8-1-1977

A-B Cattle Co. v. U. S.

IN THE SUPREME COURT

OF THE

STATE OF COLORADO

CASE NO. 27714

A-B CATTLE COMPANY, et al., Plaintiffs, vs. THE UNITED STATES OF AMERICA, Defendant.	CERTIFICATE TO THE SUPREME COURT OF THE STATE OF COLORADO

BRIEF OF PLAINTIFFS
A-B CATTLE COMPANY, et al.

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August, 1977

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I. QUESTION PRESENTED BY THE UNITED STATES COURT OF CLAIMS

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?

II. STATEMENT OF THE CASE

A. BACKGROUND

Plaintiffs, A-B Cattle Co., et al., are the stockholders of the Bessemer Irrigating Ditch Company (Bessemer). They brought this action in The United States Court of Claims under the Tucker Act, 28 U.S.C. § 1491, to recover damages from the United States for taking of a part of their water rights; namely, its quality as represented by the silt content thereof. Plaintiffs moved The Court of Claims to certify to this Court the question of whether, under Colorado law, the owner of a decreed water right to divert the waters of a natural stream as a part of that right is entitled to the natural components of the water, including its silt. The Court of Claims granted the motion and certified the question set forth above to this Court. This Court accepted jurisdiction pursuant to Colorado Appellate Rule 21.1.

Prior to the construction of Pueblo Dam, Bessemer operated a 40-mile long canal carrying water diverted directly from the Arkansas River above Pueblo. The ditch goes through Pueblo, through a truck gardening area and on into an irrigated farm area. It carries water to 85 distribution laterals which run a total of 174 miles. In all, the Ditch Company covers a 20,000 acre service area delivering about 50,000 acre feet of water each year to some 950 stockholders, the "alia" of the "et al." in the title of the case.

As part of the area to be occupied by the Pueblo Reservoir, consisting of a large lake in the bed of the Arkansas River, the United States condemned the upper 5.3 miles and headgate of the Bessemer Ditch. After the Pueblo Dam was built, the reservoir it created inundated the upper reaches of the Bessemer ditch.

Prior to construction of Pueblo Reservoir, Bessemer and its stockholders diverted natural Arkansas River stream water, containing silt, into the ditch. Since construction of the dam, the reservoir acts as a large settling basin causing the natural silt in the river water to settle out in the upstream portions of the reservoir. The United States, having removed the silt from the natural stream, now delivers to Plaintiffs clear reservoir water in place of the turbid natural stream water previously diverted by the ditch. Such deliveries are made to the remaining ditch and laterals through a valve and control works in the dam's structure.

Use of clear reservoir water for the natural stream water forced on Bessemer by the United States has had a number of adverse effects. As it flows through the ditch and its laterals, clear water strips away the fine silts and sediments which formerly lined the bottoms and sides sealing the ditch and laterals. The loss of these fine silts and sediments has weakened the ditch structure and increased seepage losses by 25% so that now only 75% as much water reaches the farm. The deterioration of the ditch's structure and increases in the growth of aquatic vegetation attributable to the clear water have increased operating and maintenance expense. On the farm, the clear water delivered at the lateral's headgates does not spread or run down irrigation rows as far as the silty water did. The reduction in coverage varies somewhat from area to area according to the nature of different soils. The 25% ditch loss coupled with the reduction

in the coverage of clear water have rendered irrigators' water rights only about half as effective or useable as they were before the United States changed the water's quality.

Bessemer water users contend that the change in the quality of the water which the ditch has historically taken from the Arkansas River constitutes a taking of the quality part of their vested water rights under Colorado law. It is the government's position that the users have suffered no compensable property loss as long as the United States continues to provide the ditch with its lawful volume of water, regardless of quality. It is noted that the users are Bessemer stockholders who own the Bessemer water rights.

B. REFERENCES TO RECORD

The Court of Claims prepared a detailed statement of facts to accompany the certified question and included all the relevant pleadings, motions and orders filed in the Court of Claims along with a supporting Appendix as a part of the record it forwarded to this Court.

Except for the "Appendix to Motion to Certify Question to Colorado Supreme Court" which was already under a separate cover, the documents which accompanied the Court of Claims' Order to this Court have been reproduced, bound and entitled, "Pleadings, Motions and Orders Accompanying Certified Question." The material in the "Appendix to Motion to Certify Question to Colorado Supreme Court" will be referred to as "App. ___" and material in the "Pleadings, Motions and Orders Accompanying Certified Question" will be referred to as "Pl. ___." All the documents, motions,

orders, opinions, exhibits and affidavits bound in both the "Pleadings" and "Appendix" have been numbered consecutively.

C. STATEMENT OF FACTS

1. Bessemer is a mutual ditch company owning substantial decreed direct flow water rights out of Arkansas River. (Pl. 3; App. 9). The headgate of the ditch was originally located on the south bank of the Arkansas River a few miles above Pueblo, Colorado. The ditch ran from its headgate generally east through Pueblo, through a suburban area east of Pueblo, through a truck gardening area and on into an agricultural area. (Pl. 3; Map, App. 95). Approximately 950 stockholders own 19,820 outstanding shares in the Company. Water from the ditch is used for commercial farm irrigation, truck gardening, lawn and shrub irrigation and for miscellaneous purposes. At least 75% of the total acreage within the service area of Bessemer Ditch is used for commercial farming. (Pl. 4). Approximately 42% of its stockholders own three shares or less (total 570.122 shares on March 31, 1975) and use their water largely for the irrigation of lawns, trees, shrubs and gardens in conjunction with homes located in the Pueblo reach of the ditch.

2. Under Colorado law, the stockholders of a mutual ditch company are the owners of the water rights and physical assets held by the company. Jacobucci v. District Court, ___ Colo. ___, 541 P.2d 667 (1975). Such ownership is pro rata to the number of shares owned. Ditch operating costs and other expenses are paid from assessments made by the Company against each shareholder. (Pl. 4). Each shareholder is entitled to receive water in proportion to his stock ownership. Water is delivered by the company to lateral ditches in proportion to the amount of water due each stockholder who draws his water from the lateral ditch.

Each lateral ditch organization is obligated to deliver each stockholder his water. Each stockholder taking water through the lateral is obligated to pay his pro rata share of the cost of operating the lateral. (Pl. 4-5).

3. The Bessemer Ditch was about 40 miles long. In 1969 in conjunction with the construction of Pueblo Reservoir, one of the units of the Fryingpan-Arkansas Reclamation Project, the United States condemned the headgate and upper 5.3 miles of the ditch in Civil Action No. C-1480 titled "United States of America v. 508.88 Acres of Land, More or Less, Situated in the County of Pueblo, State of Colorado, et al." (App. 22) Pueblo Reservoir, located on the main stem of the Arkansas River immediately west of Pueblo, inundated the headgate and upper four miles of the ditch. The additional 1.3 miles of ditch which were within the project "take" area below the dam are now owned and operated by the United States at no expense to Plaintiffs (Pl. 5A; See Map, App. 95) carrying water from outlet works in Pueblo Dam to the Bessemer Ditch. The volume of water to which Bessemer is entitled under its decrees is now delivered by the United States as clear reservoir water through the dam rather than as the naturally silty river water of the Arkansas River.

4. Like many irrigation ditches in the West the Bessemer Ditch is often short of water. Bessemer has decreed water rights totaling 392.7 cubic feet per second (c.f.s.). 70 c.f.s. have priority dates earlier than 1882. The remaining 322 c.f.s. is an 1887 water right which is often not in the river. The ditch has had a capacity of approximately 320 c.f.s. which would not permit the diversion of Bessemer's entire rights if available. (Pl. 7). Water right records over the past eight years show that there has seldom been more than 300 c.f.s. diverted through the ditch. During the

early spring months of March, April and early May and during the months of July through November, diversions are usually less than 100 c.f.s. A large part of the time there is insufficient water for Bessemer Ditch to meet all the irrigation requirements of its service area. (Pl. 7). During the period 1927-1950, on the average, Bessemer diverted 40,000 acre feet per year. During the period 1959-1974 Bessemer diverted on the average 56,000 acre feet per year. (Stipulation to Statement of Facts, filed July 19, 1977).

5. The greatest demand for water is during the months of June, July and August. The next highest monthly requirement is the month of September. The months of greatest shortage occur in June, July, August and September. An additional supply of water has been needed to meet the water uses of Plaintiffs during the peak months. There are a substantial number of irrigation wells in the Bessemer Ditch service area. It is estimated these wells supply an additional 10,000-15,000 acre feet annually for irrigation purposes. Prior to February 25, 1974, water from the irrigation wells was generally mixed with river water from Bessemer Ditch when applied. (Pl. 7).

6. The entire Bessemer Ditch is located on lands covered with loam top soil two to several feet thick underlain with permeable material, consisting of fractured limestone and shale deposits at the upper end of the ditch and alluvial deposits of sand and gravel for the remainder of the ditch. The entire service area of the Bessemer Ditch is underlain with permeable material. (Pl. 5A).

7. Since the construction of Pueblo Reservoir there has been a change in the quality of river water available to Bessemer Ditch because Pueblo Reservoir acts as a large settling basin. The silt content of the Arkansas River

water settles to the bottom of the Reservoir at its upper end. (Pl. 8). Deliveries of water through Pueblo Dam to Bessemer Ditch commencing about February 25, 1974 are clear water containing essentially no silt. Deliveries by the United States to the ditch are accomplished through a pipe and valve arrangement in the dam structure. The United States has never obtained a decree from the Colorado Water Court or any Federal Court authorizing it to impound water attributable to Bessemer's water rights in Pueblo Reservoir, or to deliver clear water to Bessemer in substitution for river water, or to otherwise interfere with Bessemer's water rights. The United States does not consider such a decree was required under either Federal or Colorado law. (Pl. 9).

8. The substitution of clear water from Pueblo Reservoir for the silty natural stream water historically diverted by Bessemer from the river has had a number of adverse effects on the Bessemer Ditch system and the lands irrigated from the ditch. (Pl. 10). The silt in the water tended to seal the bed and banks of the ditch. Clear water leaks through the bottom and sides of the ditch in greater volume than silty water. More of the water passing the Bessemer Ditch gauging station about six miles below the ditch's original point of diversion seeps out of the bottom and sides of the ditch so that less of the diverted water reaches the Plaintiffs. Sunlight which passes through clear water has caused an increase in the amount of aquatic vegetation growing in the ditch and its laterals increasing the cleaning problem. There has been an increase in the erosion of the ditch and laterals and a sloughing off of material from the sides of the ditches into the bottom. There has been more seepage from the ditch into basements through the Pueblo reach of the ditch. When applied to land for irrigation, clear water does not spread as far as silty water. (Pl. 10).

9. The parties are in agreement that the above-described adverse effects do occur. They are in disagreement as to the extent thereof. No trial has been had in the Court of Claims to quantify these adverse results. In support of its Motion to Certify, Plaintiffs filed with the Court of Claims Affidavits by John W. Patterson (App. 7-11), Dr. Daryl B. Simons (App. 1-6), and William V. Hitizing (App. 11-14). Mr. Patterson is a consulting hydraulic and agricultural engineer with extensive experience. His clients include the United States Army Corps of Engineers, Department of Justice, the cities of Denver, Pueblo, Colorado Springs and others, and the State of Colorado. (App. 7-8). Prof. Daryl B. Simons is presently the Director of Research in Civil Engineering at Colorado State University. His principal field of specialization is in the area of sediments and river mechanics and he is an internationally recognized authority in this area. (App. 1-3). Mr. Hitizing is the President of the Bessemer Irrigating Ditch Company and an experienced irrigator. (App. 12). Their affidavits serve to approximately quantify some of the adverse effects described above.

10. In the past, sediments in the river water have been carried into the pores in the material of the banks and bottoms of the ditch, sealing the ditch and minimizing seepage losses. With the introduction of clear water, this lining has been carried away. Seepage losses have significantly increased because of the loss of the lining formerly provided by the presence of sediment in the water. The protective lining provided by the sediment is lost principally in two ways: (i) The fine materials deposited on the surface of the channel in the past are simply eroded away increasing the seepage of the clear waters out of the canal

and (ii) the finer sediments deposited in the coarser materials are flushed through opening up the pores in the sides and the bottom of the ditch. (Simons, App. 3; Patterson, App. 9-10). The magnitude of the water loss in the main ditch and laterals approximates 25%. (Simons, App. 3-5; Patterson, App. 9-10; Hitizing, App. 13).

11. Removal of sediment has resulted in the reduction of ditch channel stability. The flow of clear water has significantly weakened the ditch in its upper reaches requiring the installation of a plastic liner to protect the ditch from structural failure (Simon, App. 3; Patterson, App. 10) at a cost of $30,000 (Patterson, App. 10; Hitizing, App. 13). The reduced stability requires that the normally available ditch operating head of 325 c.f.s. be reduced to 220 c.f.s. (Patterson, App. 10; Hitizing App. 13) resulting in a direct loss of divertible water at times when water under Bessemer's 1887 water right is available.

12. The sediment in the river water fills up pore spaces in farm crop rows, thus permitting runs of water of approximately 1100 to 1200 feet along crop rows. The same volume of clear water applied to irrigation results in runs of only 600 to 700 feet, representing increased labor in moving sets and a loss in irrigation efficiency. With clear water only about two-thirds as much land can be irrigated with the water that reaches the farm. The combination of a 25% increase in seepage and a reduction in the coverage of clear water has effectively reduced irrigators' water supplies by 40% to 50%. (Simons, App. 5; Patterson, App. 10).

13. Aquatic vegetation grows better in the clear water in the main ditch and laterals. Labor and chemicals to control weed problems have increased operating costs. In addition the vegetation cloggs the channels reducing the ditches'

capacity to carry its decreed rights. (Simons, App. 4; Patterson, App. 10). Increased seepage through the Pueblo reach of the ditch has raised the water table in the vicinity of the ditch and resulted in the flooding of basements. (Simons, App. 4; Patterson, App. 10).

14. Clear water losses to stockholders amount to several million dollars. (Patterson, App. 11). William V. Hitizing, President of Bessemer, estimates losses at $75 to $125 per acre annually. (App. 14).

D. HISTORY OF FEDERAL LITIGATION

On June 11, 1969, the United States filed a Condemnation Action titled United States of America v. 508.88 Acres of Land More or Less, et al., No. C-1480 in the United States District Court for the District of Colorado. In this proceeding the United States took the headgate and upper 5.3 miles of the Bessemer Ditch (History of Litigation, App. 17; Declaration of Taking, App. 35-45). The United States obtained an Order for Delivery of Possession June 17, 1969.

Both the United State's Complaint (App. 22-34) and Declaration of Taking (App. 35-46) provided that the United States is to deliver to the remaining part of Bessemer Ditch the volume of water Bessemer is entitled to receive under its Colorado water rights. Bessemer answered alleging that all it's stockholders should be parties to the proceeding and that the delivery of clear water instead of silty water would result in substantial damage to the individual stockholders in a number of specific ways which were enumerated in its Answer. (Answer, App. 47-49).

The United States filed a motion to strike the Answer (App. 50). Chief Judge Alfred A. Arraj in an opinion dated May 8, 1973 held that an appropriator is entitled to

silt-laden water as a part of his water right stating: (Opinion of May 8, 1973, App. 51-61 at 59-60):

> The case at bar presents the novel question of whether removing impurities can likewise give rise to an actionable wrong. We think that it can, because the question of what constitutes a "diminution" in the quality of water must depend upon the use to which the water is put. Water containing a large amount of silt is more beneficial than pure water for irrigation purposes. 2 C. Kinney, Irrigation & Water Rights § 1131 (2d Ed. 1912). Removal of the silt from an irrigator's water potentially injures him in the same way as the addition of impurities may injure people who appropriate water for other purposes. Consequently, if the law recognizes a property right in a certain quality of water, it should make no difference whether the quality is altered by adding harmful pollutants or by removing beneficial ones.
>
> We think it is most consistent with the language in the previously-discussed Colorado cases and with the assumptions underlying the system of prior appropriation to recognize that an appropriator has a right to the quality of water naturally flowing in the stream at the time of his appropriation. The familiar argument supporting the undisputed rule that an appropriator has a vested right to the quantity of water which he diverts and applies to a beneficial use is that, having invested resources in diverting water and improving his property on the assumption that the necessary water would be available for his enterprise, he is entitled to expect that the water will remain available. E.g. Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446 (1882). See also 1 C. Kinney, Irrigation & Water Rights §§ 585-594 (2d ed. 1912). His expectations might, it seems, just as easily be defeated by altering the quality of his water as by changing the quantity. In the situation presented by the case at bar, for example, delivery of clear water would allegedly mean that ditches must be lined to prevent seepage, that the aquatic plants which grow readily in clear water will have to be controlled by the use of chemicals, that additional labor will be required to apply the water to the land, and that the plant nutrient in the silt will have to be supplied from another source. All this, of course, would diminish the return upon which the appropriator has relied in making his investment and, if the decrease is sufficient, could cause the appropriator to discontinue his operation. In other words, the economic effect of a diminution in the quality of water is potentially the same as a diminution in its quantity, and the rationale for giving an appropriator the right to a certain quantity of water also gives him the right to a certain quality of water. Consequently, it seems that one aspect of an appropriation must be the right to the quality of water upon which the appropriator relied in making the appropriation.

The United States filed a motion asking the Court to reconsider its opinion or in the alternative to certify the quality question to the Tenth Circuit Court of Appeals. (App. 62-63). This resulted in a further opinion of September 20, 1973 (App. 64-66) in which Chief Judge Arraj refused to certify the quality question to the Tenth Circuit Court of Appeals, and adhering to his earlier opinion concerning quality. However, with respect to proving damages he held that it would be necessary for the Company to prove that the water of each stockholder was being used in conjunction with an economic unit in order for damages to be recovered on behalf of that particular stockholder. (App. 65).

Proving that a ditch system and water rights are part of an economic unit is not difficult where an irrigated farm, ranch or truck garden is involved. However, use of Bessemer Ditch water for cemetery purposes, for a municipal golf course and to water lawns, shrubs, trees and gardens by homeowners in Pueblo, Colorado, posed a difficult problem for the Company which, by Judge Arraj's first opinion of May 8, 1973, was required as trustee for each stockholder to present each individual stockholder's case. Some homeowners were heavily dependent on Bessemer water while others within the Pueblo service area could substitute city water for their ditch water; albeit at a greater cost. (App. 19). Concern also existed as to whether the taking of the silt quality would be considered a counterclaim exceeding the $10,000 jurisdictional limit of the Federal District Court for claims against the United States.

To solve these problems an action was commenced in the United States Court of Claims by each stockholder under the Tucker Act, 28 U.S.C. § 1491. The principal questions in

the Court of Claims is whether a property interest has been taken by the United States (Pl. 56-128), and if so, its value. 6A Nichols on Eminent Domain, § 29.1 at p. 29-1 (3rd ed 1976).

On September 29, 1975, the Colorado Supreme Court decided Jacobucci v. District Court, ___ Colo. ___, 541 P.2d 667, holding that the stockholders of a mutual ditch company were necessary parties in a condemnation proceeding by the City of Thornton to acquire water rights, legal title to which was held by the mutual ditch company. This decision meant that all Bessemer stockholders should be joined in the condemnation proceeding. It also became probable that some stockholders' cases would be decided in the Federal District Court and others in the Court of Claims, with the possibility that the two federal courts might reach different answers to the silt question even though both courts would be attempting to determine whether a Colorado water right included the water's quality. (App. 20).

Bessemer moved the Federal District Court to certify the silt-quality question to the Colorado Supreme Court for its decision pursuant to Colorado Appellate Rule 21.1 (App. 67-76). After substantial briefing and a number of formal and informal discussions and presentations, Judge Arraj in his opinion of June 18, 1976 (App. 83-92) decided to confine the condemnation proceeding to the precise land described in the Declaration of Taking and not address that part of the case relating to damage to the remainder of the property since all the stockholders had protected themselves by timely filing the necessary petition in the Court of Claims.

Judge Arraj refused to certify the quality question to the Colorado Supreme Court since that part of the case was to be tried by the Court of Claims. He felt the Court of

Claims could certify the question to the Colorado Supreme Court if it wished to do so. He was aware that Colorado Appellate Rule 21.1 did not include the Court of Claims as one of the federal courts the Colorado Supreme Court would accept certified questions from. Nevertheless, Judge Arraj stated it was his view the Colorado Supreme Court would expand its rule to include the Court of Claims upon request and, in any event, would answer a question certified to it by the Court of Claims.

Judge Arraj's June 18, 1976 opinion was immediately delivered to the Colorado Supreme Court. It was requested that the Court expand Rule 21.1(a) to include the Court of Claims. The Colorado Supreme Court amended its rule to include the Court of Claims on July 24, 1976. Colorado Appellate Rule 21.1, as amended.

The parties stipulated as to the value of the 508.88 acres taken by the United States. The Trial Court entered judgment accordingly providing (App. 93, 94):

> IT IS FURTHER ORDERED that if, as a result of any change in the quality of water flowing from Pueblo Dam & Reservoir, any compensable harm has occurred or will occur to owners of water rights in Bessemer Ditch, they shall not be precluded by this Judgment from pursuing their claim for damages therefor in an appropriate action in an appropriate forum.

As stated above, the Plaintiffs moved the Court of Claims to certify the water quality question to this Court. (Pl. 16-24). The Court of Claims granted the motion (Pl. 1), and sent this Court the appropriate "Certificate to the Supreme Court of the State of Colorado" (Pl. 2-13).

III. SUMMARY OF ARGUMENT

Under the facts, Bessemer's stockholders have a vested property interest in the quality of the water they have diverted and placed to beneficial use and ask the Colorado Supreme Court to so declare.

The use to which Bessemer's shareholders have applied the water customarily diverted by the ditch from the natural flow of the Arkansas River is the measure and extent of their vested property rights under Colorado's law. Bessemer and its users have placed the naturally silty stream water to beneficial use, transporting and using the water from the stream primarily for the irrigation of areas supplied by the ditch. In their use of the silty water, Plaintiffs have enjoyed a number of beneficial results. The silty water has sealed the ditches, reducing seepage loses. It has reduced maintenance expenses and preserved the integrity of the system's structure. Silty water can be more efficiently used on the farm, spreading farther and covering more area.

In changing conditions on the stream, the United States has deprived Bessemer and its shareholders of their vested interest in the maintenance of those conditions existing at the time of Bessemer's appropriations and since. The resulting damage to Plaintiffs' water rights constitutes a taking of their vested property rights under Colorado law.

The United States' tender of clear water in place of the silty water customarily diverted by Bessemer from the Arkansas River fails to meet the requirements of Colorado law protecting an appropriator's rights in the quality of waters available for his lawful diversion. Substituted water must be of a quality to meet the requirements of use to which the appropriator's water rights have normally been put. The clear water tendered Bessemer by the United States fails to meet the needs formerly satisfied by silty water.

This Court should advise the Court of Claims that in Colorado the quality of an appropriators' water is a part of his vested water rights which, under the facts presented by the Court of Claims, has been taken from the Plaintiffs by the United States.

IV. ARGUMENT

A. UNDER THE TUCKER ACT THE UNITED STATES COURT OF CLAIMS HEARS CASES ARISING UNDER THE FEDERAL CONSTITUTION. THE FIFTH AMENDMENT TO THE CONSTITUTION REQUIRES THE PAYMENT OF JUST COMPENSATION FOR THE TAKING OF PROPERTY BY THE UNITED STATES. TAKING THE SILT OUT OF NATURAL STREAM WATER TO WHICH PLAINTIFFS ARE ENTITLED UNDER COLORADO DECREED WATER RIGHTS CONSTITUTES THE TAKING OF A CONSTITUTIONALLY PROTECTED PROPERTY INTEREST. THE UNITED STATES COURT OF CLAIMS ASKED THIS COURT WHETHER ONE OF THE INCIDENTS OF PROPERTY IN A COLORADO WATER RIGHT IS THE QUALITY OF THE WATER TO WHICH THE APPROPRIATOR IS ENTITLED. THE COURT OF CLAIMS WILL USE THIS COURT'S ANSWER AS A BASIS FOR DETERMINING PLAINTIFF'S CLAIMS WHICH ARE BEFORE IT.

The issue in this case arises under the Fifth Amendment to the Constitution of the United States which prohibits the government's taking of private property for public use without the payment of just compensation. Plaintiffs, the shareholders of the Bessemer Irrigating Ditch Company, brought this action under the Tucker Act, 28 U.S.C. § 1491, which gives the Court of Claims jurisdiction to assess damages against the United States for the taking of private property. Plaintiffs seek to recover from the United States damages for the taking of that part of their water rights caused by the change in the quality of the water which Plaintiffs have customarily received from the direct flow of the Arkansas River to water now received from Pueblo Reservoir.

The Fifth Amendment is frequently said to create an implied contract on the part of the United States to pay just compensation for property which it takes. 6A Nichols on Eminent Domain § 29.1, at 29-6 (3rd ed. 1976). In providing for the delivery of Bessemer's direct flow rights through Pueblo Dam after condemning the ditch's headgate and upper reach, the United States has drastically changed the quality of the water now supplied the ditch and its users to their detriment and damage. This change in water quality has effectively taken a property right of Bessemer and it's stockholders for which they are entitled to compensation.

The United States contends Plaintiffs have no vested property right in the naturally silty quality of the Arkansas' waters which Plaintiffs diverted and placed to beneficial use long before the construction of Pueblo Dam. Plaintiffs contend that the United States has taken a part of their water rights by changing the quality of the water supplied Bessemer Ditch to the detriment of their uses of Bessemer's water.

It is well settled under Colorado law that water rights are interests in real property which cannot be taken by the government without the payment of just compensation. E.g, Jacobucci v. District Court, ___ Colo. ___, 531 P.2d 667 (1975); Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 94 P. 339 (1908); Armstrong v. Larimer County Ditch Co., 1 Colo. App. 49, 27 P.235 (1891). When the government takes a water right "in effect what it seeks to condemn is the right to make beneficial application of the water." Jacobucci, supra, at 674.

A water right is a usufructuary 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 the government takes when it condemns or injures an appropriator's water right is not the corpus of the water itself, but the use to which the water may be put. In substituting water of a quality which is not as useful to Plaintiffs as the natural stream water customarily diverted by Bessemer ditch from the Arkansas River, the United States has taken a part of the Plaintiffs' right to make beneficial application of their water.

An appropriator has long had the right to deliver substitute water so long the vested rights of the other appropriator are not injuriously affected thereby. 1897

Colo. Sess. Laws, Ch. 58, p. 177. In providing for the protection of the vested rights of other appropriators where plans of augmentation or exchange are concerned the "Water Right Determination and Administration Act of 1969", § 37-92-305(5), C.R.S. 1973, provides:

> . . . (5) In the case of plans for augmentation including exchange, the supplier may take an equivalent amount of water at his point of diversion or storage if such water is available without impairing the rights of others. Any 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, and such substituted water shall be accepted by the senior appropriator in substitution for water derived by the exercise of his decreed rights. (Emphasis added)

The substituted water must be of a quality to meet the requirements of use to which the water has normally been put. The substitution of water may only be accomplished where uses by other appropriators will not be impaired. § 37-92-305(3), C.R.S. 1973.

Where substitued water is to be provided the quality of the substituted water is the subject of legislative concern. Section 37-80-120, C.R.S. 1973, "Upstream storage - substitute supply", provides in part:

> (2) Individuals and private or public entities, alone or in concert, may provide a substituted supply of water to one or more appropriators senior to them, not to exceed that to which any senior appropriator is entitled from time to time by virtue of his appropriations, and to the extent that such substituted water is made available to meet the appropriative requirements of such senior, the right of such senior to draw water pursuant to his appropriation shall be deemed to be satisfied. The rights of such senior may be used for effectuating such substitution during the period while it is in operation, and the practice may be confirmed by court order as provided for determining water rights.
>
> (3) Any substituted water shall be of a quality and continuity to meet the requirements of use to which the senior appropriation has normally been put. (Emphasis added)

Implicit in these statutes is recognition of the fact that elements other than quantity are of critical importance to an appropriators' use of his water rights. So long as "there is no issue as to quality * * * water is fungible or [may] be treated the same as a fungible article", Denver v. Fulton Irrigating Ditch Co., 197 Colo. 47, 58, 506 P.2d 144, 150 (1972). But, when the substituted water is of a different quality, materially affecting the prior uses of other appropriators, the fungible characteristic is lost. Again, water must be of a quality so as to meet the requirements of use to which the water has normally been put. To the extent substituted water fails to satisfy those uses which the water it replaces satisfied, the appropriator has been deprived of a part of his water rights.

For more than 100 years Bessemer has diverted and supplied naturally silty water from the Arkansas River to its shareholders. Most of the water has been used for irrigation and other agricultural purposes. The clear water now supplied Bessemer by the United States in place of the silty water previously diverted by the ditch is seriously unsuited to Bessemer and its shareholders. The clear water leaks through the ditch, substantially reducing deliveries to shareholders. It promotes the growth of aquatic vegetation and eats away at the ditch system, increasing each shareholders' cost of acquiring the water and weakening the ditch's structure. On the farm, the clear water lacks the beneficial qualities found in silty water and will not spread as far as silty water.

