1-23-1953

City and County of Denver v. Northern Colo. Water Conservancy Dist.

130/375

Nos. 16881-16888

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

CITY AND COUNTY OF DENVER, CITY OF COLORADO SPRINGS, SOUTH PLATTE WATER USERS ASSOCIATION,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, NORTHERN COLORADO WATER CONSERVANCY DISTRICT, COLORADO RIVER WATER CONSERVATION DISTRICT, F. E. YUST, CLAYTON HILL, GRAND VALLEY IRRIGATION CO., GRAND VALLEY WATER USERS ASSOCIATION, ORCHARD MESA IRRIGATION DISTRICT and PALISADE IRRIGATION DISTRICT,
Defendants in Error.

Error to the District Court of the County of Summit.

Honorable Wm. H. Luby, Judge.

CROSS-SPECIFICATION OF POINTS OF COLORADO RIVER WATER CONSERVATION DISTRICT AND BRIEF OF SAID DISTRICT IN SUPPORT THEREOF AND IN ANSWER TO BRIEF OF CITY AND COUNTY OF DENVER

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PEERLESS PRINTING CO., DENVER

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INTRODUCTORY

It appears from the record in this case that the adjudication proceeding which is now before the Court for review was commenced in the District Court of Summit County as early as the year 1942. In the introduc-

tory remarks appearing in the brief of the City and County of Denver, references are made to occurrences as far back as 1914. In view of the many changes which have taken place in the intervening years, it is believed that it would be helpful to this Court to review briefly the background or framework in which this case has its setting.

The Colorado River has inspired books, songs, and litigation. It is an area where human existence as well as economic development depends upon a supply of water.

As early as 1921 it became apparent that there might not be sufficient water in the Colorado River to meet the demands, immediate and potential, of the various states which depended in whole or in part upon said river as a source of supply. Therefore to partly adjudicate and adjust the conflicting claims, the Colorado River Compact was adopted and approved by the Legislature of the State of Colorado. Sessions Laws 1923, page 684. This compact was approved by the Congress. See Boulder Canyon Project Act 45, Stat. 1057, 43 U. S. C. A. 617 to 617t.

Twenty years before that time it had become apparent to the Western states that the remaining undeveloped projects for the utilization of water were so large and required such a great amount of capital to develop that the United States, through a proper agency, might undertake the development of said projects. The result was the enactment of the Reclamation Law. (Act of June 17, 1902, Ch. 1093, 32 Stat. 388, 43 U. S. C. 391.) Under this act, 43 U. S. C. 383, the Secretary of the Interior was required to proceed in accordance with state laws in the acquisition of rights to the use of water.

After the enactment of the Boulder Canyon Project Act, the states of the lower basin proceeded with the development mixed with some litigation. *Arizona v. California,* 283 U. S. 423, 51 S. Ct. 522. In Colorado the

activity of the Bureau of Reclamation prior to 1933 in the construction of projects, was limited to two projects in Western Colorado, the Uncompahgre and the Grand Valley.

About 1933 the predecessors in interest of the Northern Colorado River Conservation District pressed vigorously for the Colorado-Big Thompson Reclamation Project. They claimed there were many acres of land in Northern Colorado which had once been irrigated but more recently were reverting to a state of nature because of a prolonged drouth which had resulted in depletion of the historical water supply of the St. Vrain, Big Thompson and other streams in that area. It was recognized that a project of such magnitude would entirely change the regimen of the flow of the Colorado River and interfere with many vested rights unless proper provision was made to safeguard the impairment of those rights. There was another consideration which might not be in strict accord with legal concepts but was certainly a strong and persuasive argument. It was based upon the same principle which brought about the allocation of water between the Upper Basin States and the Lower Basin States by the Colorado River Compact. It was the argument based on natural justice that the streams upon which any area was totally dependent for its future growth and development, should be given the right to retain the amount of water reasonably necessary for its future use in all government plans for exportation of water from one basin to another. It was recognized, of course, that this was not the theory of our constitutional provision with respect to the appropriation of waters of our streams, and was not binding upon those who made appropriations through the expenditures of private capital and in accordance with the rule of due diligence.

Such a policy might, however, in the long run bring about a more orderly development, one intended to promote the best interests of the entire state, than if the

agencies set up by the government were to adhere strictly to the earlier concept of utilization of water, which was certainly proper and practical and working efficiently at a time when tremendous trans-mountain diversion projects which would upset the entire conditions of a river basin were unknown.

It was these considerations which resulted in the adoption of Senate Document No. 80, 75th Congress, 1st Session.

On the basis of the plan outlined in this document, the Congress of the United States authorized the construction of the Colorado-Big Thompson Project and made the Green Mountain Reservoir and the power plant connected therewith an integral part of said project. The United States has expended more than $140,000,000.00 on this project. The Boulder Canyon Project Act contained a provision that the Secretary of the Interior was to make certain investigations to work out a comprehensive scheme for the development of the Colorado River Basin. In view of that mandate, the Bureau of Reclamation did make and submit to the Congress, a report entitled "The Colorado River." See House Document No. 419, 80th Congress.

In that report it is stated that potential uses of water from the Colorado River are far in excess of the supply (Chap. V, page 107). In said report it was suggested that reclamation projects of any considerable magnitude in any of the Upper Basin States could not be undertaken with safety until those states had divided among themselves the 7,500,000 acre feet of water considered conditionally allocated to the Upper Basin States under the Colorado River Compact. As a result, the Upper Basin States Compact was negotiated and approved. See Session Laws of Colorado 1949, Chap. 181, page 498.

Under the principle of the decision of the Supreme Court involving the water of the La Plata River, *Hinder-*

lider v. La Plata, etc., Ditch Co., 304 U. S. 92, 58 S. Ct. 803, a certain amount of the unappropriated water of the Colorado River has been set aside for use by Colorado in perpetuity. This is an allocation upon which the people of the state can rest with assurance. It means that arguments based upon alleged necessity of immediately appropriating the water allocated to Colorado should be encouraged, even to the extent of giving filings and uncompleted plans the force and effect of an appropriation, are no longer valid, and are merely, as they were in the beginning of irrigation in Colorado, bad policy if not pure speculation.

STATEMENT OF FACTS

After this procedure was instituted in the District Court of Summit County, there were many continuances over the years. Eventually the proceeding came on for hearing in 1949. At that time this District appeared and filed certain claims to the use of water based upon maps and filings of the Wheeler Reservoir and the Goose Pasture Reservoir, both in Water District 36. The water to be impounded was to be used through a second enlargement of the Wilcox Canal, for irrigation of lands and for the use and development of oil shale and the oil shale industry.

After the withdrawal of the United States from this case, the District, acting in behalf of water users along the Colorado River below the Green Mountain Reservoir prepared and filed a claim for a priority right for storage in the Green Mountain Reservoir for irrigation purposes, and also for a priority right for power purposes, on the theory that said users, including the District, were beneficiaries under Senate Document No. 80, and therefore had certain rights and interests which permitted them to make such claims. Notwithstanding statements to the contrary, appearing in the brief of the City and County of Denver, the Blue River Diversion claimed by Denver will materially impair the abil-

ity to fill the Green Mountain Reservoir (fol. 2944, p. 165, Denver Appendix), and such impairment may practically destroy the utility of said reservoir for the purposes for which it was designed. For that reason, and others, the District protested the claims of Denver, and has filed Cross-Specification of Points to modify the decree of the trial Court.

