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

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

David W. Beggs

A-B CATTLE COMPANY, et al,)
)
)
Plaintiffs,)
)
v.)
)
THE UNITED STATES OF AMERICA,)
)
Defendant.)

AMICUS BRIEF
BY THE
STATE OF COLORADO

CERTIFICATION OF QUESTION
TO THE COLORADO SUPREME COURT
FROM THE UNITED STATES COURT OF CLAIMS
REHEARING

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CERTIFICATION OF QUESTION
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REHEARING

STATEMENT OF FACTS

The facts in this case are set forth in the court's opinion. They establish that the substitution of clear water from Pueblo Reservoir for naturally-silty water from the Arkansas River has increased seepage losses in plaintiffs' ditch and when applied to land for irrigation, the clear water does not spread as far as silty water. This much was stipulated to by the parties, although the extent of plaintiffs' injury is vigorously contested.

SUMMARY OF THE ARGUMENT

Plaintiffs have suffered an injury by reason of the substitution of clear water from Pueblo Reservoir for naturally-silty water from the Arkansas River. However, silt is not "property" which is subject to appropriation

under Colorado law. Therefore, there is no constitutional right to damages for reduction in the silt content of water they receive under their appropriation. The only possible basis for liability is under the common law or the statutes of Colorado.

Under the common law there is no right to damages for reduction in the silt content due to a change in velocity of the stream by a junior appropriator, whether the junior appropriation is for storage or direct use. Further, under the common law there is no right to damages which result when a senior appropriator relies upon an inefficient means of transportation. The only basis for liability in this case is statutory, but C.R.S. 1973, 37-80-120(3) does not apply to substituted water which is improved in quality.

INTRODUCTION

The court should consider the extensive impact this decision may have on Colorado water projects.

If memory is correct counsel for plaintiffs indicated at oral argument that the impact of the court's decision would be limited to the Arkansas River. The State has done an informal survey of water projects, presently existing or contemplated, where downstream agricultural irrigators could potentially make similar claims. These projects include:

Narrows Project, Chatfield Reservoir, Dallas Creek Project, San Miguel Project, Dolores Project, John Martin Reservoir, Trinidad Reservoir, Juniper Project, Yamcola Project, and Bear Creek Reservoir.

The State believes this case should be decided with a proper consideration of its potential impact, and that the court should not be under a mistaken impression that this case will be limited to one reservoir in the state. This case could seriously affect further water development projects

in the state.

The State does not wish to imply that the situation in each case is identical to the matter at issue but only that the relationship of downstream ditches to an onstream reservoir is similar and that the possibility of a similar claim exists. The State can indicate to the court that questions about the operation of recreation features of the John Martin and Trinidad Reservoirs have been raised and threaten the use of those projects for public recreation use.

In addition, the State is concerned about the impact of this decision on its water quality laws. The court's opinion appears to hold that an appropriator has a vested right to the historic conditions which existed on the stream at the time of his appropriation, whether those conditions naturally occurred or were man-induced. The potential result is that an irrigator could claim damages if constituents added to the stream by an upstream appropriation were removed pursuant to the state's water quality laws. For example, an agricultural appropriator might claim damages for removal of silt added by upstream appropriators or the removal of ammonia added by a municipality. Both of these can be beneficial to the use of water by an agricultural irrigator and he could suffer injury if these materials were removed from the water. This decision could potentially create a right to damages every time the quality of state waters is improved pursuant to the state's water quality laws.

ARGUMENT

I.

SILT IS NOT "PROPERTY" WHICH IS SUBJECT TO APPROPRIATION UNDER COLORADO LAW. THERE IS NO CONSTITUTIONAL RIGHT TO DAMAGES FOR REDUCTION IN THE SILT CONTENT OF WATER.