The statute's concern over the right of an appropriator to protect his vested right in the quality of his water is a reflection of the concern expressed by this court in the case of Larimer County Reservoir Co. v. People, 8 Colo. 614,

9 P.794 (1886), which involved the construction of an on-stream reservoir. While upholding the defendant's right to appropriate water for storage and use through the construction of the onstream facilities, the court stated at page 617:

> The act of utilizing as a reservoir a natural depression, which included the bed of the stream, * * * was not, in and of itself, unlawful. * * *
>
> But the privilege so recognized is, of course, qualified by the condition that no injury to others shall result through its invocation. He who attempts to appropriate water in this way does so at his peril. He must see to it that no legal right of prior appropriators, or of other persons, is in any way interfered with by his acts. He cannot lessen the quantity of water, seriously impair its quality, or impede its natural flow, to the detriment of others who have acquired legal rights therein superior to his; and he must respond in proper actions for all injuries resulting to them by reason of his acts in the premises. (Emphasis added.)

A vested right in the quality of the water put to beneficial use has been explicitly recognized by the Utah Courts. In Salt Lake City v. Boundary Springs Water Users Association, 2 Utah 2d 141, 144, 270 P.2d 453, 455 (1954), a change in point of diversion case, the Utah Supreme Court concisely summarized the right when it stated, "The owner of a water right has a vested right to the quality as well as the quantity which he has beneficially used." (Emphasis added.) The Court had earlier recognized an appropriator's right to recover compensation for the government's taking of his vested right in the quality of his water in Shurtleff v. Salt Lake City, 96 Utah 21, 82 P.2d 561 (1938) and Moyle v. Salt Lake City, 111 Utah 201, 176 P.2d 882 (1947), both condemnation cases. Moyle, supra, contains an extensive discussion of the nature of an appropriator's vested right in the quality of his water. Both cases clearly recognize water quality as a part of the property rights included within the constituional prohibition against the taking of property without just compensation.

B. CHANGING THE CHARACTER OF STREAM WATER AND CONDITIONS ON A NATURAL STREAM SO THAT THE EXTENT OF AN APPROPRIATOR'S BENEFICIAL USE IS REDUCED CONSTITUTES AN INVASION OF THE PROPERTY RIGHT PROTECTED BY THE CONSTITUTION.

One of the fundamental premises of the law of appropriation provides that every appropriator is entitled to rely upon the continuation of conditions on the stream as they were at the time he made his appropriation. In Vogel v. Minnesota Canal Co., 47 Colo. 534, 541, 107 P. 1108, 1111 (1910), the Court expressed the rule in the following language:

> "This court has often said, in substance, that a junior appropriator of water to a beneficial use has a vested right, as against his senior, in a continuation of the conditions on the stream as they existed at the time he made his appropriation. If this means anything, it is that when the junior appropriator makes his appropriation he acquires a vested right in the conditions then prevailing upon the stream, and surrounding the general method of use of water therefrom. He has a right to assume that these are fixed conditions and will so remain, at least without substantial change, unless it appears that a proposed change will not work harm to his vested rights." (Emphasis added.)

The Court restated the principle in the case of Farmers Highline Canal and Reservoir Co. v. City of Golden, 129 Colo. 575, 272 P.2d 629 (1954), in the following language at page 579; 631-32:

> "There is absolutely no question that a decreed water right is valuable property; that it may be used, its use changed, its point of diversion relocated; and that a municipal corporation is not precluded from purchasing water rights previously used for agricultural purposes and thereafter devoting them to municipal uses, provided that no adverse affect be suffered by other users from the same stream, particularly those holding junior priorities.
>
> Equally well established, as we have repeatedly held, is the principle that junior appropriators have vested rights in the continuation of stream conditions as they existed at the time of their respective appropriations, and that subsequent to such appropriations they may successfully resist all proposed changes in points of diversion and use of water from that source which in any way materially injures or adversely affects their rights. Baer Brothers Land & Cattle Co. v. Wilson, 38 Colo. 101, 88 P. 265; Vogel v. Minnesota Canal & Reservoir Co., 47 Colo. 534, 107 P. 1108; Denver v. Colorado Land & Livestock Co., 86 Colo. 191,

279 P. 46; Baker v. Pueblo, 87 Colo. 489, 491, 289 P. 603; Farmers Reservoir & Irrigation Co. v. Town of Lafayette, 93 Colo. 173, 24 P. (2d) 756; Faden v. Hubbell, 93 Colo. 358, 369, 28 P. (2d) 247; Del Norte Irrigation District v. Santa Maria Reservoir Co., 108 Colo. 1, 7, 113 P. (2d) 676. See, also, Comstock, State Engineer v. Ramsay, 55 Colo. 244, 257, 133 P. 1107, where many earlier decisions are cited." (Emphasis added.)

In this case the continuation of conditions existing on the stream at the time Bessemer made its appropriations means a continuation of the stream's naturally silty condition.

An appropriator's right to have conditions on the stream maintained substantially as they were at the time he made his appropriation has its source in the fundamental policies behind the doctrine of prior appropriation. Appropriators who have expended time, effort and money in developing enterprises to which the water may be put must be able to rely upon the continuation of conditions which have made their use of the water possible. Recognition of this right in the use of water has been absolutely essential in the economic development of Colorado's arid lands. Without the assurance of a right to rely upon conditions existing at the time of their appropriation few users could have invested the kind of time, money and effort necessary to bring the dry lands of the state to life.

Judge Arraj recognized the application of these principles in his decision of May 8, 1973 (App. 51, at 59-60) where he stated:

> "We think it is most consistent with the language in the previously-discussed Colorado cases and with the assumptions underlying the system of prior appropriation to recognize that an appropriator has a right to the quality of water naturally flowing in the stream at the time of his appropriation. The familiar argument supporting the undisputed rule that an appropriator has a vested right to the quantity of water which he diverts and applies to a beneficial use is that, having invested resources in diverting water and improving his property on the assumption that the necessary water would be available for

> his enterprise, he is entitled to expect that the water will remain available. E.g. Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446 (1882). See also 1 C. Kinney, Irrigation & Water Rights §§ 585-594 (2d ed. 1912)."

Bessemer and its shareholders have relied upon the natural characteristics of the silty water in developing and making use of their water rights. The shareholders have relied upon certain economies and efficiencies in the use of their water rights as a result of silty water's natural tendency to inhibit the growth of aquatic vegetation, reduce seepage losses, preserve the integrity of the Ditch's structure and render the lands to which it is applied more fertile. More importantly, the size of the Ditch's service area, the number of persons served and the design and development of the farms, their crops and irrigation systems under the Ditch have been based in part on the quality of the water, reflected in its silt content, supplied by Bessemer to its shareholders from the natural stream of the Arkansas River.

Sections 5 and 6 of Article XVI of Colorado's Constitution provide:

> Section 5. Water of streams public property. 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 hereinafter provided.
>
> Section 6. Diverting unappropriated water-priority preferred uses. The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; * * *

The Constitution specifically refers to the appropriation of waters of "natural streams" to "beneficial uses."

In dealing with water quality an appropriator's vested rights cannot be defined in terms of "water" in the abstract sense of the term. There is no such thing as naturally occurring "pure" water which is available for appropriation.

The only "pure" water that exists in nature is water which has evaporated and remains as vapor. Droplets that fall as rain often begin by clustering about a nucleus of dust or other material. As they fall, the drops pick up other materials in the air. The runoff washes material into the streams. The natural stream itself is a living organism. It moves across the land picking up and depositing materials as it passes, the natural quality of its waters changing as the terrain through which it moves changes.

> "In nature, water quality is a completely dynamic value.
>
> Water which is absolutely free of dissolved or suspended matter does not occur naturally. As water passes through the hydrologic cycle, it is constantly gathering foreign matter. Even rain water contains dust and dissolved gases and may gather microscopic particles of other matter as it falls to the earth. Runoff gathers materials and carries them in suspension or solution: minerals, salts, sand, silt, and clay from rocks and soil. Certain plants and animals breed, live, and die in water. Other organic and inorganic materials are blown into watercourses by the wind or picked up by streamflow."

3 Waters and Water Rights § 202, at p. 16 (R. Clark ed. 1967).

Each use on a stream affects the quality of the stream's waters to some extent. Successive uses of every stream's waters is encouraged by the doctrine of appropriation so long as the vested rights of other appropriators are not materially injured. The quality of "natural stream" water available for "beneficial use" varies with the conditions and uses which exist on the stream at the time of the appropriation and dictate the methods the appropriator will use in putting the water to beneficial use.

The natural stream water appropriated and used by Bessemer was silty. Silty water has characteristics fundamentally different than those of the clear water now supplied the ditch by the United States. The change in the quality

of the water has materially injured the beneficial use of the water rights and constitutes a taking of the water rights by the United States.

The test for infringement of the quality of a down-stream appropriator's water rights was set forth by Mr. Justice Field in Atchison v. Peterson, 87 U.S. (20 Wall.) 507, 515, 22 L.ed. 414, 417 (1874) as follows:

> "What dimunition of quantity, or deterioration in quality will constitute an invasion of the rights of the first appropriator will depend upon the special circumstances of each case, considered with reference to the uses to which the water is applied. * * * In all controversies, therefore, between him and parties subsequently claiming the water, the question for determination is necessarily whether his use and enjoyment of the water to the extent of his original appropriation have been impaired by the acts of the defendant." (Emphasis added.)

Cases which have addressed the issue of deterioration in the quality of water supplied an appropriator point out it is not the addition of substances, or the change in the quality of the water per se which constitutes the infringement of the down-stream users' property rights, but the injury to their uses of the water which is forbidden.

> For the purposes of this case, the word "pollution" means an impairment, with attendant injury, to the use of the water that plaintiffs are entitled to make. * * * In reality, the thing forbidden is the injury; (Emphasis added.)

Wilmore v. Chain O'Mines, 96 Colo. 319, 331, 44 P.2d 1024, 1029 (1934).

Under the principles set forth above, where the thing prohibited is the injury and the test for injury is the extent of the impairment of the original appropriator's uses then each of the following constitutes an invasion of Bessemer's water rights: (i) the effective loss in the use of half the water; (ii) the substantial deterioration in the ditches' structure; (iii) the increase in ditch operation and maintenance expenses; (vi) the loss of ditch capacity; (v) the need

for revising irrigation systems to compensate for reduced spreadibility caused by the substitution of the clear water for the natural stream water; (vi) and the loss of other beneficial qualities attributable to the silt in the water. It matters little whether the invasion is couched in terms of a taking of half of the water supplied the ditch or in terms of the removal of active ingredients from the natural stream. The result is the same. Bessemer's stockholders, who own the water rights, have been substantially and materially injured.

The beneficial qualities of silty water have been recognized in a number of cases and treatises. Slide Mines v. Left Hand Ditch Co., 102 Colo. 69, 77 P.2d 125, (1938), recognized the beneficial qualities of silt in irrigation water. In that case the ditch company brought an action against Slide Mines to enjoin it from polluting the stream with mill tailings and slimes. The mining company defended on the grounds that the farmers did not have clean hands. The ditch made reservoir releases in such a volume that the stream water picked up a large amount of

> * * * natural detritus, rock particles, decayed vegetable matter, and other deleterious substances, exceeding in bulk the tailing deposits discharged from the mill, thereby, it is said, polluting the streams and contributing to the damaging of their fields.

Slide Mines, supra, at 73. The farmer's evidence was to the effect that such material as was carried into their laterals by these releases was beneficial to their land and agricultural production and therefore did not constitute a pollution of the stream. The trial court granted the injunction. In affirming this Court said at p. 73-74:

> In the Wilmore Case, supra, in the majority opinion on rehearing, the word 'pollution' is defined as meaning 'an impairment, with attendant injury, to the use of the water that plaintiffs are entitled to make. Unless the introduction of extraneous matter so unfavorably affects such use, the condition created is short of pollution.

> Here the trial court factually determined that such extraneous matter as the farmers introduced into the stream, not only did not unfavorable affect the use of the water they were entitled to make but was beneficial to it, and hence caused no pollution in a legal sense. The farmers having been adjudged guiltless, no basis is presented for the application of the principle advanced by the mining company.

The relationship and value of silt removed by an onstream reservoir to downstream appropriators' water rights was specifically dealt with by the Supreme Court of Idaho in Arkoosh v. Big Wood Canal Co., 48 Idaho 383, 283 P. 522 (1920) on facts comparable to those presented in this case. Plaintiffs sued the Big Wood Canal Company for a taking of their water rights as the result of the defendant's operation of a large onstream reservoir. From the facts it appears that the defendant's

> "* * * reservoir was constructed about 1910, primarily to conserve the flood waters of the Big Wood River. But in addition to its storage rights, appellant has acquired certain natural flow rights determined in the Frost decree. Otherwise the storage rights are later than the rights of respondents.
>
> The Big Wood River flows through a lava formation in which are found huge cracks and crevices. Before the construction of the reservoir, these crevices were kept filled, to a great extent, by the silt carried down by the natural flow of the river. The dam, however tended to precipitate the silt behind it and between 1910 and 1920 the cracks grew larger and there was a gradual increase in the stream losses.
>
> Until 1920 some of the natural flow of the stream was permitted to pass through the reservoir during the winter months of nonirrigating season. In that year, however, the entire natural flow was impounded during the nonirrigating season, until May 17 at which time it was suddenly released and the force of the great head of water, as it swept down the stream, washed away most of the silt and debris out of the crevices of the channel, greatly increasing the stream losses." (Emphasis added.)

Arkoosh, supra, at 523.

In Arkoosh, the Dam's removal of the silt from the stream reduced plaintiffs water supply just as the removal of the silt by the Pueblo Dam has done in this case. In

granting plaintiffs' request for an injunction against the reservoir operation, the Court stated at page 526:

> The principal question presented for consideration involves the responsibility of the Big Wood Canal Company for the losses in the river flow due to the construction of its reservoir. We believe that if by the construction of its dam, and its use of the natural channel of the river, appellant has interfered with respondents' rights, and by such use, unless restrained, will continue to interfere with respondents' rights and deprive them of water to which they are entitled by reason of their prior appropriation, such action is wrongful and may be enjoined.

Treatises on irrigation and water rights have also recognized the value of silty water to appropriators and ditches. F. Newell, Irrigation in the United States, pp. 147-148 (1902) discusses the value of silt in reducing the growth of aquatic plants in irrigation ditches; fertilizing the fields to which the water is applied; and in reducing seepage losses in the ditch. Kinney, in his authoritative treatise described some of the benefits to be obtained from the silt content of natural waters as follows:

> From the standpoint of absolutely pure water, water used for irrigation may contain a large amount of impurities and still be bettered for the purpose for which it is used. One of the benefits derived from the cultivation of crops by irrigation is the increased fertility of the soil caused by the substances carried in the water and spread over the land with the irrigation water. Therefore, where the water carries quantities of silt, not containing any deleterious mineral matter, it is considered a benefit to the irrigator rather than an injury. This is illustrated where the farmers below Salt Lake City, Utah, recently voluntarily traded their water rights to the water in Big Cottonwood Creek -- which water is as clear and pure as any that can be found running in surface streams -- to the city for water from Utah Lake, which water contains large quantities of silt, and cannot be used for domestic purposes. The result of such a trade was that both parties were benefited.

2 C. Kinney, Irrigation and Water Rights, § 1131, p. 2045 (2d ed. 1912).

3 Waters and Water Rights § 200.1, p. 4 (R. Clark ed. 1967) specifically recognizes that a change in the quality of water may affect the quantity required to serve a specific use.

In the related cases of Farmers Irrigation Co. v. Game and Fish Commission, 149 Colo. 318, 369 P.2d 557 (1962) and Game and Fish Commission v. Farmers Irrigation Co., 162 Colo. 301, 426 P.2d 562 (1967), this Court recognized and upheld Plaintiffs' cause of action and right to recover damages for the taking of their property rights in the quality of their water caused by the Commission's dumping of material into the stream changing the quality of the water, and rendering it less valuable for the purposes for which it was used by the plaintiffs.

In other "pollution" cases, i.e. cases where the impairment of the water's quality is caused by the addition rather than the removal of substances, the Court has recognized an appropriators vested right in the receipt of water of the quality he has traditionally received from the stream.

In Cushman v. Highland Ditch Company, 3 Colo. App. 437, 33 P. 344 (1893), a junior appropriator sought to flush accumulated alkalies from its reservoir by draining the reservoir. Senior downstream appropriators sought to injoin the proposal on the grounds it would give them water carrying a load of alkali. Although denying the injunction on grounds the Plaintiffs had failed to show harm the Court stated at page 439:

> There is no question that riparian owners and these prior appropriators of water are entitled to have the St. Vrain creek flow unimpaired in quantity and unpolluted in any permanent and unreasonable way.

The Court put it even more succinctly in its headnote, at page 437;

> Prior appropriators of water are entitled to have the same flow unimpaired in quantity and without permanent or unreasonable deterioration in quality.

Removal of the silt from Bessemer's water deteriorates the quality of the water for irrigation purposes.

In Humphreys Tunnel and Mining Co. v. Frank, 46 Colo. 524, 105 P. 1093 (1909), a mill pollution case, the lower court enjoined the mill from discharging slimes into the stream. The Supreme Court affirmed saying at page 531-32:

> * * * plaintiff acquired valid rights as the result of his direct appropriation from the stream, and to the overflow of the stream for his meadow lands, and these rights were vested before defendant began the construction or operation of its mill. * * * Plaintiff's rights were subject only to the rights acquired by prior appropriators of the water for some useful purpose, and his right, as well as theirs, as against defendant, is to have the natural waters and all accretions come down the natural channel undiminished in quality as well as quantity. (Emphasis added.)

Mack v. Town of Craig, 68 Colo. 337, 191 P. 101 (1920) was a case where Craig sought to discharge raw sewage into a stream. In holding that Craig could not, this Court said at page 343; 103:

> Plainly the town of Craig by its acts is not only injuring a valuable property right of defendant, but is guilty of an invasion of the sovereign rights of the state, and is, under pretense of necessity, doing that which, if done by an individual, he would be punished criminally. Cities and towns, in the absence of direct legislative permission to that end, have no right to befoul and contaminate our public streams by discharging raw and unpurified sewage therein. Indeed, it is highly questionable, whether, in view of Article XVI of section 5 of our Constitution, any such legislative permission could be lawfully given.

Whether the change in the water's natural characteristics is accomplished by the addition or removal of substances, the effect on the rights of an appropriator are the same. Bessemer's water rights have been just as impaired by the removal of the natural silt as the water rights of the Plaintiffs above were injured by the addition of substances to the water.

Judge Arraj so found in his opinion of May 8, 1973 (App. 51, at 59) where he stated:

> Removal of the silt from an irrigator's water potentially injures him in the same way as the addition of impurities may injure people who appropriate water for other purposes. Consequently, if the law recognizes a property right in a certain quality of water, it should make no difference whether the quality is altered by adding harmful pollutants or by removing beneficial ones.

In further recognizing Bessemer and it's shareholders' right to recover for the taking of their property rights brought about by the United States change in the quality of the water delivered Bessemer's ditch Judge Arraj stated that an appropriator's

> * * * expectations might, it seems, just as easily be defeated by altering the quality of his water as by changing the quantity. In the situation presented by the case at bar, for example, delivery of clear water would allegedly mean that ditches must be lined to prevent seepage, that the aquatic plants which grow readily in clear water will have to be controlled by the use of chemicals, that additional labor will be required to apply the water to the land, and that the plant nutrient in the silt will have to be supplied from another source. All this, of course, would diminish the return upon which the appropriator has relied in making his investment and, if the decrease is sufficient, could cause the appropriator to discontinue his operation. In other words, the economic effect of a diminution in the quality of water is potentially the same as a diminution in its quantity, and the rationale for giving an appropriator the right to a certain quantity of water also gives him the right to a certain quality of water.

Opinion of May 8, 1973, App. 51, at 60.

V. RELIEF REQUESTED

It is requested that the certified question be answered as follows: Under Colorado law the owner of a decreed right to divert and use water from a natural stream has a right to have the quality of the water of a natural stream unchanged by the acts of another so that the appropriator will receive water pursuant to his water rights of a quality and condition, including the silt content thereof, unimpaired for the use for which the water was appropriated.

Respectfully submitted,

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27.1.4

IN THE UNITED STATES COURT OF CLAIMS

NO. 105-75

A-B CATTLE COMPANY, et al., Plaintiffs,	)	APPENDIX TO
v.	)	MOTION TO CERTIFY QUESTION
UNITED STATES OF AMERICA, Defendant.	)	TO COLORADO SUPREME COURT

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December, 1976

IN THE UNITED STATES COURT OF CLAIMS

NO. 105-75

A-B CATTLE COMPANY, et al., Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	AFFIDAVITS SUPPORTING MOTION TO CERTIFY QUESTION TO COLORADO SUPREME COURT

INDEX OF AFFIDAVITS

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

NO. C-1480

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

508.88 ACRES OF LAND, MORE OR LESS,
SITUATE IN PUEBLO COUNTY, COLORADO;
THE BESSEMER IRRIGATING DITCH COMPANY,
et al., and UNKNOWN OTHERS, Defendants.

INDEX

IN THE UNITED STATES COURT OF CLAIMS

NO. 105-75

A - B CATTLE COMPANY, et al, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.	)	AFFIDAVIT OF DR. DARYL B. SIMONS

STATE OF COLORADO)
COUNTY OF LARIMER) ss.

DARYL B. SIMONS, being first duly sworn upon his oath deposes and says:

I was raised on an irrigated farm.

My education consists of B.S. and M.S. Degrees at Utah State University and Ph.D. at Colorado State University with emphasis on irrigation, river mechanics, erosion and sedimentation, hydraulic structures and water resources.

I spent 3-1/2 years in the military with the Infantry and the Corps of Engineers during World War II. From 1946 to 1948 I attended graduate school at Utah State University. Then from 1948 to 1957 I served as a professor at the University of Wyoming.

From 1957 to 1963, I was Project Chief for the U. S. Geological Survey doing basic and applied research on erosion, sedimentation, river mechanics and other related problems, and extensive studies of effects of fine sizes of sediments, canal and river systems and how systems respond with and without the presence of fine sediments. During the same period I was also teaching part time as a professor in Civil Engineering at Colorado State University. In 1963 I resigned from my position with the USGS to accept a full time position as Professor of Civil Engineering and Director of Research in Civil Engineering at Colorado State University. In 1964 I accepted the position titled Associate Dean for Research and Professor of Civil Engineering at Colorado State University.

At the present time I am the Associate Dean for Research in the College of Engineering at Colorado State University as well as Director of the

Engineering Research Center, Head of the Hydraulics Program in Civil Engineering and Professor of Civil Engineering.

From 1963 to the present, I have intermittently served as a consultant to the Corps of Engineers and the International Boundary and Water Commission on river mechanics problems as well as consultant to other federal and state agencies as well as to several major national and international consulting firms such as Bechtel Corporation of San Francisco, TAMS (Tippetts, Abbot, McCarthy & Stratton) of New York, Harza International of Chicago, IECO (International Engineering Company) of San Francisco and Hydroservice of Brazil. With all these firms, I have been principally involved in erosion and sedimentation, river mechanics, water resources, irrigation and related developments.

I have published two texts on hydraulics, river mechanics and erosion and sedimentation. In addition, I have published in three or four textbooks and have published over 100 recognized articles in the field of river mechanics, erosion, sedimentation, irrigation and related fields. In recognition of this work, I have received the Stevens Award and the Croes Award for outstanding research from the American Society of Civil Engineers.

At present, I am teaching at Colorado State University in the graduate area. I teach erosion, sedimentation, hydraulic structures and river mechanics. River mechanics includes all aspects of the water and sediment therein, diversions from the river, the related irrigation and hydraulic structures, the response of the river to these diversions, and the response of the areas to which the water and sediments are diverted for application of water to the ground.

My present positions at Colorado State University involves heading up the work in erosion, sedimentation, river mechanics, hydraulics in general. I am heavily involved in research dealing with water and sediment yields from watersheds, all aspects of river mechanics, certain aspects of irrigation and drainage. Presently, this work is largely being done for such groups as the National Science Foundation, Corps of Engineers, U. S. Geological Survey and the Department of Transportation.

Since March 29, 1973 I have been employed to determine the effects of the change in point of diversion and quality of water by the Bessemer Ditch Company on their irrigation water distribution system. The change in water quality was imposed by Pueblo Reservoir, a new storage dam constructed on the Arkansas River by the U. S. Bureau of Reclamation.

The Bessemer Ditch goes through the City of Pueblo and proceeds east out onto the plains. The Ditch itself was about 40 miles long with a number of laterals diverting from the Ditch. The construction of the dam by the Bureau of Reclamation included taking over the original headgate and the upper five miles of the Ditch. The dam as constructed contains the outlet works that might be described as a large pipe with a valve in it which, through mechanical devices, delivers water to the Ditch. The silt-ladened water of the Arkansas River flows into the reservoir and is impounded behind the dam. The silt content of the water is largely deposited in the upper reaches of the reservoir and the water delivered to the Bessemer Ditch is clear water; that is, water with essentially no silt content.

With the introduction of the clear water into the Bessemer System, certain problems have been encountered. In the past sediments in the river water have been carried by the water into the pore spaces of the bank and bottom of the Ditch sealing it and minimizing seepage losses. With the introduction of clear water, this lining has been and is being eroded from the channel. Seepage losses from the ditch have significantly increased because of the loss of lining formerly provided by the presence of the sediment in the water. The effective lining, provided by the presence of sediment, is lost principally by two means: the fine materials deposited on the surface of the canal in the past are simply eroded away and with the increased seepage of the clearer waters through the boundary of the canal toward the watertable, the finer sediments deposited in the coarser materials are flushed on through. This opens up the pores of the sides and bed of the ditch increasing seepage losses.

Another problem resulting from removal of sediment is the reduction in channel stability. The flow of clear water has significantly weakened the ditch in its upper reaches requiring installation of plastic liner to protect the ditch

from structural failure and to reduce seepage losses. Even so, it is still necessary to run the ditch at a reduced head to protect it from possible failure. The need to run the ditch at a reduced head has required a deferred time of delivery of water to the farms and less water is delivered.

Another factor is that with clear water in the system there is a potential for growth of channel clogging and water wasting aquatic plants. The presence of such materials make it more difficult for the water to flow through the system increasing head which in turn increases seepage losses. This growth will require chemical treatment with copper sulphate or some similar chemical on a periodic relatively frequent time scale in order to avoid this problem or as an alternative the ditch can be periodically drained to control the aquatic growth. The result is either increased operating expense or a water supply still further reduced.

Seepage losses from the canal flow outward and downward from the channel causing local problems particularly in the city area through raising the water table, and flooding basements.

After the canal leaves the city area and moves into the irrigated area, the water is diverted from the main canal into the laterals. Along these laterals, our investigation needs to be carried further, but it is very likely that certain segments of these laterals are underlaid with gravel deposits and when the survey is complete, it undoubtedly will indicate that special treatment of these reaches of laterals may be required. For example, linings may be necessary.

Considering the laterals in a still broader way, the factors that were cited affecting the main canal, certainly can affect the laterals; in other words, increased seepage and reduction of channel stability. All of the adverse factors cited for the main canal really apply to the laterals, except that the seriousness of the aquatic plants may not be so great. With alternate wetting and drying, aquatic plants may not have a chance to grow as vigorously as they will in the main channel.

The farm area is considered next. The area in general under consideration, has a rather limited water supply. Consequently, any additional

loss of water is a serious problem for the farmers in this particular area. By removing the silts from the water and running clear water through the system, there is an additional loss.

The loss of the water, due to increased seepage in the main canal and laterals from using clear water, will cause a significant reduction in the amount of water available to the farm units. The magnitude of this loss is on the order of 25% in the main ditch and laterals. Then there is a further loss on the farm units. The clear water will only cover about two thirds the area that could be irrigated with sediment laden water. Hence, farmers can only irrigate approximately 50-60% of the land area formerly irrigated. This results in substantial annual losses to farmers. Farmers, as distinguished from truck gardeners, irrigated about 15,500 acres prior to construction of the dam.

With the water sediment mixture, the effective length that irrigation water would run was on the order of 1100 to 1200 feet. By length of run I mean the distance that the water will go down a furrow to irrigate the planted crop. Some experimenting has been done to determine the effects in the area of an application of clear water. This testing has been done by using the clear water from pumps in the area. Clear water applied on land under the Bessemer Ditch can only be applied effectively to crop rows that do not exceed a length of 600 to 700 feet, if one is to achieve any order of efficiency in the application of the irrigation water to the land. Utilizing clear water it will ultimately be essential to modify the water distribution systems on the farms and the cost will be substantial. It will require more man hours of effort to apply the clear irrigation water to the land. With sediment laden water, the pore spaces in the field are partially filled with these sediments as the water and sediment seeps into it, allowing the water to flow into the land more slowly, allowing longer runs and making it possible to irrigate more efficiently. With the application of clear water, there is no opportunity to modify the texture of the soil and with the relatively open soil as a consequence of tillage, there is a rather rapid infiltration into the soil. Other factors that come into focus considering the farm unit, is the potential loss of land by changing the

irigation system. The construction of new ditches to shorten the runs, will occupy land and prevent its being utilized for actual production. Along the same lines, the additional cross ditches that will result by modifying existing distribution systems, does provide an additional obstacle to efficient harvesting of the crops.