The facts are, as the District contends and as we believe the evidence shows, that Denver now has, or will have when the conditional decree heretofore awarded to Denver for appropriations from the Fraser and Williams Rivers are perfected, a firm supply of 183,500 acre feet of water annually, which is a sufficient supply on the basis of the record of past use for a population of 750,000 inhabitants. That even on the most optimistic guess and conjecture made by the City of Denver, its population would not exceed one million and that the additional water required by Denver could not, therefore, under any circumstances, exceed an additional 70,000 acre feet of water.

The facts are, as the District contends, that while the City and County of Denver made many investigations and reconnaissance surveys to determine if water could be taken from the Blue River, and, if so, at what point and through what type of canals and tunnels, no definite plan was ever made to divert any such water until the Dillon Reservoir was added to the scheme some time in the year 1941 or 1942, and even thereafter, until 1946, all activities and expenditures of the City of Denver were made in further investigation work and to determine whether other plans were better. Hence, no fixed intention to construct the so-called Blue River Diversion Project was formed until 1946. The District also asserts that it was error for the trial court to refuse to award a priority right to the Green Mountain Reservoir for storage purposes, and a priority right to the electric plant for power purposes, ahead of any priority right awarded to the Blue River project.

II. SUMMARY OF THE ARGUMENT

1. Denver did not formulate a plan for the diversion of the water of the Blue River prior to 1942 and did not commence construction work until 1948, hence the doctrine of relation can not possibly carry Denver back to an earlier date other than awarded by the Court.

2. Denver is not entitled to an appropriation of water for the reason that the evidence shows that it has sufficient water to fill any reasonable expectation up to the year 1978, construing the evidence most favorable to Denver and possibly for a longer period of time.

3. It was error of the Court to deny a priority right to the Green Mountain Reservoir and power plant because

(a) The District was authorized by law to appear in this procedure in its own behalf and in behalf of other consumers of water and obtain such decree.

(b) The District and the consumers represented by it had acquired their right to the use of water impounded in and used through the Green Mountain Reservoir under and by virtue of the provisions of the Act of Congress creating the Colorado-Big Thompson Project and Senate Document No. 80.

(c) By denying a priority right to said Green Mountain Reservoir and Power Plant under the facts of this case beneficiaries thereunder will be deprived of their property contrary to constitutional and statutory provisions, both state and federal.

III. ARGUMENT

1. In the brief of the City and County of Denver, pages 11 to 14, both inclusive, subdivisions A to L, we find a chronology of events said to establish that Denver as early as 1921 had a fixed plan to appropriate Blue River water. To demonstrate that all of said efforts

described in detail under subdivisions A to L, both inclusive, were nothing more than investigations and reconnaissance work, the District has gone to the trouble of printing as an appendix to be used in connection with this brief, excerpts from the various reports W, V and Z. See pages 205 to 215 of the District Appendix. To amplify and illustrate the nature of those investigations we have also printed excerpts from the right of way application made to the United States for the Two Forks Reservoir and the purpose for which it was intended. Protestants' Exhibit 31, pp. 182-183 of the Appendix. Then we have shown in the appendix by various exhibits that in the year 1935 Denver made an application for public funds to conduct further investigations to determine which one of the several plans mentioned in said report, all being proposals to divert water from the Blue River, including the two upon which Denver had made filings, would be the most feasible, District Appendix pages 196 to 205. Then we find that several years later a contract was made between the U. S. acting through the Chief Engineer of the Bureau of Reclamation and the City and County of Denver, for cooperative studies to be paid for by the money obtained through said grant, and by contributions from the City of Denver (Denver Appendix, pages 219 to 222).

In the stipulation which was made between this District and the City and County of Denver to expedite and simplify the production of documents and alleged items of cost and expenditures upon the Blue River Project, it is noted (fol. 366, pp. 183, 184, Denver Appendix) that all of the expenditures now sought to be charged against said project were carried under a "suspense" account until 1943 at which time the various items were transferred to the Blue River Project account. This transfer was made December 31, 1943. In addition to the foregoing is the inescapable deduction to be made from the filings made by Denver and introduced by her. Some of these filings are reproduced in the appendix

to the Denver brief. Exhibit A shows a tunnel which is 4.54 miles in length with a portal or intake at an elevation of 10,322 feet. This project would, according to the uncontradicted testimony, drain about 153 sq. miles and intercept or divert not exceeding 100,000 acre feet of water. See testimony of Merriell, Folio 2497, and Protestants' Exhibits 21 and 22, District Appendix, pages 178-179. (Offered and Admitted, fol. 2948.)

The map was filed in 1923, so under the doctrine announced in *Holbrook Irrigation District v. Ft. Lyon Canal,* 84 Colo. 174, Denver can not claim that at an earlier date she had formulated a plan or intention to divert the water arising on the same area together with a very much larger area producing more water, through different ditches, different tunnels and a different plan. It is significant to note that in the statement attached at sheet 3 of said Exhibit A, an alternate transmission tunnel from the Snake River is mentioned. This plat was filed at a time subsequent to the priority date now claimed by Denver. Then, the amended map, Denver Exhibit B was filed in 1927. In the 5th subdivision of the statement of claim on this map we find the following words:

> "After said filing No. 13758 was made investigations were continued and it was determined that it would be more economical to locate said project at a lower elevation, and accordingly this amended map with statement is filed to show the relocation of the project at such lower elevation." (Filing No. 13758 is the one showing the 4.54 mile tunnel.)

This plat showed a tunnel 22 miles in length according to the evidence (Merriell, fol. 2941, Denver Appendix and Protestants' Exhibits 18 and 19). (Admitted, fol. 2948.) This project will intercept the runoff on an area of 328 square miles and will result in a very material increase in the amount of water capable of diversion as compared to the original scheme.

Then in 1942 Denver made a change in its plans which amounted to an entirely new plan. It added the Dillon Reservoir at the north Portal of its Tunnel. Said Reservoir has a capacity of 252,678 acre feet. The Plat and Statement is Denver's Exhibit D, consisting of three sheets. It is significant that this plat was not reproduced in the Denver Appendix. The plat was prepared and sworn to by H. R. Oliver, Engineer for Denver, on November 13th, 1942. It was filed in the office of the State Engineer on November 14th, 1952 as Filing 17267. The statement of claim, omitting the formal beginning is as follows:

"First: Height of Dam is 243 feet.

"Second: The initial point of survey is located on the easterly end of the dam which is at a point whence the East ¼ corner of Section 18, Township 5 South, Range 77 West of the Sixth Principal Meridian bears South 59°00' East 5507.7 feet.

"Third: The table of capacities shown hereon gives the area and total capacity for each foot in depth from the bottom of the outlet tube up to and including the high water line.

"Fourth: The total capacity of said reservoir is 11,006,653,680 cubic feet (252,678 acre feet), for which claim is hereby made for domestic, mechanical, and manufacturing uses, generation of power, and municipal uses including storage, regulation and adjustment, and also irrigation and other beneficial purposes.

