1-23-1953

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

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.

ANSWER BRIEF OF THE COLORADO RIVER WATER CONSERVATION DISTRICT, CLAYTON HILL, AND F. E. YUST TO THE BRIEF OF THE SOUTH PLATTE WATER USERS ASSOCIATION

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STATEMENT OF FACTS

In this brief the defendants in error, Clayton Hill and F. E. Yust, will hereafter be referred to as Hill and Yust. The defendant in error, The Colorado River Water Conservation District, will be referred to as the District, and the plaintiff in error, the South Platte

River Water Users Association, will be referred to as the Association.

Hill and Yust are appropriators of water from the Blue River; their ranch properties are situate along said river; they appeared in this proceeding and were awarded certain priority rights to the use of water from the Blue River.

In the decree entered by the trial Court the ditches claimed by Hill were awarded priority rights as follows:

The Independent Blue Ditch numbered 267, with priority No. 339(C), for 35 cubic feet of water per second of time, from the Blue River by reason of original construction, with priority right relating back to May 1st, 1935;

The Plunger Ditch No. 149, with priority right No. 369, for 19 cubic feet of water per second of time, from the Blue River by reason of the third enlargement, with priority right relating back and dating from May 1st, 1948.

The ditches claimed by Yust were awarded ditch numbers and priority right numbers as follows:

The Dry Creek Ditch No. 293 with priority No. 386(C), for 15 cubic feet of water per second of time, from the Blue River and Dry Creek, by reason of original construction, with priority right relating back to July 30th, 1949;

The Call Ditch No. 294, with priority No. 387(C), for 5.9 cubic feet of water per second of time, from the Blue River, by reason of original construction, with priority right relating back to and dating from July 31st, 1949. See District Appendix, pages 109 to 120.

Both of said defendants in error, Hill and Yust, filed protests against the claim of said Association.

The Colorado River Water Conservation District filed claims or reservoir statements for appropriations

for the storage of water in the Wheeler Reservoir and the Goose Pasture Reservoir (fols. 325 to 329). These claims were for 50,000 acre feet of water and 29,524 acre feet of water respectively (fols. 1238 and 1250). See similar claim in Cause 1806, folio 536.

The claim statements filed by said Colorado River Water Conservation District stated that work of construction on said reservoir had not been commenced (fol. 348, Cause 1805), although expensive detailed surveys had been made and plats had been filed in the office of the State Engineer as provided by applicable statute (see Colorado River Water Conservation District Exhibits C and D) (Offered and Admitted, fols. 1275-1277). In addition, the District had surveyed in detail the second enlargement and extension of the Wilcox Canal and had shown in great detail where, how and in what amounts the water which the District proposed to impound in said reservoirs in Water District No. 36 was to be conveyed through and appropriated along and under the second enlargement and extension of the Wilcox Canal which was a long and large canal following along the base of the oil shale cliffs in Water Districts 39 and 70 from a point near Rifle, Colorado, to a point some thirty miles west and extending beyond DeBeque in Mesa County, Colorado. See Folios 1207, 1210 and District's Exhibit B. (Offered and admitted, fols. 1275 to 1277.)

The testimony of the witnesses Merriell (fols. 1218 to 1311), Guthrie (fols. 1312 to 1353), and Ertl (fols. 1354 to 1370), shows the potential demand for water for irrigation and the development of oil shale and incidential uses in Western Colorado along the line of said second enlargement and extension of the Wilcox Canal or in that general area. District Appendix, pages 131 to 135.

The program of the District as evidenced by said filings was planned and designed to initiate appropria-

tions for the development of an industry that promises to be greater than any other industry in Colorado. The beginning of this new industry is in the near future if the men who are experts along that line are correct in their testimony.

The trial Court denied the District any decree to the Wheeler Reservoir and the Goose Pasture Reservoir. The language of the decree in this respect, paragraph 7, is as follows:

> "7. The Court finds that the evidence submitted herein with respect to the claim of the Colorado River Water Conservation District for a decree or decrees for the Goose Pasture Reservoir and Wheeler Reservoir is and was insufficient to justify the Court in entering any decree herein in favor thereof, or assigning any ditch, reservoir or priority number, either abolute or conditional, and no findings or determination whatsoever are herein made with respect to the claim statement herein filed by said Colorado River Water Conservation District, except to deny the claim and application made thereunder for an adjudication of any right or rights to the appropriation, use, and diversion therein or thereby for said Goose Pasture Reservoir and Wheeler Reservoir in this proceeding."