In summary, in the main canal the major problems include increased seepage, reduced channel stability, the necessity for lining and the potential for significant growth of aquatic plants. In the laterals, these same types of problems exist. Some lining may be necessary, certainly channel stability and seepage are significant factors. The growth of aquatic plants is probably not so serious, but is a problem that must be contended with.

On the farm units, the major problems are: (1) the reduced volume of irrigation water delivered to the farm, (2) the reduced efficiency of application of clear water to the farms and (3) the necessity to modify the on farm water distribution system to accommodate these changes to the extent feasible.

FURTHER, the Affiant saith not.

Subscribed and sworn to before me this 21st day of September, 1976. My commission expires: My Commission expires April 17, 1977

Notary Public

IN THE UNITED STATES COURT OF CLAIMS

NO. 105-75

A-B CATTLE COMPANY, et al., Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	)	AFFIDAVIT OF JOHN W. PATTERSON

STATE OF COLORADO)
CITY AND) ss.
COUNTY OF DENVER)

JOHN W. PATTERSON, being first duly sworn, upon his oath deposes and says:

I was raised on an irrigated ranch of approximately 3,000 acres in Elko County, Nevada. I graduated in 1951 from Utah State University with a B.S. degree, majoring in agronomy and irrigation and drainage engineering. I returned to the family ranch and managed it for eight years, followed by attendance at the University of Arizona to obtain an additional B.S. degree in agricultural engineering. After graduating I was employed by the Salt River Project of Phoenix, Arizona, one of the most successful Federal irrigation projects in the United States, as a design engineer and Assistant Supervisor of Watershed Operations. After one year with the Salt River Project, I accepted employment for about three years with the Denver Board of Water Commissioners as chief of its water rights and investigation section. The Board of Water Commissioners supplies Denver, Colorado and its suburbs with water.

I was employed for approximately 4-1/2 years commencing in 1962 by the State of Colorado, first as Special Deputy State Engineer and later as Division Engineer for the Arkansas River System. As Special Deputy State Engineer I conducted studies of water use and water supply in the various river basins of the state with special emphasis in the Arkansas River basin; and as Division Engineer, I was responsible for the distribution of the waters of the Arkansas River and its tributaries in accordance with priority of right established by adjudicated water decree.

I was affiliated with Woodward-Clyde Consultants, an international consulting firm specializing in soils, water, environment, mining, geology and associated fields of engineering, and its predecessor firms from 1967 through August, 1976. At Woodward-Clyde I was principal in charge of the water rights, hydrology and agronomy division for the Rocky Mountain region. Clients of the firm include foreign governments and their contractors, federal, state and local agencies and private clients.

In early September 1976, I opened my own engineering consulting firm specializing in hydrology, water rights, irrigation, agronomy, agricultural planning, and associated fields. My experience involves water supply and administrative problems in Colorado, New Mexico, Utah, Idaho, Arizona, Wyoming and Nevada.

I was one of four engineers employed by the State of Colorado to assist in codification of its water laws. I have done consulting work for the United States Army Corps of Engineers, Department of Justice, the Bureau of Indian Affairs, the cities of Denver, Pueblo, Colorado Springs and other Colorado municipalities, the Southeastern Colorado Water Conservancy District in connection with the Bureau of Reclamation Frying Pan-Arkansas Project and small local

irrigation districts. I have done private consulting work for companies owning irrigation canals and reservoirs diverting waters from the Arkansas River, i.e., Twin Lakes, Amity, Farmers Highline, Bessemer, Highland, Catlin, and Las Animas Town. In addition, I have advised major ditch and reservoir companies in the South Platte and other river basins of the state. Consulting services have been provided to energy-oriented companies such as Union Oil Company of California, Getty Oil, Chevron Oil, Atlantic Richfield, Humble Oil, Utah International, Freeport Exploration, Ethyl Corporation, Rocky Mountain Energy, and Exxon.

The Bessemer Ditch Company Owns adjudicated rights authorizing it to divert water from its decreed point of diversion on the Arkansas River. The decrees are described as follows:

Appropriation Date	Adjudication Date	Decreed Flow Owned by Applicant
4/ /1861	3/23/1896	2.00 cfs*
12/ /1861	3/23/1896	20.00 cfs
5/31/1864	2/ 3/1894	3.74 cfs
6/ /1866	3/23/1896	3.00 cfs
1/ 8/1867	3/23/1896	2.50 cfs
5/31/1867	2/ 3/1894	5.13 cfs
11/ /1870	3/23/1896	1.47 cfs
1870	3/23/1896	3.40 cfs
9/18/1873	3/23/1896	2.00 cfs
1876	3/23/1896	3.00 cfs
1878	3/23/1896	0.41 cfs
5/ 4/1881	3/23/1896	14.00 cfs
6/20/1881	3/23/1896	2.00 cfs
3/ /1882	3/23/1896	8.00 cfs
5/ 1/1887	3/23/1896	322.00 cfs
	Total	392.65 cfs

The clear water delivered by the United States to the Bessemer Ditch is "hungry" water. It erodes the existing silt and clay lining from the bottom and sides of the main

*cfs is an abbreviation for a rate of flow of one cubic foot per second. One cfs is equal to 7.48 gallons per second, 448 gallons per minute, 646,272 gallons per day or 1.983 acre-feet per day.

ditch and laterals. Clear water is causing the sides of the main ditch and laterals to slough off and disintegrate with under-cutting. Weed control problems have developed, operating costs have increased, and water losses in the main ditch and laterals are increasing. Clear water has caused increased flooding of basements of homeowners in the Pueblo reach of the ditch. This situation is expected to continue.

Clear water use weakened the main ditch to such an extent that it was necessary on June 16, 1975, to shut down the ditch for five days to make emergency repairs to a 600-foot section. The 600-foot section was lined in February, 1976 at a cost of about $30,000. Weakened conditions caused by clear water use along other sections of the ditch now require that it be operated at a maximum capacity of about 220 cfs rather than the 325 cfs that was normally diverted directly from the river prior to clear water use.

The clear water effect (increased leakage, increased vegetation growth, sloughing, etc.,), has been moving progressively down ditch as the silt is removed from the sides and bottom of the ditch. A complete inventory of all results of clear water use and their total effects will not be known for several years. Clear water operations in 1974, 1975 and 1976 have resulted in a substantial increase in leakage through the main ditch and laterals. In my opinion, only about 3/4 as much water will be delivered to Bessemer farm lands after equilibrium is reached in the ditch system than was being delivered to those same lands prior to construction of Pueblo Reservoir. This reduction in water supply will not affect all users alike. Homeowners in the Pueblo reach of the ditch, to the extent they are short of clear water, can supplement their water supply by purchasing municipal water from Pueblo at rates higher than Bessemer assessments.

Throughout the truck gardening and farm irrigation areas the results are much more serious. An equivalent amount of clear water will only move down crop rows about two-thirds as far as river water because clear water is absorbed into the soil more rapidly than the river water. The result of the estimated reduction in quantity of water reaching the farm coupled with the estimated reduction in the utility of clear water on the farm or truck garden is to reduce the effective water supply by about one-half.

Various alternatives to extend the water supply are being considered. These include lining of the main canal, delivery laterals and on-farm laterals; adding on-farm laterals; shifting to less water consuming and therefore, less valuable crops; changing cropping techniques, shortening irrigation rows; sprinkler irrigation, some combination of alternatives, etc. These items involve additional investment, additional annual expense and a reduction in income.

In my opinion, the loss to Bessemer stockholders caused by the substitution of clear water for river water will amount to several million dollars.

Further, affiant sayeth not.

John W. Patterson

Subscribed and sworn to before me this 29th day of November, 1976.

(SEAL)

Louise Champlin
Notary Public

My commission expires: Sept. 2, 1979.

11

IN THE UNITED STATES COURT OF CLAIMS

NO. 105-75

A-B CATTLE COMPANY, et al., Plaintiffs, v. UNITED STATES OF AMERICA, Defendant.	)	AFFIDAVIT OF WILLIAM V. HITIZING

STATE OF COLORADO)
COUNTY OF PUEBLO) ss

WILLIAM V. HITIZING being first duly sworn upon his oath, deposes and says that:

1. He has been a member of the board of directors of The Bessemer Irrigating Ditch Company since 1946 and has been its President since 1964.

2. The company is a Colorado nonprofit mutual ditch company with 19,829 outstanding shares. As a shareholder in a Colorado mutual ditch company each Bessemer shareholder is assessed for ditch company expenses annually on a per share basis and is entitled to receive a pro rata share of the water from company. Approximately forty percent of the stockholders own 3 shares or less and use their water primarily for the irrigation of lawns, trees, shrubs, and gardens in conjunction with homes located in the Pueblo reach of the ditch. The March 31, 1975 list of stockholders attached to the Petition shows that this group consist of 406 shareholders owning a total of 570.122 shares. Approximately 2500 shares are owned by commercial truck gardeners located generally east of Pueblo and the remainder are owned by farm irrigators still further east who irrigate between 15,000 and 16,000 acres with their Bessemer Ditch water.

3. Since December of 1973, the United States has been delivering to Bessemer at a point approximately five (5) miles down ditch from its original headgate, clear water taken from Pueblo Reservoir. The United States has not brought an action for a change of point of diversion of Bessemer's original water rights nor has it brought a proceeding to obtain the right to deliver water to Bessemer of a quality different from that to which Bessemer and its stockholders are entitled. Use of clear water in the Ditch has stripped the silt lining from the sides and bottom of the Ditch. Moss and other water vegetation is now growing where no growth occurred before the use of clear water started. Similar problems occur in the laterals and in the on-farm laterals. Additional operating expense is incurred to clean out the water vegetation and the cave-ins to the ditch. Running clear water has weakened the Ditch so that in 1975 it was necessary to reduce the head from 325 cfs to about 220 cfs. After lining the weak section with plastic in February of this year we have been diverting at 220 cfs which appears to be safe. This lining cost approximately $30,000.

4. It appears that the water losses from use of clear water will approximate 25% annually. The water that does reach the irrigation use does not go as far down the rows as river water went. Irrigation of gentle slopes with clear water results in substantial erosion that did not occur before. Fertilization

is not as effective using clear water. Affiant is of the opinion that losses from clear water use in the agricultural areas will approximate from $75.00 to $125.00 per acre annually.

Further affiant saith not.

William V Hitizing

WILLIAM V. HITIZING

Subscribed and sworn to before me this 30th day of September, 1976.

Ann L Little

Notary Public

My commission expires April 8, 1976

IN THE UNITED STATES COURT OF CLAIMS

No. 105-75

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

AFFIDAVIT OF JOHN M. DICKSON

STATE OF COLORADO)
CITY AND COUNTY OF DENVER) ss.

JOHN M. DICKSON, upon his oath, deposes and says:

1. That he prepared the "History of Litigation" of United States of America v. 508.88 Acres of Land, More or Less, et al., No. C-1480, United States District Court, District of Colorado; in his opinion said History is accurate.

2. That supplied with such "History of Litigation" are copies of the Complaint in Condemnation, Declaration of Taking, three Opinions of Chief Judge Alfred J. Arraj, and other pleadings and motions in No. C-1480; such copies are true and accurate copies of the originals thereof.

3. That a map showing the head reach of Bessemer Ditch is filed herewith.

4. That said History, copies from the District Court's file, and Map are incorporated into this Affidavit by this reference.

Further the Affiant sayeth not.

John M. Dickson

John M. Dickson
802 Capitol Life Center
Denver, CO 80203
Telephone No: 1-303-861-8200
Attorney for all Plaintiffs except
The Bessemer Irrigating Ditch Company

Subscribed and sworn to before me by JOHN M. DICKSON this 30th day of November, 1976.

My commission expires: September 2, 1979.

(SEAL)

Louise Champlin

Louise Champlin, Notary Public

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

NO. C-1480

UNITED STATES OF AMERICA, PLAINTIFF,

vs.

508.88 ACRES OF LAND, MORE OR LESS, SITUATE IN PUEBLO COUNTY, COLORADO; THE BESSEMER IRRIGATING DITCH COMPANY, et al., and UNKNOWN OTHERS, Defendants.

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HISTORY OF LITIGATION

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

NO. C-1480

UNITED STATES OF AMERICA, Plaintiff,

vs.

508.88 ACRES OF LAND, MORE OR LESS, SITUATE IN PUEBLO COUNTY, COLORADO; THE BESSEMER IRRIGATING DITCH COMPANY, et al., and UNKNOWN OTHERS, Defendants.

The United States filed its Declaration of Taking and its Complaint on June 11, 1969, and obtained an order for delivery of possession June 17, 1969. The Complaint and Declaration of Taking described 508.88 acres consisting of the upper five miles of the Bessemer Ditch and a tract in the vicinity of the headgate on both sides of the river of some 446 acres. The Bessemer Irrigating Ditch Company filed its Answer stating that it was a mutual ditch company and that all its stockholders were necessary parties to the proceeding because they were the owners of the property being taken. The Answer also alleged that these stockholders had the legal right to silt laden river water and not the clear water which the United States proposed to deliver by substitution to them as set forth in the Declaration of Taking and the Complaint, and that use of clear water would result in additional damage to the stockholders in a number of specific ways which were enumerated.

The United States filed a Motion to Strike the Answer. Chief Judge Alfred A. Arraj in an opinion dated May 8, 1973 held that an appropriator is entitled to silt laden water, saying, page 8:

> All of these cases, of course, were instances where the defendant changed the quality of the water by adding some form of impurity, and they reflect the habit of thinking that the most desirable water is that which does not contain any foreign matter. The case at bar presents the novel question of whether removing impurities can likewise give rise to an actionable wrong. We think that it can, because the question of what constitutes a "diminution" in the quality of water must depend upon the use to which the water is put. Water containing a large amount of silt is more beneficial than pure water for irrigation purposes. 2 C. Kinney, Irrigation & Water Rights § 1131 (2d ed. 1912). Removal of the silt from an irrigator's water potentially injures him in the same way as the addition of impurities may injure people who appropriate water for other purposes. Consequently, if the law recognizes a property right in a certain quality of water, it should make no difference whether the quality is altered by adding harmful pollutants or by removing beneficial ones.
>
> We think it is most consistent with the language in the previously discussed Colorado cases and with the assumptions underlying the system of prior appropriation to recognize that an appropriator has a right to the quality of water naturally flowing in the stream at the time of his appropriation. The familiar argument supporting the undisputed rule that an appropriator has a vested right to the quantity of water which he diverts and applies to a beneficial use is that, having invested resources in diverting water and improving his property on the assumption that the necessary water would be available for his enterprise, he is entitled to expect that the water will remain available.

He also held that the ditch company could represent its stockholders as a trustee and therefore there was no defect in parties.

The United States filed a Motion asking the Court to reconsider its opinion or in the alternative, certify the question concerning Colorado water law to the Tenth Circuit Court of Appeals. This Motion resulted in a further opinion of September 20, 1973 in which Chief Judge Arraj refused to certify the water law question to the Tenth Circuit Court of Appeals and adhered to his opinion concerning quality. However, with respect to

proving damages it would be necessary for the Company to prove for each stockholder that the water of each stockholder was being used in conjunction with an economic unit in order for there to be a recovery in behalf of that particular stockholder.

Proving that the ditch system and water rights are part of an economic unit is not difficult where an irrigated farm, ranch or truck garden is involved. Where Bessemer Ditch water was being used for cemetery purposes, for a municipal golf course and to water lawns, shrubs, trees and gardens by homeowners in Pueblo, Colorado, posed a difficult problem for the company, who by Judge Arraj's first opinion of May 8, 1973 was required as trustee for each stockholder to present the case of each such stockholder. Some homeowners were heavily dependent on Bessemer water and others within the service area of city water could substitute it; albeit at a greater cost.

An action was commenced in the Court of Claims by each stockholder under the Tucker Act, No. 105-75. The principal question is whether a property interest was taken by the United States.

On September 29, 1975, the Colorado Supreme Court decided Jacobucci v. District Court, ____ Colo. _____, 541 P.2d 667, holding that the stockholders of a mutual ditch company were necessary parties in a condemnation proceeding by the City of Thornton, Colorado to acquire water rights, the title to which was in the mutual ditch company. This decision meant that all Bessemer stockholders must be joined in the condemnation proceeding. It also became probable that the case for some stockholders would be decided in the Federal District Court and for others in the Court of Claims, with the possibility that the

Federal District Court and the Circuit Court of Appeals might reach one answer with respect to the silt question and that the Court of Claims might reach a different conclusion. This, even though all federal courts involved would be attempting to determine whether a Colorado water right included the quality thereof.

The Company moved the Federal District Court to certify the silt-quality question to the Colorado Supreme Court for its decision under Colorado Appellate Rule 21.1. After substantial briefing and a number of formal and informal discussions and presentations, the Court in its opinion of June 18, 1976, decided to confine the condemnation proceeding to the precise land described in the Declaration of Taking and not to entertain that part of the case relating to damage to the remainder because all stockholders had protected themselves by timely filing the necessary petition in the Court of Claims.

The Court refused to certify the quality question to the Colorado Supreme Court, feeling that since this part of the case was being tried by the Court of Claims, the Court of Claims could certify the question if it wished to do so. The trial court was aware that Colorado Appellate Rule 21.1(a) did not include the Court of Claims as one of the federal courts from which the Colorado Supreme Court would accept certified questions. Nevertheless, Judge Arraj in his opinion stated that it was his view that upon request the Colorado Supreme Court would expand its rule to include the Court of Claims and in any event would answer a question certified to it by the Court of Claims.

Judge Arraj's June 18, 1976 opinion was immediately delivered to the Colorado Supreme Court and it was requested to expand Rule 21.1(a) to include the Court of Claims. The Colorado Supreme Court on July 24, 1976 expanded its rule to include the Court of Claims. See Attachemnt I to the Brief in Support of Motion to Certify Question to the Colorado Supreme Court which is a copy of Rule 21.1 as amended to date.

The parties stipulated as to the value of the 508.88 acres. The Trial Court entered judgment accordingly, which provided:

> IT IS FURTHER ORDERED that if, as a result of any change in the quality of water flowing from Pueblo Dam & Reservoir, any compensable harm has occurred or will occur to owners of water rights in Bessemer Ditch, they shall not be precluded by this Judgment from pursuing their claim for damages therefor in an appropriate action in an appropriate forum.

John M. Dickson
802 Capitol Life Center
Denver, CO 80203
Telephone No. 1-303-861-8200
Attorney for all Plaintiffs
except the Bessemer Irrigating
Ditch Company

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, Plaintiff, VS 508.88 ACRES OF LAND, More or Less, Situated in the County of Pueblo, State of Colorado; Bessemer Irrigating Ditch Company, et al., and Unknown Owners, Defendants.	CIVIL ACTION NO. C-1480 COMPLAINT IN CONDEMNATION

1. This is an action of a civil nature brought by the United States of America at the request of the Solicitor, Department of the Interior, for the taking of property under power of eminent domain and for the ascertainment and award of just compensation to the owners and parties in interest.

2. The authority for the taking is the act of June 17, 1902, and all acts amendatory thereof or supplementary thereto (32 Stat. 388, 43 U.S.C., 1958 ed., sec. 371, et seq.); the act of August 1, 1888 (25 Stat. 357, 40 U.S.C., 1958 ed., sec. 257) as amended; the act of February 26, 1931 (46 Stat. 1421, 40 U.S.C., 1958 ed., secs. 258a-258e); the act of August 16, 1962 (76 Stat. 389); and the Public Works Appropriation Act, 1969 (82 Stat. 705).

3. The use for which the property to be acquired is in connection with the construction, operation and maintenance of the Pueblo Dam and Reservoir, Fryingpan-Arkansas Project, and is required for immediate use by the Bureau of Reclamation, Department of the Interior.

4. The estate in the property to be acquired is described in the Exhibit A hereto attached, and by this reference made a part hereof.

5. The property so to be taken is described in the Exhibit B hereto attached.

6. The persons having or claiming an interest in the property whose names are ascertainable by a reasonably diligent search of the records and those whose names have otherwise been learned, are:

Tract No. 431, Parcels A, B, C, D, E, and F

Bessemer Irrigating Ditch Company
711 Thatcher Building
Pueblo, Colorado 81003

7. The Board of County Commissioners, Pueblo County, Colorado, may have or claim an interest in the property by reason of taxes and assessments due and exigible.

8. In addition to the persons named, there are or may be others who have or may claim some interest in the property to be taken, whose names are unknown to the plaintiff and such persons are made parties to the action under the designation "Unknown Owners."

WHEREFORE the plaintiff demands judgment that the property be condemned and that just compensation for the taking be ascertained and awarded and for such other relief as may be lawful and proper.

Trial by jury of the issue of just compensation is demanded by plaintiff.

JAMES L. TREECE
United States Attorney
P. O. Box 1776
Denver, Colorado 80201
297-4184

(a) The fee simple title to the lands, tenements, hereditaments, and appurtenances situated in the County of Pueblo, State of Colorado, particularly described in the legal descriptions and plats attached hereto as Exhibit B, and by this reference made a part hereof and designated as Tract No. 431, Parcels A, B, C, D, and E, said title to be free and clear of liens and encumbrances.

(b) The fee simple title to the lands, tenements, hereditaments, and appurtenances situated in the County of Pueblo, State of Colorado, particularly described in the legal descriptions and plats attached hereto as Exhibit B and by this reference made a part hereof and designated as Tract No. 431, Parcel F, said title to be free and clear of liens and encumbrances; reserving, however, to the Bessemer Irrigating Ditch Company a permanent easement to reconstruct, operate and maintain the existing ditch now situate on that portion of said Parcel F from the north right-of-way of the relocated State Highway 96 to the south boundary of Section 31, T. 20 S., R. 65 W., said segment of ditch being approximately 600 feet in length.

(c) The Bessemer Irrigating Ditch Company shall have the right to operate and maintain the diversion works and ditch situate on Tract No. 431, Parcels A, B and C easterly to the Boggs Creek Siphon outlet, Drawing No. 382-706-2625, particularly described in the legal descriptions and plats attached hereto and made a part hereof, at their expense until such time as the diversion of water by the Bessemer Irrigating Ditch Company under its decreed

rights is transferred from said existing river diversion works to the outlet works constructed by the United States in the Pueblo Dam to be located downstream and adjacent to the existing Barrier Dam crossing Parcel D of aforesaid tract. The United States shall utilize said lands in a manner as not to interfere with the operation and maintenance of such ditch by the Bessemer Irrigating Ditch Company.

(d) The Bessemer Irrigating Ditch Company shall have the right to operate and maintain at its expense the ditch now situate on Tract No. 431, Parcels D, E, and that part of Parcel C lying easterly of the Boggs Creek Siphon outlet, Drawing No. 382-706-2625, until such time as the United States has issued notice to proceed with construction to the construction contractor for the Pueblo Dam; thereafter, the United States, at its sole expense, shall operate, maintain, and convey water as diverted by the Bessemer Irrigating Ditch Company under (c) above until transfer of water diversion to the Pueblo Dam outlet works, and then divert the decreed water in accordance with Colorado law in the ditch easterly through Parcels D and E to Parcel F as described in (b) above, subject to flow restrictions during the transfer of water diversions from the river diversion works to the outlet works in the Pueblo Dam as follows:

October 15 to December 15	71 cfs maximum	(diverted by Bessemer under (c) above)
December 15 to January 15	0 cfs	
January 15 to March 1	71 cfs maximum	(diverted by United States from Pueblo Dam outlet works)
March 1 to April 1	140 cfs maximum	(diverted by United States from Pueblo Dam outlet works)
April 1 to May 1	230 cfs maximum	(diverted by United States from Pueblo Dam outlet works)
After May 1	392.65 cfs decreed amount	(diverted by United States from Pueblo Dam outlet Works)

After May 1 the United States, at its sole expense, will divert the decreed water in accordance with Colorado law from Pueblo Dam in Parcel D and operate, maintain, and convey water easterly through Parcels D and E to Parcel F to the Bessemer Irrigating Ditch Company as described in (b) above.

(e) The Bessemer Irrigating Ditch Company shall have the right to salvage and remove all buildings and structures situate on Tract No. 431, Parcels A, B, and that portion of Parcel C easterly to the Boggs Creek Siphon outlet, Drawing No. 382-706-2625, at any time prior to March 1 during the period diversion is transferred as outlined in (d) above. In event the said buildings and structures are not removed by said March 1, such right shall cease, end and determine and the United States may dispose of said improvements and structures free and clear from all liability for damages, direct or indirect, accruing as a result of or in connection with such disposal by the United States.

EXHIBIT 1

PUEBLO IRRIGATING DITCH COMPANY
Pt. E½ Sec. 29, Pt. NE¼ Sec. 32, Pt. Sec. 33,
Pt. S½ Sec. 34, Pt. Sec. 35, Pt. S½ Sec. 36,
T20S, R66W; and Pt. SW¼ Sec. 31, T20S, R65W, 6th P.M.
Drawings Nos. 382-706-2619, -2624, -2625, -2626, and -2627
(Revised 3-27-69)

TRACT 431

Six (6) parcels of land lying in and being a part of Sections Twenty-nine (29), Thirty-two (32), Thirty-three (33), Thirty-four (34), Thirty-five (35), and Thirty-six (36), Township Twenty (20) South, Range Sixty-six (66) West, and part of Section Thirty-one (31), Township Twenty (20) South, Range Sixty-five (65) West, of the Sixth (6th) Principal Meridian, situate in Pueblo County, State of Colorado, containing 508.88 acres, more or less, more particularly described as follows:

Parcel A

All that portion of the East Half (E½) of Section Twenty-nine (29) lying south of the south boundry of the W. A. Mays property, as described in Parcel A, Tract No. 426, Civil Action No. 67-C-291; the Northeast Quarter of the Northeast Quarter (NE¼NE¼) of Section Thirty-two (32); the Northwest Quarter of the Northeast Quarter (NW¼NE¼) north of the Arkansas River in Section Thirty-two (32); that portion of Section Thirty-three (33) lying between and bounded by land conveyed to the United States by Howard Brass, et al, by deed recorded in Book 1639, Page 311, by Paul P. Wooters, et ux, by deed recorded in Book 1650, Page 453, and by land described in Land Purchase Contract between the United States and the Estate of George Vercelli, recorded in Book 1649, Page 633, all in Township Twenty (20) South, Range Sixty-six (66) West, Sixth (6th) Principal Meridian, situate in Pueblo County, State of Colorado:

Excepting therefrom three (3) parcels of land conveyed to the Denver and Rio Grande Western Railroad as described in Book 4 at Pages 228, 236, and 342, containing 12.6 acres, more or less, and a parcel of land conveyed to Pueblo County, described in Book 821 at Page 68, containing 4.3 acres, more or less, all in the records of Pueblo County, State of Colorado, containing 446.0 acres, more or less.

Parcel B

A strip of land 100 feet in width, being 50 feet wide on either side of the centerline of the ditch or canal known as the Bessemer Ditch as said ditch is constructed through, on, over, and across the South Half (S½) of Section Thirty-four (34) of said Township and Range. Said centerline is described as beginning at a point on the west line of said Section Thirty-four (34) which point lies 1,647 feet north of the Southwest (SW) Corner of said Section Thirty-four (34), thence meandering in an easterly direction for a distance of 6,000 feet, more or less, to a point on the east line of said Section Thirty-four (34), which point lies 1,045 feet north of the Southeast (SE) Corner of said Section Thirty-four (34).

The above strip of land being the same strip of land conveyed in said Section Thirty-four (34) by Warranty Deed recorded in Book 68 at Page 404, Instrument No. 33824, records of Pueblo County,Colorado, containing 13.76 acres, more or less.

Parcel C

A strip of land 100 feet in width, being 50 feet wide on either side of the centerline of the said Bessemer Ditch as said ditch is constructed through, on, over, and across said Section Thirty-five (35). Said centerline of said ditch is described as beginning at a point on the west line of said Section Thirty-five (35) which point lies 1,045 feet north of the Southwest (SW) Corner of said Section Thirty-five (35), thence meandering in an easterly direction a distance of 7,605 feet to a point on the east line of said Section Thirty-five (35) which point lies 868 feet north of the Southeast (SE) Corner of said Section Thirty-five (35).

Parcel C (continued)

This strip of land being the same strip of land conveyed in said Section Thirty-five (35) by Warranty Deed recorded in Book 68 at Page 404, Instrument No. 33824, records of Pueblo County, Colorado, containing 17.60 acres, more or less.