"Fifth: The source of supply is the Blue River and its tributaries and Williams River.

"Sixth: The estimated cost is $9,281,000.

"Seventh: Work on the Denver Municipal Water System, of which this is a part was com-

menced by survey on the 21st day of March, 1914, and on features peculiar to storage in this reservoir, on October 1, 1941.

CITY AND COUNTY OF DENVER acting by and through its Board of Water Commissioners.
By A. P. GUMLICK, President.

"Attest: GEO. F. HUGHES, Secretary."

Exhibit D was admitted in evidence at Folio 1772.

Here a new and important addition to any prior plan was added. It converted the prior plan from a direct flow project to a storage project and enabled the promoters of the project to reduce the tunnel from a capacity of 1600 cubic second feet or at least 1200 cubic second feet to a capacity of 788 cubic second feet. This resulted in a change from a plan which contemplated the appropriation of flood waters by direct flow and during about three months of the year, to an all year around diversion. Under the first plan the generation of power could be only intermittent and not on a firm basis. The second plan changed this also, as counsel concedes in the Denver brief. There are many other facts which conclusively demonstrate that Denver did not have a fixed and definite plan to divert water from the Blue River until after the addition of the Dillon Reservoir feature.

In other briefs these facts have been pointed out in detail and we will not repeat them here. *Kruemling v. Fruitland Irrigation Co.,* 62 Colo. 160, 162 Pac. 161; *Baca Irrigation Ditch Co. v. Model Land Etc. Co.,* 80 Colo. 398; *Holbrook Irrigation District v. Ft. Lyons Canal Co.,* 84 Colo. 174, 269 Pac. 574, bar the present claims of Denver.

Under the facts it is respectfully submitted that the doctrine of relation does not apply and therefore Denver can not claim a right earlier than the date it commenced construction on its tunnel under any theory of

the case. The rule of due diligence becomes effective and can be invoked only if a definite plan has been formulated to appropriate a certain amount of water, and for a definite purpose. A well reasoned case almost exactly in point is *State of Wyoming v. State of Colorado, et al,* 259 U. S. 419, 42 S. Ct. Rep. 552. One of the issues in the case was the priority date to which the Laramie Poudre tunnel diversion was entitled. The facts are related at some length beginning on page 490 of the Official Reporter and page 566 of the Supreme Court Reporter. The idea to divert water across the watershed divide originated with one Wallace A. Link, who, in the spring of 1902, made preliminary surveys on a ditch at a high elevation. Many changes and many surveys were made from that date on from 1902 to 1909. In 1903 some rights of way were cleared on the high ditch but there was no excavation. In 1904, 6,000 feet of this high ditch was constructed. Further work was done in 1907 but the ditch was never completed. In 1904 Akin and another associate procured other persons to become interested and they surveyed a tunnel and a plat was filed. A year later another plat was filed which placed the tunnel at a different location. The Court, in referring to the two tunnel locations said:

> "The difference was not pronounced and yet was a real change."

Later another filing with a more pronounced change in the location of the tunnel site was filed. Then, early in 1909 a statement was filed in which a proposed reservoir near the portal of the tunnel site was added. The cost of said reservoir was estimated at $200,000.00. The claimants of the project insisted they were entitled to a priority date relating back to the early surveys. The Supreme Court denied said contention. The Court said:

> "The plans were examined and re-examined, alternate modes and places of diversion were considered and investigated, particular features were eliminated and others added, and in 1909,

but not before, the project was definitely brought into its present form. * * *

"It is manifest from this historical outline that the question of whether, and also how, this proposed appropriation should be made remained an open one until the contract with the irrigation district was made and ratified in 1909. Up to that time the whole subject was at large. There was no fixed or definite plan. It was all in an inceptive and formulative state—investigations being almost constantly in progress to determine its feasibility and whether changes and alternatives should be adopted rather than the primary conception. It had not reached a point where there was a fixed and definite purpose to take it up and carry it through. An appropriation does not take priority by relation as of time anterior to the existence of such a purpose.

"It no doubt is true that the original promoters intended all along to make a large appropriation from the Laramie by some means, provided the requisite capital could be obtained, but this is an altogether inadequate basis for applying the doctrine of relation.

"No separate appropriation was affected by what was done on the Upper Rawah Ditch. The purpose to use it in connection with the Skyline was not carried out, but abandoned. This, as Link testified, was its 'principal' purpose. The purpose to make it an accessory of the large project was secondary and contingent. Therefore the work on it cannot be taken as affecting or tolling back the priority of that project."

Denver has pleaded depression, drought, poverty, and war as excuses for failure to drive one foot of tunnel or turn one spade of dirt in the twenty-one (21)

years between the alleged date of the initiation of its project and the year 1942. The City says that financial circumstances and the magnitude of the undertaking justifies such great delay.

It has been held that mere lack of means with which to prosecute work is never, *ipso facto,* sufficient excuse for delay in applying water to beneficial use. (See *Maricopa County Municipal Water Conservation District v. Southwest Cotton Company,* 39 Arizona 65, 4 Pac. 2d 369.)

Logically, one who undertakes to construct a very large and expensive structure should have a reasonable expectation, based on the then existing conditions and circumstances, to be able to complete this project within some period of time less than a quarter of a century. For a prospective appropriator, either individual, corporate or municipal, to conceive an undertaking of great magnitude and for twenty (20) years thereafter to do nothing in the way of actual construction, has so many of the earmarks of speculation that the facts advanced to excuse such delay should be scrutinized with particular care.

2. Denver has ample water to serve a population of 750,000. As shown by the evidence, that population will not be attained, if at all, until the year 1978. It would be unreasonable to permit a city to anticipate its needs for more than twenty-eight years, and on the strength of such anticipation, make a present appropriation for additional water.

The evidence in this case shows that Denver has unperfected, conditional decrees from the Fraser River and the Williams Fork River. These decrees permit a diversion of 600 cubic feet of water through the Moffat Tunnel. This volume may be increased to 1200 cubic second feet when the tunnel is lined. (See Protestants Exhibit 13 and Denver's Exhibit CC.) In fact, the amount of water that can be diverted is limited by the

amount available for diversion. According to Mr. Potts, who has charge of the operation of the Denver Water System, the total dependable supply which the Fraser River will produce when fully developed is 80,000 acre feet (fol. 2490, Denver Appendix). Denver's total supply of firm and dependable water is 152,000 acre feet per year (fol. 2490, Denver Appendix). At the time of the trial, Mr. Potts said Denver's requirements were a little over 100,000 acre feet per year (fol. 2451, Denver Appendix). The Moffat Tunnel diversion is half complete (fol. 2525, Denver Appendix).

In this connection, it appears that the Williams Fork diversion system had diverted larger quantities of water than the 7,000 acre feet Mr. Potts included as firm water in his total figure of 152,000 acre feet, and the earlier estimate of divertible water from that source was 25,000 acre feet per annum (fols. 2526-2532, Denver Appendix). The amount used in his computation of overall supply apparently excludes water diverted through the Williams Fork project and not used in the City water system. This includes water used by the Department of Improvements and Parks. The Departments are regarded by Mr. Potts as coordinate (fol. 2526, Denver Appendix).