(Folio 689, Cause 1805; and Folio 783, Cause 1806).

After very earnest consideration mixed with a measure of misgiving as to the correctness of the course finally decided upon, the District has not assigned cross-specification of points to reverse the decree of the trial Court in denying any appropriation or priority of right to or in favor of said Wheeler Reservoir or said Goose Pasture Reservoir.

In this respect the decree of the Court denied the claims of the Colorado River Water Conservation Dis-

trict exactly as it did the claim submitted in behalf of the Association.

We believe it is, always has been, and should continue to be the law that a conditional decree cannot properly be awarded unless and until the claimant has done and performed on or in the immediate proximity of the stream from which water is to be appropriated, sufficient work of construction to constitute such an open, physical demonstration as would be reasonably calculated to put others on inquiry as to the proposed use, the volume of water to be appropriated and the consequent demand upon the source of supply.

We further believe that any other standard will lead to speculative claims, the result of which will discourage and make small appropriations along the stream so hazardous that no such appropriations will be attempted.

Hence, the District, in the interest of sound principles of irrigation law does not assign in its cross-specification of points any alleged error based upon the action of the Court in denying the claim of said District for an appropriation for the Wheeler and Goose Pasture Reservoirs. The District surveyed and platted said reservoirs and did everything, and more, than the South Platte Water Users Association did to initiate a right to use waters of the Blue River.

For the reasons herein set forth, Hill, Yust and the District, urge that it was not error to deny any appropriation based upon the claim of said Association.

II.

SUMMARY OF ARGUMENT

Hill, Yust, and the District assert in their argument certain points and principles which may be summarized as follows:

1. The Association did not show or establish that it had done or performed the first step, or any part of

the first step, necessary to constitute an appropriation of any kind and therefore was not entitled to a conditional decree.

2. The Association did not file any specification of points on which it would rely to reverse the judgment of the trial Court, therefore any alleged errors in the judgment of the trial court now asserted by said Association should not be considered by the Court under the provisions of Rule 111 (f) of the Rules of Civil Procedure.

3. The mere filing of a statement of claim accompanied by a map in the office of the State Engineer without any work of construction or other physical demonstration on the ground does not constitute a partially completed appropriation such as to entitle the claimant to a conditional decree; that if Sec. 195, Chap. 90, C. S. A. 1935, being Sec. 5 of Chap. 147, Page 497, of the Session Laws of 1919, attempts to give a claimant of a mere filing or plat and statement the status of an appropriator, then said law is unconstitutional and void.

III. ARGUMENT.

1. *The Association did not take even the first step necessary or requisite to constitute an appropriation.*

The evidence in this case clearly establishes that the Association did not even go to the trouble of having a competent surveyor make a detailed survey as the basis for the initiation of the rights claimed in this proceeding. It appears that Mr. Bull was employed in 1942 to make the plat, Association's Exhibit B. Mr. Bull testified that between the years 1923 and 1926 he had made a detailed survey of various tunnels designed to export water from the Blue River Basin to the South Platte Basin. Several sites had been investigated and eventually he platted one known as the Webster Tunnel which is substantially the same location but not the exact location of the present Montezuma Tunnel claimed by the

City and County of Denver. (See fol. 3103, District Appendix, page 149.) The information necessary to plat the ditches from the Williams Fork River and from Black Creek and other streams on the western side of the Blue River leading in a southerly direction to the Dillon Reservoir or what Mr. Bull and some other witnesses have been pleased to call a high weir or regulating dam was made from field notes furnished by a Mr. Bunger who was making a survey for the Bureau of Reclamation (see fol. 3063). Mr. Bull did no surveying in 1942, although the plat and claim statement introduced by the Association says that work was commenced on the project on October 1st, 1942. Even the elevation for the initial point of survey of said gathering ditches was obtained from Mr. Bunger's work (fol. 3063). There was to be but one tunnel which is the same tunnel now claimed by Denver (fol. 3104). While it was designed for a capacity of 1600 cubic second feet, Denver is now constructing a tunnel with a capacity of 788 cubic second feet (fols. 3104 to 3107). Without storage at the intake portal of the tunnel the efficiency of the project would be reduced forty to fifty per cent by reducing the capacity of the tunnel to 788 cubic second feet. However, with storage the same amount of water could be diverted with the 788 cubic second feet tunnel through a year around operation as was planned for the 1600 foot tunnel.

