
NATURAL RESOURCES JOURNAL

Volume 20
Issue 1 *Winter 1980*

Winter 1980

Clearing the Muddied Waters

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NOTES

CLEARING THE MUDDIED WATERS

WATER LAW

In answer to a question propounded by the United States Court of Claims, the Supreme Court of Colorado held that under state law, the owner of decreed water rights to divert and use water from a natural stream does not have a right to receive the silt content thereof, although he historically has received them. *A-B Cattle Company v. United States*, 589 P.2d 57 (Colo. 1978).

Whatever the amount of its element the sea gives up to the atmosphere by evaporation, the sea regains exactly the same amount from the water which falls upon the earth and flows back to its source. This is the work, and the law, of rivers.

—Paul Horgan, Greater River 4 (1954)

Man cannot govern the amount of water that falls as rain and snow, but he can prevent its needless waste by careful planning and building of dams, canals, power plants, and other works.

—U.S. Dept. of Interior, The Colorado River 107 (1946)

INTRODUCTION

The Arkansas River rises in the Rocky Mountains above Leadville, Colorado, and flows eastward on its journey to the Mississippi and ultimately to the Gulf of Mexico. As the river descends the eastern slope of the Rockies, it flows through the town of Pueblo, Colorado, where the Bessemer Irrigating Ditch Company (hereinafter Bessemer) constructed a 35-mile earthen irrigation ditch. The Bessemer ditch has decreed water rights totalling 392 c.f.s., 70 of which have priority dates earlier than 1882. The remaining 322 c.f.s. have an 1887 priority date.

The diverted water was used by Bessemer's stockholders for irrigation of lawns, trees, truck gardens and farms in and around Pueblo. Prior to 1974, the ditch drew directly from the river and the quality of the diverted water mirrored the quality of the river water. Consequently, whenever the Arkansas River was silty, the water flowing through Bessemer ditch was also silty.

On June 11, 1969, the United States initiated a condemnation action in the United States District Court for the District of Colo-

rado to obtain property located on the proposed site of Pueblo Dam and Reservoir, which was part of the Frying Pan/Arkansas Reclamation Project.[1] Included in the condemnation action was the headgate and the upper 5.3 miles of Bessemer ditch.

Bessemer, in its answer, alleged that its stockholders would be injured by the government's proposed substituted delivery of clear reservoir water in place of water containing silt. Subsequently, the Bessemer stockholders, pursuant to 28 U.S.C. § 1491,[2] brought an action in the United States Court of Claims, seeking nearly $100 million in damages for the alleged taking of their property right in the natural quality of the water, provided under their decreed right. After initiation of the court of claims proceeding, the United States District Court granted the government's motion to dismiss the action without prejudice as to the silt issue to determination of that question by the court of claims. Meanwhile, the project was completed and the upper section of the Bessemer ditch was inundated. In February 1974, the government commenced delivery of clear reservoir water into the undisturbed remainder of Bessemer through a pipe and valve arrangement in the base of the dam.

After hearings on the merits, the court of claims, by stipulation of the parties, certified the following question to the Supreme Court of Colorado:[3]

> Under Colorado law, 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?[4]

After its initial hearing of the case, the Colorado Supreme Court answered this question with a qualified "yes." Following a rehearing, however, the court, by a 4-3 margin, changed its answer to "no."

1. Pub. L. 87-590, 76 Stat. 389 (1962) (subsequently codified at 43 U.S.C. § §616-616f (1970), but later omitted from the Code as having limited applicability).

2. 28 U.S.C. § 1491 (1976) provides that "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States . . . for liquidated or unliquidated damages in cases not sounding in tort."

3. Section 5(e) of the Frying Pan/Arkansas Project, Pub. L. 87-590, 76 Stat. 389 provides:

> In the operation and maintenance of all facilities under the jurisdiction and supervision of the Secretary of the Interior authorized by this act, the Secretary of the Interior is directed to comply with . . . the laws of the State of Colorado relating to the control, appropriation, use, and distribution of water therein.

4. A-B Cattle Co. v. United States, 589 P.2d 57, 58 (Colo. 1978).

THE MAJORITY OPINION

Justice Groves, writing for the majority following the rehearing, noted that plaintiffs did not contest the government's right to substitute water under Colorado law.[5] Instead, plaintiffs pointed to the language of a Colorado statute,[6] which requires that substituted water shall be of a quality and continuity to meet the requirements for which the senior appropriator has normally used his water right. Plaintiffs argued, and the court of claims found as a fact, that the substitution of clear water for silty water had adverse effects on the Bessemer ditch system. The clear water leaked through the bottom of the ditch in greater quantity than the silty water, because the silt tended to seal the bed and banks of the ditch. Also, the substituted water caused increased erosion of the ditch and increased vegetation growth within the ditch. But the majority said these findings begged the fundamental question of whether plaintiffs had a right to the silt content of the water, for if they had no right, they had no cause of action for damages resulting from loss of the silt.