Surely Justice Groves is correct when he says that the Colorado Constitution, Art. XVI, section 5, makes water - not silt, and not silt and water - the property which is subject to appropriation. (Dissent, p. 5). A water right is a usufructury right; its value consists not so much in the water itself, as it does in the uses to which the appropriation can be put. The property is not the corpus of the water itself, but the right to use a certain rate of flow of water. While there may be liability for interfering with the quality of water appropriated by a senior appropriator which materially affects its use, it is not because the senior appropriator has a "property" interest in a specific quantity of a particular constituent in water, such as silt, but because the common law or the statutes of Colorado provide an action for interference with the quality of water in the stream as it existed at the time of appropriation. Thus, one must look to the common law or the statutes of Colorado to determine which interferences with the quality of water are actionable.

II.

THERE IS NO COMMON LAW RIGHT TO DAMAGES FOR REDUCTION IN THE SILT CONTENT OF WATER DUE TO A CHANGE IN THE VELOCITY OF THE STREAM BY A JUNIOR APPROPRIATION.

The crucial issue raised by this case is not whether plaintiffs have suffered an injury, but whether that injury is actionable under Colorado law. The State contends that there is no common-law liability for such an injury; the

only possible basis for liability in this case is statutory, C.R.S. 1973, 37-80-120(3).

A. The doctrine of maximum utilization protects junior appropriators whether for reservoir appropriations, or direct flow appropriations, from liability for injuries which result solely as a result of the change in velocity of the stream.

There are a number of instances in the law where someone suffers a real, monetary injury, yet that injury is not actionable because the activity which caused the injury is protected by some public policy which outweighs any injury suffered by the plaintiff. For example, a house is blown up to stop a fire, a building during construction is destroyed in a situation where the destruction was not foreseeable, a developer purchases property on a flood plain which is rezoned to prohibit building. All of these inflict real, monetary injuries on the property owner which lessens the value of his ownership rights, yet they are not actionable because of overriding public policy. Examples of legislative restrictions on the use of property by zoning are commonplace today; yet, when these laws were first tested in the courts, the cases were brought by property owners who complained of real, monetary injuries to their property and their expectations about the use of their property, injuries for which they demanded damages. The courts recognized that the interests of the public in certain situations must override the interests of the property owner and that injuries do not in every instance require payment of damages. Indeed, the courts impose liability based on public policy, not on the mere fact of injury.

Nor, has such accommodation to public policy been required only pursuant to acts of the legislature. Courts have established doctrines under which the injury to the

owner of private property must be weighed against the public interest. Important examples of these have been mentioned but include a house blown up to stop a fire, the limitation on negligence liability to foreseeable injuries; and, more relevant to this case, the principle discussed by the court that senior appropriators of water from a stream cannot successfully allege injury as the result of diversions by junior appropriators which reduce the water velocity and cause the silt concentration to decrease. Opinion at p. 14 n.4. This result is not because such injury is not real, or not material; no, such injury is not actionable because to allow it "would entail violation of the principle of maximum utilization of our scarce water resources." This is a critical issue in this case: whether this principle of maximum utilization of water also applies to onstream storage by a junior appropriator who reduces the velocity of the stream and thereby causes the silt concentration to decrease. In both the case of the direct flow appropriator and the on-stream storage appropriator, the downstream senior appropriator may suffer an injury/1/.

Storage reservoirs are an absolute necessity in this state to maximize the beneficial use of water. The only way most flood waters can be saved is through the construction of storage facilities to preserve water at certain seasons of the year for use at other seasons. There are two means of construction of such storage reservoirs: one is the construction of a reservoir at a distance from the stream, and diversion of water into the reservoir by means of ditches or other devices; the other is to erect a dam and use the bed of the stream to store and preserve water. The validity of on-stream reservoirs as a means for storage of flood waters has been established by this court and by statute. Larimer County Reservoir Company v. People, 8 Colo. 614, 9 Pac. 794, 795-6 (1886); C.R.S. 1973, 37-87-101.

Clearly, storage reservoirs maximize the beneficial use of our "scarce water resources."