R. P. Culverwell was called as a witness in behalf of the Association. He testified that he was Secretary and Manager of the Henrylyn Irrigation District (fol. 3119). It is interesting to note that he is the same individual who made filing No. 15134 in the office of the state engineer, the same being the filing under which Colorado Springs now asserts priority right to a date as of 1927. (See Folios 3172, 3175, 3178 and 3179 to 3181, District Appendix, page 152.) The witness was also Treasurer of the South Platte Water Users Association (fols. 3121, 3122). The witness testified that the Bureau

of Reclamation had been contacted to provide finances to construct the project (fols. 3166, 3167). However, he knew of no other persons who were approached or efforts made to obtain finances (fol. 3168).

We assume that a priority date for a partially completed appropriation in a conditional decree cannot be a date earlier or different than the date to which the priority right would relate if the subject matter of the decree were a completed appropriation. There must be some act or event in the law of appropriation which determines the date of priority for a conditional decree on the same basis as the date a priority is determined for an absolute and unconditional decree. If we accord the same priority date to an uncompleted or partially completed appropriation under the conditional decree law as must be awarded a completed appropriation, then, there is no difficulty in fixing the principle which applies and the only difficulty is in its application to a given state of facts. It is submitted that if the Association were to commence actual construction of the proposed diversion project tomorrow and complete the same, great as it is, within a period of five or ten years, its priority right could not take precedence over those who have made appropriations in the ten years since the Association filed its plat and statement and during which it has done nothing to construct a project. The Association could not relate back so as to destroy the rights of junior appropriators under the doctrine announced in *Kruemling v. Fruitland Irrigation Co.,* 62 Colo. 160, 162 P. 161; *Baca Irrigating Ditch Co. v. Model Land etc. Co.,* 80 Colo. 398, 252 P. 358; *Holbrook Irrigation Co. v. Ft. Lyons Canal Co.,* 84 Colo. 174, 269 P. 574.

In the case of the *State of Wyoming v. The State of Colorado, et al,* 259 U. S. 419, 42 S. Ct. Rep. 552, wherein the law of appropriation as understood in the West was applied, because both states adhered to that doctrine, the Court said, referring to the plan to construct a project:

> "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 a 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.

It is argued that inasmuch as the project is of such tremendous magnitude that unsuccessful efforts to obtain funds over a period of ten years or more is the equivalent of due diligence in the construction of the works. It is said:

> "Such a project cannot be built with local funds and is of such magnitude as to require careful planning with every available government agency for such cooperative construction and financing."

It is respectfully submitted that want of funds may have been considered as a factor in determining what constitutes due diligence for settlers who had to make a home as they improved their ranches and diverted water for purposes of irrigation but that it is no factor at all where a corporation takes steps to initiate a project of great magnitude and then takes no steps thereafter to construct the proposed works.

The effect of the want of funds when advanced as an excuse for long and unreasonable delay in the construction of a project is discussed in the case of *Maricopa Municipal Water Conservation District v. Southwest Cotton Co.,* 39 Ariz. 65, 4 P. 2d 369. The Court there said:

> "But the mere lack of means with which to

> prosecute the work is never *ipso facto* a sufficient excuse for delay. As was well stated in the case of Ophir Silver Mining Co. v. Carpenter, 4 Nev. 534, 97 Am. Dec. 550: 'It would be a most dangerous doctrine to hold that the ill-health or pecuniary inability of a claimant of a water privilege will dispense with the necessity of actual appropriation within a reasonable time, or the diligence which is usually required in the prosecution of the work necessary for the purpose.' See, also, Cole v. Logan, 24 Or. 304, 33 P. 568; Mitchell v. Amador C & M. Co., 75 Cal. 464, 17 P. 246. Particularly is this true when the delay is due to the difficulty of financing a large project. U. S. v. Whitney, (C. C.) 176 F. 593; Nevada, etc., Co. v. Kidd, 37 Cal. 282."