Parcel D

A strip of land 100 feet wide being 50 feet wide on each side of the centerline of said Bessemer Ditch, as constructed on, over, and across the South Half ($S\frac{1}{2}$) of Section Thirty-six (36) of said Township and Range. Said centerline described as beginning on the west line of said Section, 866 feet north of the Southwest (SW) Corner of said Section Thirty-six (36), thence northeasterly through the said South Half ($S\frac{1}{2}$) for a distance of 6,550 feet, more or less, to a point on the east line of said Section, 1648 feet north of the Southeast (SE) Corner of said Section Thirty-six (36).

This being the same strip of land as conveyed in Book 69, Page 346, Instrument No. 34962 of records of Pueblo County, Colorado, containing 15.03 acres, more or less.

Parcel E

A strip of land 150 feet wide being 100 feet wide on left or north side of the centerline and 50 feet wide on the right or south side of the centerline of said Bessemer Ditch as said ditch is constructed through, on, over, and across the Southwest Quarter ($SW\frac{1}{4}$) of Section Thirty-one (31), said Township and Range. Said centerline described as beginning at a point on the west line of said Section Thirty-one (31) a distance of 1,648 feet north of the Southwest Corner of said Section Thirty-one (31), thence meandering a distance of 4,209 feet, more or less, to a point on the east line of the Southwest Quarter ($SW\frac{1}{4}$) of said Section Thirty-one (31) which point is 282 feet, north of the Southeast Corner of the said Southwest Quarter ($SW\frac{1}{4}$) of said Section Thirty-one (31). Said centerline crosses the north line of the South Half of the Southwest Quarter ($S\frac{1}{2}SW\frac{1}{4}$), 1,875 feet east of the Northwest Corner of said South Half of the Southwest Quarter ($S\frac{1}{2}SW\frac{1}{4}$) of said Section Thirty-one (31).

This strip of land being the same land conveyed in deeds recorded in Book 69 at Page 297 and Book 67 at Page 595, records of Pueblo County, Colorado, containing 14.49 acres, more or less.

Parcel F

A strip of land being that portion of the said Bessemer Ditch lying in the South Half of the Southwest Quarter ($S\frac{1}{2}SW\frac{1}{4}$) of said Section Thirty-one (31) described as follows:

Beginning at a point on the southernmost line of the right-of-way of the ditch or irrigating canal of the Bessemer Irrigating Ditch Company 190 feet more or less westerly from the west end of the structure known as Flume No. 8 of the said Company and easterly measured along said right-of-way line 1,054 feet more or less from Mile Stone No. 5 from the head of said ditch; thence curving southerly and westerly to point of intersection with the south line of said Section whence the South Quarter ($S\frac{1}{4}$) Corner of said Section is now marked by a stone in place bears 573 feet east; thence easterly along said south line 150 feet more or less; thence curving easterly and northerly parallel to and 150 feet from the line described above as curving southerly and westerly to point of intersection with the aforesaid southernmost right-of-way line; thence westerly along said right-of-way line to point of beginning.

This is the same strip of land conveyed in Book 247, Page 437, Instrument No. 121104 in records of Pueblo County, Colorado, containing 2.0 acres, more or less.

I hereby certify that I have carefully checked the foregoing legal description and find that it is correct to the best of my knowledge.

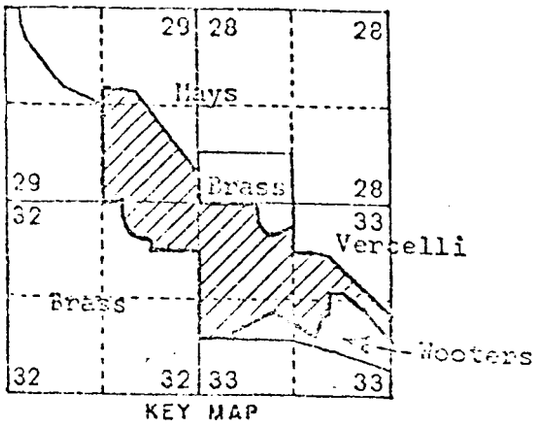
28

E. Lloyd Anderson Civil Engineering Technician 3-28-69

The estimated just compensation for this taking is $31,200.00.

Titleholder: Bessemer Irrigating Ditch Company, 711 Thatcher Building, Pueblo, Colorado 81003

Tenants: None



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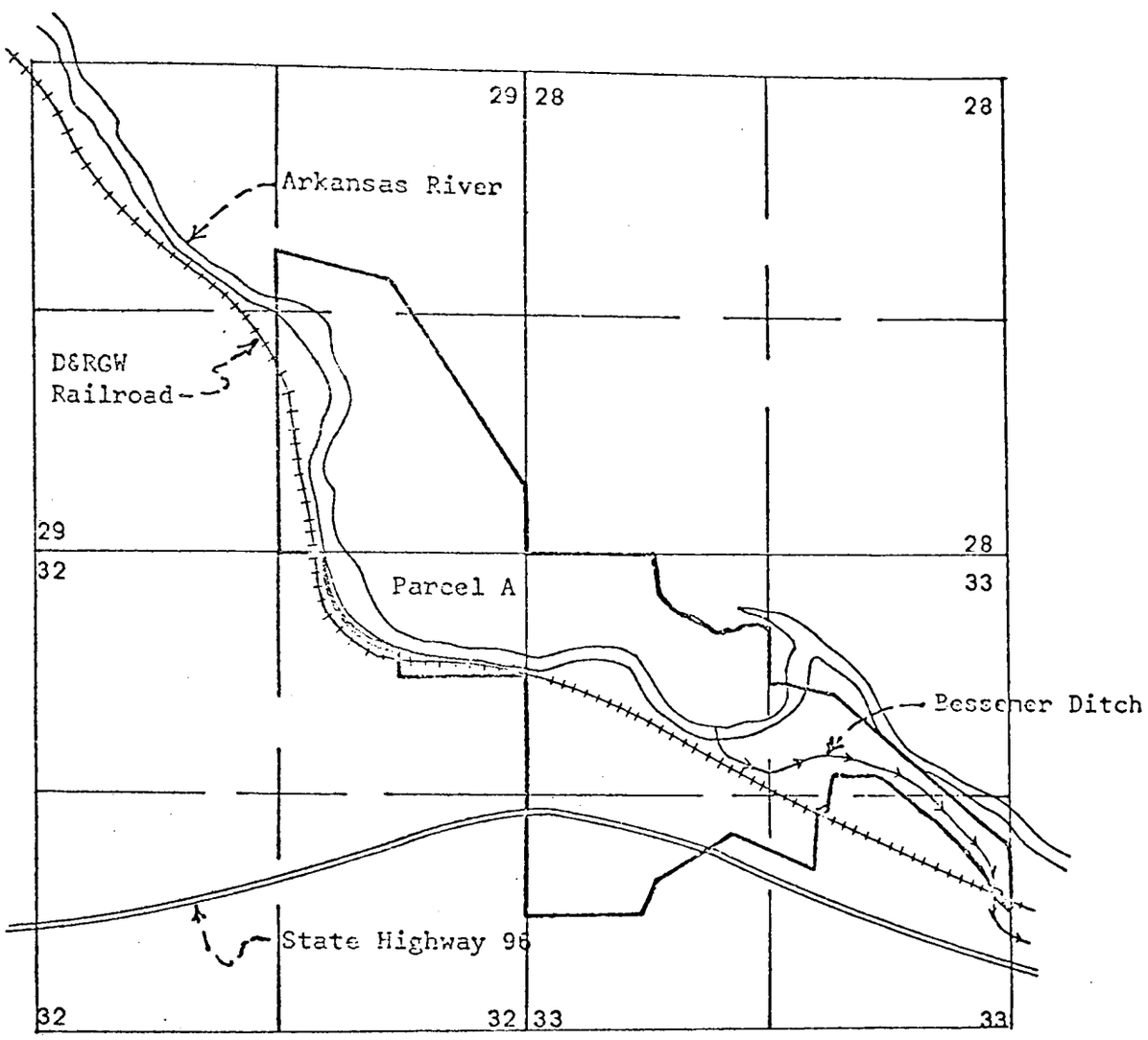


Reference
Parcel B - Drawing No. 382-706-2624
Parcel C - Drawing No. 382-706-2625
Parcel D - Drawing No. 382-706-2626
Parcel E & F - Drawing No. 382-706-2627

Parcel "A" 446 acres more or less

CRS	BEARING	LENGTH	CRS	BEARING	LENGTH

2000 0 2000
SCALE IN FEET

TRACT NO. 431
BESSEMER IRRIGATING DITCH COMPANY
Pt. of Sec. 33 Pt. of Sec. 32
Pt. of Sec 29, T20S, R66W, 6 P. M.

Rev. 2nd 3/27/69	Added Dwg. 382-706-2628 and Tracts E & F

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

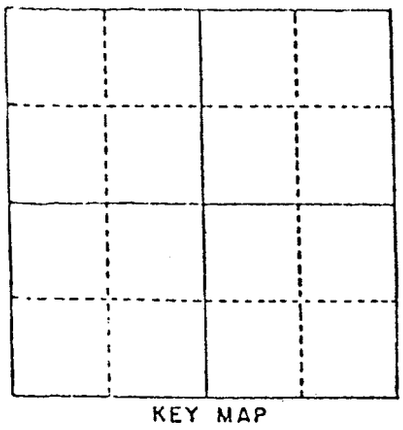
FRYINGPAN-ARKANSAS PROJECT - COLORADO

RIGHTS-OF-WAY

PUEBLO DAM AND RESERVOIR

DRAWN LDD SUBMITTED C. Lawandowski
TRACED ELA RECOMMENDED C.C. Stewart
CHECKED ELA APPROVED A.D. Jolley

Pueblo, Colo. 1/7/69 382-706-2619



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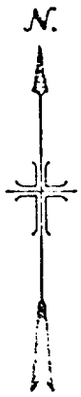
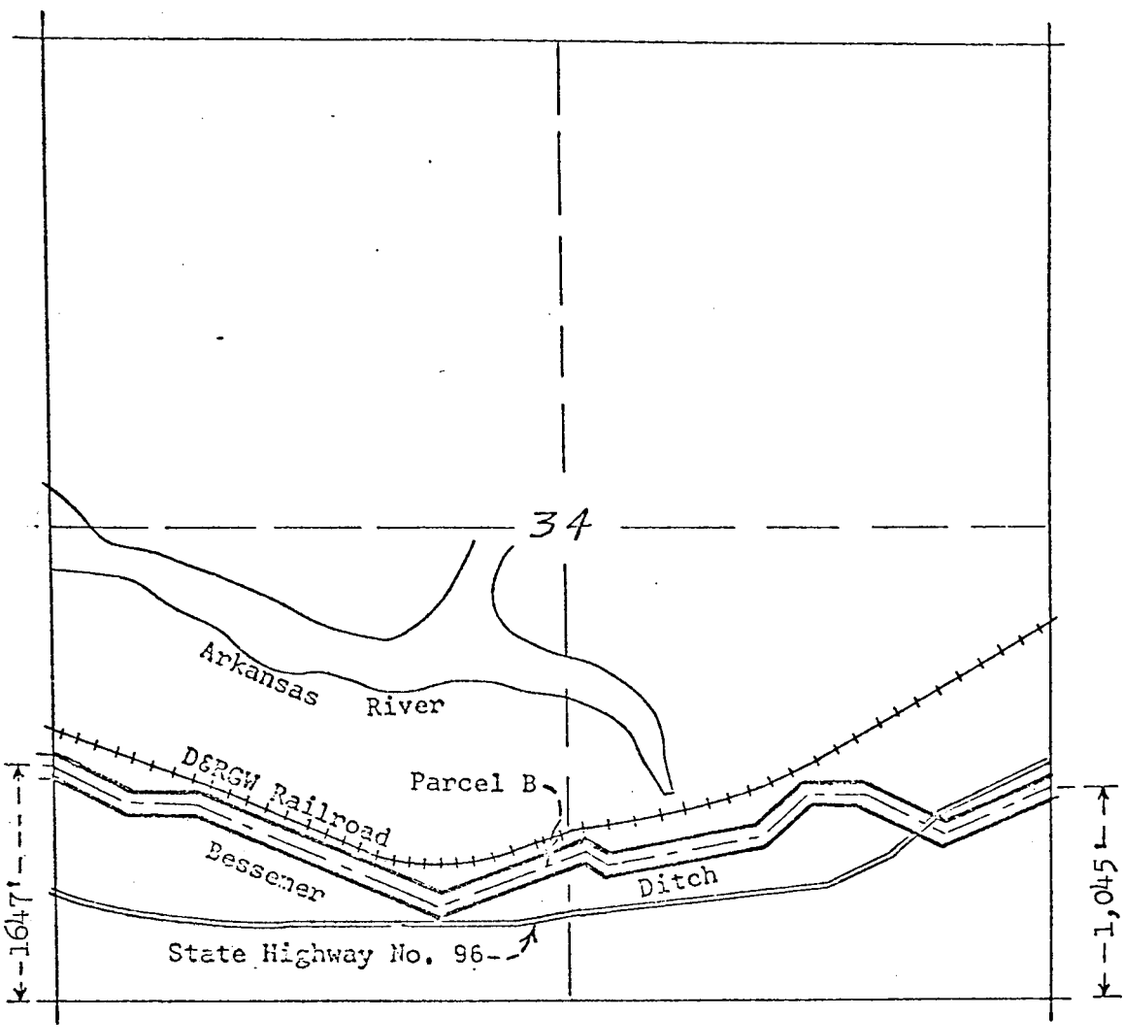




Reference

Parcel "A" Dwg. No. 382-706-2619
Parcel "C" Dwg. No. 382-706-2625
Parcel "D" Dwg. No. 382-706-2626
Parcel E and F - Dwg. No. 382-706-2627

Parcel "B" 13.76 acres more or less

CRS	BEARING	LENGTH	CRS	BEARING	LENGTH

1000 0 1000
SCALE IN FEET

TRACT NO. 431
BESSEMER IRRIGATING DITCH COMPANY
Pt. of S½, Sec. 34, T20S, R66W, 6th P.M.

Rev. LDD 3/27/69	Added Dwg. 382-706-2626 and Tracts E & F

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

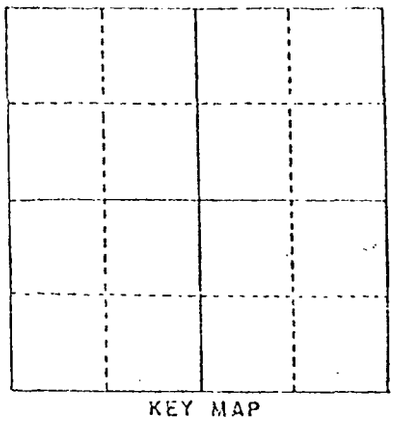
FRYINGPAN-ARKANSAS PROJECT - COLORADO

RIGHTS-OF-WAY

PUEBLO DAM AND RESERVOIR

DRAWN L.D.D. SUBMITTED
TRACED L.D.D. RECOMMENDED
CHECKED APPROVED

Pueblo, Colo 2-14-69 | 382-706-2624



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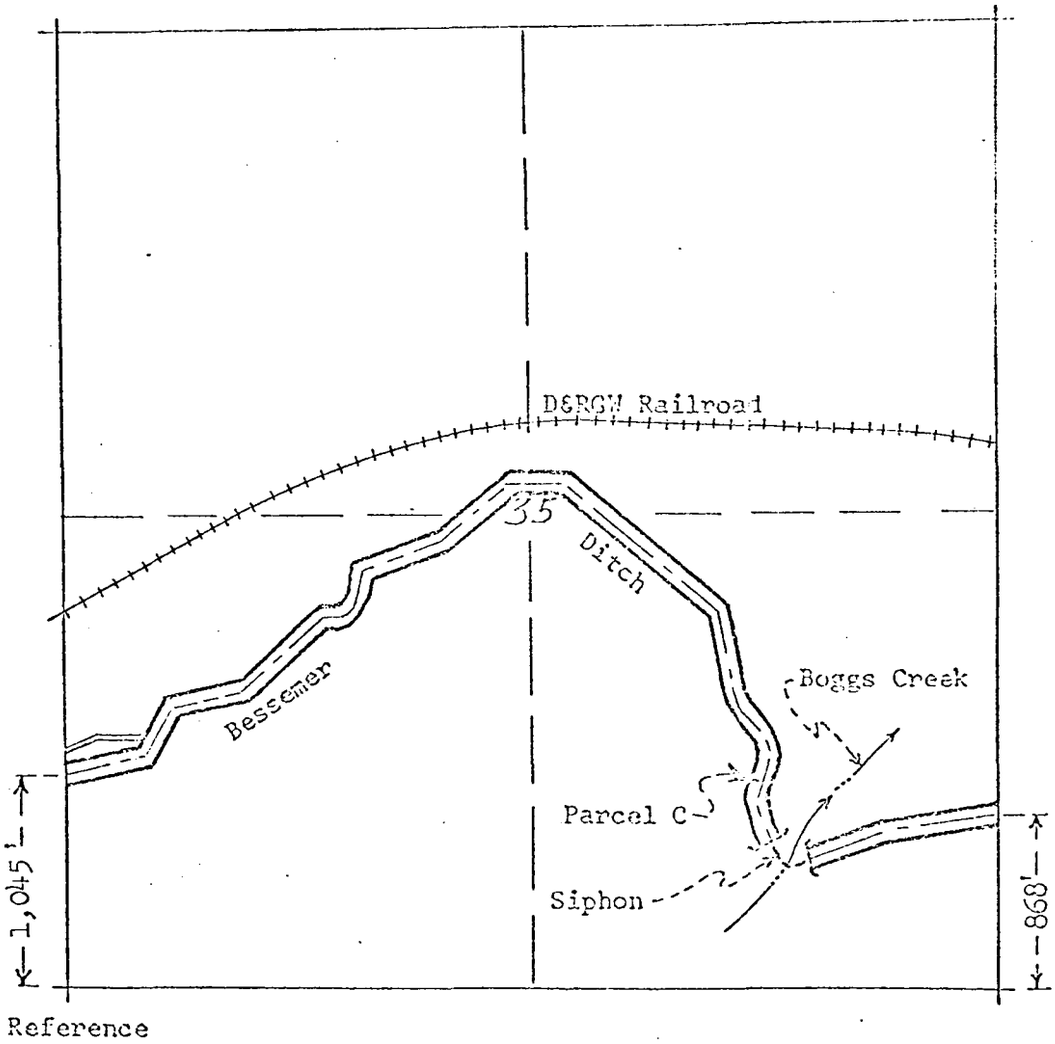


Reference

Parcel "A" Dwg. No. 382-706-2619
Parcel "B" Dwg. No. 382-706-2624
Parcel "D" Dwg. No. 382-706-2626
Parcels E & F - Dwg. No. 382-706-2627
Parcel "C" 17.60 acres more or less

CRS	BEARING	LENGTH	CRS	BEARING	LENGTH

1000 0 1000
SCALE IN FEET

TRACT NO. 431
BESSEMER IRRIGATING DITCH COMPANY
Pt. of Sec. 35, T20S, R66W, 6th P.M.

Rev. 4 3/27/59	Added Dwg. 382-706-2626 and Tracts E & F

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

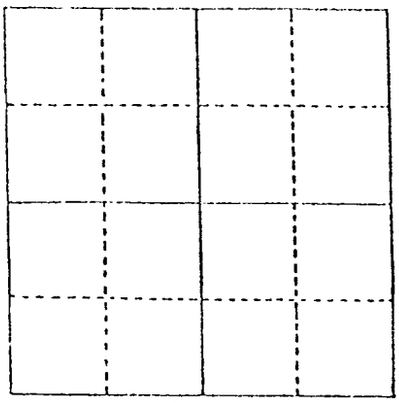
FRYINGPAN-ARKANSAS PROJECT - COLORADO

RIGHTS-OF-WAY

PUEBLO DAM AND RESERVOIR

DRAWN L.D.D. SUBMITTED
TRACED L.D.D. RECOMMENDED
CHECKED APPROVED

Pueblo, Colo 2-24-59 | 382-706-2625



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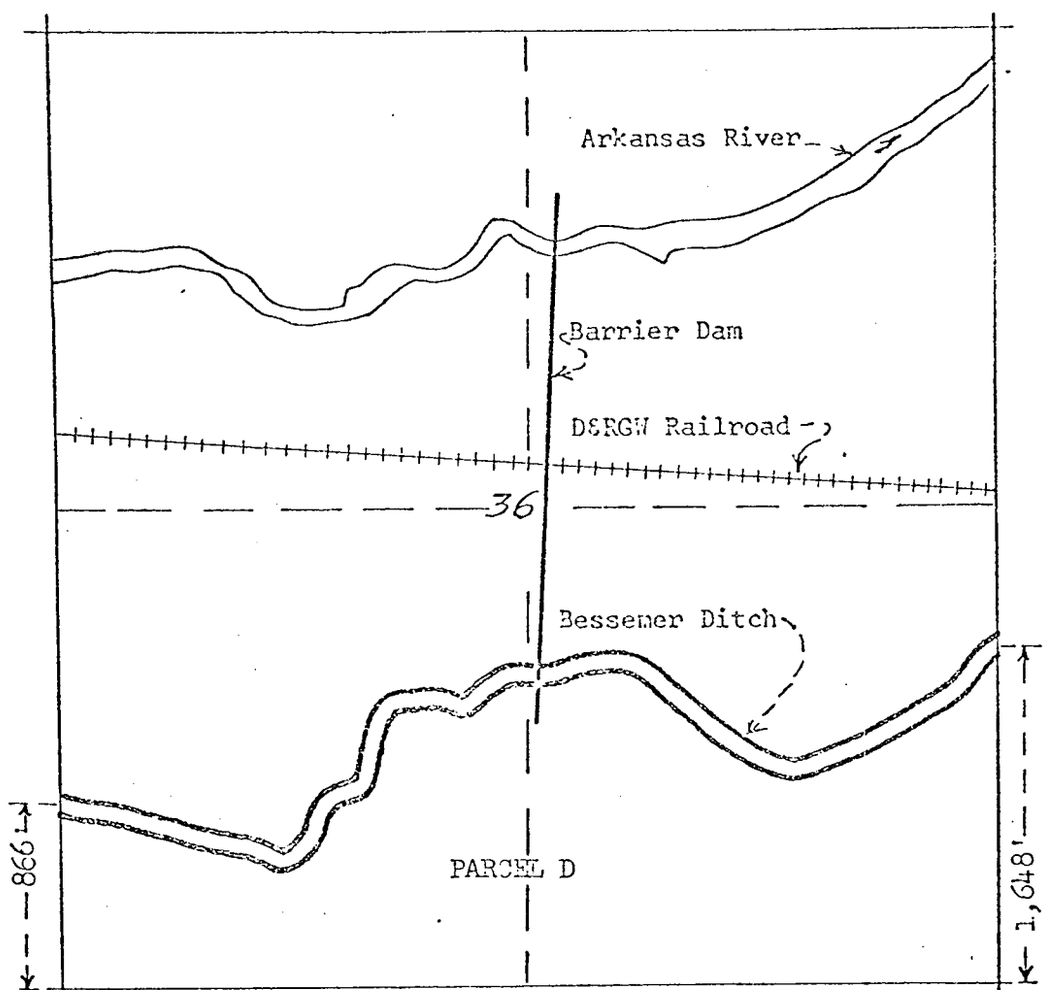


Parcel A - Dwg. No. 382-706-2619
Parcel B - Dwg. No. 382-706-2624
Parcel C - Dwg. No. 382-706-2625
Parcels E and F - Dgw. No. 382-706-2627

TRACT 431
BESSEMER IRRIGATING DITCH COMPANY
Pt. S½, Sec. 36, T20S, R66W,
6th P.M.

Parcel D - 15.03 acres, more or less

CRS	BEARING	LENGTH	CRS	BEARING	LENGTH

1000 0 1000
SCALE IN FEET

Rev. LPD 3/27/69	Added Dwg. 382-706-2626 and Tracts E & F

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

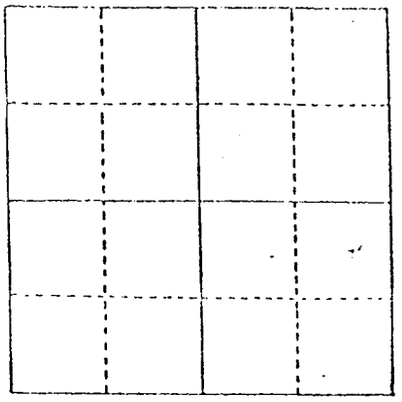
FRYINGPAN-ARKANSAS PROJECT - COLORADO

RIGHTS-OF-WAY

PUEBLO DAM AND RESERVOIR

DRAWN LPD SUBMITTED
TRACED LPD RECOMMENDED
CHECKED EJB APPROVED

Pueblo, Colo. 2/19/69 | 382-706-2626



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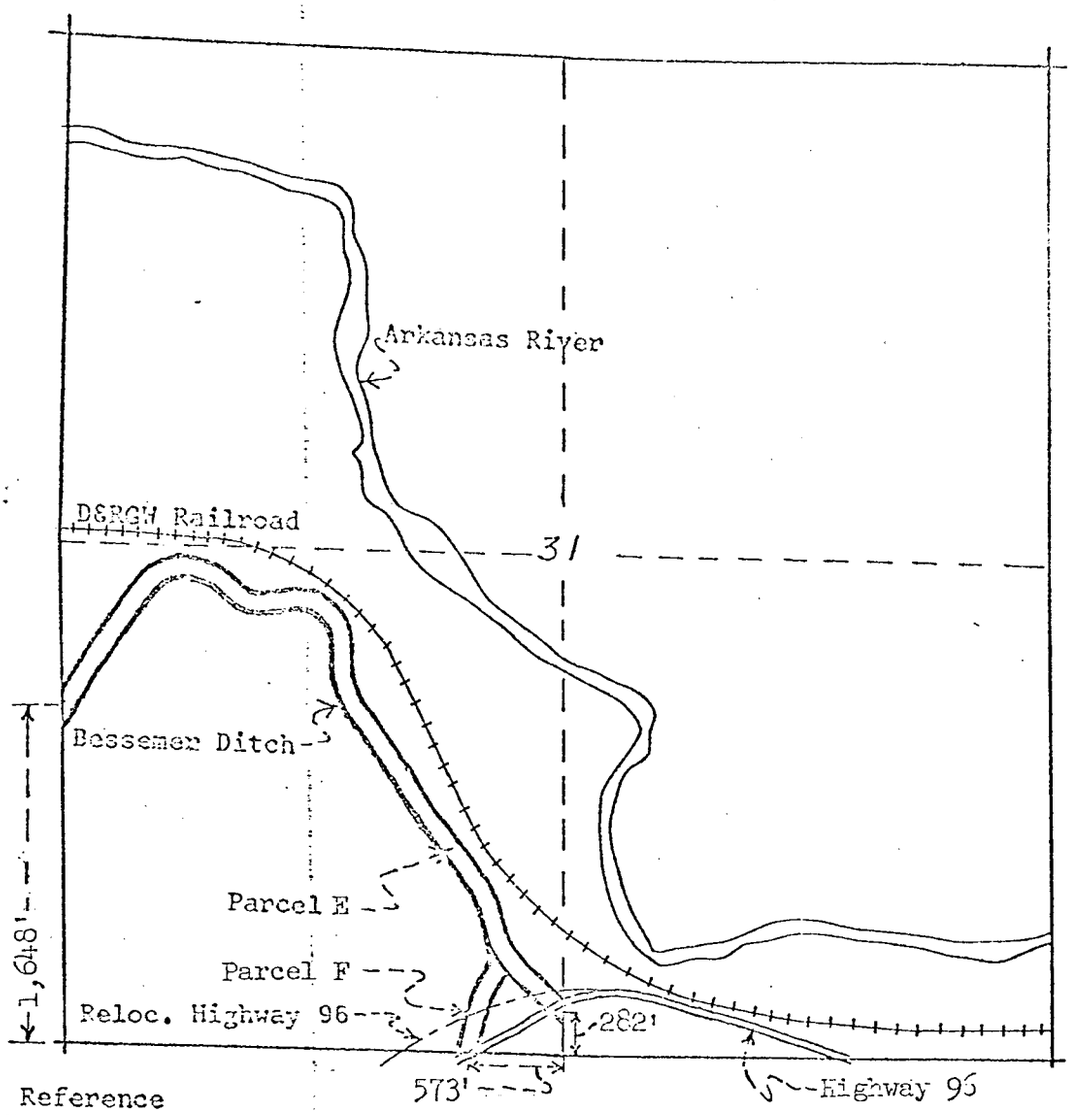


Reference
Parcel "A" Dwg. No. 382-706-2619
Parcel "B" Dwg. No. 382-706-2624
Parcel "C" Dwg. No. 382-706-2625
Parcel D - Dwg. No. 382-706-2626

Parcels E and F - 16.49 acres, more or less

CRS	BEARING	LENGTH	CRS	BEARING	LENGTH

1000 0 1000
SCALE IN FEET

TRACT NO. 431
BESSEMER IRRIGATING DITCH COMPANY
Pt. of SW¼, Sec. 31, T20S, R65W,
6th P.M.

