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RECENT NATURAL RESOURCES CASES

WATERCOURSES—RECREATIONAL USES FOR WATER UNDER PRIOR APPROPRIATION LAW*

In 1937 the Colorado legislature, in order to promote conservation of the water of the Colorado River,[1] created the Colorado River Water Conservation District and empowered it, *inter alia*,

> To file upon and hold for the use of the public sufficient water of any natural stream *to maintain a constant stream flow* in the amount necessary to preserve fish, and to use such water in connection with retaining ponds for the propagation of fish for the benefit of the public.[2]

In 1965, for the first time, the District, having seen fishing ruined in one Colorado stream after another, tried to use its power to "file upon and hold for the use of the public" the waters of three streams —all tributary to the Colorado River—"for the propagation of fish." The District became a party in a supplemental adjudication in Rio Blanco County, Colorado, claiming a right with a priority date of June 7, 1937 (the effective date of the alleged empowering legislation). The District specified rates of flow alleged to be necessary for fish life in the streams involved, and claimed water rights which, if recognized, would have prevented reduction of the streams below those amounts by any rights created since June 7, 1937. The Supreme Court of Colorado affirmed the trial court in denying the District the water rights it claimed.[3]

The supreme court based its decision on two grounds: (1) there is no authority for the proposition that a water right may be acquired for purpose of fish propagation without making a diversion from the stream, and (2) the legislature did not intend to depart from

* Colorado River Water Conservation Dist. v. Rocky Mountain Power Co., 406 P.2d 798 (Colo. 1965).

1. Colo. Laws 1937, ch. 220 § 1, p. 997, Colo. Rev. Stat. Ann. § 150-7-1 (1963).

2. Colo. Rev. Stat. Ann. § 150-7-5(10) (1963). (Emphasis added.)

3. Colorado River Water Conservation Dist. v. Rocky Mountain Power Co., 406 P.2d 798 (Colo. 1965).

"well established doctrine requiring a diversion to complete an appropriation."[4] The court's reasoning is surprising. Not only because it is circular, but because in 1960 it had held that diversion from the stream was not necessary to create a water right. In *Genoe v. Westfall*,[5] the court had allowed a water right for cattle watering without a diversion. The opinion in the present case did not mention *Genoe*. The Colorado Supreme Court now has two lines of authority: one holding diversion not a necessary requirement for the creation of a water right, and another holding that diversion is a necessary requirement. The court was right in *Genoe* and wrong in this case. Beneficial use is the crux of a water right, and if water can be put to beneficial use without a diversion then the requirement of a diversion serves no useful purpose.

It is much more likely that the Colorado court denied the claim of the District because it was a very large and unusual claim. The court was not willing to believe the legislature had sanctioned such a claim in the absence of a statute considerably more explicit than that relied upon by the District. The District's claim does indeed appear large and unusual when compared to the normal water right. Although it would neither divert nor consume any water, the District wanted to make all unclaimed water in these three streams unavailable for any use. By hiding behind the false requirement of a diversion, and thereby failing to analyze the real nature of the District's claim, the Colorado court sidestepped one of the more troublesome problems of western water law.

One advantage of western prior appropriation water law is that water rights are saleable apart from land. The system, ideally, encourages the creation of a water market which tends to allocate water to the highest economic uses available in the area. One of the principal blind spots in this system is the recreational use of natural streams and lakes.

Preservation of natural recreational facilities has economic value for the entire area affected,[6] but by its very nature there is no one to

4. 406 P.2d at 800:

> There is no support in the law of this state for the proposition that a minimum flow of water may be 'appropriated' in a natural stream for piscatorial purposes without diversion of any portion of the water 'appropriated' from the natural course of the stream. By the enactment of C.R.S.1963, 150-7-5(10) the legislature did not intend to bring about such an extreme departure from well established doctrine, and we hold that no such departure was brought about by said statute.

5. 141 Colo. 533, 349 P.2d 370 (1960).

6. The Value of Water in Alternative Uses, app. D (Wollman ed. 1962).

bid for it in the market; that is, the economic benefit is spread so widely that no one can afford to pay more than a tiny fraction of its true value.[7] As a result, the market system allocates no water for natural recreational purposes.