2. *The Association did not file a "Specification of Points" upon which it relies for reversal of the judgment.*

Rule 112(f) states that plaintiff in error shall file a "Specification of Points upon which he relies for reversal or modification of the judgment * * * ." Said Rule also provides that "counsel will be confined to the Points to be specified but the Court may in its discretion notice any error appearing of record." Inasmuch as the Association has not seen fit to indicate in concise language the exact reasons or grounds upon which it relies for a reversal of the judgment, it is respectfully submitted that the decree of the trial Court should not be modified or changed insofar as the rights or claims of the South Platte Water Users Association are involved. It is submitted that there is nothing in the record which should call for the court to notice errors not mentioned in the Specification of Points.

3. *Filings or maps do not constitute an appropriation.*

The evidence in the case shows that the Association

held many meetings and possibly did a lot of promotion work. However, its activities were wholly divorced from any construction work or steps to divert water. The Association relies entirely upon the case of *Taussig v. Moffat Tunnel,* 106 Colo. 384, as its authority for the assertion that in this particular case a conditional decree should have been awarded in favor of the South Platte Water Users Association. That argument must be based upon the conviction that the case mentioned holds that no construction work is necessary as a basis for a conditional decree, and that a survey accompanied by a map is all that is required.

As said in the case of *Windsor Reservoir & Canal Co. v. Lake Supply Ditch Co.,* 44 Colo. 214, 98 P. 729, "All general declarations or statements in the opinion must be taken in connection with the facts of that case" applies to the *Taussig* case. In said *Taussig* case it must be remembered that this Court found from undisputed evidence that the defendant in error Company had, after considerable efforts, obtained a right to run or convey water through the Moffat Tunnel which as then constructed. The following language in that case differentiated it from the situation of the Association in this case, to-wit:

> "As for construction work, the record discloses that test holes were drilled at the ranch creek reservoir; that work was performed in the way of clearing timber along the proposed ditch lines; that hill slopes were taken for many miles along the ditch lines; that timber along such lines was classified in respect to lands over which rights of way would have to be obtained, and the survey work was completed in respect to the component parts along the entire system."
>
> (Page 390 of 106 Colo.)

The Court also said:

> "There might be circumstances under which

there should be a partial diversion and the application of water for a beneficial use before the granting of a conditional decree, but this is not such a case."

The Court may have concluded that the existence of the tunnel which was fixed and in place and the clearing of timber along the lines of the ditch leading to said tunnel was a demonstration on the ground of the nature and extent of the proposed appropriation as well as the demands the same would make upon the stream from which the appropriation or appropriations took water.

If, however, it was the purpose and intent of the Court to hold that a survey followed by the making of a plat constitutes the making of an appropriation, and that Sec. 5 of Chap. 147 of the Session Laws of 1919, the same being Sec. 195 of Chap. 90, C. S. A. 1935, makes a survey followed by the filing of a plat, a "partially completed appropriation" as the term "appropriation" is understood, and used in the Constitution and defined by the courts, then we respectfully submit that said Section 195 and most of the Act of which it is a part are unconstitutional and void. It would permit anyone who has a hope or an expectation of raising funds to finance a project but no present reasonable basis to believe that such funds could be raised, to make a filing, obtain a conditional decree, and thereafter for an indefinite period of time hold the waters to the extent covered by his filings so that no other persons could make any appropriations. This would be in effect a denial of the right to appropriate. In addition, the title of the Act which has to do with a matter of procedure could not be construed to be broad enough to permit the Legislature to define an appropriation as something entirely different from what the accepted meaning of that term had theretofore been.

It is respectfully submitted that the *Taussig* case should be reexamined and clarified. The very fact that

the Association, organized, as it was, as a corporation for the express purpose of diverting waters by one or more transmountain projects, now comes into court ten years after it made a filing and admits that no construction work whatever has been done within that time, but still claims that it has exercised due diligence in the construction of the works, and has been unable to finance the same and therefore is entitled to a decree, indicates that the *Taussig* case needs reexamination.

Some of the questions which we raised in this connection were raised on petition for rehearing in the *Taussig* case, but the Court then refused to consider the same. In the *Taussig* case the Court said that the definitions of an appropriation were not helpful. However, we submit that the understanding and meaning of the terms appropriate, or appropriation as used in the fundamental law must be inquired into to determine whether or not the Legislature by the Act of 1919, under a title which indicated that the Act was limited to procedural matters in the settlement and adjustment of priority rights to the use of water could inject certain provisions which would require the Courts to accept as an appropriation proof of acts which have never been regarded as any part or step in making an appropriation.

