12-19-1952

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

No. 16881
No. 16888

IN THE

SUPREME COURT

OF THE

STATE OF COLORADO

CITY AND COUNTY OF DENVER, CITY OF COLORADO SPRINGS AND 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,
Defendants in Error.

Error To The District Court of The County of Summit.

Honorable Wm. H. Luby, Judge.

ANSWER BRIEF OF DEFENDANT IN ERROR NORTHERN COLORADO WATER CONSERVANCY DISTRICT

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GREELEY TRIBUNE

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I

STATEMENT OF THE CASE

This was a statutory adjudication of relative priorities of water rights on the Blue River. Many claimants appeared and offered testimony on their claims. It was tried in Summit County District Court. It went to decree March 10, 1952, awarding numerous priorities of appropriation to a multitude of claimants.

Denver, as a claimant for an incomplete appropriation, was awarded a conditional priority, dating from June 26, 1946, for 788 cubic feet per second for the intended capacity of its not yet constructed Blue River tunnel and reservoir from the Blue River. It had no works built for diversion.

Colorado Springs, as claimant for incomplete works it began to construct in 1948, was awarded a conditional priority of appropriation dating from May 13, 1948.

Denver, joined by Colorado Springs, has sued out writ of error. Denver's brief asserts the trial court should be reversed for not granting its Blue River Tunnel a date 25 years earlier, to 1921, and a volume of 1,600 second feet. This is double the intended capacity of its tunnel. Denver also claims it should have been awarded reservoir priorities out of the Blue River for 685,484 acre-feet.

Denver's tunnel has been only built to the extent of one half mile of its 23-mile total projected length. No work has been done on its claimed West Slope reservoir. Nothing more of the inlet to the numerous named East Slope reservoirs has been built. Thirty years have elapsed since 1921, the 1946 date Denver seeks to have awarded it.

Denver's brief, at the outset, "Introduction," page 5, states that "the real opponent to Denver's claims on the Blue is the United States" and that the United States submitted itself to the jurisdiction of the trial court by filing a statement of claim there, which it withdrew, and that Denver considers that withdrawal of no effect.

Plaintiffs in error have named the United States as defendant in error. They have also named as defendant in error Northern Colorado Water Conservancy District, Colorado River Water Conservation District, and two Colorado River Irrigation Districts. These are

beneficiaries as users of water from the Colorado-Big Thompson Project.

The United States has the legal title to the appropriation and works and appropriations of that Project, among them, Green Mountain Reservoir built on the Blue River. As such legal title owner the United States is the proper litigant to present the claims of the Project in water adjudication. Special Assistants to the Attorney General filed that claim. The United States withdrew its claims, joined by Northern Colorado Water Conservancy District, before any evidence was offered by any claimant. No priority was awarded the Colorado-Big Thompson works by the trial court in the general decrees so entered on March 10, 1952.

Northern Colorado Water Conservancy District is a state agency which has the contract with the United States for a water supply for domestic, irrigation, municipal, and industrial uses other than power from the project. It is comprised of the greater part of the irrigated lands, towns, and cities in seven counties on the South Platte River watershed, Boulder, Larimer, Weld, Morgan, Washington, Logan, and Sedgwick Counties and their cities.

This district is the subject of an extensive delineation in the case leading to this contract, *People ex. rel. v. Letford*, 102 Colo. 284, to which for a proper understanding of this situation we respectfully refer. Green Mountain Reservoir is one of the works. See also, *Kistler v. Northern Colorado Water Conservancy District*, No. 16736, June 28, 1952.

Other districts, defendants in error, are also users of water from Green Mountain Reservoir by being downstream on the Colorado River, to which the Blue is tributary and for their use, in part, it was built. Also, not derived through the United States, are individual defendants in error whose rights were adjudged to have arisen in the period between 1921 and 1946.

Denver and Colorado Springs have designated all these defendants in error, thus imposing on them duty to answer its specification of points and brief. In compliance therewith is this answer brief of Northern Colorado Water Conservancy District. It is intended to answer, first, Denver. Next, by way of supplement adopting the Denver brief, is a shorter section of the brief answering the matters in the Colorado Springs brief which are different from those in the Denver argument.

It is significant that, although they here file separate briefs, Denver and Colorado Springs are not contesting each other's claims.

From our standpoint, as to Denver and Colorado Springs, the issue here is whether the evidence is only such that each of those must be related back thirty years, as to Denver, and 25 years, as to Colorado Springs, so as to be ahead of the users of the Colorado-Big Thompson Project, begun in 1933. We maintain that the Colorado-Big Thompson Project, initiated in the meantime and diligently constructed to use of water should not be relegated to inferior status by having Denver and Colorado Springs related to antedate this diligent enterprise.

A second summary of relief which Denver asks to reverse the trial court is that specific judgments be rendered against the works of the United States and its beneficiaries of the Colorado-Big Thompson Project, decreeing them inferior in date to that decreed to those cities, the plaintiffs in error here.