Rev. 4/27 3/27/69	Added Dwg. 382-706-2626 and Tracts E & F

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

FRYINGPAN-ARKANSAS PROJECT - COLORADO
RIGHTS-OF-WAY
PUEBLO DAM AND RESERVOIR

DRAWN L.D.D. SUBMITTED
TRACED L.D.D. RECOMMENDED
CHECKED APPROVED

Pueblo, Colo. 2/25/69 | 382-706-2627

IN THE DISTRICT COURT OF THE UNITED STATES

IN AND FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, Plaintiff, v. 508.88 Acres of Land, More or Less, Situated in the County of Pueblo, State of Colorado; Bessemer Irrigating Ditch Company, et al., Defendants.	COND. NO. C-1480 DECLARATION OF TAKING

Pursuant to authority delegated on February 17, 1959, by the Secretary of the Interior under subparagraphs (6) and (7) of 210.2.2 Departmental Manual of the Department of the Interior (24 F.R. 1348) to the Solicitor of the Department of the Interior, I hereby make and cause to be filed this Declaration of Taking under section 1 of the act of February 26, 1931 (46 Stat. 1421, 40 U.S.C., 1958 ed., sec. 258a), and declare that:

FIRST: (a) The lands hereinafter described are taken for the use of the United States under the authority of the act of June 17, 1902, and all acts amendatory thereof or supplementary thereto (32 Stat. 388, 43 U.S.C., 1958 ed., sec. 371, et seq.); the act of August 1, 1888 (25 Stat. 357, 40 U.S.C., 1958 ed., sec. 257) as amended; the act of February 26, 1931 (46 Stat. 1421, 40 U.S.C., 1958 ed., secs. 258a-258e); the act of August 16, 1962 (76 Stat. 389); and the Public Works Appropriation Act, 1969 (82 Stat. 705).

(b) The said lands have been selected by me for acquisition by the United States for use in connection with the construction, operation and maintenance of the Pueblo Dam and Reservoir, Fryingpan-Arkansas Project, and are required for immediate use by the Bureau of Reclamation, Department of the Interior.

(c) In my opinion it is necessary, advantageous and in the interest of the United States that said lands be acquired by judicial proceedings, as authorized by the acts of Congress approved August 1, 1888 (25 Stat. 357, 40 U.S.C. 1958 ed., sec. 257),

as amended; and February 26, 1931 (46 Stat. 1421, 40 U.S.C., 1958 ed., secs. 258a-258e), and acts amendatory thereof or supplementary thereto.

SECOND (a) Pursuant to law I have ascertained and selected for acquisition for the purposes set forth herein, and in accordance with the foregoing acts of Congress, the fee simple title to the lands, tenements, hereditaments, and appurtenances situated in the County of Pueblo, State of Colorado, particularly described in the legal descriptions and plats attached hereto and by this reference made a part hereof and designated as Tract No. 431, Parcels A, B, C, D, and E, said title to be free and clear of liens and encumbrances.

(b) Pursuant to law I have ascertained and selected for acquisition for the purposes set forth herein, and in accordance with the foregoing acts of Congress, the fee simple title to the lands, tenements, hereditaments, and appurtenances situated in the County of Pueblo, State of Colorado, particularly described in the legal descriptions and plats attached hereto and by this reference made a part hereof and designated as Tract No. 431, Parcel F, said title to be free and clear of liens and encumbrances; reserving, however, to the Bessemer Irrigating Ditch Company a permanent easement to reconstruct, operate and maintain the existing ditch now situate on that portion of said Parcel F from the north right-of-way of the relocated State Highway 96 to the south boundary of Section 31, T. 20 S., R. 65 W., said segment of ditch being approximately 600 feet in length.

(c) The Bessemer Irrigating Ditch Company shall have the right to operate and maintain the diversion works and ditch situate on Tract No. 431, Parcels A, B and C easterly to the Boggs Creek Siphon outlet, Drawing No. 382-706-2625, particularly described in the legal descriptions and plats attached hereto and made a part hereof, at their expense until such time as the diversion of water by the Bessemer Irrigating Ditch Company under its decreed

rights is transferred from said existing river diversion works to the outlet works constructed by the United States in the Pueblo Dam to be located downstream and adjacent to the existing Barrier Dam crossing Parcel D of aforesaid tract. The United States shall modify said ditch in a manner so as not to interfere with the operation and maintenance of such ditch by the Bessemer Irrigating Ditch Company.

(d) The Bessemer Irrigating Ditch Company shall have the right to operate and maintain at its expense the ditch now situate on Tract No. 431, Parcels D, E, and that part of Parcel C lying easterly of the Boggs Creek Siphon outlet, Drawing No. 382-706-2625, until such time as the United States has issued notice to proceed with construction to the construction contractor for the Pueblo Dam; thereafter, the United States, at its sole expense, shall operate, maintain, and convey water as diverted by the Bessemer Irrigating Ditch Company under (c) above until transfer of water diversion to the Pueblo Dam outlet works, and then divert the decreed water in accordance with Colorado law in the ditch easterly through Parcels D and E to Parcel F as described in (b) above, subject to flow restrictions during the transfer of water diversions from the river diversion works to the outlet works in the Pueblo Dam as follows:

October 15 to December 15	71 cfs maximum	(diverted by Bessemer under (c) above)
December 15 to January 15	0 cfs	
January 15 to March 1	71 cfs maximum	(diverted by United States from Pueblo Dam outlet works)
March 1 to April 1	140 cfs maximum	(diverted by United States from Pueblo Dam outlet works)
April 1 to May 1	230 cfs maximum	(diverted by United States from Pueblo Dam outlet works)
After May 1	392.65 cfs decreed amount	(diverted by United States from Pueblo Dam outlet works)

After May 1 the United States, at its sole expense, will divert the decreed water in accordance with Colorado law from Pueblo Dam in Parcel D and operate, maintain, and convey water easterly through Parcels D and E to Parcel F to the Bessemer Irrigating Ditch Company as described in (c) above.

(e) The Bessemer Irrigating Ditch Company shall have the right to salvage and remove all buildings and structures situate on Tract No. 431, Parcels A, B, and that portion of Parcel C easterly to the Boggs Creek Siphon outlet, Drawing No. 382-706-2625, at any time prior to March 1 during the period diversion is transferred as outlined in (d) above. In event the said buildings and structures are not removed by said March 1, such right shall cease, end and determine and the United States may dispose of said improvements and structures free and clear from all liability for damages, direct or indirect, accruing as a result of or in connection with such disposal by the United States.

THIRD: The sum estimated by me as just compensation for the lands taken is Thirty-One Thousand Two Hundred and No/100 Dollars ($31,200.00), which sum I hereby deposit in the registry of this Court for the use and benefit of the party or parties entitled thereto. I am of the opinion that the ultimate award for the lands taken probably will be within any limits prescribed by Congress as the price to be paid.

IN WITNESS WHEREOF, I have signed this Declaration of Taking on this 3rd day of July, A. D., 1969, in the City of Washington, District of Columbia.

Solicitor
Department of the Interior

PUEBLO BESSEMER DITCH COMPANY
Pt. E½ Sec. 29, Pt. NE¼ Sec. 32, Pt. Sec. 33,
Pt. S½ Sec. 34, Pt. Sec. 35, Pt. S½ Sec. 36,
T20S, R66W; and Pt. SW¼ Sec. 31, T20S, R65W, 6th P.M.
Drawings Nos. 382-706-2619, -2624, -2625, -2626, and -2627
(Revised 3-27-69)

TRACT 431

Six (6) parcels of land lying in and being a part of Sections Twenty-nine (29), Thirty-two (32), Thirty-three (33), Thirty-four (34), Thirty-five (35), and Thirty-six (36), Township Twenty (20) South, Range Sixty-six (66) West, and part of Section Thirty-one (31), Township Twenty (20) South, Range Sixty-five (65) West, of the Sixth (6th) Principal Meridian, situate in Pueblo County, State of Colorado, containing 508.88 acres, more or less, more particularly described as follows:

Parcel A

All that portion of the East Half (E½) of Section Twenty-nine (29) lying south of the south boundry of the W. A. Mays property, as described in Parcel A, Tract No. 426, Civil Action No. 67-C-291; the Northeast Quarter of the Northeast Quarter (NE¼NE¼) of Section Thirty-two (32); the Northwest Quarter of the Northeast Quarter (NW¼NE¼) north of the Arkansas River in Section Thirty-two (32); that portion of Section Thirty-three (33) lying between and bounded by land conveyed to the United States by Howard Brass, et al, by deed recorded in Book 1639, Page 311, by Paul P. Wooters, et ux, by deed recorded in Book 1650, Page 453, and by land described in Land Purchase Contract between the United States and the Estate of George Vercelli, recorded in Book 1649, Page 633, all in Township Twenty (20) South, Range Sixty-six (66) West, Sixth (6th) Principal Meridian, situate in Pueblo County, State of Colorado:

Excepting therefrom three (3) parcels of land conveyed to the Denver and Rio Grande Western Railroad as described in Book 4 at Pages 228, 236, and 342, containing 12.6 acres, more or less, and a parcel of land conveyed to Pueblo County, described in Book 821 at Page 68, containing 4.3 acres, more or less, all in the records of Pueblo County, State of Colorado, containing 446.0 acres, more or less.

Parcel B

A strip of land 100 feet in width, being 50 feet wide on either side of the centerline of the ditch or canal known as the Bessemer Ditch as said ditch is constructed through, on, over, and across the South Half (S½) of Section Thirty-four (34) of said Township and Range. Said centerline is described as beginning at a point on the west line of said Section Thirty-four (34) which point lies 1,647 feet north of the Southwest (SW) Corner of said Section Thirty-four (34), thence meandering in an easterly direction for a distance of 6,000 feet, more or less, to a point on the east line of said Section Thirty-four (34), which point lies 1,045 feet north of the Southeast (SE) Corner of said Section Thirty-four (34).

The above strip of land being the same strip of land conveyed in said Section Thirty-four (34) by Warranty Deed recorded in Book 68 at Page 404, Instrument No. 33824, records of Pueblo County, Colorado, containing 13.76 acres, more or less.

Parcel C

A strip of land 100 feet in width, being 50 feet wide on either side of the centerline of the said Bessemer Ditch as said ditch is constructed through, on, over, and across said Section Thirty-five (35). Said centerline of said ditch is described as beginning at a point on the west line of said Section Thirty-five (35) which point lies 1,045 feet north of the Southwest (SW) Corner of said Section Thirty-five (35), thence meandering in an easterly direction a distance of 7,605 feet to a point on the east line of said Section Thirty-five (35) which point lies 868 feet north of the Southeast (SE) Corner of said Section Thirty-five (35).

Parcel C (continued)

This strip of land being the same strip of land conveyed in said Section Thirty-five (35) by Warranty Deed recorded in Book 68 at Page 404, Instrument No. 33824, records of Pueblo County, Colorado, containing 17.60 acres, more or less.

Parcel D

A strip of land 100 feet wide being 50 feet wide on each side of the centerline of said Bessemer Ditch, as constructed on, over, and across the South Half ($S\frac{1}{2}$) of Section Thirty-six (36) of said Township and Range. Said centerline described as beginning on the west line of said Section, 866 feet north of the Southwest (SW) Corner of said Section Thirty-six (36), thence northeasterly through the said South Half ($S\frac{1}{2}$) for a distance of 6,550 feet, more or less, to a point on the east line of said Section, 1648 feet north of the Southeast (SE) Corner of said Section Thirty-six (36).

This being the same strip of land as conveyed in Book 69, Page 346, Instrument No. 34962 of records of Pueblo County, Colorado, containing 15.03 acres, more or less.

Parcel E

A strip of land 150 feet wide being 100 feet wide on left or north side of the centerline and 50 feet wide on the right or south side of the centerline of said Bessemer Ditch as said ditch is constructed through, on, over, and across the Southwest Quarter ($SW\frac{1}{4}$) of Section Thirty-one (31), said Township and Range. Said centerline described as beginning at a point on the west line of said Section Thirty-one (31) a distance of 1,648 feet north of the Southwest Corner of said Section Thirty-one (31), thence meandering a distance of 4,209 feet, more or less, to a point on the east line of the Southwest Quarter ($SW\frac{1}{4}$) of said Section Thirty-one (31) which point is 282 feet, north of the Southeast Corner of the said Southwest Quarter ($SW\frac{1}{4}$) of said Section Thirty-one (31). Said centerline crosses the north line of the South Half of the Southwest Quarter ($S\frac{1}{2}SW\frac{1}{4}$), 1,875 feet east of the Northwest Corner of said South Half of the Southwest Quarter ($S\frac{1}{2}SW\frac{1}{4}$) of said Section Thirty-one (31).

This strip of land being the same land conveyed in deeds recorded in Book 69 at Page 297 and Book 67 at Page 595, records of Pueblo County, Colorado, containing 14.49 acres, more or less.

Parcel F

A strip of land being that portion of the said Bessemer Ditch lying in the South Half of the Southwest Quarter ($S\frac{1}{2}SW\frac{1}{4}$) of said Section Thirty-one (31) described as follows:

Beginning at a point on the southernmost line of the right-of-way of the ditch or irrigating canal of the Bessemer Irrigating Ditch Company 190 feet more or less westerly from the west end of the structure known as Flume No. 8 of the said Company and easterly measured along said right-of-way line 1,054 feet more or less from Mile Stone No. 5 from the head of said ditch; thence curving southerly and westerly to point of intersection with the south line of said Section whence the South Quarter ($S\frac{1}{4}$) Corner of said Section is now marked by a stone in place bears 573 feet east; thence easterly along said south line 150 feet more or less; thence curving easterly and northerly parallel to and 150 feet from the line described above as curving southerly and westerly to point of intersection with the aforesaid southernmost right-of-way line; thence westerly along said right-of-way line to point of beginning.

This is the same strip of land conveyed in Book 247, Page 437, Instrument No. 121104 in records of Pueblo County, Colorado, containing 2.0 acres, more or less.

I hereby certify that I have carefully checked the foregoing legal description and find that it is correct to the best of my knowledge.

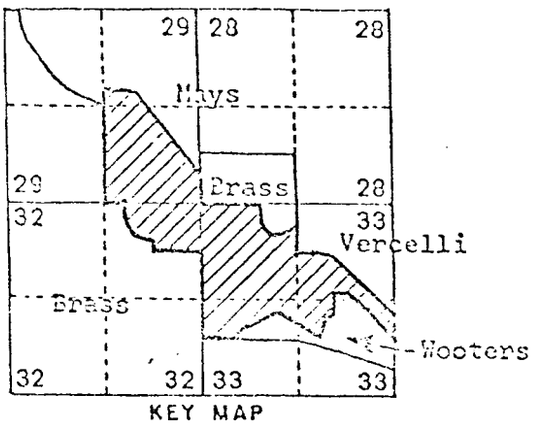
40

E. Lloyd Anderson Civil Engineering Technician 3-28-69

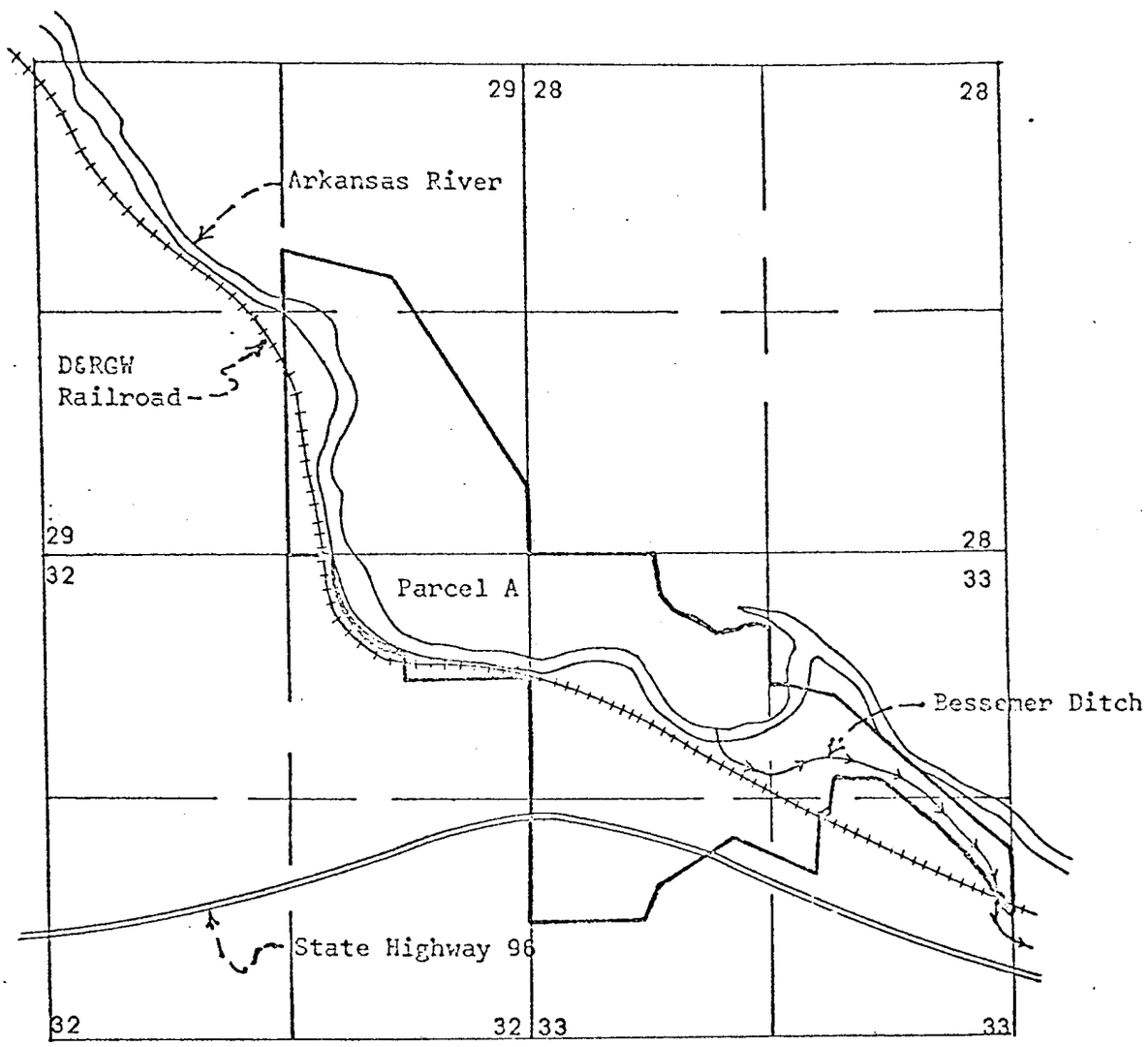
The estimated just compensation for this taking is $31,200.00.

Titleholder: Bessemer Irrigating Ditch Company, 711 Thatcher Building, Pueblo, Colorado 81003

Tenants: None



KEY MAP



Reference
Parcel B - Drawing No. 382-706-2624
Parcel C - Drawing No. 382-706-2625
Parcel D - Drawing No. 382-706-2626
Parcel E & F - Drawing No. 382-706-2627

Parcel "A" 446 acres more or less

CRS	BEARING	LENGTH	CRS	BEARING	LENGTH

2000 0 2000
SCALE IN FEET

TRACT NO. 431
BESSEMER IRRIGATING DITCH COMPANY
Pt. of Sec. 33 Pt. of Sec. 32
Pt. of Sec 29, T20S, R66W, 6 P. M.

Rev. LDD 3/27/69	Added Dwg. 382-706-2626 and Tracts E & F

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

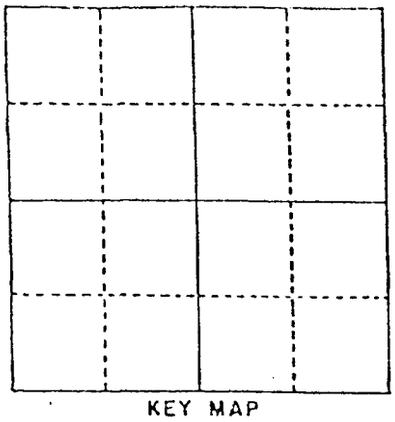
FRYINGPAN-ARKANSAS PROJECT - COLORADO

RIGHTS-OF-WAY

PUEBLO DAM AND RESERVOIR

DRAWN LDD SUBMITTED
TRACED RECOMMENDED
CHECKED ELA APPROVED

Pueblo, Colo. 1/7/69 382-706-2619



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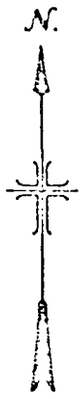
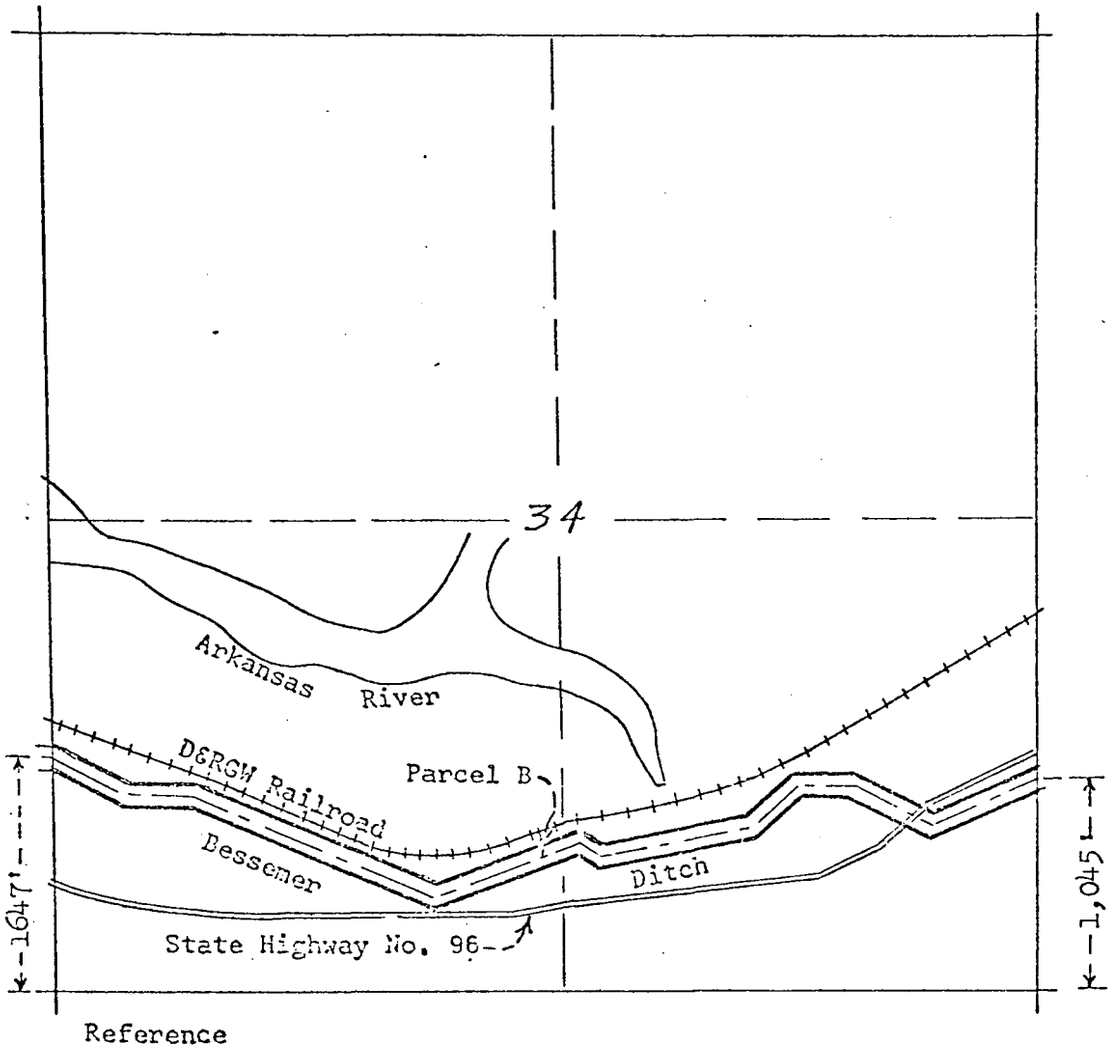




Reference

Parcel "A" Dwg. No. 382-706-2619
Parcel "C" Dwg. No. 382-706-2625
Parcel "D" Dwg. No. 382-706-2626
Parcel E and F - Dwg. No. 382-706-2627

Parcel "B" 13.76 acres more or less

CRS	BEARING	LENGTH	CRS	BEARING	LENGTH

1000 0 1000
SCALE IN FEET

TRACT NO. 431
BESSEMER IRRIGATING DITCH COMPANY
Pt. of S½, Sec. 34, T20S, R66W, 6th P.M.

Rev. LDD 3/27/69	Added Dwg. 382-706-2626 and Tracts E & F

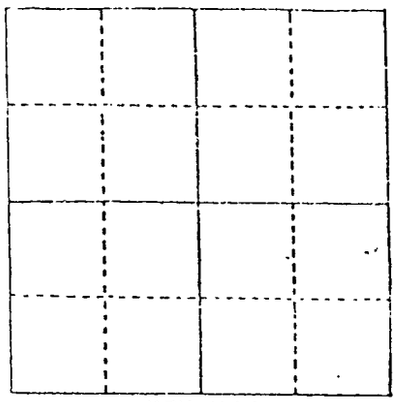
UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

FRYINGPAN-ARKANSAS PROJECT - COLORADO

RIGHTS-OF-WAY

PUEBLO DAM AND RESERVOIR

DRAWN L.D.D.	SUBMITTED
TRACED L.D.D.	RECOMMENDED
CHECKED	APPROVED
Pueblo, Colo 2-14-69	382-706-2624



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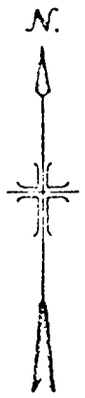
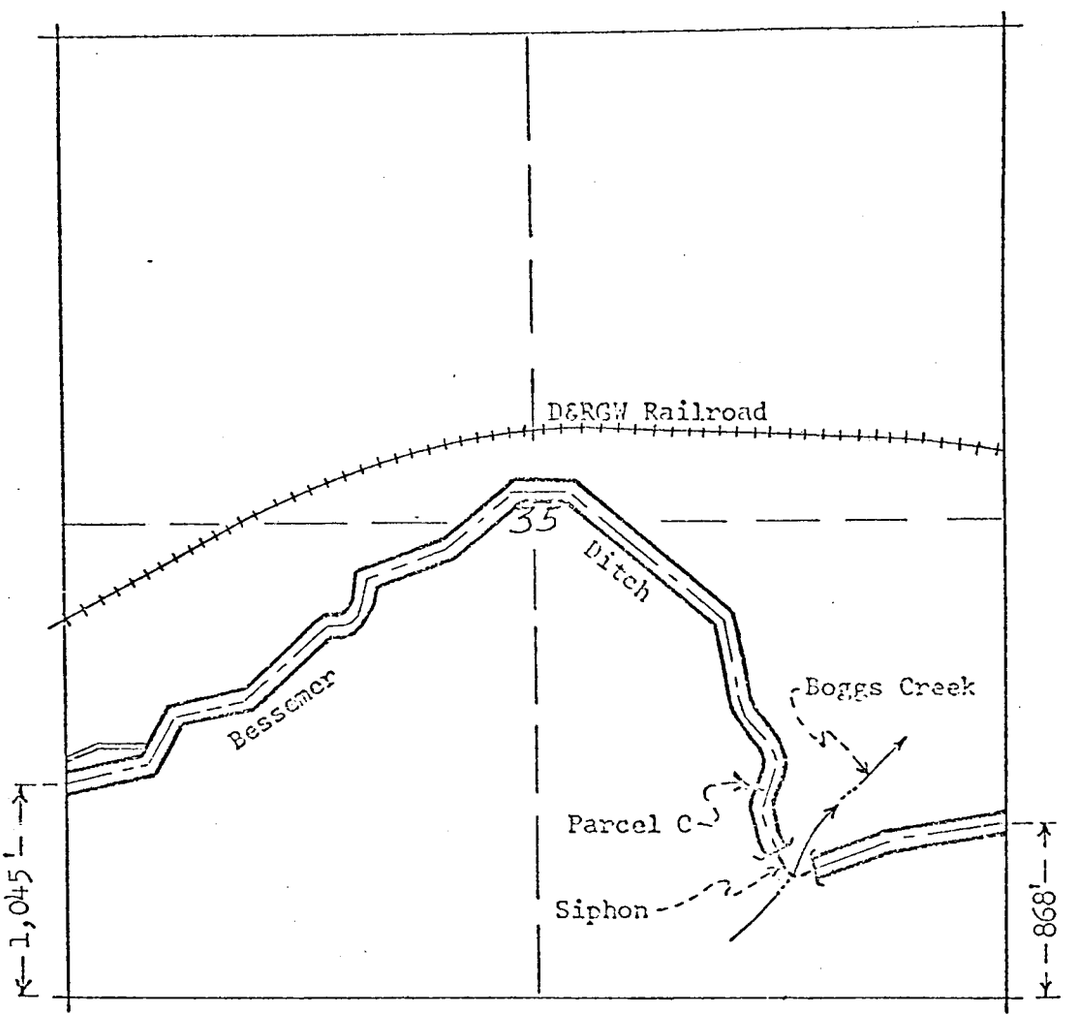




Reference

Parcel "A" Dwg. No. 382-706-2619
Parcel "B" Dwg. No. 382-706-2624
Parcel "D" Dwg. No. 382-706-2626
Parcels E & F - Dwg. No. 382-706-2627
Parcel "C" 17.60 acres more or less

CRS	BEARING	LENGTH	CRS	BEARING	LENGTH

1000 0 1000
SCALE IN FEET

TRACT NO. 431
BESSEMER IRRIGATING DITCH COMPANY
Pt. of Sec. 35, T20S, R66W, 6th P.M.