A. Water Defined in Constitutional Terms

In seeking an answer to this fundamental question, the majority looked to Article XVI, § 5 of the Colorado Constitution which states:

> The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.

Emphasizing the word "water" in the provision, the majority then cited case law[7] in support of the proposition that words used in the constitution are to be given the natural and popular meaning in which the words are usually understood by the people who have adopted them. The majority then concluded that the meaning of "water" is water only. The term does not include "silt," or "silt and water." Thus water, exclusive of matter which may be suspended in it, is the property subject to appropriation under the constitutional provision.[8] The majority implied that this "natural and popular meaning" analysis alone was dispositive of the question propounded.[9]

5. COLO. REV. STAT. §37-80-120(2) (1973).
6. COLO. REV. STAT. §37-80-120(3) (1973).
7. Prior v. Noland, 68 Colo. 263, 188 P. 729 (1920).
8. 589 P.2d at 61.
9. *Id.*

B. Statutory Water Quality

The majority found no violation regarding the quality requirement set forth in the statute[10] cited by plaintiffs. The government's action of slowing down the movement of water, which resulted in settling of silt and substituting delivery of clear water to the senior appropriator, was not seen as an unreasonable deterioration of water quality.

In reaching this conclusion, the majority first distinguished *Arkoosh v. Big Wood Canal Co.*, 48 Idaho 383, 283 P. 522 (1929). In *Arkoosh,* the flushing action of clear water released from a reservoir into a streambed caused an increase in streambed leakage, resulting in a lessened quantity of water reaching the headgates of downstream appropriators. In the case at bar, the majority noted that there is no contention that the quantity of water delivered at the new Bessemer point of diversion (at the base of the dam) had been lessened by substitution of clear water for silty water. Thus, because there was no streambed or ditch between the dam and Bessemer ditch, the *Arkoosh* case was factually distinguishable.

The original and substituted points of diversion are critical to the outcome of this case. If Bessemer's original headgate had been below the dam and if the government's substitution of clear water had caused increase seepage through the bed of the Arkansas River prior to reaching the Bessemer headgate, the case would have clearly aligned with *Arkoosh* and the result might have been different. Similarly, had Bessemer changed its point of diversion not to the base of the dam but well downstream of the dam, leakage along the intervening riverbed would arguably have been actionable under *Arkoosh.*

C. Doctrine of Maximum Utilization

Bessemer was receiving its full appropriation of clear water directly into its ditch through the pipe at the base of the dam. Therefore the majority turned its eyes downstream from that point of diversion to determine whether the Bessemer ditch system, with all its leaks and seepage, satisfied the doctrine of maximum utilization.

Not surprisingly, the majority found the ditch system wanting. A brief historical summary of state constitutional provisions, statutes, and case law revealed to the majority that within that body of law lurked the principle that there shall be maximum utilization of water.[11] As evidence for this principle, the majority cited the following proposition:

10. COLO. REV. STAT. §37-80-120(3) (1973).
11. 589 P.2d at 60.

> At his own point of diversion on a natural water course, each diverter must establish some reasonable means of effectuating his diversion. He is not entitled to command the whole or a substantial flow of the stream merely to facilitate his taking the fraction of the whole flow to which he is entitled.[12]

Having concluded that Bessemer had no right to the silt content of its appropriated water, the majority had no difficulty in finding that Bessemer's use of its leaky ditches constituted less than maximum utilization of its substituted appropriation of clear water, notwithstanding the fact that the leakage occurred not from any affirmative act or failure to act on the part of plaintiffs, but rather from an affirmative act of the government. While stating that the time may not yet have arrived when all ditches can be required to be lined or placed in pipes, the majority firmly stated that plaintiffs have no right to use silt content to help seal leaky ditches.[13]

This answer, the majority concluded, is part of the policy of Colorado that there should be maximum utilization of water and that the maximum utilization doctrine be integrated into the law of vested rights. To view it otherwise, Justice Groves wrote, would run contra to a basic principle of western irrigation that conservation and maximum usage demand the storage of water in times of plenty for the use in times of drought.[14]

THE DISSENT

Because the majority found that the natural and popular meaning of the word "water" did not include silt content thereof, it had no occasion to review the scope of water quality protection traditionally afforded water appropriators by the courts of Colorado. It is a review of this law to which Justice Erickson turned in his dissent.