Denver's second prayer for reversal, appears to be answered by itself at page 52. The decree awarded no priority date to the Colorado-Big Thompson Project. Northern Colorado Water Conservancy District is summoned in here, at the instance of plaintiffs in error. In answer, we point out evidence and legal principles of Colorado water law whereby we maintain the briefs of

plaintiffs in error are without merit and do not require the Supreme Court, on conflicting evidence, to reverse the trial court, and to make defendants in error junior.

While informing the Court, in its brief at page 42, that "The Courts will not substitute their judgment for that of duly qualified and acting public officials of other departments of the government," yet Denver, at page 7, "Introduction," is not willing to concede this criterion to other officials than its own, but imputes bad faith to the government in building and putting into beneficial use Green Mountain Reservoir and power plant. This Denver's brief characterizes with such invidious language as: "in an attempt to jump Denver's Blue River claims." "It is this wasteful seizure of the entire flow of the Blue River that threatens to consign Denver's future to the mercies of Bureau of Reclamation officials."

By such authoritative and revelatory language, Denver seeks to have the Supreme Court adjudge that the trial court was in error in not giving Denver's work a relation back to 1925. This although the Colorado-Big Thompson appropriation and others had arisen and been building with continuity of effort in that period of lack of physical construction by Denver.

Denver opens by asserting "the late date given in the decree effectively denies Denver any water from the Blue River," and "will stop its growth after another ten or twelve years." This seems an extravagant statement, in view of the testimony of works and appropriations, in the interval, by others which was before the trial court which settled all claims, relatively.

Similar claims of dire results to foreclose Denver's future if relieved of the large consumption of water for Englewood, were made by Denver's attorneys in the recent Englewood case, 124 Colo. 366.

STATEMENT OF THE ARGUMENT

We maintain the trial court was not in error in deciding that the date to which Denver is entitled to relate its conditional priority, by the doctrine of relation, is to its East Slope tunnel portal building begun in 1946, and of Colorado Springs is to its tunnel construction begun in 1948.

I. The evidence supports the trial court's decision of a 1946 date for Denver's conditional priority. The date awarded was supported by evidence showing that in the period of lack of construction back from 1946 to 1921, to which Denver seeks to have its conditional priority from the Blue River related, rights of other appropriators arose. Thereby was limited Denver's right, while dilatory, to have its priority related back twenty-five years further.

II. THE APPROPRIATIONS OF THE COMPLETED COLORADO-BIG THOMPSON PROJECT AROSE IN THAT PERIOD. IT SHOULD NOT BE SUBORDINATED.

DENVER WAS ENTITLED TO RELATE ONLY TO 1946. THE DOCTRINE OF RELATION BACK IS ONLY TO RELATE TO THE DATE FROM WHICH DILIGENCE IN PROSECUTION IS SHOWN. The evidence did not show that Denver was diligent in prosecuting its work prior to 1946, nor that Denver was entitled to be placed twenty-five years earlier so as to become senior to those intervening appropriators of that 25-year period whose appropriations conflict with those of Denver.

III. MAPS AND STATEMENTS WERE NOT TIMELY. THEY DID NOT EXCUSE DENVER'S OMISSION OF CONSTRUCTION FOR TWENTY-FIVE YEARS FROM 1921, OR COLORADO SPRINGS' LACK FOR 21 YEARS FROM 1927.

Denver's maps are not prima facie evidence of initiation in 1921. They do not exempt Denver from duty

to show diligence in construction from the date to which it is to have benefit of doctrine of relation.

IV. DENVER'S FINANCING, LACK OF MONEY FOR 30 YEARS DO NOT EXCUSE. DENVER'S CONSTRUCTION IN 1932-1942 UPON DIVERSIONS OF MOFFAT AND JONES PASS TUNNELS OUT OF FRASIER AND WILLIAMS FORKS RIVERS INTO BOULDER CREEK AND INTO CLEAR CREEK WAS NOT WORK ON THE TUNNEL AN DRESERVOIR FROM BLUE RIVER. ITS BLUE RIVER WORK WAS TRIVIAL. NOR WERE GALLOWAY'S ACTIVITIES BEFORE 1948 ON THE HOOSIER PASS TUNNEL SUCH WORK ON THAT TUNNEL AS TO ENTITLE COLORADO SPRINGS TO RELATE IT BACK TO THE YEAR 1927.

V. DENVER'S AUTHORITIES DISTINGUISHED. THEY DO NOT GOVERN THIS CASE, EITHER ON THE FACTS OR THE LAW.

The "Sheriff case" was against restrictions attempted by one court against use of water of East Slope stream priorities decreed by other courts.

In the "Taussig case" no conflicting rights of other appropriators were in evidence.

The "Holbrook case" supports the trial court's decision here on diligence.

A dog in the manger policy is not to be given sanction.

VI. IN COLORADO SPRINGS' PRIORITY DATE OF 1948 AWARDED IT, THE TRIAL COURT IS SUPPORTED BY THE EVIDENCE AND BY ALL THE LEGAL PRINCIPLES WHICH ARE CITED AS TO DENVER'S ATTEMPT TO RELATE BACK TO 1921.