In one of the earlier Colorado cases, a definition of the word "appropriation," taken from a California case, is accepted. In this definition intent is probably regarded as a part of the process of appropriation. We refer to the case of *Larimer County Reservoir Co. v. People,* 8 Colo. 614, 9 P. 794, in which the Court approved the following definition:

> "This appropriation is the intent to take, accompanied by some open, physical demonstration of the intent and for some valuable use."

In the later case of *Ft. Morgan Land & Canal Co. v. South Platte Ditch Co.,* 18 Colo. 1, 30 P. 1032, 36 Am. St. Rep. 259, the above concept of the meaning of the

word appropriation was modified so that the intent of the appropriator, while it may limit or explain the extent of the appropriation, is not one of the component parts. In the last mentioned case, a decree, and apparently it was an absolute decree, was awarded to a ditch before a material part of the water conveyed therein had been used for irrigation. It was urged that there was the intent and there was the physical works and therefore there was an appropriation. In this last case the Court said:

> "Moreover the language (referring to the language in the 8th Colo.) does not warrant the construction placed upon it by counsel. It expressly states that an appropriation is only consummated in case the water is finally applied to the use designated. No warrant is given for the entry of a decree in advance awarding a priority upon the diversion and promised use, as has been done in this case. To uphold such a decree would necessitate the abandonment of a cardinal principle that has been announced in many carefully considered cases. This principle in the paragraph next preceding the one quoted in the opinion in 8 Colo., is stated in this terse language:
>
> " 'The true test of the appropriation of water is the successful application thereof to the beneficial use designed.' * * *
>
> "The construction contended for by counsel is so radically and palpably wrong that we deem further argument or additional citation of authorities unnecessary to its overthrow."

In *Combs v. Farmers Highline Canal & Reservoir Co.,* 38 Colo. 420, 88 P. 396, the following definition of an appropriation is given:

> "Such an appropriation consists of two acts: A diversion of water from a natural

> stream and the successful application thereof, within a reasonable time thereafter, to some beneficial use."

This meaning of the term appropriation is approved in subsequent Colorado cases. For instance in the case of *Baca Irrigating Ditch Co. v. Model Land & Irrigation Co.,* 80 Colo. 398, 252 P. 358, the Court said:

> "While an appropriation consists of a diversion of water from a natural stream and the application thereof within a reasonable time to a beneficial use, it is also true that there must be an intent to appropriate a definite amount of unappropriated water to a definite and beneficial purpose."

The Act of 1919 was construed in the case of *Archuleta v. Boulder & Weld County Ditch Co.,* 118 Colo. 43, 192 P. 2d 891. In this decision at page 51 this Court held, as we understand the opinion, that the provisions of said Act were intended to clear the records in the office of the State Engineer of all maps and filings, the claims under which had in effect been abandoned. If the claimants still intended to assert claims under such filings, provision was made whereby said claimants or their grantees would be given notice of subsequent adjudication proceedings. In this case the Court reaffirmed the decision in *DeHaas v. Benesch,* 116 Colo. 344, 181 P. 2d 453, to the effect that maps and statements filed in the office of the state engineer do not constitute appropriations nor lack thereof invalidate them.

The title of the Act, as stated in the *Archuleta* case, *supra,* is:

> "An Act to make further provisions for settling the priority rights to the use of water for irrigation and other beneficial purposes."

It is respectfully submitted that if the law be given the effect now being claimed by the Association and if

it be held that said Act has written into the law a different definition of the term appropriation, then the title of the act is not broad enough to cover the subject matter and the same is void under Section 21 of Article V of the Constitution because the title of the Act does not express or indicate the object or purposes of various provisions of said Act including the definition of what constitutes an appropriation.

In a similar case it was held that the title was not broad enough to cover the subject matter. We refer to the case of *Lamar Canal Co. v. Amity Land and Irrigation Co.,* 26 Colo. 370, 58 P. 600.

