A DECISION OF MUCH IMPORTANCE TO THOSE INTERESTED IN THE WATER APPROPRIATIONS

OREGON SUPREME COURT DECISIONS

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Cookinham, et al vs. Lewis, et al, Marion County.

R. S. Cookinham and W. A. Thacher, respondents, vs. John H. Lewis, H. L. Holgate and F. M. Saxton, comprising the Board of Control of the State of Oregon, and O. Finkelnburg, trustee, appellants. Appeal from the circuit court for Marion county. The Honorable Wm. Galloway, judge. Argued January 31, 1911. C. A. Moore, J. N. Hart (and J. H. Nichols, on brief) for respondents. Will R. King and John L. Rand (A. M. Crawford, I. H. Van Winkle and James T. Chinnock, on brief) for appellants. Eakin, C. J. Reversed and remanded.

On March 18, 1909, plaintiffs filed with the state engineer, John H. Lewis, an application for a permit to make an appropriation of 370 second feet of the waters of Powder River in Baker and Union counties, for 120 days, making 88,060 acre feet, to be diverted in Sec. 26, T. 6, S. R. 40 E. W. N., for the purposes of power and domestic use and to irrigate 30,000 acres of land in T. 7 S. R. 40 and 42 E.; T. 8, S. R. 41, 42 and 43 E.; and T. 9 S. R. 42 and 43 E.; and to construct a storage reservoir to impound the waters of Powder River in Thief Valley with a capacity of 60,000 acre feet, at an estimated cost of $500,000. On March 31, 1909, at 8 a. m. they filed a supplemental application for an additional quantity of water for irrigation upon certain lands, some of which were included in the former application. On the same day at 4:30 p. m., O. C. Finkelnburg, trustee, filed an application with the state engineer for a permit to construct a storage reservoir in Thief Valley for the storage of water of Powder River for irrigation, the dam therefor to be in Sec. 26, T. 6 S. R. 40 E., at an estimated cost of $200,000. Thereupon, on April 12, 1909, the state engineer, being of the opinion that the proposed use in each case would be a menace to the safety and welfare of the public, referred such applications, by letter, to the board of control, with this statement: "The proposed use in each of the following cases are a menace to the safety and welfare of the public. * * * Prior to the examination of these application, and on March 30 1909, the vacant and unappropriated lands included in the area described in these applications were withdrawn from entry under the public land laws of the United States by the secretary of the interior for irrigation by the state under the Carey Act, or by the United States under the Reclamation Act * * * Such withdrawal was made at the request of the State Land Board, by order dated March 23, 1909."

On September 11, 1909, after a full hearing, the Board of Control directed the state engineer to refuse the applications of the party or parties not securing final contract with the Desert Land Board for the reclamation of said lands; and that he approve the application of the party securing such a contract. Plaintiffs, on Dec. 20, 1909, filed a petition in the circuit court for Marion county, State of Oregon, for a writ of review, reciting in full the facts above mentioned and the writ was duly issued the same day. The return to the writ contains the transcript of the proceedings before the Board of Control, together with a full transcript of the evidence produced before the board. At the hearing upon the return, the circuit court sustained the writ and directed the dismissal of the proceeding before the Board of Control, for the reason, that it had no jurisdiction of the proceeding and defendants appeal therefrom to this court.

Eakin, C. J. A writ of review lies only in cases in which the lower court, officer or tribunal has exceeded its jurisdiction or where it has exercised its judicial functions erroneously and contrary to the course of procedure applicable to the matter before it: Garnsey v. County Court, 33 Or. 201. Therefore, the write will only bring up the record, upon which the case will be reviewed as to questions of jurisdiction and errors in the proceeding. It will not review questions of fact and has nothing to do with the evidence: Smith v. Portland, 25 Or. 297, 301; Douglas County Road Co. v. County of Douglas, 6 Or. 209, 303.

The main contention of plainptiffs is that by the terms of sections 45 and 47 of the Act of 1909 (Laws 1909, 332; L. O. L. Sec. 6624, 6627) known as the "Water Code," the person filing application for a water right is entitled to the first right and that the law is mandatory upon the state engineer to approve it, unless the proposed use is a menace to the safety and welfare of the public, in which case he must refer it to the board of control, and that there is nothing before him in this case to disclose any such menace. It was upon this ground that the circuit court sustained the writ.