Colorado Springs did not by the quitclaims to it get a priority by relation for 21 years back of 1948 when

the project first became definite by construction. No rights to so relate were passed by the assignment.

VII. THERE IS A LACK OF JURISDICTION TO HERE TRY COLORADO-BIG THOMPSON PRIORITIES, TO-WIT: TITLE OF THE UNITED STATES, IN ITS PROPERTY, THE PRIORITIES OF APPROPRIATION OF ITS WATER RIGHTS OF THE COLORADO-BIG THOMPSON PROJECT ON THE BLUE RIVER.

Of this Northern Colorado Water Conservancy District citizens are users. Their representative in water adjudication is the United States. This is a quiet title action against property of the United States. Consent of Congress to sue in state court is absent. Jurisdiction lack cannot be waived by government officers. The title to that property cannot be here litigated by here making the water users defendants in error.

ARGUMENT

I. The evidence supports the trial court's decision of a 1946 *aate for Denver's conditional priority. The date awarded was supported by evidence showing that, in the period of the construction work back from* 1946, *to* 1921, *to which Denver seeks to have its conditional priority related, rights of other appropriators arose. Thereby was limited Denver's right, while dilatory, to have its priority related back* 25 *years further.*

The appropriations of the Colorado-Big Thompson Project for eight West Slope and for seven East Slope irrigated counties, and their cities, was initiated in the meantime, in 1933, and it has been constructed and has been diverting water and applying water to beneficial use for many years for one works on the Blue River, the Green Mountain Reservoir and power plant, ever since 1943. This is a project in which legal title is in the United States and a water supply, for many appropriators downstream on the Colorado without repayment,

and for domestic and irrigation use is contracted to Northern Colorado Water Conservancy District, in seven counties on the East Slope, the repayment agency.

Their need, the state policy and their work to then, 1937, on the project is delineated in *People ex. rel. v. Letford*, 102 Colo. 284, 79 P (2d) 274.

We assume other aspects of this project will be here shown by Western Slope users, represented by Colorado River Water Conservation District, and the respective irrigation districts, and certain other individuals applying water to lands as beneficiaries of the United States, holder of legal title to the Colorado-Big Thompson Project.

With Denver's here asserted efforts to antedate it, there is a serious conflict shown which will diminish gravely the feasibility of that project.

Denver's attorneys in their brief, page 7, also admit that Colorado Springs is seeking a September 27, 1927, "ten or twelve thousand acre feet it would divert at Hoosier Pass above Dillon," but asserts that it would have little effect at Green Mountain because almost half of the water in the Blue at Green Mountain comes into the river below Dillon."

We have to notice, by its own brief here, that Colorado Springs' claims for a new appropriation as shown by the evidence, and by its writ of error here are for 500 second-feet for more than 10,000 or 12,000 acre—feet they are seeking to antedate the 1933 appropriation initiation of Colorado-Big Thompson and by the recent case Denver cites, *Colorado Springs v. Yust*, 125 Colo. ....., it is before the court also that Colorado Springs is seeking to divert that much more water out of the Blue River watershed by change of point of diversion for other upstream ditches.

Denver is not contesting Colorado Springs' claims.

It must be clear that Denver's claims are gravely in conflict with those of the Colorado-Big Thompson appropriations. Else, why is Denver, with such an array of eminent legal talent so vigorously and vehemently fighting the Colorado-Big Thompson Project?

Denver's brief, on its page 6, feels it necessary to premise that the Colorado-Big Thompson Project will not be injured by Denver's claims. The witnesses of these other parties objecting to Denver's attempts to get a 1921 priority testified otherwise. The evidence was conflicting. The trial court, after extended evidence and argument, held Denver's incomplete appropriation was not entitled to have its priority related ahead of the Colorado-Big Thompson, but should relate from its beginning of construction on June 26, 1946, at the east portal of its tunnel and was not entitled to be related back 25 years to July 4, 1921.

Denver claims expenditures on the Blue River works much in excess of what the defendants in error concede. Much of this was on investigating or exploration only, or was on reservoirs Denver built before 1921 or is projecting on the other side of the Continental Divide on the Platte. These Denver will utilize or now uses for its elaborate South Platte and other appropriations, among them those also of the Moffat Tunnel, Jones Pass Tunnel, Williams Fork, and Frasier River works, over mountain ranges many miles distant from the Blue River at Dillon. Some was for conjectural reservoirs, as the Two Forks on the Platte, and some for property, as the Empire Reservoir, abandoned, on Clark Creek.

In its brief, page 34, Denver recites that the United States had already made grants of $150,000.00 for surveys to the Colorado-Big Thompson when later, Denver, when its attorneys solicited it, in 1936, got $100,000.00 investigation money from the United States. Denver's brief, page 7, states that Denver and the government's Reclamation Bureau are "cooperating in planning" the

Denver Blue River development, yet, in the opening, page 5, the brief asserts "The Blue River is (by the Colorado-Big Thompson Project) made a Reclamation Bureau preserve," and, at page 39, varies this by asserting that the United States "simply seeks to have the entire Blue River made a sort of wilderness area," and incidentally doubles the mileage between Dillon and Green Mountain Dam.