We further submit that if inability to finance a project and inability to obtain rights of way from the United States as the owner of the property over or on which structures are to be located, are to be considered on the question of due diligence and if efforts to secure money without any reasonable expectation of success, and fruitless efforts to secure a right of way in the face of a positive refusal of the owner to grant such a right, especially where there is no recourse by condemnation proceedings or otherwise against such owner and therefore no prospect of overcoming such refusal, may be regarded as the exercise of due diligence and excuse the spending of any money in construction, then we have a system under which speculative monopolies may attach their tentacles to every stream in the Colorado River Basin.

Such a practice may be compared to the situation of a settler who claimed illness or lack of finances as a reason why he had been unable to perfect his appropriation; those conditions might extend the time to do what was necessary to apply the water to a beneficial use, but it never excused failure to do some construction work.

The Courts held that to accept such excuses and thereby prevent other appropriators from the exercise

of their constitutional rights would in effect amount to a denial of such right. Permit us to illustrate our argument by certain language used in the case of *Cole v. Logan,* 24 Ore. 304, 33 P. 568 at 510:

> "The authorities clearly show that the claimant's pecuniary condition is not an excuse and though the doctrine may seem harsh, it is nevertheless right. If the rule were otherwise, the prior settler on a creek, if he were ill or poor, could make a survey from his claim to some desirable point above him on the stream, or give any other notice of his intention to appropriate the water, and, by doing such work as his health or his means would permit, could ultimately divert the water at such point, and claim a prior right, without regard to the number of subsequent appropriators below such point of diversion or above it, when the water was used and returned and used before it reached the claimant's land. Hence, it follows that defendant could not by the completion of his ditch in 1883 claim a diversion of the water so as to relate back to 1871 and that the diversion at this point was subsequent to plaintiffs."

To hold that promotional efforts to obtain financing is the equivalent of actual work to divert and apply water is in effect a denial of the constitutional right to appropriate water. If it were the purpose of the Act of 1919 or any part of said act to permit such a practice, then said act encourages a speculative monopoly with respect to the right to appropriate water and is contrary to and void under the provisions of the Colorado Constitution pertaining to the appropriation of waters, namely Sections 5 and 6 of Article XVI thereof.

The history of the type of decrees considered proper in adjudication proceeding also throw an interesting light on the question of when and under what conditions

a conditional decree may be entered. At one time it was held the Courts had no right to enter a conditional decree.

Larimer & Weld Irr. Co. v. Wyatt,
23 Colo. 480, 48 P. 528;

Lake Fork Ditch Co. v. Haley, 28 Colo. 513,
67 P. 158.

Later, in the case of *Waterman v. Hughes,* 33 Colo. 270, 80 P. 891, the Court in effect approved a conditional decree based on proof that a ditch had been partly completed.

The Court apparently considered that in such decree the date of priority was the date to which the right to appropriate would be entitled under the doctrine of relation, the language being:

> "The decree, however, as to the date and relation of priority was absolute."

The Court further said:

> "It may be, and possibly is, the better practice to withhold entirely a decree, as to any element, until the ditch is finished, and water actually and beneficially applied, and had any party to this proceeding whose ascertained rights are thereby effected objected to the conditional portion of this decree the Court might have postponed all action until the conditions specified existed. And it is also probably true, had any such party seasonably objected, the water commissioner ought not to have allotted to petitioner's ditch any water until such time as the Court awarded to it some fixed quantity."

In *Trinchera Irrigation District v. Trinchera Ranch Co., et al,* 100 Colo. 181, 66 P. 2d 539, the Court recognizes that in some Colorado jurisdictions it is the practice to enter conditional decrees, under circumstances

not defined, but held that the findings were insufficient for that purpose in that case.

It is respectfully submitted we come back to the rule announced in *Baca Irrigating Ditch Co. v. Model Land & Irr. Co., supra,* where the Court said that the decision denying a priority right as claimed,

> " * * * might well have been put, solely, upon the entire failure of the owners of the Baca Ditch to give such reasonable notice by physical demonstration on the grounds as to make it necessary for persons who wished to acquire any rights in the stream to take notice thereof before attempting to acquire any rights."

Any rule, regulation, or law which denies or unreasonably interferes with the right of prospective appropriators to acquire rights to the unused waters of a stream are void.

Wheeler v. Northern Colorado Irrigation Co., 10 Colo. 582, 17 P. 487;

Combs v. Agricultural Ditch Co., 17 Colo. 146, 28 P. 966.