The Williams Fork diversion is not complete (fols. 2522 and 2533, Denver Appendix). Hence, some amount must be added to the total of 152,000 acre feet, firm supply, which the witness testifies is available. It might be 4000 acre feet or 18,000 acre feet. It seems pretty certain that it should be 18,000 acre feet, making a total of 170,000 acre feet, because the witness further testified that when the project is completed, the Williams Fork water will go directly into the City mains (fol. 2569, and fols. 2574-2582, Denver Appendix). Also, there are 25,000 acre feet available from the Williams (fol. 2592, Denver Appendix). Some of this water is rented to farmers (fol. 2600, Denver Appendix). There are other water rights which supply water to parts of the

so-called Denver Municipal System not shown in Exhibit BB (fols. 2611-2624, Denver Appendix). Water was leased to farmers even during the dry years (fols. 2653-2669, Denver Appendix). In 1946, the City leased 14,248 acre feet of water diverted from the Williams and Fraser diversions for irrigation (fol. 2662, Denver Appendix). (It should be noted that the conditional features of the decree have not been made absolute in their entirety.) (See Protestants' Exhibit 13.) Hold-over storage will be materially increased by Reservoir 22, which is a part of the system (fols. 2676-2677, Denver Appendix).

The witness testified that in 1970, according to the present trend, the demands of the City for raw water will be 163,000 acre feet (fol. 2695, Denver Appendix). The testimony and evidence adduced through this witness, an employee of the City and County of Denver, and the most favorable evidence in the case, shows the City now has a dependable supply of water, when the conditional decrees are made absolute, sufficient to supply all demands to 1970 (fol. 2965, Denver Appendix), twenty years from the date of trial. (See Table, fols. 2696-2701, page 142, Denver Appendix.)

Further analyzing the figures given by this witness, it appears that in 1980 the demand for water will be 199,000 acre feet of water per annum (fol. 2695, page 141, Denver Appendix).

According to this same witness, Denver's population will then be 810,000, possibly 840,000 (fols. 2696-3700, page 142, Denver Appendix). This Court is requested to analyze the testimony of this witness as printed in Denver Appendix, fols. 2547-2969.

J. R. Riter is Chief Hydrologist of the Bureau of Reclamation. His high qualifications are well known and his integrity is respected by hydrologists and water specialists in all walks of life. Those qualifications are fairly set forth in Denver's Appendix, fols. 2717-2723,

pages 144-145. The witness considered Denver's Exhibit BB and Protestant's Exhibits 13 and 15, in connection with his other studies, in arriving at his conclusion as to Denver's dependable supply of water.

The table at page 66 of Exhibit 15 shows the population served by the Denver System from 1918 to 1948, both inclusive.

The witness described the methods he used to anticipate or foretell population growth (fol. 2741, Denver Appendix). By what he termed the "conservative method," that is projecting into the future Denver's average rate of growth for the 30-year period from 1918 to 1948, the witness came out with a population figure of 792,000 persons in the year 2000, for Denver and the metropolitan district. Using a more optimistic rate of growth, namely the average rate between 1938 and 1948, projected into the future, the witness came out with a population for Denver and suburban area of 1,011,000 in 2000 A.D.

Using information in Denver's publication, Protestant's Exhibit 15, page 66, the witness determined the average per capita consumption of Denver to be 190 gallons of water per day, or a .236 acre foot consumption per year. That amounts to 23,600 acre feet for each 100,000 of population (fol. 2745, Denver Appendix).

The firm, dependable water supply of Denver (assuming Reservoir 22 is constructed and the Williams Fork water is regulated, fols 2749-2750, Denver Appendix), is 183,500 acre feet annually, based on the average of 8 years (fol. 2756, page 149, Denver Appendix). The years referred to were the driest years in the last forty years (fol. 2746, Denver Appendix).

For a population of 800,000, the demand would be 189,500 acre feet per year, leaving a deficiency of 6000 acre feet to supply such a population (fol. 2758, Denver Appendix). The witness prepared Protestants' Exhibit 16, a graph which shows population projected into

the years indicated at the bottom. Two dash lines are extended beyond 1948, one curve representing the average rate of growth from 1918 to 1948, projected. According to this method of calculation of population, Denver would have sufficient water until 1998 (fol. 2764, Denver Appendix). According to the exhibits, the curve based on the average rate of growth from 1938 to 1948, Curve B, shows that Denver would have an adequate supply of water to the year 1979 (fol. 2769, Denver Appendix). The witness studied the growth of other large cities and made a graph showing such growth. This graph is Protestant's Exhibit 17. The growth of many of the cities leveled off at a certain population (fol. 2771, page 151, Denver Appendix). It was the opinion of the witness that Denver would not attain the figure shown by his optimistic curve (fol. 2794).

F. C. Merriell is Secretary and Engineer of the Colorado River Water Conservation District. In that capacity, he occupies about the same relationship to the district that Mr. Potts does to Denver, and its water board. Mr. Merriell arrived at a population of 800,000 for Denver by the year 2000. He took the average rate of growth between 1910 and 1940, and projected it into the future. He did not use the last 10-year period, which shows the greatest rate of growth in the history of the City and County of Denver. He did not apply the percentage method (fols. 2954 and 2956, page 166, Denver Appendix). The conclusion of this witness is that while the water in reserve storage would be diminishing at the end of the period, there would still be sufficient water in the year 2000 to supply Denver's needs (fols. 2967-2968, page 167, Denver Appendix). As we read the testimony of this witness, Denver might have to increase its supply just before the end of the 50-year period in order to carry on into the future. Merriell, in his calculations, starts with a population of 475,000 in the year 1950, and arrives at a population of 800,000 in the year 2000 A. D.

The figures of the three witnesses varied somewhat, but on the basis of the uncontradicted evidence shown by the records, some of which were records kept by Denver, and which evidence, so far as we can ascertain has not been disputed by Denver, 23,600 feet of water for each 100,000 of population is an ample supply. This means 236,000 acre feet a year for a population of 1,000,000. Denver already has a supply of about 183,000 acre feet. This amount deducted from 236,000 acre feet leaves 53,000 acre feet necessary to supply a population of 1,000,000 people. The trial Court has conditionally decreed four or five times that amount from the Blue River. Mr. Potts calculates that the Blue River diversion will produce 157,000 feet of water per annum. This amount is far in excess of any possible demands for water Denver can ever expect to attain. We submit that Denver cannot obtain a conditional decree under any theory for a larger quantity of water than she can reasonably expect to put to beneficial use. It was error for the Court to conditionally award a much greater quantity. See Cross-Specification of Points, paragraph 7.

That Denver does not need for her population the water she seeks to appropriate is very clearly demonstrated by the terms of the contract between Denver and the South Platte Water Users Association. Under this agreement, the last-mentioned Association may contribute funds up to one-half of the total expended by Denver and become entitled to a half interest in the water proposed to be diverted from the Blue River. This agreement is printed as an appendix to the brief of the South Platte Water Users Association, pages 17 to 20.