There seem to be "benefits forgot."

The record shows that Denver undetermined as to its course, as late as 1936, 1941 and 1946, sought and took the advice of United States and Colorado Water Conservation Board engineers as to what tunnel to build. This resuted in rejection, in 1938 or 1939, of the line Denver now claims, and a different "Montezuma" tunnel line substituted for a time (fol. 1551-1554) and another by way of Moffat Tunnel Exhibit "S." Another map was for t scheme with only a 4½-mile tunnel, into Jefferson Creek (f. 2939). Ex. "E" contract between U.S. and Denver for "Cooperative Investigations."

Wyoming v. Colo., 259 U. S. 419, 66 L.Ed. 999, held:

Syl. 9—An appropriation does not take priority by relation as to a time anterior to the existence of a fixed and definite purpose to take it up and carry it through."

"Colorado further answers that she can accomplish more with the water than Wyoming does or can." (p. 469). "It is true that irrigation in the Poudre Valley has been carried to a higher state of development***" (The Court rejected that as a consideration to allow Colorado a better priority).

P. 490. "Colorado insists that this proposed appropriation (the Laramie-Poudre tunnel) takes priority by relation, as of August 25, 1902; and Wyoming that the priority can relate only to the latter part of 1909. The true date is a matter of importance because some large

irrigation works were started in Wyoming between the dates mentioned, were diligently carried to completion, and are entitled to priorities as of the dates when they were started."

There, in 66 L.Ed. pages 1024 and 1025, the Supreme Court, speaking of the Laramie-Poudre tunnel project, pointed out efforts to demonstrate that water was obtainable and to obtain money to be used in promoting the tunnel project, that it was surveyed on one route from the Laramie into the Poudre in 1902, further surveys in 1904, 1906, and 1908, with varying routes, and that until 1909 sufficient capital had not been secured, the Irrigation District bond issue 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 formative stage—investigations being 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 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 applyingt he doctrine of relation."

So, here, is a closer parallel to Denver, than any they cite.

II. The appropriations of the Colorado-Big Thompson Project on the Blue River area before 1946, *should not be decreed subordinate.*

Denver was entitled to relate only to 1946. The doctrine of relation back is only to the date from which diligence in prosecution is shown. The evidence did not

show that Denver was diligent in prosectuing its work prior to 1946, nor that Denver was entitled to be placed twenty-five years earlier, so as to become senior to these intervening appropriators of that 25-year period whose appropriations conflict with those of Denver.

There can be not question here of the initiation of those other appropriations. On the second page of its brief, p. 6, plaintiff in error admits that:

> "In 1933 the Bureau commenced its survey for the Colorado-Big Thompson Project with visible work at Granby Reservoir and at Adams Tunnel. In 1936 it surveyed the Green Mountain Reservoir at a location on the Blue some 50 miles (in fact, it is only 25 miles) below Denver's diversion point at Dillon. By 1943 the Bureau had completed a 152,000 acre-foot reservoir at Green Mountain."

The trial court properly held that, where, as here, the rights of another appropriator intervened during the period of failure to prosecute the enterprise diligently, then the doctrine of relation could not apply to plaintiff in error's advantage as against the intervenin gappropriator ,to-wit, the water users of the Colorado-Big Thompson Project, for domestic, irrigation, and power purposes.

Trowel Co. v. Bijou, 65 Colo. 202, 208.

The relative priority date, 1946, *awarded by the trial court to Denver Blue River work is supported by the evidence. Refusal of the trial court to give an earlier relation date was not error.*

Others' rights arose and intervened.

The evidence was heard in open court before a judge of the vicinity. It was conflicting. He knew the criterion of diligence on the Colorado River. In the interval elapsed between the date of beginning construc-

tion awarded, 1946, and the year to which Denver would have the Supreme Court substitute its judgment for that of the trial court, to-wit, to 1921, others' rights had arisen and intervened. That period of 25 years without construction or diversion by the plaintiff in error was plainly too long where, in that interval, as here, such others' rights were initiated and became vested by works for diversion which diligently prosecuted to application to beneficial use.

Hence, initiation of other rights in that 25-year interim is not a fact in issue here. So being, Denver cannot claim benefit of the authorities on which, at this late day, are postulated by its counsel in Supreme Court.

Denver's construction is not so adequate in the twenty-five years, to entitle it to relate back twenty-five years before 1946.

Denver claims a project based on a tunnel 23 miles long and seeks to date it back to 1921 ahead of intervening appropriators. Yet in the 30 years from 1921 to hearings in 1951 it has built only 2,870 feet of that tunnel—about 1/45th of it. Is Denver, at that rate, to have 80 years to tie up the Blue River water while other appropriators have been building works to divert it and have put the water to beneficial use? Is this speculation to be approved in Colorado to set back others actively proceeding, as compared to the capitol city with its great resources? Must all others be told to leave the river because Denver filed a map in 1923?