Yet this court apparently distinguishes between on-stream storage appropriators and direct flow appropriators as to whether they are liable to downstream senior appropriators for reducing the silt content of the water. In footnote 4 of its opinion the court says that "whether junior appropriators cause a net increase or decrease in silt concentration, senior appropriators cannot successfully allege injury in such a situation, since to do so would entail violation of the principle of maximum utilization of our scarce water resources." According to this footnote, apparently a junior appropriator who constructs a reservoir off-stream and effectuates the diversion through a ditch which causes a reduction in the velocity of the stream and a decrease in the silt concentration is not liable to a senior downstream appropriator who suffers injury thereby, even though that injury is precisely the same as that inflicted on the plaintiffs/2/.

This distinction between on-stream reservoir appropriators and direct-flow appropriators is not supported by anything in the court's opinion/3/. There is no logical reason to favor one over the other in terms of their liability to downstream senior appropriators. Both maximize the use of water; both are capable of inflicting the same injury on downstream senior appropriators. The reason for exempting direct-flow junior appropriators from liability to downstream seniors for reductions in silt content is "to do so would entail violation of the principle of maximum utilization of our scarce water resources." Yet, there can be no question that storage reservoirs by preserving flood waters that would otherwise be wasted maximize the utilization of the water resources of the state. Reservoirs and direct flow appropriations cannot be distinguished by the materiality of the injury they cause to downstream appropriators. There

is no evidence before the court that reservoirs by their very nature cause greater injury to downstream senior appropriators by reduction in the velocity of the stream than direct flow appropriators. Whether a reservoir causes a decrease or increase in the silt content of the water may depend on a number of factors, including the placement of the outlet and the length of time the water is stored.

Having embraced the principle of maximum utilization of water as the public policy of this state which outweighs the injury to senior appropriators, this court cannot in a reasoned, principled way distinguish between direct flow appropriators and reservoir storage appropriators. The commanding doctrine of maximum utilization encompasses all junior appropriations for beneficial uses. The court under this principle cannot exempt one beneficial use but not another.

The State requests that the court reconsider its decision and recognize that even though plaintiffs have suffered an injury, that it is not actionable under the common law of Colorado. And while the plaintiffs' historic use of the water is affected, it is worth noting that the quantity of the plaintiffs' water rights is not impaired, nor is the market value of these rights necessarily diminished; since the water which plaintiffs now receive is clean, and thus more suitable for other uses, the market value of those water rights may in fact be increased.

Cases cited by plaintiffs which hold that junior appropriators are liable for addition of pollutants or other materials to the water which renders the water unfit for the purpose of the senior's appropriation are inapposite. The principle of maximum utilization protects those changes in water quality which are due to reduction in the velocity of the stream which necessarily result from further appropriation by juniors. It does not affect, nor should it, changes

in water quality which result from the use made of the water, i.e., additions of pollutants to the stream.

3. The doctrine of maximum utilization protects a junior appropriator from liability for water losses which result solely because the senior appropriator has relied upon an inefficient means of transportation.

An additional reason why the plaintiffs do not have an action under the common law of Colorado for their injuries which are due to losses from seepage in their ditch is that an appropriator is not entitled to rely upon an inefficient means of transportation.

Over the years Colorado has experienced a tremendous population growth which has placed great demand on the now scarce water resources of the state. The surface flow of the Arkansas River is overappropriated and has been for years. Fellhauer v. People, 167 Colo. 327, 325, 447 P.2d 966, 983 (1958). Storage reservoirs are absolutely essential to store and preserve the flood waters of the Arkansas River so that they may be put to beneficial use. This case presents the issue of whether an appropriator is entitled to insist that 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 less efficient when the water quality is improved.

