12-27-1976

City of Boulder v. Boulder & Left Hand Ditch Co.

IN THE SUPREME COURT

OF THE

STATE OF COLORADO

CASE NO. 26996

THE CITY OF BOULDER, COLORADO, a Municipal Corporation,	)	
	)	APPEAL FROM THE
Plaintiff-Appellant,	)	DISTRICT COURT IN AND
vs.	)	FOR WATER DIVISION NO. 1,
THE BOULDER AND LEFT HAND DITCH COMPANY, a Mutual Ditch Company, THE NORTH BOULDER FARMERS DITCH COMPANY, a Mutual Ditch Company, W. G. WILKINSON, Division Engineer of Water Division No. 1 of the State of Colorado, and C. J. KUIPER, State Engineer of the State of Colorado,	)	STATE OF COLORADO
	)	HONORABLE DONALD F.
Defendants-Appellees.	)	CARPENTER, WATER JUDGE

PETITION FOR REHEARING

MR. JUSTICE GROVES delivered the decision of the Court.

En Banc.

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COME NOW Defendants-Appellees, the Boulder and Left Hand Ditch Company and the North Boulder Farmers Ditch Company and respectfully petition the Court for rehearing of this matter, and as grounds therefor state:

1. Petitioners respectfully suggest that the Court may have misapprehended the full consequences of the distinction which it has drawn between waste and return waters, and the criteria upon which it has drawn the distinction.

The Court describes "waste" as water which has served no useful function to the irrigator and which flows from the irrigator's land on the surface. The Court described "return" as water which has been absorbed into the ground, accomplished its nutritional function, and then flows from the irrigator's land underground. Petitioners respectfully suggest that these characterizations may be accurate in many cases, but that a distinction drawn on that basis may not adequately cover all situations. For example, in the Metropolitan case the water involved had been put to its full intended use in the municipalities' water systems, and was being returned to the stream after treatment to remove impurities and wastes introduced into the water in use. On the basis of these facts and the Court's descriptions, supra, it is unclear whether this water would be properly classified as "waste" or "return". Alternatively, an irrigator who applies excessive amounts of water to his land will cause some of this water to flow to the stream on the surface of the ground but will also cause some of this water to deep-percolate to the groundwater table and flow to the stream underground. In this example, both quantities of water are excessive to the needs of his crops and neither have performed any nutritional function, but it is unclear whether

any distinction should be drawn between them on the basis of the Court's criteria.

Petitioners note that "waste" is not a term that has been defined by statute and that it is a term that is subject to many definitions depending on the circumstances. Because of the many factors which go into the determination of whether water was applied "excessively", including, in the two examples given, the nature of the use, the characteristics of the soil and the topography, the determination of whether water flowing to the stream after application is "waste" or "return" may often be an exceedingly difficult one to make. Petitioners respectfully suggest that the distinction drawn by the Court is exceedingly complex, subject to differing interpretations, introduces new complexities into the law of water rights and invites litigation. They believe that it is a determination that should be made, if at all, by the Water Judges, on the basis of the facts presented to them in the proper course of the proceedings.

2. Petitioners respectfully suggest that the Court may have overlooked the fact that the case relied upon in Petitioners' Brief and the Court's decision, Tongue Creek Orchard Co. v. Town of Orchard City, 1313 Colo. 177, 280 P.2d 426 (1955), does not distinguish between what the Court here denominates "waste water" and "return flow". At various points in that Opinion Mr. Justice Lindsley spoke of both waste water and return waters (280 P.2d at 428). The basis of the Opinion appears to Petitioners to be that junior appropriators cannot justifiably rely upon their seniors' continued diversion and use of water rights in the manner in which they have historically been used, and any effects resulting from a change of use of a water right which would also result from a mere discontinuance of diversion and use of the senior water rights are effects which do not constitute injury.

Further, Petitioners respectfully suggest that the Court may have overlooked the fact that the second case relied upon by Petitioners and the Court, Metropolitan Denver Sewage v. Farmers Res. & I. Co., 179 Colo. 36, 499 P.2d 1190 (1972), also drew no distinction between "waste" and "return" waters, and used the two terms together and interchangeably.

In light of Petitioners' reading of the Tongue Creek and Metropolitan cases, it appears that the Court's drawing a distinction between return and waste water in the present matter marks a new and unwarranted course in Colorado law. This is particularly apparent when considered alongside the Court's recognition of the one-river concept found in Fellhauer v. People, 167 Colo. 320, 447 P.2d 986 (1969), and carried forward in the Water Right Determination and Administration Act of 1969, C.R.S. 1973, 37-92-102(1). Petitioners respectfully suggest that this new distinction will fragment considerations which Fellhauer sought to consolidate.

Petitioners also respectfully suggest that the Court's decision, and the manner in which it was reached, may have given too little consideration to the expertise and special jurisdiction of the Water Judges established by C.R.S. 1973, 37-92-203(1) and appointed by the Court under C.R. S. 1973, 37-92-203(2). Petitioners believe that the General Assembly intended determinations such as this to be made by these Water Judges on the basis of their expertise and their familiarity with the river basins under their jurisdiction, and on the basis of evidence presented to them in the proper course of the proceedings. By taking judicial notice of facts which were not pled in the complaint and by creating a distinction between "waste" and "return waters, which was neither pled in the complaint nor indicated to the Water Judge by his special expertise and

experience, the Court has created the impression that factual matters in cases such as this are henceforth to be determined by the appellate court on the basis of extra-record evidence, and not by the Water Judges on the basis of their expertise and familiarity with their Water Divisions and the facts of the dispute as presented by the Complaint.

3. Petitioners respectfully suggest that the Court misapprehended the thrust of Petitioners' reliance in their Brief on Cache La Poudre Irr. Co. v. Larimer & Weld Res. Co., 25 Colo. 144, 53 P. 318 (1893). Petitioners carefully set out the facts of that case in their Brief and showed that the case was concerned with how mutual ditch companies' shareholders' use of water affected abandonment, and explicitly held that "junior appropriators may not complain" about transfers of water among mutual ditch company shareholders. (Appellee's Brief, at 15-16.) The language from City and County of Denver v. Just, 175 Colo. 260, 487 P.2d 367 (1971), quoted in Petitioners' Brief and the Court's decision, supports Petitioners' interpretation of Cache La Poudre, as the Court recognized. Petitioners respectfully suggest that Cache La Poudre, when read carefully in conjunction with Petitioners' Brief, supports the Just opinion's, and Petitioners' characterization of it.

WHEREFORE, Petitioners respectfully petition the Court for Rehearing of this matter.

Respectfully submitted this 27th day of December, 1976.

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CERTIFICATE OF MAILING

I hereby certify that on the 27 day of December, 1976, a true and correct copy of a Petition for Rehearing in Case No. 26996 was mailed to the following by placing the same in the United States Mail, postage prepaid, addressed as follows:

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