Denver's attorneys say Denver took the first step to claim this great appropriation from the Blue River in 1914. They have not followed its construction with continuity of physical work. They have not yet done physical construction of any works other than a token 2,870 feet of tunnel diverted any water, or applied any water to beneficial use under the claimed project. Even

this much of the tunnel is characterized as a "pilot bore" in Denver's brief, p. 49.

Denver does not assert now the right to relate its appropriation to the date 1914 when it claimed by its first map, but claims now its appropriation should be fixed as having taken effect in 1921 when it claims it made a Fourth of July reconnaissance and followed it with another map filed in 1923. No construction of works has followed in thirty years gone, other than the 2,870 feet out of a 121,000-foot tunnel. The 1923 map, claiming a 1921 appropriation was not followed by any diligent physical, open construction any more than was the 1914 map.

Therefore, the question was before the trial court as to when this incomplete appropriation may conditionally be held to have taken effect. The evidence showed no actual construction before 1946. It showed others were initiating and constructing after 1921 and before 1946. The trial court found that was the date from which diligence related back.

Doctrine of relation; it applies only to the substantial step from which diligence in consummation is shown.

It has long been well established that the true test of an appropriation of water is the application to beneficial use designed.

If, however, the work of construction and of such application to lands has been prosecuted with reasonable diligence from the first act taken looking toward the perfecting of the appropriation, then (and then only) the claimant of the diversion works is entitled to have the right of such works to the use of water relate to that first act.

Sieber v. Frink, 7 Colo. 148, 153 (1883) on 1870 appropriations.

The right to relate back to the first step is not unconditional. In conflicts between priorities where the doctrine of relation is relied upon, the party asserting the superior right must show: (1) priority of inception of right; (2) reasonable diligence in its consummation. This statement of the law of water appropriation from *Kinney on Irrigation (2d Ed.) p.* 1294, has been the reliance of the West and the rule of its development for over eighty years. It has become a rule of property such as to itself become a vested right.

Without the doctrine of relation the appropriation could only date from the time the water shall have been applied to land.

Unless reasonable diligence is shown in these acts preliminary to the maturing of the appropriation, the priority of the diversion works cannot be related back, where there are conflicting rights of other appropriators.

What is reasonable diligence? True it depends largely upon the facts of the particular case.

"Diligence is defined to be the steady application to business of any kind, constant effort to accomplish the undertaking***such assiduity in the prosecution of the enterprise as will manifest to the world a bona fide intention to complete it within a reasonable time." This is elementary water law.

Ophir Silver Min. Co. v. Carpenter, 4 Nev. 535.

Diligence in diverting water for irrigation, as in other human enterprises and acts, is the assiduity which average men apply to their affairs under the same conditions.

The question here is the fixing of the reasonable time (in advance of any maturing of the appropriation) from which the appropriation of this Denver tunnel and

reservoir system shall have been perfected. When will it be perfected? Has Denver made such a showing of diligent construction and application of water to beneficial use that the doctrine of relation can be invoked? If not to 1914, 37 years ago, then why to 1921, 30 years ago? Is it shown that 30 years, from 1921 to 1951, is a reasonable time within which to have built only a little over ½ mile of a 22-mile tunnel which is the diversion works? Was the "work of construction prosecuted during this period, constantly, with steadiness of purpose or labor which is usual to men engaged in like enterprises and who desire a speedy accomplishment of their designs?"

Denver asserts there was no evidence to support the finding of no diligence in construction until 1946. The trial judge heard and saw the witnesses on the stand. He heard the evidence of all the scores of claims in that water district. He knew the measure of diligence applied on that river. We submit that evidence supports the finding and that his decision is right, and should stand.

Denver seeks to relate back thirty years by fiction or fact, not merely law. The common law of Colorado on diligence does not countenance this.

Was the Fourth of July, 1921, act followed with such diligence and accomplishment of the purpose that the priority of this less than one-fortieth project should now be related back to thirty years ago? When will it complete the appropriation by application to beneficial use? Will that remote day be within a reasonable time? We submit there was evidence to support the trial court's decision that it was not reasonable to relate back to 1921. Was that survey on the Blue River? The evidence does not so show. Maybe it was on the Frasier, over the mountains into Grand County.

The history of this project shows that after the 1921 "Fourth of July" survey there was no physical

construction done on it until 1946. There were some "testings," "investigations," preliminary experiments on different suggested routes, none settled upon, certainly, before 1946. The cost of all these investigations, surveys, testings, on the Blue River works, is not shown to equal, in the whole thirty years, one percent of the estimated construction cost.

The running of a 400-foot channel with a dragline and six men 600 feet North of the Snake River in the fall of 1942 cannot avail Denver to relate to 1921. It was *not* construction. Denver's Engineer, Dwight Gross, on cross examination says that. (f. 1852, 1905). It was investigatory. It is abandoned.