Rev. 4 DD 3/27/69	Added Dwg. 382-706-2626 and Tracts E & F

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

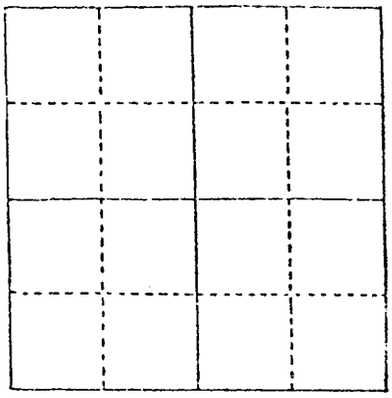
FRYINGPAN-ARKANSAS PROJECT - COLORADO

RIGHTS-OF-WAY

PUEBLO DAM AND RESERVOIR

DRAWN L.D.D. SUBMITTED
TRACED L.D.D. RECOMMENDED
CHECKED APPROVED

Pueblo, Colo 2/14/69	382-706-2625



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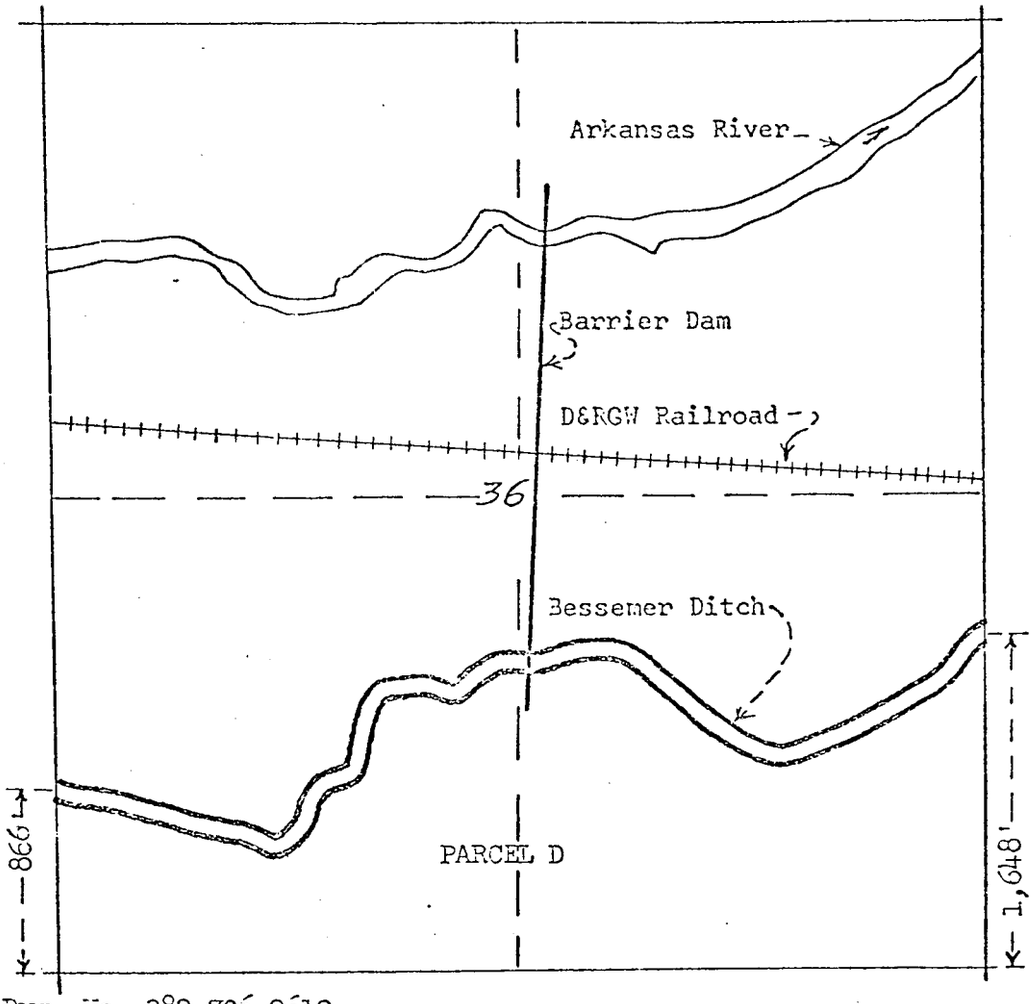


Parcel A - Dwg. No. 382-706-2619
Parcel B - Dwg. No. 382-706-2624
Parcel C - Dwg. No. 382-706-2625
Parcels E and F - Dgw. No. 382-706-2627

TRACT 431
BESSEMER IRRIGATING DITCH COMPANY
Pt. S½, Sec. 36, T20S, R66W,
6th P.M.

Parcel D - 15.03 acres, more or less

CRS	BEARING	LENGTH	CRS	BEARING	LENGTH

1000 0 1000
SCALE IN FEET

Rev. LPD 3/27/69	Added Dwg. 382-706-2625 and Tracts E & F

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

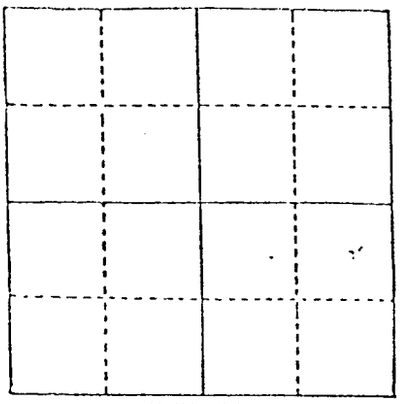
FRYINGPAN-ARKANSAS PROJECT - COLORADO

RIGHTS-OF-WAY

PUEBLO DAM AND RESERVOIR

DRAWN LPD SUBMITTED
TRACED LPD RECOMMENDED
CHECKED E.J.C. APPROVED

Pueblo, Colo. 2/19/69 | 382-706-2625



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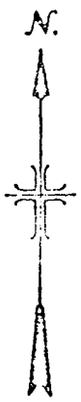

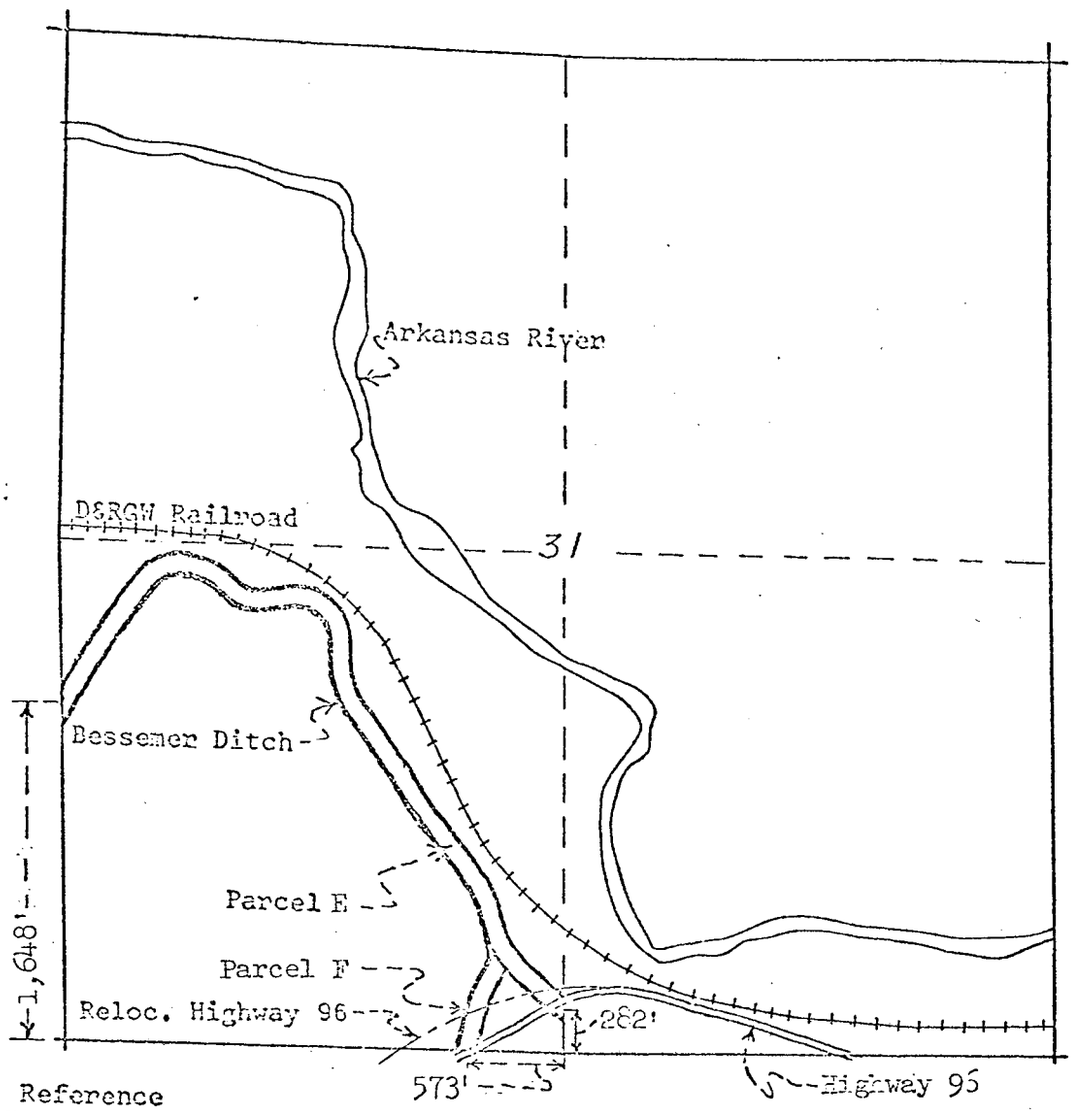

Reference

Parcel "A" Dwg. No. 382-706-2619
Parcel "B" Dwg. No. 382-706-2624
Parcel "C" Dwg. No. 382-706-2625
Parcel D - Dwg. No. 382-706-2626
Parcels E and F - 16.49 acres, more or less

CRS	BEARING	LENGTH	CRS	BEARING	LENGTH

1000 0 1000

SCALE IN FEET

TRACT NO. 431
BESSEMER IRRIGATING DITCH COMPANY
Pt. of SW¼, Sec. 31, T20S, R65W,
6th P.M.

Rev. 4/22/69	Added Dwg. 382-706-2626 and Tracts E & F

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

FRYINGPAN-ARKANSAS PROJECT - COLORADO
RIGHTS-OF-WAY
PUEBLO DAM AND RESERVOIR

DRAWN L.D.D. SUBMITTED
TRACED L.D.D. RECOMMENDED
CHECKED APPROVED

Pueblo, Colo. 2/25/69 | 382-706-2627

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, Plaintiff, v. 508.88 ACRES OF LAND, More or Less, Situated in the County of Pueblo, State of Colorado; Bessemer Irrigating Ditch Company, et al., and Unknown Owners, Defendants.	Civil Action No. C-1420 ANSWER OF BESSEMER IRRIGATING DITCH COMPANY

COMES NOW defendant The Bessemer Irrigating Ditch Company and for its answer avers:

1. That said defendant is a mutual irrigating ditch company organized under the laws of the State of Colorado.

2. That title to the lands described in Plaintiff's Complaint and Notice, the headgate, ditch and water rights standing in the name of defendant The Bessemer Irrigating Ditch Company, is held by said corporation as Trustee for and for the benefit of the stockholders of The Bessemer Irrigating Ditch Company.

3. That there are outstanding approximately 19,821 shares of stock in said company in the hands of approximately 900 stockholders of said The Bessemer Irrigating Ditch Company.

4. That plaintiff is taking said defendant's land and its headgate in the Arkansas River and the upper reaches of said defendant's ditch system and expects to replace these with a headgate in the dam structure to be erected by plaintiff. As a result, instead of receiving silt-laden water at river temperatures into its ditch, said defendant will receive clear water at reservoir temperatures for distribution to its water users.

5. That said defendant is entitled to be furnished silt-laden water at river temperatures taken from the flowing river either above or below the dam and transported to said defendant's ditch for distribution to its water users, or the equivalent substitute of equal facilities of equal utility to those taken by plaintiff to provide said defendant with silt-laden water at river temperatures, or the cost of such substitute facility plus its cost of operation for a thirty-year period.

6. That the clear reservoir water will damage said defendant additionally in the following manner:

(a) Aquatic vegetation within the waterway of said defendant's ditch will flourish with the clear water, obliging said defendant to spend sums of money annually for the destruction of such vegetation.

(b) The change in water character from silt-laden water to clear water will cause a change in the regimen of the defendant's canal and induce new erosion and increase seepage loss.

(c) The clear water will be more difficult to handle in the fields of the water users, resulting in a reduction in efficiency of irrigation applications and an increase in the cost of applying such clear water to the land.

(d) The beneficial effects of fertility contained in the silty water will be lost.

(e) Certain of the crops now being raised by the users of water from said defendant's canal will be damaged because of the temperature of the reservoir water not being suitable for some of the crops presently being grown.

7. That the stockholders of The Bessemer Irrigating Ditch Company are indispensable parties for the reason that they are owners of the property being taken in these proceedings; said stockholders are alive and residents of the State of Colorado for the most part and subject to jurisdiction of this Court as to both service of process and venue; said stockholders can be made parties without depriving this Court of jurisdiction of the present parties; and said stockholders have not been made parties hereto.

SAUNDERS, DICKSON, SNYDER & ROSS P.C.

By _____
Attorneys for Defendant The Bessemer Irrigating Ditch Company
802 Capitol Life Center
225 East Sixteenth Avenue
Denver, CO 80203
244-4401

PRESTON, ALTMAN & PARLAPIANO

By _____
Attorneys for Defendant The Bessemer Irrigating Ditch Company
550 Thatcher Building
Pueblo, CO 81002
544-6853

Address of Defendant:

Thatcher Building
Pueblo, CO 81003

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, Plaintiff, VS 508.88 ACRES OF LAND, More or Less, Situated in the County of Pueblo, State of Colorado; Bessemer Irrigating Ditch Company, et al., and Unknown Owners, Defendants.	CIVIL ACTION NO. C-1480

MOTION TO STRIKE ANSWER

Plaintiff moves, under Rule 12(f), Federal Rules of Civil Procedure, to strike the answer of defendant Bessemer Irrigating Ditch Company on the ground that said answer sets forth defenses insufficient as a matter of law.

Respectfully submitted,

JAMES L. TREECE
United States Attorney

By: Leonard Campbell
LEONARD W. D. CAMPBELL
First Assistant U.S. Attorney
P.O. Box 1776
Denver, Colorado 80201
297-4184

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action C-1480

UNITED STATES OF AMERICA,

Plaintiff,

v.

508.88 ACRES OF LAND, More or Less, Situated in the County of Pueblo, State of Colorado; BESSEMER IRRIGATING DITCH COMPANY, et al., and Unknown Owners,

Defendants.

Mr. James L. Treece, United States Attorney, by Mr. Charles W. Johnson, Assistant United States Attorney, 323 United States Courthouse, Denver, Colorado, for Plaintiff; Messrs. Preston, Altman & Parlapiano, Attorneys at Law, by Mr. Leo S. Altman, P. O. Box 1576, Pueblo, Colorado, and Messrs Saunders, Dickson, Snyder & Ross P.C., Attorneys at Law, by Mr. John M. Dickson, 802 Capitol Life Center, Denver, Colorado, for defendant The Bessemer Irrigating Ditch Company; Mr. William Tucker, Assistant Attorney General, State of Colorado, 104 State Capitol, Denver, Colorado, for defendant State of Colorado; Messrs. Petersen, Evensen and Mattoon, Attorneys at Law, by Mr. Harry S. Petersen, 651 Thatcher Bldg., Pueblo, Colorado, for defendant Central Telephone & Utilities Corporation.

MEMORANDUM OPINION AND ORDER

ARRAJ, Chief Judge

By this proceeding the United States seeks to condemn certain real property and improvements needed for the construction and maintenance of Pueblo Dam and Reservoir, a unit of the Fryingpan-Arkansas Water Diversion Project. Among the properties to be taken are the headgate improvements and the upper four miles of a 40-mile irrigation canal known as the Bessemer Ditch. Instead of also taking the water decreed to the Ditch, however, the government proposes to construct an outlet device in the Pueblo Dam and to deliver the quantity of Arkansas River water appropriated to the Ditch through this outlet.

In its answer to the government's petition, defendant Bessemer Irrigating Ditch Company argues two propositions. First, it asserts that this proceeding requires the presence of its approximately 900 shareholders. The basis for this assertion is that Bessemer "is a mutual irrigating ditch company organized under the laws of the State of Colorado," and that, under Colorado law, the water rights and improvements of such a company are actually owned by its shareholders. Consequently, according to Bessemer, Rule 71A of the Federal Rules of Civil Procedure[1] requires that each shareholder receive notice and have an opportunity to defend the action. Second, Bessemer maintains that the delivery of reservoir water through the outlet in Pueblo Dam will injure the company because the large quantity of silt which the roily Arkansas naturally carries will settle to the bottom of the reservoir and the water delivered to the Bessemer Ditch will be substantially clear. The argument is that, for a number of reasons which we shall hereafter detail, silty water is more valuable than clear water for irrigation purposes. Thus, Bessemer claims that the government will have taken a property right, for which the company is entitled to compensation. The matter is now before us on the government's motion to strike Bessemer's answer because it "sets forth defenses insufficient as a matter of law."

I

Whether Bessemer's 900 shareholders claim such an interest in the property taken that they must receive notice under Rule 71A depends upon the precise nature of the relation between a mutual ditch company and its shareholders. Colorado law is not entirely clear upon the question. The company asserts that it is organized under Colo. Rev. Stat. Ann. § 34-14-1 et seq. (1963). This statute, although entitled "Ditch and Reservoir Companies," is nevertheless not helpful here because it does not define the powers of such companies, the powers of their shareholders, or the relation between the two.

Bessemer's argument that its shareholders should receive notice of this proceeding does find some support in several decisions of the Colorado Supreme

[1]. The pertinent part of Rule 71A provides:

> . . . prior to any hearing involving the compensation to be paid for a piece of property, the plaintiff shall add as defendants all persons having or claiming an interest in that property whose names can be ascertained by a reasonably diligent search of the records, considering the character and value of the property involved and the interests to be acquired, and also those whose names have otherwise been learned.

Court. Billings Ditch Co. v. Colo. Industrial Comm'n, 127 Colo. 69, 253 P.2d 1058 (1953) is perhaps the clearest expression of the argument. There the court was asked to set aside an award made by the Industrial Commission to an employee of Billings. The employee had sustained an injury while repairing the mutual ditch operated by the company. Farm and ranch laborers, however, were exempt from the coverage of the Workmen's Compensation Act, and the question was whether the employee was performing such labor. The court set aside the Commission's award. It reasoned that the employee was performing farm labor because the company was engaged solely in the pursuit of conveying water to its farmer-shareholders -- a pursuit closely related to farming activities. In so holding, the court noted:

> "On behalf of the Commission and the claimant it is argued that the Billings Ditch Company owns the ditch and the water. This is incorrect, for while the naked title may stand in the name of the ditch company, the actual owners of the ditch and water rights are the owners of the farms served thereby, in proportion to the stock interests of each thereof. The water rights may not be sold separate from these several tracts of land, and the sale and conveyance of the land carries with it the ditch and water rights, regardless of the transfer of the stock on the books of the company. Under the undisputed facts of this case the conclusion is inescapable that the Billings Ditch is a mutual irrigation ditch, and that the corporation is merely the vehicle by which its owners operate and manage its affairs. It was neither organized, nor is it operated, for profit, but solely for the convenience of its members in the management of their irrigation system and the distribution of the proper apportionment of water to the owners as their respective interests may appear; the shares of stock being merely incidental to the ownership of the water rights." 127 Colo. at 74. 253 P.2d at 1060.

Accord, Beaty v. Board of County Commissioners of Otero County, 101 Colo. 346, 73 P.2d 982 (1937); Comstock v. Olney Springs Drainage Dist. 97 Colo. 416, 50 P.2d 531 (1935) (concurring opinion).

The issues confronting the court in the foregoing cases, however, were different from the issue confronting us here, and we do not believe the court meant to say that mutual ditch company shareholders are, for all purposes, to be regarded as fee simple owners of the company's assets. In Billings Ditch Co. v. Colo. Industrial Comm'n, supra, for example, the court emphasized that maintenance of irrigation facilities was an integral aspect of farming and that, if one farmer or a group of farmers had individually hired the injured employee, there would be no doubt that he was performing farm labor. This being so, the court reasoned that the form of the entity which the farmers organized -- a mutual ditch company -- could not affect the nature of the employee's work.[2] The language concerning ownership of the ditch and water

(See p. 4 for Footnote 2.)

rights must be read in the context of this reasoning, which we think was the real basis for the decision.

Other Colorado cases cited by Bessemer also raised issues different from those raised by the case at bar. In Beaty v. Board of County Commissioners of Otero County, supra, plaintiff owned shares of mutual ditch company stock which entitled her to more water than she needed to irrigate her lands. The county had assessed this excess stock as an improvement on her real property, and she sued to recover the taxes paid on the stock. She argued (1) that the excess shares were corporate stock and thus were exempt from taxation under Colorado law and (2) that stock in a mutual ditch company represented the company's assets and thus was exempt from taxation under a portion of the state constitution providing that ditches, canals, and irrigating flumes should not be separately taxed. The court dealt with both arguments by holding that the shares of stock were "muniments of title to her water right." 101 Colo. at 351, 73 P.2d at 985. Because the shares represented plaintiff's water right, the court thought they, like ordinary water rights, were taxable as real property. Similarly, the question in Comstock v. Olney Springs Drainage Dist., supra, was whether county treasurer's deeds, issued to defendant because plaintiff had failed to pay an assessment to a drainage district, passed title to her stock in a mutual ditch company. The majority of the court agreed that the deeds did pass title because the shares represented real property, and real property was subject to the assessment. Thus, Comstock and Beaty, at most, stand for the proposition that stock in a mutual ditch company is to be treated as a water right for purposes of real property taxation and assessment. It does not follow that the shareholders, rather than the company, are the owners to whom notice must be given in this condemnation proceeding. The question of what property interest, if any, could be claimed by the ditch company was not before the court in either case.

[2] 127 Colo. at 76, 253 P.2d at 1061:

> . . . Now can we say that the farmers who own the Billings ditch, having been sufficiently progressive so as to have organized themselves under the method provided by statute for the operation of their mutually owned water and ditch rights, are to be penalized by liability under the Workmen's Compensation Act, whereas others more loosely organized, but operating under similar circumstances, would be exempt? We think to do so would be extremely discriminatory and unfair. We believe the statute must be interpreted in the spirit and in accord with the intention of the legislature in its passage. Under all the facts and circumstances of this case, and confined strictly to such facts and circumstances, we conclude that claimant, at the time of his injury, was engaged in the performance of farm and ranch labor. [emphasis supplied]

The cases cited by the United States are also not very helpful in deciding the question of whether Bessemer's shareholders must have notice of these proceedings. The government argues that the shareholders of this company are no different from shareholders of more familiar business corporations and that such shareholders are not ordinarily proper parties to a proceeding to condemn corporate property. The difficulty with this position is that shareholders of mutual water companies do differ from shareholders of ordinary corporations in at least one important respect. Their stock, as the cases already discussed point out, represents a specific property interest in a water right. This interest so represented, unlike the ownership interest of ordinary shareholders, cannot be defeated or altered by any action of the ditch company or its other shareholders. In Bent v. Second Extension Water Co., 51 Cal. App. 648, 197 P. 657 (1921), for example, the holders of two-thirds of the stock in a mutual water company voted to sell the water, water rights, and all physical property of the company to another company. Plaintiff, who objected to the transfer, sought to force delivery of his share of the water. The court held that the other shareholders could not divest plaintiff of his water right and ordered that the vendee company furnish water to him.

Like the parties, we have been unable to find any law clearly defining the respective ownership interests of a mutual ditch company and its shareholders in the improvements operated by the company. Bessemer admits in its answer to the condemnation petition that record title to the headgate, ditch, and water rights in question stands in the name of the company.[3] This apparently is generally true of title to assets operated by mutual water companies. See 3 C. Kinney, Irrigation & Water Rights § 1481 (2d ed. 1912). The law, however, does not ordinarily permit the company to transfer the water right represented by each share of stock without the stockholder's consent. Bent v. Second Extension Water Co., supra. If an analogy to other legal entities would be helpful, we prefer that of a trust, since a trustee holds legal title to trust property but his power to deal with that property may be limited by agreement or by law. Such an analogy would lead to the conclusion that the company is the owner to

[3]In its brief opposing the motion to strike, Bessemer asserts that "legal and equitable title to all assets is in the stockholders of the company as tenants in common. . . ." This assertion, however, contradicts the allegations concerning record title in the pleadings of both parties and appears merely to represent the conclusion which Bessemer would have us draw from the argument in its brief.

whom notice should be given, since a trustee is ordinarily the proper party to maintain an action to recover compensation for property taken in eminent domain.[4]

The analogy to trusts and the conclusion that only the company need be made a party to these proceedings finds some support in several Colorado cases. In Monte Vista Canal Co. v. Centennial Irrigating Co., 24 Colo. App. 496, 135 P. 981 (1913) the plaintiff sought to change the point at which it diverted its water. One of the arguments of the defendant junior appropriators was that plaintiff, a mutual ditch company, did not own or use the water and thus could not maintain the proceeding. The court held that the evidence demonstrated injury to junior appropriators and that plaintiff could not change the point of diversion, but it noted, in dictum, that plaintiff, as a trustee, could at least maintain the action for its shareholders. Similarly, in Farmers Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 P. 444 (1896), plaintiff, a mutual ditch company, alleged that defendant, a junior appropriator, was interfering with its water right. The court of appeals had found the complaint insufficient because it failed to state the names of plaintiff's water users and their priority dates. In reversing, the supreme court stated:

> "It is not the practice to give the names of the individuals supplied by any such ditch, or the number of acres of land owned by each. Such is not required by the statute nor demanded by any decision of this court. As we have already stated, the statute provides for a decree awarding priorities to the several ditches and not to those claiming water under the ditches. It is, however, necessary in making proof to show that the water has been actually applied to the land in order that a completed appropriation may be shown. Under some of the ditches in this state there are thousands of consumers, and it would be impracticable, by reason of their number alone, to make them parties to a proceeding like the one before us. Moreover, such consumers change from year to year, and this furnishes an additional reason against the contention of defendants in error. Courts will never sanction a practice which imposes an impossible or even an unreasonable requirement upon litigants." 22 Colo. at 524, 45 P. at 448.

The Court's language is especially significant in the present case. If we were to hold that mutual ditch company shareholders, as owners, were parties who

[4] Restatement (Second) of Trusts § 280, comment f (1959):

> If a right other than for tort or in contract arises against a third person from the holding of title to the trust property, it is enforceable by the trustee. Thus, if property held in trust is taken by eminent domain, the trustee can maintain an action to recover compensation.

See also In re Monocacy Park, 181 F. Supp. 880 (E.D. Pa. 1960). True, these authorities deal with the propriety of an inverse condemnation action brought by the trustee without joining beneficiaries, but we see no reason for distinguishing this from a direct condemnation action against the trust property. The interest of the trustee in pursuing the action and the fairness of binding the beneficiaries to the result are equal in each case.

should receive notice of this proceeding, it would seem to follow that they -- and not the company -- are the interested parties who should receive the notice of other water right proceedings. Yet it has not been the practice to join the shareholders as parties or to notify them, and the result which Bessemer proposes would have the apparent effect of gratuitously questioning all decrees rendered in the absence of the shareholders. This we decline to do, in light of the fact that Bessemer holds record title to the ditch and water rights and thus is bound, as a trustee, to protect the interest of its shareholders in these assets. 3 C. Kinney, Irrigation & Water Rights § 1482, at 2662-2663 (2d ed. 1912).

