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

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

David W. Boyer

NO. 27714
IN THE
SUPREME COURT
OF THE
STATE OF COLORADO

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 PROCEEDINGS

PETITION FOR REHEARING

EN BANC

QUESTION ANSWERED
IN THE AFFIRMATIVE

MR. JUSTICE ERICKSON delivered the Opinion of the Court.

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COME NOW the People of the State of Colorado, amicus herein, by and through the Attorney General, and submit, pursuant to C.A.R. 40, the following points of law and fact which amicus believes the court has overlooked or misapprehended. The amicus also requests that the court exercise the discretion allowed it by C.A.R. 40(1) and restore the cause to the calender for reargument.

I.

THIS DECISION VALIDATES AN HISTORICALLY INEFFICIENT MEANS OF TRANSPORTATION OF WATER AND THEREBY FRUSTRATES THE MAXIMUM UTILIZATION OF WATER OF THIS STATE.

In recent years Colorado has experienced a tremendous population growth which has placed great demand on the now scarce water resources of the state. One issue presented by this case is whether an appropriator is entitled to insist that the water quality of a stream not be improved by storage in an upstream reservoir so that he can continue an historic method of transportation of diverted water because the method of transportation becomes inefficient when the water quality is improved.

In Colorado Springs v. Bender, 148 Colo. 458, 366 P.2d 522 (1961), this court adopted the doctrine of efficient and reasonable means of diversion:

Appropriators who rely upon inefficient means of diversion, therefore, will not be permitted to inhibit the constitutional right to appropriate the unappropriated waters of our natural streams.

Opinion at p. 13 (emphasis added).

In this case the State argued that under the rationale of the Bender case, plaintiffs were not entitled to insist on maintaining the water quality of the stream to facilitate transportation of their water through an inefficient, leaky ditch. The court distinguished this case from Bender on its facts, i.e.,

that in Bender the appropriator sought to command the entire flow of the Arkansas River to effectuate a diversion of naturally-silty water. The court then states that this case can be decided by reference to the principle that an appropriator is entitled to the quantity of water under his decreed rights in its natural quality as it existed at the time of appropriation. The State submits that the court's decision on this issue does not provide a principled basis for distinguishing this case from Bender. If an appropriator is entitled to the quantity of water in its natural quality as it existed at the time of appropriation, then the appropriator in Bender should have been able to rely on the same principle to maintain stream conditions at the time of his appropriation. Yet, the court upholds the Bender decision. The State submits that these two cases cannot be distinguished by reference to the principle on which the court rests its decision and requests a rehearing to allow the court to reconsider this issue.

II.

THIS COURT'S DECISION WILL SERIOUSLY HAMPER
COLORADO'S EFFORTS TO CLEAN UP ITS WATER IN
COMPLIANCE WITH ITS WATER QUALITY LAWS.

This decision will seriously hamper the State's efforts to clean up its waters and, read literally, locks the state into the status-quo regarding water quality. This situation is inconsistent with the state policy to improve the quality of state waters. C.R.S. 1973, 28-8-104(2) and (3), which provides:

It is further declared to be the public policy of this state to conserve state waters and to protect, maintain, and improve the quality therefor for public water supplies, for protection and promulgation of wildlife and aquatic life, and for domestic, agricultural, industrial, recreational, and other beneficial uses; to provide that no pollutant be released into any state waters without first receiving the treatment or other corrective action necessary to protect the legitimate

and beneficial uses of such waters; to provide for the prevention, and control of new or existing water pollution; and to cooperate with other states and the federal government in carrying out these objectives.

The precise question before this court is does "the owner of a decreed water right to divert and use water from a natural stream have a right to receive water of such quality and condition, including the silt content thereof, as has historically been received under that right." (emphasis supplied)

In its conclusion, the court states that the certified question is affirmed. The effect of affirmance is to provide each and every appropriator in the state with a cause of action for damages whenever the historic quality of water is improved pursuant to the above-cited legislative declaration. Each time sewage effluent is removed from a natural stream by a community improving its waste treatment process a downstream irrigation appropriator could claim damage due to the loss of nutrients historically received. The mischief created by this decision can only heighten the conflicts between interests seeking to improve water quality and those seeking to continue existing uses --- a conflict that the government should be seeking to resolve.

III.

THE DECISION SERIOUSLY HAMPERS OR PRECLUDES
THE FULFILLMENT OF STATE GOVERNMENTAL RESPON-
SIBILITIES IN THE AREA OF WATER MANAGEMENT.

Finally, the court has seriously misapprehended the practical results of its decision. Pursuant to legislative authorization and appropriation agencies of state government have been endeavoring to establish permanent recreation pools in numerous water impoundment structures around the state. Negotiations are presently underway concerning pools in Trinidad,

John Martin, Chatfield and Bear Creek (Mt, Carbon) Dams. All of these negotiations and efforts will be affected if not terminated by this decision, and the people of the state denied a precious recreation resource. For example, the contracts for the establishment of a recreation pool in the Trinidad Project must be re-negotiated and the existence of the recreational facility are placed in grave doubt by the decision. It is doubtful that any facility can meet the costs suggested by this opinion.


Even more important to the citizens of this state and to their economic well-being is the drastic effect this decision will have on all water development projects existing, under construction, and planned for the future. It can only be hoped that the court misapprehended the effect of its decision, as it is hard to believe that it could intend to end major water development with a single blow. It is inevitable that the issue of continued silt for appropriators below project dams such as Dallas Creek, Dolores, Narrows and even Strontia Springs/Two Forks will be raised to halt or delay these projects. Such litigation could delay these projects for years frustrating the efforts of elected officials and the duties of numerous government boards and agencies.

WHEREFORE, it is requested that this petition for rehearing and the restoration of this cause to the calender for reargument be granted.

FOR THE ATTORNEY GENERAL



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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within PETITION FOR REHEARING upon all parties herein by depositing copies of same in the United States mail, postage prepaid at Denver, Colorado this 6th day of September, 1978, addressed as follows:

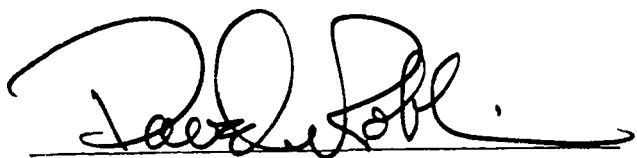
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A handwritten signature in black ink, appearing to read "Don Redd", written over a horizontal line.