Rights of way acquisition before 1946 was, relatively to the whole, ambitious, hundred million dollar project, merely colorable—a few dollars, comparatively.

III. *Maps and statements were not timely. They are not conclusive of diligence to relate an appropriation priority back* 30 *years. Map filing does not exempt Denver from lack of construction here.*

"Whether a map and statement was actually filed, is a matter of evidence only and does not constitute the substance of the appropriation. Maps and statements filed in connection with water rights do not constitute appropriations nor lack thereof invalidate them."

DeHaas v. Benesch, 116 *Colo.* 344, 181 *P.* (2*d*) 453.

FURTHERMORE, DENVER MAP WAS NOT FILED WITHIN TIME LIMIT, 60 days after July 4, 1921. Here it is not even prima facie evidence of initiation on that date.

The Map and Statement Act. *C.S.A., Ch.* 90, *Secs.* 27-32, requires, Sec. 27, the corporation constructing a ditch or reservoir "shall, within sixty days after the commencement of such construction," make a filing in the office of the State Engineer, of a map, with a state-

ment of location, capacity, time of commencement, etc., which (32) shall be prima facie evidence of *intent* of claimant to construct.

Schluter v. Burlington Co., 117 Colo. 284, 189, 18S P (2d(253.

Furthermore, that the statute expressly limits the evidentiary effect of such a map, in Section 32, "*provided* that nothing herein contained shall be so construed as to dispense with the necessity for due diligence in the construction of such projects."

Denver still is not exempted from such diligence "in construction" and has failed to show it in the 30 years elapsed since 1921.

"Of making of maps there is no end," but these maps were not construction or prosecution of the *tunnel.* Rather, they were evidence of changing purposes of manner, place of diversion and amount of works. They varied, in different maps and statements, from two 4½-mile tunnels from the Swan to the Snake, and Snake to Geneva Creek in the 1923 Map, Ex. "A," in the 1927 Map, Exhibit "B," to begin on the Blue, to a 23-mile one. (f. 2936-2944).

The United States Supreme Court, in the *Wyoming vs. Colorado* case, 259 U.S. 419, 490-495, said such shift of a plan will not entitle a priority to relate back to the first general idea of a diversion through mountains.

IV. *Financing, Denver has not done it enough to avoid construction diligence.*

Denver has not obligated itself for any bond issue to build this project. Thirty years work on "financing" cannot excuse failure to diligently perfect the appropriation by works and by application of water to beneficial use. Denver says it is a $100,000,000 project, yet would substitute the expenditure, throughout a period of 30 years from 1921 of less than 3% of that sum on building

works from the Blue River. Furtermore, these expenditures, until 1946 at least, are only investigatory, exploratory. Of the sums spent $175,000 was only on a fifty-fifty basis with the government—not in construction, but in *investigations.*

Denver's asserted excuses of 30 years lack of money do not require reversal of the decree here.

The excuse of lack of money does not require reversal here to carry Denver over a 30-year period with the showing of only a little over a half mile of a twenty-three mile tunnel built. That has taken from 1946 to 1951, only, with a small, one shift a day crew, at Grant on the Platte. Denver has great resources and unlimited power for financing debts for acquisition of water supplies. When Denver in 1932 began on the Moffat Tunnel and Frasier River and Williams Fork collecting system, it had the tunnel, dams and collection canals there built and delivering water in four years in 1936. It did not delay 25 years from date claimed, to start there, nor take 30 years to build a half mile of tunnel. Denver's engineer Dwight Gross puts its expenditures to date on the tunnel as $156,000.00. (f. 1894).

The fact is, plainly, Denver chose to pursue and build "The Moffat Tunnel," Frasier River, and Jones Pass Tunnel, Williams Fork diversion and water system as a preferable one to the Blue River System. Denver never started, but dropped, as to construction, for 25 years, from 1921 to 1946, the Blue River tunnel and reservoir. It has not yet done, to 1951, a 2½% of the tunnel construction work, much less anything on the Dillon Reservoir. Others' rights have intervened in that long period, naturally, in this developing and constructive state.

To uphold such lack of construction as against the Colorado-Big Thompson and other projects being built would tend to prevent development of the country. The degree of activity of these many others building large

systems in the present century fixes the diligence incumbent on the City of Denver in this Blue River Project.

Denver, according to its claims and the recital in the decision of the Supreme Court on the 1937 adjudication of the Frasier, Williams Fork, and Moffat Tunnel appropriations in Grand County, *Denver v. Sheriff*, 105 Colo. 193, at 197, 96 P. (2d) 836 was expecting 74,000 acre-feet available from that source when fully developed. The evidence of Denver's engineers here show that Denver has not yet fully developed the collection works for that other and first pursued Colorado River water, and has much more water still in prospect from it by completing its collection ditch system, conditionally decreed (Riter f. 2875, 2821, 2827).

