood Springs, Colorado. These tributaries naturally carry during annual spring runoff and the frequent cloudburst conditions on these streams, substantial quantities of silt

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4/ Not all silt suspended in the waters of a river are "natural". Substantial quantities are man induced, such as, irrigation return flows, street runoff and storm sewers, and construction activities in or adjacent to the river channel. Land activities of man far from the river increase the silt load by drainage from affected areas into the stream. Silt attributable to flash floods and man induced silt cannot be said to be predictable as an element of an appropriation.

5/ In the course of argument, inquiry was made of counsel as to how the quantity of silt available at the time of the Bessemer appropriations would be determined. Mr. Saunders, we believe, responded such determination could not be made, but the last 25 years of record could be used. This quantity is, of course, a condition resulting after all junior rights, except Pueblo Reservoir, have been established. Not withstanding Pueblo Reservoir, plaintiffs have never received "The quantity of water under their decreed rights in natural quality as it existed at the time of their appropriation" (Opp., p. 13 - 14), because other and junior appropriators changed the "natural" condition long prior to the advent of Pueblo Reservoir.

6/ Since, as we are advised, Colorado is the only state with a holding such as here, the adverse effect on projects in other states is minimal; indeed, it will there have a salutary effect as more water should become available from the Colorado River to other states, Colorado forsaking the balance of its Compacted share of the River. As the Court has been advised in yet another case, Colorado's share of the Colorado River is now fixed in annual quantity by a combination of the Compacts on the River and downstream storage. To use even this limited amount, however, upstream storage (in Colorado) is required. Having to pay damages for the loss of natural silt occasioned by storage would drive uses by those who cannot afford to pay for silt out of existence.

(suspended solids), with probably the same salutary effect on ditches and irrigation as alleged here. At least, in view of the Opinion of a majority of the Court, such a claim could be made. Numerous senior water rights divert downstream of the reservoirs proposed for construction by the project. The reservoirs are necessary to supply a substantial quantity of the water needed for project purposes. If the project must respond in damages for the silt removed by the reservoirs, the project becomes economically infeasible. The result of the Court's Opinion is as effective in destroying this project as all of the environmental and other financial problems currently besetting agricultural projects in the Western States. The same can be said for all such projects presently authorized by the United States Congress for construction.<sup>7/</sup>

5. Diversions for most purposes necessarily must clarify water for use, and upon return to the stream must remove by and large through various means, including sanitary sewer plants,<sup>8/</sup> suspended solids, harmful metals and bacteria. Such diverters often purposely build clarification structures<sup>9/</sup> at their stream diversions points.<sup>10/</sup>

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<sup>7/</sup> Particularly Narrows, Fruitland Mesa, Savery-Pot Hook, Dallas Creek, Dolores, Animas-La Plata and San Miguel.

<sup>8/</sup> There is no factual basis for a distinction between silt as "naturally" occurring in a stream, and other pollutants such as nitrogen and phosphorus (nutrients) added to those naturally occurring in the stream by municipal sewage treatment plants, beneficial to agriculture. Will the Court's decision lead to claim of entitlement to a continuation of the addition of such nutrients, even though their release to the stream is forbidden by state and Federal Clean Water Acts?

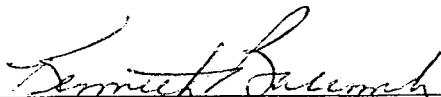
<sup>9/</sup> Such as Denver's proposed Foothills Treatment Plant.

<sup>10/</sup> Imperial Irrigation District maintains mammoth desilting works at Imperial Dam to remove silt from the agricultural water diverted to the largely unlined All American Canal to avoid the cost of removal of silt deposition in the canal. Properly designed canals usually prefer clear water to muddy because the expense of removing silt from the canals exceeds the cost of silt removal from the water before diversion.

6. Colorado has long contended the compacts on its various rivers, while binding as to quantity, did not bind it as to quality. In fact, the deteriorating quality of the Colorado River occasioned in part by upstream uses in Colorado and her sister Upper Division states is recognized as a Federal responsibility by Sec. 205(a)(1) of the Colorado River Basin Salinity Control Act of 1974, 43 U.S.C.A. 1595. The result here is a reversal of such recognition in Colorado, and, notwithstanding the attempt of the Court to limit the effect of the decision to silt removal, Colorado water users could be held responsible for downstream quality changes resulting from instate use of Colorado's compacted and limited share of the River.

ACCORDINGLY, these Amici urge rehearing and would further, if such would be of benefit to the Court, respectfully suggest reargument.

DELANEY & BALCOMB

By   
Kenneth Balcomb, Reg. No. 1559  
P. O. Drawer 790  
Glenwood Springs, CO 81601  
(303) 945-6546

Attorneys for Amicus Curiae,  
The Colorado River  
Water Conservation District

MAYNES, BRADFORD & DUNCAN  
Mr. Frank E. Maynes, Reg. No. 1363  
P. O. Box 3420  
Durango, CO 81301  
(303) 247-1755

Attorneys for Amicus Curiae,  
Southwestern Water Conservation  
District

DATE: August 31, 1978

CERTIFICATE OF MAILING

I hereby certify that I have served a true and correct copy of the foregoing PETITION FOR REHEARING by mailing a copy thereof, with postage prepaid, to the persons shown below at their respective addresses on the 31st day of August, 1978, to-wit:

Mr. Charles J. Beise  
FAIRFIELD AND WOODS  
1600 Colorado National Building  
950 Seventeenth Street  
Denver, CO 80202

Mr. Frank E. Maynes  
MAYNES, BRADFORD & DUNCAN  
P. O. Box 3420  
Durango, CO 81301


Mr. D. Monte Pascoe  
IRELAND, STAPLETON, PRYOR & HOLMES, P.C.  
1700 Broadway, Suite 2017  
Denver, CO 80290

Mr. Hank Meshorer  
Trial Attorney  
Department of Justice  
Land and Natural Resources Division  
P. O. Box 1656  
Denver, CO 80201

Mr. John R. Little, Jr.  
Mr. Ralph O. Canaday  
Regional Solicitor's Office  
Department of the Interior  
P. O. Box 25007  
Denver Federal Center  
Denver, CO 80225

Mr. Glenn G. Saunders  
SAUNDERS, SNYDER, ROSS & DICKSON, P.C.  
802 Capitol Life Center  
Denver, CO 80203

Mr. Leo S. Altman  
PRESTON, ALTMAN & PARLAPIANO  
524-550 Thatcher Building  
Pueblo, CO 81002

  
\_\_\_\_\_