To comprehend the full meaning of these two sections of the water code, it is necessary to review the law relating to the subject. To aid in the reclamation of desert public land, the congress of the United States, by the Act of August 18, 1894, known as the "Carey Act" (28 Stat. L. 422; found also in Vol. I, L. C. p. 65) and amendments of June 11, 1896, (29 Stat. L. 434), March 3, 1901 (31Stat. L. 1188, Sec. 3) and March 15, 1910, authorized the secretary of the interior to contract with certain states to grant and patent to the state such desert land, not exceeding one million acres in each state, as the state may cause to be irrigated, reclaimed and occupied by actual settlers. In 1901 the legislature of Oregon accepted the conditions of this offer and provided that, upon the application of any person, desiring to reclaim any desert land, the state land board should enter into a contract with the secretary of the interior therefor, and to enter into such contract as may be necessary to cause the reclamation thereof, with provision for procuring water therefor and the manner of procedure: (Laws 1901, 376; Sec. 3283 et seq. B. & C. Comp.) For the purpose of still further aiding in the reclamation of arid public lands, the legislature, on Feb. 22, 1905 (Laws 1905, 401; L. C. L. Sec. 6598) enacted a law for acquiring water for the reclamation of arid lands; created the office of state engineer, and gave him general supervision of all measurements and records of appropriation of waters of the state, and required him to deliver to the governor before each session of the legislature a full report of the work of his office with such recommendations for legislation as he may deem advisable.

The legislative act of February 24, 1909 (Laws 1909, 377; L. G. L. Sec. 3860 et seq.) which created the desert land board, of which the state engineer is a member, again accepted the conditions of the Carey Act and made further provision for reclaiming the desert land in this state, and repealed Sections 3283 to 3293 B. & C. Comp., above cited. The act of February 24, 1909, known as the "Water Code" (Laws 1909, 319; L. C. L. 6594 et seq.) declares that water rights can only be acquired as in the act provided; and creates the offices of division superintendents and the board of control, of which the state engineer is a member. The first 44 sections of the act relate to the manner of settling disputed rights among water users and sections 45 to 47 (L. O. L. Sec. 6624, 6626) relate to the manner of acquiring water rights and sections 58 and 59 (L. G. L. Sec. 6622-3) provide for reservoir permits. Section 45 provides that any person intending to acquire a right to the beneficial use of any waters shall, before commencing the construction of any ditch, make application to the state engineer for a permit to make the appropriation. By 46 the application shall, among other things, set forth the nature and amount of the proposed use; if for agricultural purposes it shall give the legal subdivisions of the land and the acreage to be irrigated: (Farmers' Irr. Dist. v. Franck, 72 Neb. 136; 100 N. W. 288.) Section 47, among other things, provides "it shall be the duty of the state engineer to approve all applications made in proper form which contemplate the application of water to a beneficial use, but when the proposed use conflicts with determined rights, or is a menace to the safety and welfare of the public, the application shall be referred to the board of control for consideration. It shall be the duty of the board to enter an order directing the refusal of such application, if, after full hearing, the public interest demands." Section 58 gives the procedure under a reservoir permit, called a "primary permit" in which an enumeration of any lands proposed to be irrigated under this act shall not be required, but the parties proposing to apply the water stored to a beneficial use shall file an application for a secondary permit, and provision is made for acquiring title to the water by the user as appurtenant to the land irrigated.

The right to the beneficial use of water to be acquired under the permit applied for under Section 45, et seq., is not an opportunity to acquire a monopoly of the water of a stream for promiscuous sale, but must contemplate a use upon specific lands which, when completed under 53, shall become appurtenant to the land to which it is applied. The primary reservoir permit, provided for by Sec. 58, contemplates a storage of the water in some locality where it can be utilized for irrigation. The secondary permit contemplates that users of the water shall acquire a permanent ownership by agreement with the owner for a specified quantity of the stored water for the needs of and use upon his land, and when reclamation is completed the water becomes appurtenant to his land. The water code makes a distinction between a permit for diversion of water and one to construct a reservoir and store surplus. The latter does not include the right to divert and use such stored water, which must be the subject of the secondary permit. This water code was enacted in the light of and with reference to the desert land act of 1901, above cited, and the act substituted therefor, which creates the desert land board, as well as the act of 1895 above cited. The fact that a permit must be granted by the state engineer before a right can be initiated, indicates that it is not merely a question of priority in filing the application that secures the right. There are many things to be considered by the engineer before approving the application for a permit. If it appears that the time when the construction is to be begun, or completed, as stated in the application, is unreasonable, or if the use is impracticable or not beneficial, the engineer may deny the permit; or if it conflicts with determined rights or is a menace to the safety and welfare of the public, it would be his duty to refer the application to the board of control; and in determining whether a permit shall be approved he is not limited to the recitals in the application. He may act upon any information he may have. By Sec. 10 of the Act of 1905 (Laws 1905, 404; L. O. L. Sec. 5590) he is required to make hydrographic and topograhic surveys and investiagtion of each stream system and the source of water supply in the state, and report the same to the governer, and he is thus in a position to determine whether an application will be for a beneficial use or whether any permit applied for would be a menace to the public welfare.

With this understanding of the statute upon the subject, and other facts within the knowledge of the state engineer, we will proceed to apply it to the conditions in this case It appears that since 1901, the state through the state land board until the creation of the Desert Land

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