Denver efforts on the Blue, to 1946, *were only investigatory.*

That these expenditures, from 1936, when the first government grant for investigations was obtained, to the report in 1946, were only for investigations is shown by the fact they were so characterized in the December 31, 1941, contract of Denver with the government. Denver's Ex. E, Appendix, p. 219, signed by Denver's Mayor Stapleton and by Glenn G. Saunders as Denver's attorney, and by the natural utterances of Denver's witnesses, Gumlick, f. 2302, speaking of these acts as "investigations." Such also was the December 12, 1941 (f. 1567) Engineering Board of review and its 1946 report, Denver Ex. T, as well as by the work orders themselves. They repeatedly describe it as "investigating."

Denver includes, to swell these expenditures, money for attempting to get a conditional decree in 1936 in the adjudication court. But it was there adjudged, and not appealed from, that Denver had not shown sufficient diligence in prosecuting the works, had done no con-

struction that that date to entitle it to even a conditional priority (f. 1601). That became res judicata. Such is one example of expenditure improperly included — $12,700.00.

The 1922 and 1923 survey items appear to be for a 4½-mile tunnel that was abandoned, brief, p. 27. Exhibit "A."

So, also, are many items which go to make the claimed whole—for instance, two items, aggregating $952.00, for moving the drag line in 1942 and 1943 from the west portal work to Denver and to Winter Park on the Moffat Tunnel or Frasier River Project. (Denver Appendix p. 204). Denver moved away and in eight years has not come back to that work, which has caved in. (Oliver f. 2062).

That this 1942 job was on the tunnel line is not shown.

The 1942 expenditure at a Snake River tunnel portal, 600 feet from Snake River, was only exploratory, f. 1782. Denver's Chief Engineer since 1926, Dwight D. Gross, so classifies it (f. 1852). "The west end of the tunnel was just an exploratory tunnel." (f. 1905). That was in 1942 and 1943—8 years later, in 1950, it had been so regarded, it had caved in, had not been pursued in any way. Here was over $12,000.00 of the total claimed sum for which credit in construction of diversion works is claimed. Other instances of improper classification are apparent.

Denver cannot claim lack of financial ability in all these years, if that were an excuse. Denver could have, but has never sought by a bond issue, in the entire 30 years, to raise the money through its property and its people for a Blue River Diversion. Chief Engineer Gross says this (f. 1987).

Denver has for 15 years importuned the government for grants and got them, from the $100,000 in

1936 (f. 1541, 1561) to more money later up to 1943. But those funds were used for investigations, not for construction of works.

And now in the opening section of its brief, the recipient repeatedly denounces that government, whose money and assistance it has solicited and accepted. Here is some indication of what Denver regards as the standard, when it proclaims it has acted in good faith in work of perfecting its appropriation. In relation to the total cost, Denver has not been risking much of its own money, either prior to 1946 or since.

We submit Denver's attempt to avail itself of its 30 years' history in Blue River diversion financing as a substitute for 30 years expenditure in construction does not show that the trial court was in error in not granting Denver a conditional priority ahead of 1946.

Before the same court, in 1936, Denver had submitted its testimony for adjudication on such a project It was adjudged in the general adjudication decree ther entered in Summit County District Court (fol. 1601) that what Denver had spent to then on its Blue River diversion project was "for surveys, geological investigation, and other preliminary work; but that no physical construction work has yet been done by claimant." It was denied a decree, either final or conditional. Denver never appealed from that decree or had it set aside. What physical construction of work in the 12 years ensuing from 1936 to 1948 has Denver done, other than investigations?

Denver's Blue River diversion rights of way expenditures were, relatively to amount of water being claimed, and total cost, trivial.

Rights of way expenditures by Denver prior to 1946 do not require reversal of the trial court's decree.

These are not shown to have been made before 1946 in any substantial amount for this $30,000,000 tunnel

and $70,000,000 reservoir for diverting water. Chief Engineer Gross says the 1942, 1943 five-man, west end work on Snake River was only exploratory. (f. 1782, 1852, 1905). Probably this is the reason for not spending, until 1946, money on West Slope rights-of-way in any substantial amount in the 30 years from 1921 to 1951. Denver's Exhibit AA shows rights-of-way purchases, prior to 1946, only from three parties. These were all in the year 1943 and aggregate only $9,500.00, less than 1/10 of one percent, on the alleged hundred million dollar project. A quit claim deed of Glenn Saunders, June 18, 1945, for $164.92, is the only other West Slope item from 1921 to 1946.

There was not rights-of-way acquisition on the Western Slope on the Blue River or on its tributaries either in 1921, nor within 20 years of 1921. That prior to 1946, at the Town of Dillon could not be regarded as so substantial as to excuse for 25 years construction of works nor as a physical demonstration to appropriators initiating appropriations in the fifteen years prior to 1946.

Such a "dog in the manger" policy is not given countenance in Colorado or in the arid West where the appropriation doctrine has developed its resources.