It is apparent that if such purposes are to receive any portion of available western water they must do so outside the water market. Several western states have recognized this truth. The Oregon legislature has withdrawn certain streams from the appropriation system, and thus preserved them in their natural condition.[8] Other state legislatures have delegated this power to state agencies that are in a position to make wise decisions about which streams and lakes could best be withdrawn from the market system and preserved as they are today.[9]

Obviously, the section of the Colorado River Conservation District Act relied upon by the District was an attempt by the Colorado legislature to delegate the power to withdraw certain waters from the market system to the District in which those streams are located.[10] The District would seem to be an excellent choice for the delegation of this power. It is concerned with all aspects of water use and not just protection of fish, or conservation. Its board of directors is made up of citizens of the counties within its jurisdiction,[11] men who represent the localities that would be most affected by the preservation of natural streams, as well as by the detrimental effects of withdrawing their waters from the market.

Perhaps the greatest objection that can be made to the District's argument is that the power it claims has been granted without any guiding standards for its use. Several methods of evaluating recreational uses have been suggested.[12] In the absence of any instructions from the legislature on how to select the amount and location of water

7. This, of course, is not true of private fishing clubs and the like. Such private facilities cannot meet the entire need for recreational facilities. Conservation of beauty is also a human need not met by the market system in water rights. See the eloquent opinion of Chief Judge Duffy in Namekagon Hydro Co. v. FPC, 216 F.2d 509 (7th Cir. 1954).

8. Ore. Rev. Stat. §§ 538.110 to .300 (Supp. 1965). See generally Trelease, Bloomenthal & Geroud, Cases and materials on Natural Resources 54-62 (1965).

9. Wash. Rev. Code Ann. § 75.20.100 (1963); Idaho Code Ann. §§ 67-4301 to -4306 (1949). The Idaho statute is a delegation of power in form only. It grants to the governor power to appropriate certain named lakes.

10. The same delegation is contained in Colorado's Southwestern Water Conservation District Act. Colo. Rev. Stat. Ann. § 150-8-5(10) (1963).

11. Colo. Rev. Stat. Ann. § 150-7-3 (1963).

12. See Trelease, *Policies for Water Law: Property Rights, Economic Forces, and Public Regulation*, 5 Natural Resources J. 1, 18-23 (1965).

to be withdrawn from waters available for appropriation, serious constitutional objections could be made to the attempted grant of power. Furthermore, assuming a constitutional grant of power to the District, the District in attempting to acquire a 1937 water right was trying to use its power improperly.

One of the unique things about the type of water right the District was claiming is the fact that fishermen along the banks of a stream give no notice to the public that a water right is or may later be claimed for all the remaining water in the stream. The District's argument that its acts of constructing camp grounds, access roads, and fish hatcheries, and the stocking of the streams evidenced the intention of the public to appropriate the waters was hardly fair to those who perfected rights after 1937 in reliance upon the amount of flow they could observe and the claims listed in the State Engineer's Office. The Colorado court would be on solid ground if it would hold that the Distrist is not entitled to a right under the act with a priority any earlier than the "filing" which the act requires. The fact that a filing is not neccesary to create an ordinary water right in Colorado[13] has no bearing on the requirements for the creation of this special right under the Act. Presumably the "filing" should be made with the Colorado State Engineer, since his office is charged with keeping a record of all water rights and is the place where inquiries are made to determine whether there is unclaimed water in a particular stream.[14]

The decision in this case could be seen as a construction of this act requiring the District to maintain stream flow from waters diverted into, off, or on stream reservoirs and released during dry seasons. It is doubtful that this was the legislature's meaning, however. In other portions of the act the District was specifically empowered to construct dams and reservoirs. The power to "file upon and hold for the use of the public sufficient water . . . to maintain a constant stream flow" is separate and distinct from the sections discussing dams and reservoirs.

However, the opinion in *Colorado Water Conservation Dist.* seems to disallow altogether the kind of water right sought. The court seems to have held that although a diversion is not necessary to perfect a water right for stock watering purposes, it is necessary to perfect a right for "piscatorial purposes." If this is the case, it is difficult to read any meaning into that part of the statute granting the District power to acquire a water right "to maintain a constant stream

13. DeHass v. Benesch, 116 Colo. 344, 181 P.2d 453 (1947).
14. Colo. Rev. Stat. Ann. §§ 148-4-1 to -4-7 (1963).

flow." Obviously, the maintenance of stream flow to preserve fish life *in the stream* and the requirement of a diversion are inconsistent. The statute has now been amended by the court to grant only the power to acquire water rights for fish ponds.

The extra-market protection of some natural resources is important to a balanced water economy. The Colorado legislature should try again. This time, however, it should specify the means by which the agency is to choose the amount and location of the water to be withdrawn.

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