In Colorado Springs v. Bender, 148 Colo. 458, 366 P.2d 522 (1961), this court adopted the principle 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 its earlier brief the State argued that under this principle, which is based on the case of Schodde v. Twin Falls Land and Water Company, 224 U.S. 107 (1911), 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 Schodde on its facts, i.e., that in Schodde the appropriator sought to command the entire flow of the river to effectuate a diversion of water. Opinion at p. 13. The court then states that this case can be decided by 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. Id. at p. 13-14. The state submits that the court's decision on this issue does not provide a principled basis for distinguishing this case from Schodde. 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 Schodde should have been able to rely on the same principle to demand the same quantity of water necessary to effectuate his diversion as at the time of his appropriation.

On the other hand, if appropriators cannot allege injury for water losses which result from an inefficient means of diversion, then any injury to the plaintiffs should not be actionable which is the result of an inefficient means of transportation. The fact that one case involves a means of diversion and this one involves a means of transportation does not provide a basis for distinguishing them. The principle underlying Schodde is that a senior appropriator cannot unreasonably inhibit the right to appropriate unappropriated water. This principle applies equally whether excess water is demanded at the point of diversion or in the ditch. The state respectfully submits that these two cases cannot be distinguished by reference to the principle on which the

court rests its decision. The common law of Colorado should not permit appropriators who rely on inefficient means of diversion, or transportation, to allege injury when a junior appropriation makes the senior's method of diversion or transportation, inefficient.

III.

THE ONLY BASIS FOR PLAINTIFFS' RECOVERY IS STATUTORY.

As plaintiffs have no common-law right to damages in this case, the only possible basis of liability is statutory. C.R.S. 1973, 37-80-120(3) provides that appropriators who store water upstream and substitute water for that which would have naturally flowed to decreed appropriators are subject to the following condition:

(3) Any substituted water shall be of a quality and continuity to meet the requirements of the use to which the senior appropriation has normally been put.

A. A proper interpretation of C.R.S. 1973, 37-80-120 exempts reservoir appropriators from liability for changes in the quality of water due to decrease in the velocity of the stream.

The State believes that this section does not impose liability on the defendant in this case. This section enacted in 1969, is a codification of the common-law principle that all decreed appropriators, whether junior or senior, are entitled to rely upon the continuation of stream conditions as they existed at the time the appropriation was made. Opinion at p. 8; Farmers' Highline Canal and Reservoir Company v. City of Golden, 129 Colo. 575, 272 P.2d 629 (1954); Constock v. Ramsey, 55 Colo. 244, 133 P. 1107 (1913); Vogel v. Minnesota Canal Company, 47 Colo. 534, 107 P. 1108 (1910). This principle is subject to the common-law exceptions. Senior appropriators cannot allege injury as a result of

diversions by junior appropriators which reduce the water velocity and cause the silt concentration to decrease. Further this principle is subject to the exception that senior appropriators cannot rely on inefficient methods of transportation. The State believes that this statute was not intended to alter the common-law principles. However, even if the court affirms its decision, the State believes the opinion can only rest squarely on this statute since it provides the only rational basis for distinguishing reductions in the silt by upstream reservoir appropriators from other uses which maximize the utilization of our scarce water resources.

If the court were to indicate that its decision were limited to this statute, that is, that the plaintiffs may have a statutory cause of action when substituted water is improved in quality so that it does not "meet the requirements of use to which the senior appropriation has normally been put", the State would be somewhat less troubled by the court's decision. Such a limited holding would not interfere with the State's actions to improve the quality of the waters of the state in other instances. For what concerns the State about the decision is that the court stated that it approved the question certified by the court of claims, which was as follows:

Under Colorado law, does the owner of a decreed water right to direct 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 added). The effect of affirming the certified question appears to be that the court is holding that under Colorado law, every appropriator has a right to damages whenever the historic quality of water is changed, whether as a result of upstream storage or by any other means, even if pursuant to the policy of the State to improve water quality.