If the foregoing analysis is correct, and we submit it cannot be disputed, then on what theory is Denver entitled to any appropriation from the Blue River? Before discussing this phase of the case, we are perfectly willing to admit that Denver occupies a unique position in the law pertaining to the appropriation of water,

in fact it occupies a very advantageous position. The City has had the advantage of years of astute planning in the fields of law and engineering. She has been able to secure special legislation for her benefit and thereby obtain advantages which are denied other municipalities in Colorado. We refer to Denver's leasing statute just to emphasize our argument. It is Section 398, Chap. 163, C. S. A. 1935.

The statute which applies to other municipalities is Section 24, Chap. 90 C. S. A. 1935, which reads:

> "Water claimed and appropriated for domestic uses shall not be employed or used for irrigation or for application to land or plants in any manner to any extent whatever; provided, that the provisions of this Section shall not prohibit any city or town or corporation organized solely for the purpose of supplying water to the inhabitants of such city or town from supplying water thereto for sprinkling streets and extinguishing fires or for household purposes."

In *Denver v. Sheriff*, 105, Colo. 193, 96 Pac. 2d 836, this Court determined several questions including the following:

1. Denver might lawfully lease to others for agricultural use water which the City had lawfully appropriated by prior application to a beneficial use.

2. Denver could not lease water, the right to the use of which had not been acquired by application to a beneficial use. In other words, Denver has no right to divert unappropriated water for the sole purpose of leasing it to others and cannot divert water for that purpose. Leasing must be an incident to the right to use theretofore acquired by lawful means.

3. This Court held it was not error to deny Denver a decree for the use of water for irrigation on lands not served by Denver's municipal water system.

As applied to the Denver situation, the standards fixed in this case present a very interesting problem. Neither the Fraser nor the Williams Fork Diversions have been completed, nor have the decrees been made absolute (fols. 2525, 2533 and 2569, pages 128, 129 and 132, Denver Appendix). Yet Denver is already leasing the water she is concurrently diverting under a conditional decree.

Of course there is no way to determine whether the volume of water then being leased has been theretofore beneficially applied for municipal purposes. The effect is that Denver can very effectively circumvent any limitations placed on her right to lease water not yet appropriated.

Except as to Denver, the general limitations on the right to appropriate and use water, applies to Colorado municipalities of every type. The following rule is announced in *Pulaski Irrigation Ditch Co. v. Trinidad,* 70 Colo. 565, 203 Pac. 681:

> "It is elementary that the waters of the public streams of this state belong to the people, and that appropriators acquire only a right of use. It is also a settled law that an appropriator is limited to his use of water to his actual needs. He must not waste it, and if there is a surplus remaining after use, it must be returned to the stream from which it came.
>
> "When a city appropriates water for the use of its citizens, it is subject to the limitations and requirements above stated."

If Denver can perfect a water right by diverting and leasing water to others not inhabitants of the municipality, particularly to farmers, and still not become a public carrier by the mere operation or interpretation of Section 398, Ch. 163, C. S. A. 1935, the law clearly becomes class legislation and should be stricken down as such under the rule applied in the *Estate of Winter-*

meyer v. Gobble, 120 Colo. 581, 212 Pac. 2d 863. It is respectfully submitted that nothing in the Home Rule amendment to the Constitution gives Denver the right to appropriate water for the express purpose of leasing the same out for agricultural purposes and thereby perfect conditional rights awarded to the City to be used for municipal purposes. Article XX, Sec. 1 of the Colorado State Constitution, the Home Rule Amendment, gives Denver a right to acquire a water supply for the use of the city and its inhabitants. We submit that this is a limitation upon the power of the city to acquire water rights for other purposes.

To appropriate the water of public streams goes entirely beyond the scope of local self government. The exercise of such power must be classified as an exercise of power under general state law. What was said in *Mauff v. People,* 52 Colo. 562 at 568, 123 Pac. 101, applies here. The language is as follows:

> "The fact that the authority given by Article XX to the people of the City and County of Denver to legislate is confined and limited solely to local matters was the precise thing that made it possible for the courts to uphold and enforce it. If by Article XX it had been undertaken to free the people of the City and County of Denver from the state Constitution, from statute law, and from authority of the general assembly, respecting matters other than those purely of local concern, that article could not have been upheld.' '

Denver claims that the Blue River diversion is a unit of a larger integral plan of development which had several parts.

If, as pointed out in another part of this brief, Denver had no plan on the Blue River until after 1942, then, of course, no plan on the Blue can not be made a part of a plan on the Fraser and Williams Rivers.

Under our system an intention to claim water or to appropriate water may be evidenced by maps, if filed within the 60 day period fixed by statute. Denver did not comply with the requirement of the statute as to the time of filing her maps in any instance. Otherwise the intent to appropriate must be evidenced by the construction of diversion works.

Under the statute, maps are to be filed in the office of the State Engineer and a copy in the county where the headgate of the ditch is located.

The special statutory proceedings to adjudicate water are limited in geographical scope to given water districts. There are some exceptions not material in this discussion. The Court is limited to a determination of the relative rights of ditches and other works within the irrigation district. It is not authorized to go outside the district to adjudicate directly or indirectly rights said to be perfected in another district. It is submitted that the so-called unit rule could not apply under the circumstances of this case. If there is any such rule, and if it could ever apply to different streams in different irrigation districts, and we deny that there can be any such application, such a rule has no factual application here because of the following cases:

Kruemling v. Fruitland Irrigation District, 62 Colo. 160, 162 Pac. 161;

Holbrook Irrigation District v. Ft. Lyon Co., 84 Colo. 174, 269 Pac. 574;

New Loveland & Greeley Irrigation Land Co. v. Consolidated Home Supply Ditch & Reservoir Co., 27 Colo. 525, 62 Pac. 366.

A case bearing on the subject is *Sierra Land and Water Co. v. Cain Irrigation Co.,* 219 Cal. 82, 25 Pac. 2d 223; it holds in substance that diligence elsewhere

can not excuse want of diligence in constructing another part of the diversion.

It is, therefore, submitted that Denvers' specification of points, No. 1, subdivisions (C) to (F) inclusive, are not well founded.

Denver's specifications of Point No. 1, subdivision (B) predicates error on the refusal of the Court to receive in evidence the so-called composite map of the Denver Municipal Water System. The map was not filed within sixty days after any survey was made. It was self serving in nature and was intended as an argument to support the contention that the Blue Diversion was a part of entirely separate and distinct projects. Surely it was not error to reject this exhibit.

Denver has made a number of unwarranted assertions about the Bureau of Reclamation, all of which are designed to reflect on the good faith of the proponents of the Colorado Big-Thompson Project, as well as other litigants in the case. In the brief it is stated:

> "The real opponent to Denver's claims on the Blue is the United States Bureau of Reclamation."

(page 5); also that the United States withdrew, "knowing full well that its theories would be advanced by others who hoped to find indirect benefit from having the Blue River made a "Reclamation Bureau Preserve." (Page 1.) Similar statements are repeated at pages 7 and 39.