II

Bessemer also argues that it is entitled to compensation because the government will impound the ordinarily silty water of the Arkansas in Pueblo Dam and deliver clear water to the Company. The argument is that silty water is more valuable for irrigation than clear water for a number of reasons. It deposits fine particles in the banks of the ditch and thus seals the ditch to prevent seepage loss and ditch erosion. It also prevents the sun from penetrating the water and thus prevents the growth of aquatic vegetation. Finally, silty water spreads more easily on the field than clear water and is better for growing crops. According to Bessemer, if the United States delivers clear water, it will have to incur additional costs to compensate for these benefits of silty water, and the Company consequently claims a compensable loss.

Whether the government must pay Bessemer because of the change of water turns, in our view, upon (1) whether an appropriator, under Colorado law, has a property right in water of a given quality and (2) whether the government's interference with this water amounts to a "taking" for which compensation must be paid. Although the two issues coalesce into one in some of the cases, we shall treat them separately here.

The government argues that plaintiff's property right here is in plain water and not in any matter, such as silt, which is foreign to the water. The two cases which it cites for this position are, however, distinguishable from the present one. In Joslin v. Marin Municipal Water Dist., 67 Cal. 2d 132, 429 P.2d 889 (1967), a downstream owner of riparian land sued to recover for damage caused when an upstream appropriator constructed a dam on the stream. In its natural state the stream carried rocks, sand, and gravel in suspension and deposited them on plaintiff's land. The dam prevented the replenishment of

these deposits. Under California law the rights of a riparian owner extend only to such water as he may put to reasonable use by a reasonable method of diversion. The court held that use of the waters to amass sand and gravel deposits was an unreasonable and wasteful use and that plaintiff thus had no right at all to the water. The California doctrine of "reasonable use" between riparians and appropriators, however, can have no application to the ownership of water rights in Colorado, which follows the doctrine that an appropriator has a right to such water as he may divert and beneficially use.[5]

Deseret Livestock Co. v. State, 110 Utah 239, 171 P.2d 401 (1946), the other case cited by the government, is also distinguishable from the one at bar. There the plaintiff wanted to appropriate water from the Great Salt Lake and to extract the salt from it. A Utah statute provided that minerals in navigable waters belonged to the state and that an appropriator who wished to appropriate water for the purpose of extracting them should obtain a permit and pay a royalty to the state. The court thus reasoned that plaintiff did not own the salt and that an appropriation for the purpose of extracting salt was not a beneficial use. Deseret Livestock, however, cannot control the case before us, since the very question to be decided here is whether Bessemer has a property right in silty water. This question was clearly settled by the Utah statute in Deseret Livestock. Moreover, plaintiff here does not argue that it has a right to appropriate water for the purpose of extracting the silt, but only that silty water is more valuable than clear water for an otherwise recognized beneficial use.

Quite expectably, we have found no Colorado case involving the question of whether an appropriator is entitled to silty, rather than clear, water. A number of cases involved some form of stream pollution and seem to have been litigated upon the theory that such pollution constituted a nuisance. See, e.g., Humphreys Tunnel & Mining Co. v. Frank, 46 Colo. 524, 105 P. 1093 (1909); Wilmore v. Chain O' Mines, 96 Colo. 319, 44 P.2d 1024 (1934); Cushman v. Highland Ditch Co., 3 Colo. App. 437, 33 P. 344 (1893). In another case the court was not clear as to whether it meant to prevent the pollution on a nuisance theory or on the theory that it was a taking without compensation. See Mack v. Town

[5] The Joslin court, in fact, indicated that it might have reached the opposite result if it were faced with an attempt by a government entity to condemn plaintiff's right, rather than with a conflict between private riparians and appropriators. 429 P.2d at 895-896.

of Craig, 68 Colo. 337, 191 P. 101 (1920). In any event, these authorities, while not directly applicable here, all suggest that an appropriator of water in Colorado is entitled "to have the natural waters. . . come down the natural channels undiminished in quality as well as quantity." Humphreys Tunnel & Mining Co. v. Frank, 46 Colo. at 532, 105 P. at 1096. (emphasis supplied).[6]

All of these cases, of course, were instances where the defendant changed the quality of the water by adding some form of impurity, and they reflect the habit of thinking that the most desirable water is that which does not contain any foreign matter. The case at bar presents the novel question of whether removing impurities can likewise give rise to an actionable wrong. We think that it can, because the question of what constitutes a "diminution" in the quality of water must depend upon the use to which the water is put. Water containing a large amount of silt is more beneficial than pure water for irrigation purposes. 2 C. Kinney, Irrigation & Water Rights § 1131 (2d ed. 1912). Removal of the silt from an irrigator's water potentially injures him in the same way as the addition of impurities may injure people who appropriate water for other purposes. Consequently, if the law recognizes a property right in a certain quality of water, it should make no difference whether the quality is altered by adding harmful pollutants or by removing beneficial ones.

We think it is most consistent with the language in the previously-discussed Colorado cases and with the assumptions underlying the system of prior appropriation to recognize that an appropriator has a right to the quality of water naturally flowing in the stream at the time of his appropriation. The familiar argument supporting the undisputed rule that an appropriator has a vested right to the quantity of water which he diverts and applies to a beneficial use is that, having invested resources in diverting water and improving his property on the assumption that the necessary water would be available for his enterprise, he is entitled to expect that the water will remain available.

6. Bessemer also claims that the Colorado legislature has recognized an appropriator's right to water of a certain quality. Specifically, it points to Colo. Rev. Stat. Ann. § 148-11-25 (1969 Supp.), which provides that individuals or public entities may provide appropriators with a substitute supply of water, but that "any substituted water shall be of a quality and continuity to meet the requirements of use to which the senior appropriation has normally been put." (emphasis supplied). See also Colo. Rev. Stat. Ann. § 148-21-21 (1969 Supp.). We do not think this language conclusively shows that a certain quality of water is a recognized aspect of every appropriative right. In fact, it might be possible to argue that the statute, by its terms, applies only when one appropriator actually takes the water of another appropriator and that, in other cases, such as this one, the right to a certain quality of water has not been recognized. Consequently, we do not rely upon this statute in reaching our decision.

E.g. Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446 (1882). See also 1 C. Kinney, Irrigation & Water Rights §§ 585-594 (2d ed. 1912). His expectations might, it seems, just as easily be defeated by altering the quality of his water as by changing the quantity. In the situation presented by the case at bar, for example, delivery of clear water would allegedly mean that ditches must be lined to prevent seepage, that the aquatic plants which grow readily in clear water will have to be controlled by the use of chemicals, that additional labor will be required to apply the water to the land, and that the plant nutrient in the silt will have to be supplied from another source. All this, of course, would diminish the return upon which the appropriator has relied in making his investment and, if the decrease is sufficient, could cause the appropriator to discontinue his operation. In other words, the economic effect of a diminution in the quality of water is potentially the same as a diminution in its quantity, and the rationale for giving an appropriator the right to a certain quantity of water also gives him the right to a certain quality of water. Consequently, it seems that one aspect of an appropriation must be the right to the quality of water upon which the appropriator relied in making the appropriation.

Even if Bessemer has such a right, the government further asserts that it has not been taken. The argument is that "the government is only regulating the flow of the water and if that regulation process removes a characteristic deemed desirable by Bessemer and its shareholders, and they are damaged thereby, it is not by a taking." Some of the cases which the United States cites for this proposition did not involve water rights, and the one which did, United States v. Willow River Power Co., 324 U.S. 499 (1945), involved the government's power over navigable rivers, an issue not before us here. In that case, the court held that an owner of lands riparian to a navigable river had no property interest in having the river flow unimpeded past his land, because his riparian right was subject to the government's servitude in the interest of navigation. 324 U.S. at 509. Cf. United States v. Cress, 243 U.S. 316 (1916). The court reached this result, not because there was no "taking," but because the riparian right was always subject to this servitude.

Since the government has not physically appropriated Bessemer's entire water right, we think the question of whether there has been a taking must depend upon whether there is an "intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it." United States v. Causby, 328 U.S. 256, 265 (1945). It is immaterial that

the government has not physically entered upon defendant's land. Dugan v. Rank, 372 U.S. 609 (1963). If the direct and immediate intrusion substantially damages defendant by reducing the value of its property right, then there is a partial taking for which Bessemer is entitled to recover. United States v. Cress, 243 U. S. at 328; United States v. Causby, supra; Richard v. United States, 282 F.2d 901 (Ct. Cl. 1960), modified on other grounds, 285 F.2d 129 (Ct. Cl. 1961).

Here, the government's impounding of Bessemer's water in Pueblo Dam and permitting the silt to settle before the water is delivered seems to constitute a direct and immediate interference with the Company's right. Although there is no evidence in the record concerning the damage thereby caused, Bessemer maintains that it will be substantial, and this is sufficient to avoid the government's motion to strike. We need not decide at this point precisely how Bessemer's damage should be measured.

For the foregoing reasons, it is

ORDERED that paragraph 7 of Bessemer's answer, alleging that Bessemer's shareholders are parties indispensable to this proceeding, be, and the same hereby is, stricken. It is further

ORDERED that the government's motion to strike the remainder of the answer be, and the same hereby is, denied.

DATED at Denver, Colorado, this 4th day of May, 1973.

BY THE COURT:

ALFRED A. ARRAJ, Chief Judge
United States District Court

ENTERED
ON THE DOCKET

MAY 9 1973

JAMES R. MANSPEAKER
BY _____ DEP. CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, Plaintiff, VS 508.88 Acres of Land, More or Less, Situated in the County of Pueblo, State of Colorado; Bessemer Irrigating Ditch Company, et al., and Unknown Owners, Defendants.	CIVIL ACTION NO. C-1480 MOTION TO RECONSIDER OR IN THE ALTERNATIVE MOTION TO CERTIFY

COMES NOW the United States of America, plaintiff herein, by James L. Treece, United States Attorney, and Charles W. Johnson, Assistant United States Attorney, and moves this Court to reconsider that portion of the written opinion of May 8, 1973, denying plaintiff's Motion to Strike which allows defendant landowner to introduce evidence of loss of quality of water in the instant condemnation proceeding, or in the alternative, the United States of America respectfully requests that this Court, pursuant to 28 U.S.C. §1292(b), certify to the Tenth Circuit Court of Appeals as controlling questions of law which could materially advance the ultimate determination the following questions:

1. Whether this Court has jurisdiction in this action to determine as a part of just compensation to the landowner what, if any, diminution in the quality of the water, will occur in the future where the Declaration of Taking and the Complaint herein specifically exclude from this action any water rights of the defendant?

2. Whether or not, as a matter of law, the fact that the landowner's water will be diminished in quality by removal of silt constitutes a taking of a portion of the landowner's property rights, where the United States has not taken the water?

AND AS GROUNDS THEREFOR, the plaintiff, United States of America, shows unto the Court that there is substantial grounds for

a difference of opinion of the aforementioned issues; the trial of said issues could well encompass many additional days of testimony concerning the effects of the water quality change upon various parts of the landowner's ditch system, all of which additional testimony might not be applicable in this proceeding if the legal issues were decided in favor of the plaintiff.

It is further shown unto the Court that the written opinion of May 8, 1973, has not treated the jurisdictional issue heretofore raised, to wit: whether loss of quality of water can only be determined in an inverse condemnation proceeding, (Tucker Act 28 U.S.C. §1491), in the Court of Claims.

The United States of America also wishes to call to the Court's attention the latest opinion of the Tenth Circuit Court of Appeals, U.S.A. v. 20.53 Acres of Land (City of Downs, Kansas) 72-1571 (May 15, 1973), which was not available for discussion at the time of the oral argument. The opinion states that the estate taken, by a Declaration of Taking, cannot, and should not, be enlarged under the guise of severance damage, by judicial fiat.

In support of this Motion, the United States of America will file a brief which is now in preparation by the Department of Justice, Land and Natural Resources Division, Washington, D.C.

Respectfully submitted,

JAMES L. TREECE
United States Attorney

By _____
CHARLES W. JOHNSON
Assistant U. S. Attorney
P. O. Box 1656
Denver, CO 80201
303-837-3861

CERTIFICATE OF SERVICE

This is to certify that on the 18th day of May, 1973, a copy of the foregoing Motion to Reconsider or in the Alternative Motion to Certify was placed in the U.S. Mail, postage prepaid, addressed to Leo S. Altman, 542 Thatcher Bldg., Pueblo, CO 81002 and John M. Dickson, 802 Capitol Life Center, Denver, CO 80203.

_____

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action C-1480

UNITED STATES OF AMERICA,

Plaintiff,

v.

508.88 ACRES OF LAND, More or Less, Situated in the County of Pueblo, State of Colorado; BESSEMER IRRIGATING DITCH COMPANY, et al., and Unknown Owners,

Defendants.

ORDER

This matter is before the court on the government's motion to reconsider our order of May 8, 1973, refusing to strike portions of Bessemer's answer, or, in the alternative, to certify certain questions of law to the United States Court of Appeals for the Tenth Circuit. After further consideration, we are convinced that we were correct in refusing to strike the contested parts of the answer, but we also think that the theory upon which we reached this conclusion must be modified.

The question at issue is whether the government must compensate Bessemer for the loss of silt in the water which the government proposes to deliver to Bessemer. In the May 8 opinion, we upheld Bessemer's right to recover on the theory that there had been a "taking" of a part of its vested water rights. The government has convinced us that there are jurisdictional obstacles in the way of our entertaining Bessemer's claim for compensation because of this "taking." This does not, however, justify striking the answer, for we think that the loss of siltation may be viewed as an item of damage to the remaining lands of Bessemer and its shareholders.

Whether compensation for the silt is appropriate depends upon whether the award of severance damage is appropriate here. This, in turn, depends upon whether the lands taken and the lands left to the shareholders can be regarded as a single tract. Sharp v. United States, 191 U.S. 341 (1903). This question is one of fact, 4A Nichols, The Law of Eminent Domain § 14.31 (3d ed. 1971); Sharp v. United States, supra, and its resolution should be

left for a later point in these proceedings unless an answer is clear now as a matter of law. Certainly physical contiguity is important in making the determination, L. Orgel, Valuation Under the Law of Eminent Domain § 47, at 229 (2d 3d. 1953), and it does appear here that the lands are all connected by the narrow strip constituting the ditch right-of-way.

Physical contiguity alone is not a fact determinative of whether the lands are part of a single tract. Even more important is the question of whether the lands taken and the lands left are readily adaptable for use as constituent parts of a single economic unit. United States v. Waymire, 202 F.2d 550, 554 (10th Cir. 1953); Nichols, The Law of Eminent Domain § 14.31[1] (3d ed. 1971). It would be possible for the fact-finder to draw the inference of economic unity here, because the lands were used for the single purpose of carrying water to farms and growing crops on them. Each part, valued separately, may be worth less without the other, and the two parts may be more valuable as a single whole than as two separate parts. We thus think it is possible to infer that there has been a partial taking of lands belonging to Bessemer and its shareholders. If this inference is ultimately drawn, then Bessemer should be able to recover severance damages caused by the use to which the land taken is put.

The government resists this conclusion, first, by arguing that it has expressly left Bessemer its water rights. This may be true, but it proves only that defendant is entitled to a lesser amount of damages than if the government had taken the entire right. Bessemer still asserts that it has sustained some damage because of the use to which the land taken has been put, and, if severance damage is appropriate, the company is entitled to prove this assertion. The government also argues that an award of damages for loss of siltation impermissibly expands the scope of what the government declares it is taking. We do not agree. We do not contemplate awarding the government title to anything more than it has declared that it is taking. Nor do we intend to force the government to pay for anything more than it is taking. We do think, however, that the government should pay for the damage caused by its taking, and this includes loss in value of the remaining lands owned by Bessemer and its shareholders.

What we have said in this order admittedly modifies part of our reasoning in the May 8 opinion. It does not modify the result, and Bessemer is still entitled to prove that it has sustained a loss because of the loss of silt

in the water reserved to it. Moreover, since recovery of this item of damage seems largely to turn upon a question of fact, we think no purpose would be served by certifying the question to a higher court. Consequently, it is

ORDERED that the United States' motion to reconsider or, in the alternative, to certify be, and the same hereby is, denied.

DATED at Denver, Colorado, this ____ day of September, 1973.

BY THE COURT:

ALFRED A. ARRAJ, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

NO. C-1480

UNITED STATES OF AMERICA, Plaintiff, vs. 508.88 ACRES OF LAND, More or Less, Situated in the County of Pueblo, State of Colorado; THE BESSEMER IRRIGATING DITCH COMPANY, et al., and UNKNOWN OWNERS, Defendants.	MOTION TO CERTIFY QUESTIONS TO COLORADO SUPREME COURT

The Bessemer Irrigating Ditch Company moves the Court to certify questions set forth below to the Colorado Supreme Court:

For more than 100 years Bessemer Ditch owners have irrigated their land by use of an unlined open irrigation ditch taking natural water from a natural stream containing natural silt and sediment. A large stream-bed reservoir was built by the United States on the stream so that the ditch and irrigators are supplied with only clear, sediment-free water from the reservoir resulting in greatly increased seepage out of the ditch injuriously affecting land and improvements along the line of the ditch and substantially diminishing the quantity and utility of the water for the historical irrigation. Under such circumstances:

I

Does the removal of the silt content of the river water by the artificial means constitute the taking of a property element of a Colorado water right?

II

Does the ditch owners' right to seep adjacent lands by use of the unlined irrigation ditch (customarily included as part of the ditch easement) include the right to increase the burden of the ditch easement:

(a) by reason of the clear water causing new and substantially increased damage to lands heretofore seeped, and

(b) by reason of the clear water damaging additional land not formally seeped?

The grounds for said Motion are:

1. The Colorado Supreme Court will respond to questions certified to it by this Court. Rule 21.1(a) of Colorado Appellate Rules provides:

> (a) "Power to Answer. The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or a United States District Court, when requested by the certifying court, if there is involved in any proceeding before it questions of law of this state, which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court."

2. This Court has complete discretion with respect to certification. Lehman Brothers v. Schein, 416 U.S. 386, 40 L. Ed. 2d 215, 94 S. Ct. 1741 (1974). The Supreme Court in remanding a case to the Second Citcuit Court of Appeals to consider certification, stated at page 390.

> "We do not suggest that where there is doubt as to local law and where the certification procedure is available, it is obligatory. It does, of course, in the long run save time, energy and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court.
>
> Here resort to it would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant state."

3. Because of the large number of claims dependent upon resolution of the questions, we ask that this Court exercise its discretion and seek a clear pronouncement of Colorado law. A conclusive determination of these questions will save time, energy, and judicial resources. It would form the basis for the transfer of portions of these proceedings to the Court of Claims that this Court otherwise might find compelled to hear. These matters are set forth in greater detail in the paragraphs below.

4. Judicial time will be conserved if all federal courts that will hear portions of the total litigation have the answers of the Colorado Supreme Court to the questions. Each of those persons who were stockholders on December 15, 1973, the date when the United States terminated river water deliveries and shifted to clear water operation, have filed an action in the Court of Claims under the Tucker Act, 28 U.S.C. 1491, to recover: (i) damages usffered by the taking of the silt quality out of their Colorado water rights, and (ii) for compensation covering amounts they will be required to pay others whose property will be seeped, bogged or flooded from clear water operation. Prior to final disposition of the litigation pending in this Court and the Court of Claims it will be necessary for this Court, the Tenth Circuit Court of Appeals, the Court of Claims, and possibly the Supreme Court of the United States to find Colorado water law with respect to the two questions presented for certification. Conservation of judicial time by the several courts will result from certification. Lehman Brothers pointed out that the Supreme Court and the Circuit Courts have resorted to certification from time to time to obtain conclusive determinations of state law.

5. Certification will lead to uniform decisions and therefore result in the payment of just compensation in this and in the Court of Claims. Failure to certify creates the risk that the several courts involved will reach different conclusions as to Colorado law. Consider:

(a) This Court or the Court of Claims finds that the seep and bog plaintiffs are not entitled to recover damages for their injuries. In separate litigation the Colorado Supreme Court decides to the contrary. Bessemer and its stockholders will suffer substantial monetary damage running into several million dollars without counterbalancing federal compensation. Bessemer and its stockholders will lack funds to line the ditch through Pueblo and to purchase seepage easements east of Pueblo in the agricultural area, or to take other corrective measures.

(b) This Court or the Court of Claims may hold that the seep and bog plaintiffs are entitled to recovery and compensate Bessemer stockholders accordingly. The Colorado Supreme Court may hold otherwise. Under these circumstances the United States will have paid excess compensation.

(c) This Court and the Tenth Circuit Court may reach conclusions as to Colorado law contrary to the conclusions of the Court of Claims, a situation which is uncorrectable except by the United States Supreme Court - and properly corrected only if the Court decides to certify the question. An uncorrected split decision

on the base issues guarantees an unjust result for Bessemer stockholders and the United States.

(d) The Colorado Supreme Court may reach a middle ground. This Court, the Court of Claims, and the Colorado Supreme Court could reach three different results, each applying a different standard. Again, a guarantee of unjust compensation.

Counsel believe that the Colorado Supreme Court will adopt this Court's view when the quality (silt taking) issue is ultimately presented to it. However, with respect to the silt issue all of the possibilities described above exist.

Just compensation is a practical concept and should be so treated.

> The owner is entitled to be put in as good a position pecuniarily as if his property had not been taken. He must be made whole but is not entitled to more.

Olson v. United States, 292 U.S. 246, 255 (1934). Two major substantive issues of law must be decided by two trial courts and one, or possibly two, appellate courts. Certification will prevent erroneous findings of Colorado law and should lead to just and uniform results for Bessemer and the United States.

6. Lack of definiteness of Colorado law prevents Bessemer and its stockholders from moving this Court to make an efficient division of the entire litigation between itself and the Court of Claims. The Declaration of Taking, filed June 11, 1969, describes Tract 431, the upper four miles of ditch. This Court is required to hear the Tract 431 case. 40 U.S.C. § 258a; Rule 71A, Fed. R. Civ. P. Further, this Court is required by existing case law to compensate Bessemer and its stockholders for the severance damage they have suffered from the taking, "and this includes loss of the remaining lands owned by Bessemer and its stockholders." Opinion by Arraj, J., September 20, 1973.

Attachment 1 describes in general the kinds of damage that are being suffered from clear water operation. Two principles give this court authority to transfer severance damage proceedings to the Court of Claims if Bessemer and its stockholders frame this matter in the proper procedural posture.

(a) 28 U.S.C. § 1406(c) provides as follows:

> (c) If a case within the exclusive jurisdiction of the Court of Claims is filed in a district court, the district court shall if it be in the interest of justice transfer such case to the Court of Claims, where the case shall proceed as if it had been filed in the Court of Claims on the date it was filed in the district court.

If Bessemer amends its answer to assert a Tucker Act counterclaim under 28 U.S.C. § 1491, with respect to all of the various damage described in Attachment 1, then under 28 U.S.C. § 1406(c), this Court can transfer the severance damage counterclaims to the Court of Claims.

(b) Attachment 2 is the Opinion of Chief Judge Cowen of October 26, 1973, in Vanada v. United States, 202 Ct. Cl. 1121 (1973).

That case holds that were a federal district court neither hears nor considers the severance damage issues in a condemnation action, those issues can be heard by the Court of Claims under the Tucker Act. Res judicata is no bar. Use of this precedent would require a decision by this Court not to hear the severance damage part of this case, a failure by Bessemer and its stockholders to appeal such holding, and a stipulation with government counsel that the United States would not assert res judicata, estoppel, or similar defenses in the Court of Claims proceeding. Use of 28 U.S.C. § 1406(c)

appears preferable. But counsel cannot take the procedural steps necessary to seek transfer of the severance damage issues to the Court of Claims until there is assurance that that court will apply proper Colorado law. The stockholders must proceed in this Court with a trial of the severance damage issues because of the favorable opinion of May 8, 1973; the stockholders cannot risk a contrary opinion by the Court of Claims. Once the Colorado Supreme Court has spoken on this issue, however, counsel can take the procedural steps prerequisite to a transfer.

7. Transfer of litigation regarding the Attachment 1 damages to the court of Claims presents a number of advantages:

(a) Trial of the entire Attachment 1 proceeding in the Court of Claims will create a savings of time;

(i) Trial of the severance damage issues in a district court requires a threshold finding that the particular stockholder's water use does or does not constitute part of an economic unity. A Tucker Act case does not require a finding of economic unity; it only requires a taking. Trial in the Court of Claims will thus save the judicial, attorney, and witness time otherwise devoted to the economic entity issue.

(ii) Duplication of trial time and effort, insofar as proof of the common elements of damages is concerned, can be eliminated.

(b) The parties can litigate in the Court of Claims on a more equal footing. In this Court Bessemer and its stockholders must pay their own attorney and expert witness fees. Because of losses suffered by the stockholders from clear water operations last year and those expected this year, their ability to pay any substantial amounts for attorney and expert witness fees is limited. However, any successful Tucker Act plaintiff is entitled to an award which includes reasonable attorney fees and engineering expenses. 42 U.S.C. § 4654(c) provides:

> (c) The court rendering a judgment for the plaintiff in a proceeding brought under section 1346 (a) (2) or 1491 of Title 28 awarding compensation for the taking of property by a Federal agency, or the Attorney General effecting a settlement of any such proceeding, shall determine and award or allow to such plaintiff, as a part of such judgment or settlement, such sum as will in the opinion of the Court, or the Attorney General reimburse such plaintiff for his reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal and engineering fees, actually incurred because of such proceeding.

Irrespective of whether this Court, the Court of Claims, or both courts hear this matter, the stockholders will be faced with a well-prepared battery of government attorneys and expert witnesses. It is only in the Court of Claims that the stockholders can, because of the statute cited, adequately prepare and present their case.

(c) The cost of serving process on the December 15, 1973 stockholders will be eliminated.

8. A recent Colorado case authorizes Bessemer's directors to transfer the entire severance damage matter to the Court of Claims. Jacobucci vs. District Court _____ Colo. _____, 541 P.2d 667 (1975), held that mutual ditch company stockholders own both the physical structures and water rights, and that the stockholders, in the contract represented by the corporate charter, may vest in the directors whatever authority they wish with respect to these assets. The Bessemer articles grant the directors the power to maintain and operate the ditch and to manage the property and conduct the business of the company as they deem in the best interests of the company. The company property consists of the ditch and the water rights. The company has legal title to both.

9. Determination of the two questions by the Colorado Supreme Court may lead to a solution of growing clear water problems. Discussions have been conducted with the Bureau of Reclamation in regard to the construction by the Bureau of a canal around the reservoir to deliver substantial silt flows to Bessemer and to the Arkansas River below the dam. Downstream ditches are beginning to have clear water difficulties. They are interested in a physical solution to this problem Either answer the Colorado Supreme Court gives will establish the economic parameters for the solution to the problem. Meaningful discussions cannot go forward until these parameters are known.

10. This Court can expect an answer to the Questions certified six to seven months after the Colorado Supreme Court receives the Certification Order. This time

period breaks down as follows: The matter should be at issue about two months after certification; cases are argued three to six weeks after they are at issue; and, currently, the Colorado Supreme Court renders its opinions three to four months after argument.

11. Colorado Appellate Rule 21.1 describes the formalities of certification. It requires the certification order to set forth the questions of law to be answered and a statement of facts relevant to the questions certified. This can be accomplished by certifying the questions propounded in this motion and attaching this Court's opinions of May 8, 1975, September 20, 1973, and the affidavit of Dr. Darrel B. Simons, Assistant Dean of Colorado State University, which was filed with this Court March 29, 1973. This affidavit provided the factual basis for this Court's opinion of May 8, 1973. This Court's two opinions have already been before the Supreme Court in the Jacobucci case.

WHEREFORE, in the interest of uniformity of decision in the federal judiciary, the conservation of judicial time, the fairness of result, a reasonable division of work between this Court and the Court of Claims, sound judicial administration and cooperative judicial federalism, it is respectfully requested that this court certify the questions proposed to the Colorado Supreme Court.

SAUNDERS, SNYDER, ROSS & DICKSON

GLENN G. SAUNDERS

JOHN M. DICKSON

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Motion to Certify questions to the Colorado Supreme Court has been served upon the following persons by depositing a true and correct copy thereof in the U.S. mail with proper postage affixed this 30th day of March, 1976, addressed to the following:

James L. Treece
United States Attorney
United States Courthouse
19th and Stout Street
Denver, Colorado 80202

Mr. B. Richard Taylor
Trial Attorney
Department of Justice
P.O. Box 1656
Denver, Colorado 80202

Two years of clear water operation have demonstrated areas of damage caused by the use of clear water to include:

A. Main Ditch:

1. Excessive loss of water through bottom and sides of main ditch causing level of water table in area to increase which has resulted in the flooding of many basements in Pueblo, the bogging of Pueblo's municipal golf course and lands, and the alkalization of lands.

2. Increase in annual operating expense caused by clear water operation such as clean up from sloughing off of the banks of the main ditch into the ditch from excessive moss and weed growth in clear water and from adding material to attempt to obtain some sealing of the ditch.

3. Capital investment required to convert ditch to clear water operation such as lining ditch. Purchasing easements to raise water table in areas where no encroachment existed in the past is a possible alternative.