The consequences of an extended holding would be disastrous. For example, if the State, pursuant to its water quality laws required agricultural irrigators to eliminate silt discharges in their return flows, a downstream agricultural irrigator might contend that he has a right to damages because he is entitled to the historic silt content at the time of his appropriation whether natural or man-induced, since he relied upon it. Other possible claims suggest themselves: a downstream agricultural irrigator might claim damages because ammonia or other chemicals were removed from municipal discharges pursuant to state water quality laws. These chemicals are beneficial as fertilizers for agricultural use and the appropriator could claim a right to receive the same quality of water he historically received. There is no need for such for such uncertainty, even if the court affirms its decision, if the court clearly limits its decision to the statute/4/. Of course, the State believes that this statute does not impose damages in this case.

B. Interpreting 37-80-120(3) to require upstream reservoirs to pay damages for improving the quality of the water seriously impairs the ability of the public to enjoy the recreational facilities provided by these reservoirs.

Pursuant to legislative authorization, agencies of state government within the Department of Natural Resources have been endeavoring to establish permanent recreation pools in numerous reservoirs around the state. Congressional legislation often mandates the establishment of these recreation pools as a required feature of a federal water resource project. 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.

The State wishes the court to be aware that there are a number of recently constructed or currently planned projects within the state that contemplate on-stream storage. Permanent silt control pools, irrigation storage pools and recreation pools in these facilities can have nearly identical effects on water quality in the respective rivers. The court must assume that ditches with headgates in proximity to those structures can and will advance claims similar to the plaintiffs. The effect of claims of that magnitude can only have a chilling effect on the construction projects and will surely hamper or prevent the establishment of flat water recreation opportunities for Colorado citizens.

Plaintiff's comment at page 41 of their reply brief that this is a matter of first impression, implying that the problem is unique to the Pueblo Reservoir is slightly misleading. The problem is not unique. As the court is well-aware, the construction of major, onstream storage facilities in the valley areas of the state is only now beginning and the opportunity for such a claim has only recently presented itself. The identical claim has been advanced in litigation concerning the John Martin Reservoir, but legal problems with the proposed water supply for the pool have prevented permanent storage thus mooted the claim up until this time. The State does not consider the matter to be unique and respectfully requests that the court consider the full impact of its present ruling on water development projects within the state.

CONCLUSION

The State respectfully requests that this court reverse its decision. However, even if the court affirms its decision, the State requests that the court limit its decision to liability under C.R.S. 1973, 37-80-120(3).

/1/ The court indicated in footnote 4 that it believed that the injury by the direct flow appropriators might be ameliorated by return flows which may increase the degree of silt concentration. This may be true where the tailwater or run-off carries silt with it; however, as water becomes scarcer and irrigation practices improve, there is less tailwater or run-off; most water which returns to the stream does so through underground return flow which adds dissolved solids from the soil but not silt. Furthermore, under water-quality laws, irrigators will be expected to use best management practices to reduce silt run-off. Thus, direct flow irrigators who decrease the velocity of the stream will be decreasing the silt content of the stream with little or no corresponding increase in the silt content. The result of this is that the court should recognize that direct flow appropriators can inflict precisely the same injury as an onstream reservoir appropriator. Materiality of the injury can not be the basis for holding that one injury is compensable and the other is not.

/2/ Again, the State would point out that junior appropriators are protected in such cases not because the injury to senior appropriators is not material, but because public policy encourages the maximum utilization of water despite the injury to a senior appropriator. Perhaps another factor underlying this doctrine is that even though the quality of water affects its uses, its value is undiminished, that is, even though water of improved quality does not irrigate the same acreage, its suitability for other uses, municipal industrial, may be improved and thus its value is increased, or at least undiminished.

/3/ Except C.R.S. 1973, 37-80-120(3) which specifically applies to substituted water from reservoirs and is discussed below.

/4/ Under C.R.S. 1973, 37-92-305(5) substituted water in the case of plans for augmentation would also be affected. But such a holding would not affect other discharges to the stream.

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