As we understand the law, the Bureau was charged with the construction of the Colorado Big-Thompson Project by Act of Congress. This project included important features on the Blue River designed to protect vested rights in Western Colorado, and also to provide a part of the supply of water which, according to the figures of the Bureau, will be needed in Western Colorado for future development. It is submitted that very

persuasive evidence was introduced by the District to establish that within a very short time a tremendous oil shale industry will be in progress in Western Colorado. Men versed in this particular line were called as witnesses. See testimony of Boyd Guthrie, fols. 1312-1353, pages 137 to 141, District's Appendix, and Tell Ertl, fols 1354 to 1389, pages 145 to 146, District's Appendix.

These witnesses testify that on a minimum basis of development at least 200,000 acre feet of water will be required, along the Colorado River in the area West of Rifle for processing oil shale and domestic uses necessary for the population.

It does appear to us that Denver has followed a policy suggested by early engineering advisers under which the city undertakes to appropriate water for agricultural use in the surrounding area. In doing so, Denver apparently jealously guards against the possibility of other municipalities in the surrounding area obtaining a supply of water wholly independent of Denver. Such would be the conclusion reached by the casual reader of certain cases in which Denver has recently been one of the principal litigants.

> *City of Englewood v. Denver,* 123 Colo. 290, 229 Pac. 2d 677; and
>
> *Brighton Ditch Company et al v. City of Englewood,* 124 Colo. 366 at 377, 237 Pac. 2d 116.

We fear that Denver is endeavoring to make the Blue River her "private Preserve," and for some reason makes a similar accusation against the Bureau of Reclamation. If a choice has to be made between the two agencies, we do believe that the Bureau would be less partial. However, under the facts of the case, we are confident that the Blue River will not become anybody's preserve but will be administered under the general laws of the State of Colorado.

IV.

It was error to deny a priority right to the Green Mountain Reservoir and Power Plant. The Act which authorized the construction of the Green Mountain Reservoir as a part of the Colorado-Big Thompson Project provided that the project should be constructed "in accordance with the plan described in Senate Document No. 80, Seventy-Fifth Congress * * * ." Act of August 9, 1937, 50 Stat. 595. In a later act, the Act of May 9, 1938, (52 Stat. 321) in which an additional appropriation of funds were made for the project, we find this direction:

> " * * * The sum hereby appropriated shall be expended in the construction of the Green Mountain Reservoir in accordance with the plan set forth in Senate Document No. 80 of the Seventy-Fifth Congress, and that construction of said reservoir shall be commenced at or before the time of beginning the construction of the tunnel described in said Senate Document No. 80; * * * ."

In the District's Appendix filed in connection with this brief, page 156, we have printed material parts of Senate Document No. 80 (Colorado River Water Conservation District Exhibit A). Said Act of Congress, in effect, includes and made the plan set forth in Senate Document No. 80, a part of the Act. See *Ryan et al v. Chicago B. & Q. R. Co.,* 57 Fed. 2d 137.

The letters attached to Exhibit A indicate that the document is a contract to which the United States of America, the Northern Colorado Water Users Association and the Western Slope Protective Association are parties. The Colorado River Water Conservation District named as one Defendant in Error in this case has taken over the functions of the said associations. (See testimony of Silman Smith, fols. 1190 to 1204, pages 129-131, District Appendix.)

The United States may make contracts express or implied. Such contracts may be evidenced by letters. 65 C. J. Sec. 92, page 1310, 65 C. J. Sec. 95, pages 1313 and 1314, *American Smelting and Refining Co. v. United States,* 259 U. S. 75, 42 S. Ct. 420.

By Senate Document No. 80 the United States granted to the water users, under the different features of the project, the right to use water made available by the project works.

The Western Colorado Water Users, including those along the Colorado River in the area served by the Grand Valley Reclamation Project, were given the right to use the water of the Green Mountain Reservoir. The power plant was a part of the plan of appropriation. It was necessary, or at least desirable, to insure the financial success of the project. It had a vital bearing on the ability of the water users of Northern Colorado to pay for the irrigation features of the project. The Green Mountain Reservoir features of the project were completed and in operation by 1943. See testimony of Merriell, fols. 1293-1297, pages 131-137.

District Appendix, Winter, and Neilson, Folios 2896 to 2911 and Folios 2915 to 2927, pages 161 to 163, Denver's Appendix.

The water from this project was applied to beneficial uses in the generation of electricity, and a part of the impounded water was released and thereafter used for irrigation. Folios 1398-1399, District Exhibit H, Protestants' Exhibit 28, Admitted in Evidence Folios 1401 and 2973, District Appendix, pages 146, 171, 181. It was a completed appropriation and a decree should have been granted, assuming that parties entitled to ask for the decree had made a proper appearance and presentation of the evidence in the case.

Did the said withdrawal of the United States leave the trial Court in a position in which it was either without authority or under no duty to grant a decree?

The Colorado River Water Conservation District was created by an Act of the Legislature. Said Act is Chapter 220, pages 997 to 1030, Session Laws of 1937. Said Act appears as Chapter 138, Sections 199(1) to 199(32), C. S. A. 1935. As amended by Chapter 243, page 691, of the Session Laws of 1951, Sections 199(2), 199(3), Chapter 138, C. S. A. 1935 Supplement, the District embraces the counties of Mesa, Garfield, Pitkin, Eagle, Delta, Gunnison, and Summit and part of the County of Montrose. The attention of the Court is directed to the fact that one of the letters of submittal preceding and printed as a part of Senate Document No. 80, District Appendix page 156 was signed in the name of the Western Slope Protective Association by Silmon Smith, Clifford H. Stone, and A. C. Sudan, as Secretary, Director and Special Representative of Grand County. The District is the successor to the Western Slope Protective Association. See testimony of Silmon Smith, Folios 1193 to 1195, District Appendix, pages 129-131.

Said Colorado River Water Conservation District has power to hold and dispose of real estate including ditches and reservoirs and similar works. It also has the power to appropriate and perfect water rights for the use and benefit of water users in said District. See Section 199(5), Chapter 138, C. S. A. 1935. Said Section confers the following powers upon the District:

> "(c) To make surveys and conduct investigations to determine the best manner of utilizing stream flows within the district, the amount of such stream flow or other water supply and to locate ditches, irrigation works and reservoirs to store or utilize water for irrigation, mining, manufacturing or other purposes, and to make filings upon said water and initiate appropriations for the use and benefit of the ultimate appropriators, and to do and perform all acts and things necessary or advisable to

secure and insure an adequate supply of water, present and future, for irrigation, mining, manufacturing and domestic purposes within said districts."

The District appeared and filed a claim (fols. 325-347, pages 47 to 55, District Appendix). It claimed an appropriation of waters impounded in the Green Mountain Reservoir in its own behalf and in behalf of other actual consumers of water, who, according to the provisions of Senate Document No. 80, were to be benefited by the Green Mountain Reservoir and incidental works. Even though the United States withdrew as a party litigant, the claim statement made by the United States remained on file and was supplemented and completed by the claim statement filed by the District. The District, and those who subsequently appeared and asked for a decree, were water users or consumers under the project. Such is the rule announced in the case of *Nebraska v. Wyoming,* 325 U. S. 589, 65 S. Ct. 1328, in which the Court said:

"We can say here what was said in Ickes v. Fox, *supra,* 300 U. S. pages 94, 95, 57 S. Ct. page 416, 81 L. Ed. 525: 'Although the government diverted, stored, and distributed the water, the contention of petitioner that thereby ownership of the water and water rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property rights of the government in the irrigation works. Compare Murphy v. Kerr, D. C. 296 F. 536, 544, 545. The government was and remained simply a carrier and distributor of the water (Id.), with the right to receive the sums stipulated in

the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works."