CONCLUSION

When Glen Saunders cast aside the role of attorney and assumed the status of a witness he revealed a most unusual situation. The Association as well as Denver were pooling their filings, their claim of priority and their joint efforts to persuade the Bureau of Reclamation to become the sponsor for the pooled schemes and construct a project. Mr. Saunders said he was the assistant Secretary of the Association from its inception. His testimony about what the Association did and intended to do is in part as follows:

> "Among the things that were done that I recall and it is difficult to place exact dates from memory, the Association made contacts

with the respective persons I mentioned and also with a man by the name of Jim Knights who replaced Miles Bunger with a view to have the Bureau of Reclamation develop this project very much along the lines of the project which is described in Senate Document 80 which is an exhibit in one of these cases. To that end in connection with meetings called by E. B. Debler, Mr. Debler suggested that in order to get a district, a taxing district formed, which is necessary under the Reclamation law and a district which would have power to make a contract with the Reclamation Bureau that an engineering board of review be formed. Also that the Association make it appear to the Bureau of Reclamation that it could secure the cooperation of the City and County of Denver because Mr. Debler said—" (fols. 3201 and 3202, Transcript of Testimony).

Objection was made at this point to Mr. Debler's statements as hearsay. The objection was sustained, after some discussion the witness continued as follows:

"I had got to the point where we were discussing relations with the Bureau of Reclamation and the officers of the Bureau. The officers of the Association as a result of our conferences accepted the view that what they had to do and what they did then was to take the steps necessary to work out one of these re-payment contracts with the Bureau of Reclamation by which the Reclamation Bureau would finance and construct the project and then the beneficiaries of the project would pay for it and then after they did pay for it the project was turned over to them and the South Platte Water Users Association was authorized to proceed to get the Bureau to construct and pay for the project,

and the Bureau advised that one of the steps—" (fols. 3208-3209).

Here another objection was made and sustained. The witness then continued:

"In order to carry this out the officers of the Association did seek the advice of the Bureau of Reclamation and as a result of all the advice and judgment they could get and put on the thing they worked out preliminary contracts with the City and County of Denver, they worked out a preliminary contract, which is this exhibit in here, and created a plan whereby all these interested parties in the whole area would have a single set of physical structures through which the water claimed by any of them could be put, so that a single set of structures could handle the diversion of a number of different claimants. The Bureau of Reclamation had its engineers and they produced a certain plan or plans or how this work could be done and the Association and its officers thought the project and figures were much too extravagant and in view of that fact the Association employed Mr. R. J. Tipton to represent the Association in making representations to the Bureau to get the design more simple and a more economical plan than originally proposed by the Bureau of Reclamation, with the object of having a plan designed that the Association felt it could pay for. Therefore, we had Mr. R. J. Tipton work with the Bureau's engineers to this same end. He worked with the Board of Engineers, this Committee mentioned. The State Water Conservation Board appointed an engineer to this same committee to bring out a reconciliation of all interests so that a project could be designed that would have the backing

and support of the whole State of Colorado" (fols. 3210, 3211, 3212).

See also Folios 3201 to 3216, District Appendix, pages 153-154.

The foregoing testimony discloses that neither the Association nor Denver had a fixed intention to construct the so-called Blue River Diversion. The most that can be said is that Denver and the Association intended to cooperate if the Bureau of Reclamation could be persuaded to finance and construct the project. To paraphrase the language used in *Wyoming v. Colorado, supra*:

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

If an intention to appropriate water "provided the requisite capital could be obtained," is an "altogether inadequate basis for applying the doctrine of relation" it is also an altogether inadequate "basis" for the fixing of a priority date for a conditional decree.

We urge that any law which permits a decree to be entered on a mere "promised use," without proof of any amount of money spent to make a physical demonstration on the ground, plus proof of inability to raise money to excuse failure to construct the diversion works, coupled with the acceptance of such a showing by the trial court, is a departure from all prior meaning of an appropriation. Such, we submit, is the interpretation placed on such act by the Association and others since rendition of the opinion of the *Taussig* case.

An Act that establishes or encourages the earmarking of the waters of a stream for an unreasonable time is a speculation.

It is such a threat that in a practical sense it denies to others the right to appropriate the earmarked water, and is therefore an unwarranted interference with the right to appropriate. The statute is void if it be given the interpretation for which the Association contends in this case.

Respectfully submitted,

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