B. Laterals:

1. Excessive leakage through bottom and sides of laterals. Purchase of easements, water table elevation increase lining, etc.

C. User Losses:

1. Increased farm operating expense required to use clear water.

2. Increased capital investment required to make use of clear water.

3. Reduction in water supply arriving at the user's junction box on his supply lateral.
4. Sloughing off of sides of on-farm laterals into bottom.
5. Additional on-farm laterals required plus turn around space for machinery in conjunction with new laterals.
6. Excessive weed problems in on-farm laterals.
7. Excessive erosion.
8. Some boggy areas have been created and some areas have gone to alkali.
9. Loss of effective fertilization.

IN THE UNITED STATES COURT OF CLAIMS

No. 514-71

CHESTER S. VANADA, BETTY RAY VANADA,
ROBERT P. LANT, GERTRUDE A. LANT,

Plaintiffs,

v.

THE UNITED STATES,

Defendant.

Before COWEN, Chief Judge, SKELTON and BENNETT, Judges.

O R D E R

This case comes to the court on defendant's motion for summary judgment, having been submitted to the court on the briefs and accompanying papers of the parties and without a request for oral argument. Upon consideration of the case, the court concludes as follows:

(1) Plaintiffs here were condemnees in an action in the United States District Court wherein the Government took certain of their lands to a high-water mark designated as 362.6 feet m.s.l. United States v. 124.84 Acres of Land, No. EV 65-C-53 (S.D. Ind. Dec. 7, 1966), aff'd, 387 F. 2d 912 (7th Cir. 1968). They received a judgment for said lands but challenged the correctness of the 362.6-foot elevation, which, had their views prevailed, would have added 12 to 15 acres to the taking. The district court concluded that it was without authority to alter or to amend that bench mark to include additional lands. Plaintiffs did not appeal that decision and now accept it as correct. However, they here seek recovery under the Tucker Act for lands not included in the 1965 complaint for condemnation

which was the subject of the judgment referred to above. Defendant states that plaintiffs are barred by the doctrine of res judicata because the same parties were before the district court when the same issue was decided there. We conclude otherwise. The district court failed to decide plaintiffs' properly raised allegation that elevation 362.6 feet m.s.l. was not the correct ordinary high-water mark. The court did not reach that issue on the merits and concluded that it had no authority to do so, as noted above. Plaintiffs reserved their right, upon advice of Government counsel and a Rule 71A commission, appointed by the district court, to proceed on the correctness of the high-water mark in a Tucker Act proceeding in the Court of Claims. The district court could have considered this issue. United States v. 21.54 Acres of Land, No. 72-2447 (4th Cir. July 13, 1973). Its failure to do so does not divest the Court of Claims of its jurisdiction in a separate proceeding under different statute. No final judgment has been rendered on the instant issue and a genuine issue of material fact remains to be adjudicated. The issue is not barred.

(2) Plaintiffs' assertion that defendant is barred by estoppel from asserting the defense of res judicata is rendered moot by the above ruling, but is without validity in any event.

(3) Plaintiffs' Count II states a new claim upon which relief can be granted insofar as it states a claim regarding sand and gravel taken from land "at or near," but not included in the taking. The district court consideration, in United States v. 124.84 Acres, supra, specifically avoided this matter. No independent claim upon which relief can be granted has been stated for sand and gravel taken from land included in the taking which might lie below elevation 362.6 feet and above a correct ordinary high-water mark, if such a different mark exists. Existence of mineral deposits on land taken by defendant cannot be considered independently, but must be considered only as it enhances the value of the whole. United States v. 158.76 Acres of Land, 298 F. 2d 559, 561 & n. 4 (2d Cir. 1962). Any compensation for such sand

and gravel taken must be included in the compensation received for the taking of that area below elevation 362.6 feet and above the correct ordinary high-water line, if such area is found actually to exist.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment be and it is hereby denied.

IT IS FURTHER ORDERED that the case be and it is hereby remanded to the Trial Division of this court for proceedings consistent herewith.

BY THE COURT

OCT 26 1973

Wilson Cowen
Chief Judge.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action C-1480

UNITED STATES OF AMERICA,

Plaintiff,

v.

508.88 Acres of Land, More or Less,
Situate in Pueblo County, Colorado;
THE BESSEMER IRRIGATING DITCH COMPANY,
et al., and UNKNOWN OWNERS,

Defendants.

Mr. James L. Treece, United States Attorney, by Mr. B. Richard Taylor, Trial Attorney, Department of Justice, 323 U. S. Courthouse, Denver, Colorado, for Plaintiff; Messrs. Preston, Altman, & Parlapiano, Attorneys at Law, by Mr. Leo S. Altman, 501 Thatcher Bldg., Pueblo, Colorado; Messrs. Saunders, Snyder, Ross & Dickson, P.C., Attorneys at Law, by Messrs. Glenn G. Saunders and John M. Dickson, 802 Capitol Life Center, Denver, Colorado, for Defendant.

MEMORANDUM OPINION AND ORDER

ARRAJ, Chief Judge

This matter is before the court on the motion of Defendant Bessemer Irrigating Ditch Company to certify a question to the Supreme Court of Colorado and for reconsideration of the court's earlier ruling that the shareholders of Bessemer need not be joined as parties defendant. There have been several significant developments in this case and in Colorado water law generally since our order of September 20, 1973; these will be discussed below.

The essence of the underlying cause of action, the nature and relationship of the parties, and the elements of the controversy presenting itself in this motion have been discussed in detail in the court's previous memorandum opinion and order of May 8, 1973 and the order of September 20, 1973. Briefly, the United States seeks to condemn certain real property and improvements for the

construction of the Pueblo Dam and Reservoir, a unit of the Fryingpan-Arkansas Water Diversion Project. The properties taken include the headgate improvements and the upper four miles of the irrigation canal known as the Bessemer Ditch. The United States has constructed an outlet in the dam to deliver to Bessemer the quantity of water appropriated to it under Colorado water law. Defendant Bessemer is a mutual ditch company organized pursuant to Colo. Rev. Stat. 1973 § 7-42-102 et seq. in 1894. The thrust of its contention here is that the water it now receives from the outlet in the Pueblo Dam is diminished in quality from that which it received prior to the opening of the outlet and that this diminution is compensable in this proceeding.[1]

I

Following is the question[2] that Bessemer seeks to certify to the Colorado Supreme Court:

> Is the silt content of water diverted pursuant to an appropriative right from the natural stream a water property right under Colorado law?

The authority for such certification is found in Colorado Appellate Rule 21.1, which states in pertinent part:

> The [Colorado] Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or a United States District Court, when requested by the certifying court, if there is involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the [Colorado] Supreme Court. .... This Rule may be invoked by an order of the courts referred to [above] upon said court's motion or upon motion of any party to the cause.

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[1]Prior to the construction of the Pueblo Dam, Bessemer received its water directly from the Arkansas River. The water had a high silt content, which Bessemer alleges was beneficial in sealing the ditch, preventing the growth of water-consuming aquatic flora, and supplying nutrients to the irrigated lands. During the construction of the dam, the Government supplied water by means of a diversion system, which water similarly possessed a high silt content. After the dam was built, the water was supplied from the reservoir itself through an outlet in the dam. Bessemer alleges that the water now supplied is clear, the silt settling into the bottom of the reservoir and not passing through the outlet. The declaration of taking was filed June 11, 1969. The clear water allegedly began passing into the ditch on or about December 15, 1973. The declaration stated that the taking was of the fee simple title to the lands and improvements and specifically reserved to the condemnee Bessemer the water rights "in accordance with Colorado law."

[2]The phrasing of the question or questions to be presented to the Colorado court has consumed much time, the parties being unable to agree on it or on the supporting materials to be submitted. Our determination that the question will not be certified precludes the necessity of framing a suitable question. For the purposes of this opinion, Bessemer's suggested question sufficiently states the issue.

Colo. App. R. 21.1, Colo. Rev. Stat. 1973 vol. 7, ch. 27. Four prerequisites to certification are established by the rule. First, there must be a question of law presented and not merely one of fact. Second, the question must be certified by an appropriate court. Third, the question must be one that may be determinative of the cause. Fourth, it must appear to the certifying court that there is no controlling case decided by the Colorado Supreme Court. Of course, the procedure is one whose "use in a given case rests in the sound discretion of the federal court." Lehman Brothers v. Schein, 416 U.S. 386, 391 (1974). We decline to certify the question for three reasons.

Not all of the prerequisites of the rule are met here. This court could not state to the Colorado court that the question presented is one that "may be determinative of the cause." There are other questions in this case, both of law and fact. No one of them can be singled out as "determinative." Without such a finding, certification is inappropriate. See Imel v. United States, 375 F. Supp. 1102 (D. Colo. 1973). The Colorado court, like other courts, must marshal its resources to ensure judicial efficiency. Advisory opinions that will not resolve a case or controversy are wasteful of those resources. Nor are we content to certify the question to the Colorado court and allow it to find the question is not determinative of this entire controversy, as has been suggested. Such an exercise is not likely to foster "cooperative judicial federalism." Lehman Brothers v. Schein, supra at 391 at n.8.

Secondly, the certification may be futile for the reason that the United States so vigorously protests the action. In this posture the Colorado court may choose to decline consideration of the matter.[3]

Finally, the question of law which the defendant seeks to certify concerns an aspect of the case that this court now determines must properly be brought in its suit before the Court of Claims. See part III infra.

I therefore conclude that, despite the arguable power to certify, certification would not be proper here. The mere possession of power is not a mandate of its exercise. Rios v. Morton, Civil Action No. C-5499 (D. Colo. Nov. 5, 1975).

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[3]Another factor in this regard is the sovereign immunity of the United States. While the Government is properly before this court pursuant to its own condemnation action, there remains the question of whether this court may order the United States to appear in a state court in the posture of a civil respondent without an express waiver of sovereign immunity. Our research has failed to reveal a case so allowing.

II

The memorandum opinion and order of May 8, 1973 held that the shareholders of Bessemer were not required to be joined in this action. Since the issuance of that opinion, the Colorado Supreme Court has had occasion to consider the nature of a mutual ditch company and its relationship to its shareholders. Jacobucci v. District Court of Jefferson County, ____ Colo. ____, 541 P.2d 667 (1975). Bessemer contends that this subsequent development requires this court to reconsider the previous denial of joinder. Jacobucci does appear to hold that the shareholders of a mutual ditch company are necessary parties in a state condemnation action seeking to obtain the land and water rights of the ditch company. Id. at 673. The opinion in fact categorizes the parties as indispensable under Colorado civil procedure. Colo. R. Civ. P. 19; Jacobucci v. District Court, supra at 674.

We begin with the premise that this is a procedural question, since it is directly governed by a federal rule of civil procedure. Fed. R. Civ. P. 19; Hanna v. Plumer, 380 U.S. 460 (1965). As such, its determination is not dictated by resort to state precedents. Id. Additionally, Jacobucci concerned itself with a condemnation action brought by a municipality pursuant to state statute. The eminent domain authority of the United States and the procedures implementing it are regulated, if at all, by federal law.

The state substantive law, however, is relevant in assessing the nature of a mutual ditch company and the relationship of it to its shareholders. 3A J. Moore, Federal Practice ¶ 19.01[4] (2d ed. 1974). In that light, the effect of Jacobucci should be considered.

> The relationship between the mutual ditch corporation and its shareholders arises out of contract, implied in a subscription for stock and construed by the provisions of a charter or articles of incorporation. ....
>
> ....
>
> The shares of stock in a mutual ditch corporation represent the consumer's interest in the reservoir, canal, and water rights.
>
> ....
>
> .... While the "naked title" may stand in the name of [the mutual ditch company], the ditch, reservoir, and water rights are actually owned by the farmers who are served thereby.

Jacobucci v. District Court, supra at 671-73. Thus the shareholders of Bessemer are the actual, if not the "naked title," owners of the ditch here. Therefore they may be proper parties in an action that seeks to condemn the land on which the ditch is located.

Having determined this much, the next question is how should the shareholders be classified under Rule 19. It would appear that they are not Rule 19(a)(1)

parties, because complete relief could be accorded to the mutual ditch company the shareholders formed and their rights to any relief would be dictated by the articles of incorporation of Bessemer. It is possible that they may be Rule 19(a)(2)(i) parties if any judgment failed to protect their interest, whatever it may be. Clearly it cannot be claimed that they are Rule 19(a)(2)(ii) parties, since that provision exists primarily for the benefit of the adverse party in the litigation who may be subject to multiple liabilities caused by nonjoinder. Here the Government most strenuously objects to joinder and so cannot be considered to be prejudiced by nonjoinder. See 3A J. Moore, Federal Practice, ¶ 19.07 et seq. (2d ed. 1974).

Even if the shareholders were considered necessary parties under Rule 19(a), their numerosity renders their joinder infeasible. Kent v. Northern Calif. Regional Office of the American Friends Service Comm., 497 F.2d 1325, 1329 (9th Cir. 1974). Therefore we must turn to Rule 19(b) to determine whether the nonjoinder of these possible necessary parties whose joinder is not feasible requires dismissal.

The first test is whether a judgment rendered in the absence of the shareholders might be prejudicial to them or to the parties here present. Since the mutual ditch company can be considered an adequate representative of the interests of the shareholders (see order of May 8, 1973), it is difficult to see what prejudice might result to them. As to the present parties, it is likewise difficult to see how any one of them would be exposed to a fresh action by the absentee, especially in light of the fact that all of the shareholders have joined in the action in the Court of Claims seeking compensation for the precise same set of facts. See Advisory Committee Note to 1966 Revision of Fed. R. Civ. P. 19.

The second factor is the extent to which the relief can be shaped, by protective provisions in the judgment, to lessen or avoid any prejudice. Assuming that there is any prejudice, the court can and will formulate a decree that will preserve to the shareholders their rights in any compensation awarded in this court. There is no need to consider a protective provision concerning the Court of Claims action, since the shareholders have joined as parties plaintiff there.

The third factor to be considered is whether the judgment rendered in absence of the shareholders will be adequate. We find that the posture of the proceedings at this juncture, the relationship of Bessemer to the shareholders,

and the ability of the court to cast in fair and equitable terms any judgment require a determination that any judgment rendered would be adequate.

The fourth factor is whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder. In a condemnation proceeding, it is actually the defendant-condemnee who should be considered in this regard. The Government, having taken the land to be condemned, has all that it desires. It is the condemnee who is to be awarded just compensation who might be prejudiced by nonjoinder, especially since relief would then be available only in an inverse condemnation action.

Upon consideration of all the factors set out in Rule 19(b), the court concludes that the shareholders, even if they are held to be necessary parties in this action, are not indispensable parties and dismissal for nonjoinder, were it requested, would not be required.[4]

III

This case has bogged down over the question of silt. A great deal of time, both the court's and the parties', has been spent in researching and analyzing the relationship of Bessemer's claim for damages for loss of silt to the underlying condemnation action. Two opinions have already been issued on the question, the later on September 20, 1973. Arguing the lack of controlling precedent in Colorado case or statutory law, defendant Bessemer has sought to certify the question discussed above. See part I supra.

There has been a noteworthy development since the September 20, 1973 order. Defendant Bessemer, along with its shareholders and the owners and operators of lateral ditches from the Bessemer Ditch and the shareholders of those laterals, have filed a civil suit in the Court of Claims. Suit was filed by the 957 plaintiffs pursuant to 28 U.S.C. § 1491 and claims entitlement to an award of just compensation from the United States for the taking of the alleged property right to turbid, silt-laden water and substituting clear water therefor. A-B Cattle Company, et al. v. United States, No. 105-75 (Ct. Cl., Trial Div. 1975). The issue, obviously, is precisely the same as that framed by Bessemer for determination in this case.

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[4] The extended analysis of the rule and its factors has been necessitated by the somewhat unusual nature of the case. Defendant seeks joinder of the shareholders, but does not now nor has it sought dismissal for nonjoinder. Furthermore, the Government did all that it should have in initiating the suit by joining all the record owners of the land condemned. It would not be feasible at this stage of the proceedings to join the numerous shareholders and force the proceedings back to the posture obtaining in 1969.

In that case Trial Judge Harry E. Wood, at the request of the plaintiffs therein to suspend proceedings pending final action in this case, suspended any action until June 21, 1976. The conclusion here reached has been based upon the knowledge of the pendency of that action and the suspension date ordered by Judge Wood. The Court of Claims is the proper forum in which the parties should proceed.

A

The order of September 20, 1973 demonstrated the acknowledged jurisdictional difficulties with the entire question of silt loss as an element of severance damages. There we determined that the claim of Bessemer could be compensated for, if at all, as an item of severance damages upon a determination of the fact finder that there was economic unity of the tract taken and the land reserved, and that Bessemer was "still entitled to prove that it has sustained a loss because of the loss of silt in the water reserved to it." United States v. 508.88 Acres etc., et al., Civil Action No. C-1480 (D. Colo. Order filed Sept. 20, 1973 at 2-3). The filing of the suit in the Court of Claims now renders this conclusion inappropriate.

First, the complaint in the Court of Claims reveals that the claimed damages for any loss of silt, which is the thrust and essence of that suit, will greatly exceed the $10,000 jurisdictional limit imposed on this court by 28 U.S.C. § 1346(a).[5] It would be anomalous to say that a federal district court, which does not have jurisdiction over a complaint seeking damages in excess of $10,000, would have jurisdiction over a counterclaim seeking damages against the United States in excess of $10,000. Cf. United States v. Gregory, 300 F.2d 11 (10th Cir. 1962)(Murrah, C.J.). The Congressional purpose in providing a special forum for cases seeking large judgments against the United States would be ill-served by bifurcating the treatment solely dependent upon who sued whom first. Nor is the potential for multiple suits controlling here, since we deal with statutes that create exceptions to the Government's inherent sovereign immunity. Such statutes must be strictly construed so as to ensure their properly limited application. See, e.g., Childers v. United States, 316 F. Supp. 539 (S.D. Tex. 1970), aff'd, 442 F.2d 1299 (5th Cir.).

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[5] Even though the cited statute imposes this jurisdictional limit in actions where the United States is a defendant, it has been interpreted to apply in condemnation actions where the condemnee seeks to raise a counterclaim. United States v. 6.321 Acres, 479 F.2d 404, 407 (1st Cir. 1973) (discussing 28 U.S.C. §§ 1346(a)(2), 1491).

Second, the Court of Claims has the power to afford complete relief on this claim. 28 U.S.C. § 1491. All of the concerned parties, whether classified as necessary or indispensable, are before that court. The relief available is not limited to $10,000. And moreover, the Government has not contested there, to our knowledge, the power of that court to issue the prayed for relief.

Third, there is no apparent prejudice to any of the parties by a determination that the issue of silt loss be adjudicated in the Court of Claims. The Government has suggested this procedure, and Bessemer has initiated it. In fact, according to the Government's brief, Bessemer would have sought a transfer of this aspect of the case to the Court of Claims if we had certified a question to the Colorado court and had received a favorable answer thereto. Furthermore, there has been no trial in this case, nor any presentation of evidence, so there would be no duplication of effort in the trial division of the Court of Claims. The election of defendant Bessemer to proceed in this particular fashion is entitled to consideration. Cf. 2,953.15 Acres v. United States, 350 F.2d 356, 360 (5th Cir. 1965) ("if they so elect").

Fourth, a protective provision can and will be fashioned in the final order in this case to preserve to Bessemer any claim it has for silt loss. Damages arising from this taking but not compensated for in this proceeding for whatever reason can and should be adjudicated in their proper forum, the Court of Claims. See United States v. Holmes, 238 F.2d 229, 231 (4th Cir. 1956).

Fifth, if the Court of Claims should determine that the question of silt loss is one which it cannot adjudicate without further instruction from the Colorado Supreme Court, then it can seek certification of appropriate questions from the Colorado court, and it appears unlikely that the Government would protest certification in that posture.[6]

In conslusion, the Court of Claims has jurisdiction to determine the matter at issue here; it has power to afford full relief; no apparent prejudice would

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[6]Certification may be possible under either of two methods. The Court of Claims could seek direct certification to the Colorado Supreme Court pursuant to Colorado Appellate Rule 21.1, discussed above. See part I supra. The omission of the Court of Claims from the list of courts in the rule may not be an indication of unwillingness to accept questions from that court, but rather an understandable belief that questions of Colorado law would not ordinarily arise in that court. The rule generally describes Article III courts and the Court of Claims, being an Article III court, would undoubtedly be accorded the same privilege in a spirit of comity and federalism. 28 U.S.C. § 171. Alternatively, the Court of Claims could certify the question to the Supreme Court pursuant to 28 U.S.C. § 1255(2). The Court, being enumerated in the Colorado rule, could then certify the question to the Colorado Supreme Court and relay the answer to the Court of Claims as its "binding instructions" on the matter.

result by adjudication there rather than here; a provision can be included in the judgment sufficient to protect Bessemer's claim for silt loss; and the Court of Claims could seek guidance from the Colorado court if it felt that advisable. Therefore it is now appropriate that the claim for silt loss, raised in Bessemer's answer to the complaint, be stricken from this condemnation proceeding and that the parties be left to their action in the Court of Claims on this issue.[7]

B

The parties will, of course, apprise the Court of Claims of all the relevant case law on the subject of silt loss in order to aid it in its determination. While this appears to be a novel question under Colorado law,[8] other states have dealt with questions at least similar to that posed here.[9]

It is therefore

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[7]Nothing in United States v. Northern Colorado Water Conservancy District, 449 F.2d 1 (10th Cir. 1971) precludes this result. There the court affirmed our discretionary refusal to transfer the action to the Court of Claims on the request of intervenor Yust filed nine years after the initiation of the action. Id., Civil Action No. 2782 (D. Colo.). Furthermore, defendant Bessemer has already filed a separate action in the Court of Claims, apparently recognizing the Government's contention that this court lacks subject matter jurisdiction over the claimed loss of silt, or at least acknowledging the very limited relief available under the statute. 28 U.S.C. § 1346(a)(2).

[8]Colorado has not dealt directly with the question of silt content as an element of water rights under Colorado law, as we indicated in our memorandum opinion and order of May 8, 1973. Two recent cases from the Colorado court avoided comment on the issue of water quality in passing on statutory plans for augmentation, however they gave renewed attention to the statute we noted in footnote 6 of our May 8 opinion. Colo. Rev. Stat. 1973 § 37-92-305(5). Although the Government's supply of water to Bessemer is not stated to be done pursuant to a plan of augmentation, it is a substitution of water to be accomplished "pursuant to Colorado law," according to the declaration of taking filed herein. That fact may invoke the "quality and quantity" language of the cited statute. This, of course, is a matter for the Court of Claims to determine finally. See generally Cache La Poudre Water Users Assoc. v. Glacier View Meadows, ____ Colo. ____ (June 1, 1976); Kelly Ranch v. Southeastern Colorado Water Conservancy Dist., ____ Colo. ____ (June 1, 1976). These cases also recognize that a judgment can be so phrased as to protect the interests of the parties and potential parties in the eventuality of possible adverse effects on the quality of the well water provided there. See, e.g., Cache La Poudre Water Users Assoc. v. Glacier View Meadows, supra, slip opinion at 20-21.

[9]United States v. Gregory, 300 F.2d 11 (10th Cir. 1962) (Government removal of accumulated silt from irrigation ditches caused noncompensable damage to condemnee's frog and fish business); Hicks v. United States, 266 F.2d 515 (6th Cir. 1959) (condemnee entitled to compensation for loss of use of land naturally fertilized by silt from overflow of adjoining rivers); Joslin v. Marin Municipal Water Dist., 67 Cal. 2d 132, 429 P.2d 889, 60 Cal. Rptr. 377 (1967) (riparian owner suffered noncompensable damages caused by reason of water district's appropriation of river which had previously deposited sand and gravel used by condemnee as quarry); Peabody v. City of Vallejo, 2 Cal. 2d 351, 40 P.2d 486 (1935) (riparian owner suffered noncompensable damages caused by reason of city's appropriation of water which had prevously deposited silt on land because it was an unreasonable use).

ORDERED:

1. that the motion of Defendant Bessemer Irrigating Ditch Company to certify a question of law to the Colorado Supreme Court be, and the same hereby is, denied;

2. that the claim of Defendant Bessemer Irrigating Ditch Company for damages caused by the alleged taking of silt be, and the same hereby is, dismissed and that that portion of Defendant's answer relating thereto be, and the same hereby is, stricken; and

3. that if, as a result of any change in the quality of water flowing from the Pueblo Dam and Reservoir, any compensable harm has occurred or will occur to owners of water rights in the Bessemer Ditch, they shall not be precluded by this order from recovering damages on account of such compensable harm in an appropriate action in an appropriate forum.

DATED at Denver, Colorado, this 18th day of June, 1976.

BY THE COURT:

ALFRED A. ARRAJ, Chief Judge
United States District Court

ENTERED
ON THE DOCKET
JUN 18 1976
JAMES R. MANSPEAKER
BY [illegible]
DEP. CLERK

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

UNITED STATES OF AMERICA, Plaintiff, v. 508.88 Acres of Land, More or Less, Situate in Pueblo County, Colorado; THE BESSEMER IRRIGATING DITCH COMPANY, et al., and UNKNOWN OWNERS, Defendants.	CIVIL ACTION NO. C-1480 TRACT NO. 431, Parcel A (446 acres) JUDGMENT ON STIPULATION FOR SETTLEMENT

CAME ON this day to be considered the matter of entry of judgment on Stipulation for Settlement as to the just compensation to be paid for Tract 431, Parcel A, heretofore entered into by and between Plaintiff, United States of America, and Defendant, The Bessemer Irrigating Ditch Company, by and through their respective attorneys.

And it appearing to the Court that this condemnation action was instituted on June 11, 1969 by the filing of a Complaint in Condemnation, and on the same day, by the filing of a Declaration of Taking, reference to which is made for all purposes, there was deposited in the Registryof the Court the sum of $31,200.00 as estimated compensation for the taking; and on said date, title to the estate described in said Declaration of Taking vested in Plaintiff, United States of America, and there vested in the parties entitled thereto the right of just compensation; and

It further appearing to the Court that there are no taxes due on said property; that this proceeding has been regularly conducted; that all necessary persons have been served, either in person or by publication, and the only remaining party entitled to receive the just compensation for the above-captioned Parcel is Defendant, The Bessemer Irrigating Ditch Company; and

It further appearing to the Court that the parties have entered into a comprehensive Stipulation for Settlement of Tract 431, Parcel A:

IT IS ORDERED that the Stipulation is in all things ratified, confirmed and adopted as the judgment of compensation for Tract 431, Parcel A.

IT IS FURTHER ORDERED that the sum of $65,000.00, inclusive of interest, is the just compensation for the taking of Tract 431, Parcel A, consisting of 446.00 acres.

And it appearing to the Court that the sum of $31,200.00 heretofore deposited in the Registry of the Court as estimated compensation for the taking of Tract 431, Parcel A, has been previously advanced to Defendant Bessemer;

IT IS FURTHER ORDERED that the amount of $33,800.00, representing the difference between the deposit and the stipulated compensation, shall be deposited in the Registry of the Court by Plaintiff, United States of America, and upon such deposit, the Clerk of the Court shall issue a check in said amount, payable to Defendant, The Bessemer Irrigating Ditch Company.

IT IS FURTHER ORDERED that if, as a result of any change in the quality of water flowing from Pueblo Dam & Reservoir, any compensable harm has occurred or will occur to owners of water rights in Bessemer Ditch, they shall not be precluded by this Judgment from pursuing their claim for damages therefor in an appropriate action in an appropriate forum.

IT IS FURTHER ORDERED that title to the estate described in the Declaration of Taking filed herein, with respect to Tract 431, Parcel A, consisting of 446.00 acres, is vested in Plaintiff, United States of America.

And it being represented to the Court that nothing further remains to be done as to this Civil Action, that when said funds are disbursed, this action shall be closed and stricken from the active docket.

DONE AT DENVER, COLORADO, this 2nd day of November, 1976.

ENTERED
ON THE DOCKET
NOV 4 1976
JAMES R. MANSPEAKER
BY _____ DEP. CLERK

BY THE COURT:

Alfred A. Arraj
UNITED STATES DISTRICT JUDGE

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PUEBLO RESERVOIR HIGH WATER LINE

RELOCATED DENVER AND RIO GRANDE WESTERN

PUEBLO DAM AXIS

PUEBLO RESERVOIR

ARKANSAS RIVER

DIVERSION DAM

GOVERNMENT PARSHALL FLUME

Livesey

BESSEMER DITCH

BOGGS CREEK SIPHON

Goodnight

Peck Creek

PUEBLO DAM OUTLET FOR BESSEMER DITCH

96

BESSEMER DITCH

END GOVERNMENT TAKE LINE

BESSEMER DITCH PARSHALL FLUME

Rock Creek

Boggs Creek

RED CREEK ROAD

RELOCATED 96

2000 0 2000 4000 6000 FEET

SCALE

HEAD REACH OF BESSEMER DITCH 95