State of Nebraska v. State of Wyoming, 65 S. Ct. page 1328 at page 1349, Sec. (13).

Under the Reclamation Law the legal status of a consumer is similar to that of a user or appropriator of water under a canal owned or operated by a common carrier of water under Colorado law. In various decisions this Court has held that the Company is the proper person to appear in the adjudication proceedings to obtain a decree for a ditch. *Farmers Independent Ditch Co. v. Agriculture Ditch Company,* 22 Colo. 513, 45 Pac. 444; *Montrose Canal Co. v. Loutzenheiser,* 23 Colo. 233, 48 Pac. 532; *Randall v. Rocky Ford Canal Co.,* 29 Colo. 430, 68 Pac. 240. The first case holds the canal owner is a trustee and is bound to protect the rights of the consumer. These decisions recognize an exception to the general rule. The exception is that if the owner of the ditch or reservoir fails to perform its duty as a trustee, then the consumers may appear and protect their own rights.

Logically the withdrawal by the United States should furnish the strongest possible argument to support the rights of the consumer to appear and protect his rights as such consumer.

The statutes then in force which have a bearing upon this point in the case are Secs. 153, 154 and 161, Chap. 90, C. S. A. 1935. They clearly indicate that a consumer has a right to appear and protect his rights. Sec. 154 which pertains to the adjudication of rights for beneficial purposes other than irrigation, gives the owner of a water right permission to obtain a decree by following the procedure prescribed for the adjudication of rights to use water for irrigation.

In the year 1938 when the United States started

the actual construction of the Green Mountain Reservoir, it had a right to rely on the doctrine or principle announced in the case of *Kruemling v. Fruitland Irrigation Co.,* 62 Colo. 160, 162 Pac. 161, and *Holbrook Irrigation District v. Ft. Lyons Co.,* 84 Colo. 174, 269 Pac. 574. In 1938 no one had done any work or made any physical demonstration, as stated in those cases, to charge junior appropriators with notice of the intended appropriation. Diversion filings had not been made within 60 days after completion of the alleged surveys, hence those filings were not even *prima facie* evidence of intention of use in 1914 or any other date. *Schluter v. Burlington Ditch, Reservoir and Land Co.,* 117 Colo. 284, at 289, 188 Pac. 2d 253. No one had done any work or made any physical demonstration as required by the above case to charge other appropriators with notice. Under such facts the doctrine of *stare decisis* may be invoked by those claiming as beneficiaries under the project initiated by the United States.

The doctrine and the limits of its application are well established. It may be invoked by one who claims under a contract or under a statute or decision under which vested rights have been acquired. 21 C. J. S., Sec. 187, pages 302 and 304; 21 C. J. S., Sec. 216, page 396. The principle applies to water rights. The case of *Muir v. Allison,* 191 Pac. 206, 33 Ida 416, involved a decree of a court which enforced the principle of rotation of use of water between claimants. As we read the decision, the previous practice was based on priority of use and the fact that one who acquired a right was entitled to a continuous flow as long as the water was available in the stream for such purpose. The following language is taken from the opinion:

> "The Constitution has delegated to the Legislature control of the waters of the state, with the power to regulate by law its distribution. Prior to the Constitution, and probably since, in the absence of express legislative regulation,

the courts have been under the necessity of declaring laws or regulations relating to water and its use as founded in the practice, custom, or implied understanding of the people using the water. These, of course, have been accepted by the people as the law, and they have proceeded to acquire property based upon these laws, and secured, as they supposed, by a reliance upon them. Among these rules was the one that, when the user of water had procured to himself the right to divert a certain quantity, he was thereafter entitled to a continuous flow of that amount, and practically every decree quieting title to water that has been written in this state for 50 years, or more, has been based upon this rule of continuous flow. It has been the law since the creation of the territory and property interests of tremendous value, and affecting thousands of individuals, have had their inception and development under it. Numerous statutes have also been passed by the Legislature affecting the water law of the state, in the light of this rule of distribution and without any manifest intention or purpose to change it.

"May the courts thus change this long and established rule of property right, and set up in its place a new and different rule? We think not, for there are lacking all those elements justifying a declaration of law which existed at the time of the adoption of the original rule. This conclusion is more easily arrived at when we consider the effects of such a sweeping change. By far the larger portion of the water rights existing in the state have passed to decree based upon the rule of continuous flow. These decreed rights would at once become unsettled and disturbed, and new and expensive litigation encouraged.

> "We think the case to be one particularly suited to the application of the rule of *stare decisis,* and it is held that it does apply. But it may be added, in passing, that it is far from the purpose or intention of the court to close the door against the adoption of the rotation system in the state."

As bearing upon the contractual phase of this case mainly the right of water users benefited by Senate Document No. 80, to invoke the principle to protect the rights acquired by them under that document, we respectfully refer the Court to one of the leading cases: *Gelpcke v. City of Dubuque,* 1 Wallace 175 at pages 206, 207, 17 L. Ed. 520.

It is respectfully submitted that the argument now advanced by Denver to the effect that preliminary surveys, reconnaissance work, investigations and other expenditures designed to determine whether any plan of diversion of water was feasible cannot be accepted as a basis for initiation of a property right which would destroy the rights of other appropriators who depended upon the decision of this Court then in effect and proceeded to expend in excess of one hundred forty million dollars under the firm conviction and with the assurance that they could rely upon the law in force at the time the rights of the United States were initiated.

The District filed a motion to make findings of the trial Court more specific by setting forth the reasons for denying any decree in favor of the Green Mountain Reservoir and Power Plant. The motion was denied, Folios 604 and 672, pages 79, 109, District Appendix. We never knew the grounds on which the Court rested the denial of a decree for said Reservoir. Denver itself filed a claim statement for the Green Mountain Reservoir (fols. 4297 *et seq.*). This was for replacement purposes. Since neither the ownership of the ditch or diversion works nor who is entitled to the use of the water decreed is determined in such a proceeding, it

would appear no real issue was presented on the primary question, namely, Was the Green Mountain Reservoir and Power Plant completed and water stored and beneficially used by means of said works? If the answer is in the affirmative, there was a perfected appropriation and the filing of a claim statement by Denver was an admission of that fact.

Denver now asks for a decree for its Blue River Diversion which if granted, will antedate decrees entered in the same water district in Causes 1709 and 1710. Denver was a party to those proceedings and appeared therein and attempted to have her rights saved for future consideration. Folios 1593 to 1607 and 2981, pages 23 to 26 and page 168 of Denver's Appendix. If the Court attempted to toll the two year statute of limitation which was probably not the purpose, such action would not bind junior appropriators. There is no authority for such a finding as recital in a statutory adjudication proceeding. Hence, the present claim of Denver is barred.

Crippen Trustee et al v. The X Y Irrigating Ditch Co., 32 Colo. 447, 76 P. 794.