Since 1885, the Colorado Supreme Court has recognized the principle that an appropriator cannot lessen the quantity of water, seriously impair its quality, or impede its natural flow to the detriment of others who have acquired legal right therein.[15] While it is true that water must be put to beneficial use and the appropriator must employ a reasonable means of diversion, the dissent notes that Colorado courts have consistently recognized the principle that decreed appropriators are entitled to rely upon the continuation of stream

12. 589 P.2d at 60-61 (citation omitted), *quoting* Colorado Springs v. Bender, 148 Colo. 458, 461, 366 P.2d 552, 555 (1961).
13. 589 P.2d at 61.
14. *Id.*
15. Larimer County Reservoir Co. v. People, 8 Colo. 614, 9 P. 794 (1885).

conditions as they existed at the time the appropriation was made.[16] These judicially-created principles were later recognized by the Colorado General Assembly through legislation.[17] Thus, while the majority focused on the doctrine of maximum utilization implicit in Colorado water law, the dissent notes strong support for the concept that a Colorado water appropriator has a judicially recognized and statutorily protected expectation to continue to receive that amount and quality of water, within a reasonable range of acceptability, which he has historically applied to beneficial use.

Turning to the facts, the dissent observed that the findings of the court of claims revealed that plaintiffs, the owners of decreed rights, have lost the use of a portion of the water which they have historically put to beneficial use. Thus, while the majority looked downstream from the point of diversion to determine whether plaintiffs' use was in accordance with the doctrine of maximum utilization, the dissent looked upstream to examine plaintiffs' right to rely upon continuation of stream conditions as they existed at the time the appropriation was made.

By extending the logic of the majority opinion, Justice Erickson found that that holding altered well-established principles of water law. Accepting the premise that a Colorado water right does not entitle its holder to the naturally occurring silt of a stream leads to the conclusion that appropriators who hold decrees to specific quantities of water should have originally appropriated that quantity of silty water which, absent the silt, would reasonably irrigate their lands. Yet, under Colorado law, any attempt to obtain a decree for a quantity in excess of actual needs, in anticipation of a change in water quality, would properly have been denied.[18]

Within the majority opinion, there is a suggestion that all Colorado appropriators should be required to line their earthen ditches.[19] Justice Erickson questioned the court's power to make such a requirement and warned of the far-reaching consequences of such a demand, since earthen ditches are the customary method of diverting water in Colorado. Regarding the majority's implied requirement of ditch-

16. 589 P.2d at 65, *citing* Farmers' Highline Canal and Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629 (1954), Comstock v. Ramsey, 55 Colo. 244, 133 P. 1107 (1913), and Vogel v. Minnesota Canal Co., 47 Colo. 534, 107 P. 1108 (1910).

17. COLO. REV. STAT. § §37-80-120(3) and 37-92-305(5) (1973). The latter statute provides that "substituted water shall be of a quality and quantity so as to meet the requirements for which the water of the senior appropriator has normally been used."

18. 589 P.2d at 66, *citing* Baker v. City of Pueblo, 87 Colo. 489, 289 P. 603 (1930).

19. 589 P.2d at 68. Justice Erickson's fear that *all* appropriators would be forced to line their ditches by the majority holding is perhaps exaggerated. Only those appropriators whose ditches suffer increased seepage loss after substituted delivery of silt-free water would be affected by the holding.

lining, the dissent cites *Colorado Springs v. Bender*, supra, for the well-settled principle that a senior appropriator cannot be forced to go beyond his economic reach to maintain his method of diversion, when the acts of a junior appropriator make it more expensive for the senior to use the water to which he is historically entitled.[20]

Thus, the dissent mustered a formidable array of Colorado case law with connotations in opposition to the holding of the majority. The conflict between this prior case and the majority opinion is apparent and unresolved in the majority opinion. Perhaps it was because of this that Justice Erickson prefaced his dissent with the comment, "I sincerely hope that this court will reconsider this issue in future years."[21]

CONCLUSION

The practical effect of the decision is that appropriators are stripped of the right to continued expectation of naturally occurring water conditions, an expectation which is arguably protected by statute and case law in Colorado and other Rocky Mountain states. No balancing of interests was mentioned or attempted by the majority. The dissent felt a balancing is required in every case of this type to determine whether the change in quality or condition is within a reasonable range of acceptability for a prior appropriator when related to his beneficial use. Indeed, the rigidity of the majority opinion that water in the strict molecular sense—not silt, and not silt and water—is the property subject to appropriation under the Colorado constitution provides little flexibility for equitable considerations in future cases.

The implications of this holding are both obvious and enormous. A senior appropriator who receives substituted delivery of silt-free water under Colorado law must either improve the efficiency of his system or bear the losses sustained through increased leakage of his earthen ditches. The economic reach of the senior appropriator will not be considered under this holding, and the majority opinion can be read to imply that he has no right to simply accept the loss by allowing the water to leak away. Custom and efficiency of his system prior to the substituted delivery play no part in the determination.

Such is the law in Colorado today, although the extremely close division of the court and Justice Erickson's strong dissent indicate that the question could appear again before long in the Colorado courts.

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20. 589 P.2d at 69.
21. 589 P.2d at 62.