Aside from the foregoing no decree entered at this late date can take a priority date earlier than the latest priority number in the last preceding decree.

Huerfano Valley Ditch and Reservoir Co. v. Hinderlider, 81 Colo. 468, 256 P. 305.

CONCLUSION

Cross-Specification of Points numbered 1 to 5 printed immediately following this brief are based on the argument in this subdivision, IV, of this brief. It is submitted that no one can be certain whether the Federal Courts will hold that consumers of water who are citizens of this state and therefore subject to the jurisdiction of the Courts of this state are not bound by decisions of our District Courts. If, after many years

of litigation, it should be determined that the beneficiaries under Senate Document No. 80 are bound by the decision of the lower Court, then those whom the District represents are not only deprived of their property rights but any incentive to adjust differences and controversies between two sections of the state by arrangements similar to the provisions of Senate Document No. 80 are forever foreclosed. Such a result may prove to be an impediment to the utilization of our remaining water resources. More important, however, is that valuable property rights are in jeopardy and may become subordinate to later rights through the application of statutes of limitation.

It is submitted this proceeding should be remanded with instructions to the trial Court to deny the application of Denver, or, if said City be awarded any priority, the same be limited to not exceeding 50,000 acre feet of water with priority right as of June 24th, 1946, the date awarded by the trial Court. That the trial Court be instructed to award priority rights for irrigation and non-irrigation uses to the Green Mountain Reservoir and to the power plant for 1726 cubic second feet of water from the Blue River for the manufacture of electricity through the Green Mountain Power Plant, all as set forth in the statement of claim of the District and established by the District in its evidence in the hearing below.

Respectfully submitted,

FRANK DELANEY,
Attorney for the Colorado River Water Conservation District.

Nos. 16881-16888

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

CITY AND COUNTY OF DENVER, CITY OF COLORADO SPRINGS, SOUTH PLATTE WATER USERS ASSOCIATION,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA, NORTHERN COLORADO WATER CONSERVANCY DISTRICT, COLORADO RIVER WATER CONSERVATION DISTRICT, F. E. YUST, CLAYTON HILL, GRAND VALLEY IRRIGATION CO., GRAND VALLEY WATER USERS ASSOCIATION, ORCHARD MESA IRRIGATION DISTRICT and PALISADE IRRIGATION DISTRICT,
Defendants in Error.

Error to the District Court of the County of Summit.

Honorable Wm. H. Luby, Judge.

CROSS-SPECIFICATION OF POINTS

The Colorado River Water Conservation District, hereinafter referred to as the "District," one of the defendants in error, hereby assigns and files the following Cross-Specification of Points on which said District will rely to modify the findings and decree of the trial Court, to-wit:

1. The trial Court erred in failing and refusing to award in Cause 1805 in the trial court, an appropriation to the Green Mountain Reservoir for storage for irriga-

tion purposes, in an amount of at least 149,600 acre-feet of water, the source of supply of said reservoir being the Blue River; such priority rights to relate to a date not later than January, 1938.

2. The trial Court erred in failing and refusing to award in Cause No. 1806 in the trial court, an appropriation to the Green Mountain Reservoir for storage for beneficial purposes other than irrigation, in an amount of at least 149,000 acre-feet of water, the source of supply of said reservoir being the Blue River; such priority rights to relate to a date not later than January, 1938.

3. The Court erred in failing and refusing to award a priority right to the Green Mountain power plant for 1726 cu. ft. of water per second of time for purposes other than irrigation and particularly for the generation of electricity.

4. The Court erred in denying the motion of the District to make more definite and certain the findings in the decree of the Court insofar as the same pertained to the claims of said District for an appropriation or priority right in the Green Mountain Reservoir.

5. The Court erred in awarding a priority right to the Blue River Diversion Project, including the Dillon Reservoir, based on claims of the City and County of Denver, which, in legal effect, would antedate and be superior to the priority right to store water in the Green Mountain Reservoir and thereafter to use the water so stored for beneficial purposes, as well as prior to the right to use 1726 cubic second feet of water of the water of the Blue River for manufacturing purposes for the following reasons:

(a) The United States between the years 1933 and 1936 initiated the right to store water in said Green Mountain Reservoir and to use the water of the Blue River for power purposes. That thereafter the United States duly and diligently completed said reservoir and

appropriated the water stored therein as well as 1726 cubic feet of water per second of time of the water of the Blue River, for beneficial purposes, all of which was done by the year 1943, and in so doing spent many millions of dollars.

(b) At the time that the United States filed its present map and initiated its claim to the water of the Blue River for the purposes aforesaid, it was proceeding under the Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. 388, 43 U. S. C. 391. At that time the law of Colorado, as established by decisions of courts of last resort, was to the effect that the mere filing of maps and claims in the office of the State Engineer did not constitute notice to junior appropriations of the nature and extent of an intended appropriation. That to give such notice there must be an open physical demonstration on the ground which would indicate the extent of the intended appropriation.

(c) That under said law the United States perfected vested rights in and to the use of the water of said Blue River by storage in said Green Mountain Reservoir, and by direct flow through its hydro electric plant. That said property rights are entitled to protection under the principle of *stare decisis.*

(d) That if the law is as now asserted, namely, mere filings not accompanied by physical demonstration on the ground constitutes an appropriation or is sufficient to enable the claimant of said filings to relate its rights back to the time of making such filings, or be the basis for a conditional decree, then the United States and those claiming under the United States will be deprived of their property contrary to the 14th Amendment to the Constitution of the United States and also contrary to the Constitution of the State of Colorado.

(e) The Act of Congress which authorized construction of said Green Mountain Reservoir and the power plant installed in connection therewith, Act of

August, 1937 (50 Stat. 595) and the subsequent Act of May 9, 1938 (52 Stat. 321) referred to and thereby adopted and approved, Senate Document No. 80, 75th Congress, First Session (Colorado River Water Conservation District Exhibit A). Said document was contractual in nature and was for the use and benefit of water users, some of whom are represented by this District, and by reason of said acts and document said water users acquired certain rights and privileges which were denied to them in and by the decree of the trial Court.

6. The Court erred in awarding a priority right in favor of the Continental Hoosier System including the Blue River Ditch, the Crystal Ditch, the Spruce Ditch, the McCullough Ditch, the East Hoosier Ditch, the Hoosier Ditch (Claim No. 1), the Hoosier Ditch (Claim No. 2), The Hoosier Tunnel, the Upper Blue, the Lower Blue, the Spruce, and the Mayflower Reservoirs or Lakes, based upon the claims of the City of Colorado Springs, as of a date of May 13th, 1948, or as of any date which would in legal effect antedate and be superior to the right to store water in the Green Mountain Reservoir and thereafter to use the water so stored for beneficial purposes, as well as a priority right to use 1726 cubic feet of water per second of time of the waters of the Blue River for manufacturing purposes for each and all of the reasons set forth as subdivisions (a) to (e) of the last preceding specification of points being paragraph 5 hereof.

7. The trial Court erred in awarding any priority right or decree to the Blue River diversion claimed by the City and County of Denver.

Respectfully submitted,

FRANK DELANEY,
Attorney for the Colorado River Water Conservation District.