Nor can Denver claim credit for reservoir construction because the railroad in Two Forks Reservoir site was, in 1942, *voluntarily* abandoned by the C. and S. Railroad Company itself. This was a fortuitous, gratuitous event of 1942, 21 years after the date Denver asked the Court to date its construction, and was not construction of works to divert by Denver. To so claim it, is grasping at a straw.

And it is significant that, as to the site of another works claimed, the engineering witnesses of Denver, at the trial in 1950, speak of "Two Forks Reservoir," not as a settled thing, but only as a conjectural possibility. They allude to only "if" it be built: Gross (f. 1925,

1935, 1980), much as they speak of a conjectured "Empire" Reservoir and a possible "American" Reservoir.

Arguing with like facility, and dignity in an attitude which disregards the appropriations of Colorado River Water Conservation District and Northern Colorado Water Conservancy District and of the United States and other defendants in error, Denver's attorneys give the solemn advice to the Supreme Court: "The Courts will not substitute their judgment" for that of the Denver officials. Denver's brief, p. 42. Denver, outside the record, makes a further assertion of like quality that Denver can only secure 200,000 acre-feet out of the Blue by these works, at a maximum rate of 1,600 second-feet. We submit that the evidence is that Denver would be able to secure more than 200,000 acre-feet and would be depriving the United States, as owner of the appropriations of which the districts are beneficiaries, as well as depriving other appropriators whose rights have intervened since 1921. f. 4427, Ex. 50, Ex. 51, 52, f. 4446-49.

The evidence shows that Denver has done neither (a) financing nor (b) construction of its enterprise to entitle it, under the C.S.A., Ch. 90, Sec. 195, to date its priority to the date of 1921 claimed in its map. That statute does not say Denver shall be entitled to that 30 years past date, with no dorks done, other than ½ mile out of a 23-mile tunnel. Its words are that the district court shall enter a decree fixing and determining the priority of right of *each* such partially completed appropriation *as of the date from which such reasonable diligence shall be shown to have been exercised.*" (italics ours).

Clearly, here, the District Court was warranted from all the evidence in determining that Denver's Blue River works date was not earlier then, but was, June 24, 1946, and Colorado Springs Hoosier Tunnel works date was not earlier than May 13, 1948.

V. DISTINGUISHING THE AUTHORITIES RELIED ON BY PLAINTIFFS IN ERROR: They do not govern this case, either on the law or on the facts!

The right to invoke the doctrine of relation to a date prior to use is contingent on diligence in construction and application to use with assiduity appropriate to the works.

None of the cases relied on by the briefs of plaintiffs in error was of excusing a delay in construction comparable in the least respect to the delays of Denver here in construction work prior to 1946, and of Colorado Springs prior to 1948.

In *Ophir Silver Min. Co. v. Carpenter*, 4 Nev. 534, 97 Am. Dec. 550, an 1860 appropriation, and an 1869 high court decision, the time from diversion of water back to the first step was short. The court there defined diligence as: "the steady application to business of any kind, constant effort to accomplish the undertaking." "It is the doing of an act or series of acts with all possible expedition with no delay except such as may be incident to the work itself."

Denver cites *Highland D. Co. v. Mumford*, 5 Colo. 325. It was on the right to assess users of water from the same ditch. There the ditch survey was in 1871. Construction was that winter and 1872 for 5 miles then sold to appellant. There were no intervening claimants.

In *Sieber v. Frink*, 7 Colo. 148, the Court expressly conditions the doctrine of relation to that stated in *Ophir M. Co. v. Carpenter*, 4 Nev. 534.

> "If such work be prosecuted with reasonable diligence, the right relates to the time the first step was taken to secure it."

There work was commenced in May, 1871, water was turned in in August, 1871.

In *Water Supply Co. v. Larimer and Weld Irr. Co.*, 24 Colo. 322, the reservoir was initiated in 1890 by

physical work in building the headgate, was finished in 1893—only three years from the first step, as appears on plaintiff's own recital of the case. The priority was related to physical demonstration.

Phillips v. Cole, 27 C.A. 540, cited by Denver, was a Graveyard Creek water adjudication proceeding, supplementary equity suit to modify. It does not excuse lack of diligence in work of construction. There the dam was built first in 1900, across the stream and the water therefrom promptly and continuously diverted from 1900 to 1906—a completed appropriation, expeditiously perfected. In 1906 the headgate was moved one-half mile and the water there diverted until 1913 when this injunction suit was brought by a junior. The court simply held (p. 542) that "under the peculiar facts of this case" where all the water of the creek from 1900 was used by the first appropriator, "the change resulted in no greater draft on the waters of the stream, either in volume or in time of use," hence there was no injury or prejudice to plaintiff. That was a slight change of place of diversion of a *constructed* works, a perfected appropriation, not of an ambulatory idea of a project on which no actual construction was done until 1946, nor one where, even yet, no relatively substantial construction has been completed nor diversion made. *Downing v Copeland*, 1952, 249 P. (2d), 539. is to the same effect. A slight headgate move upstream on a long perfected appropriation.

That case does not make "maps and investigations" a substitute for construction here where Denver's substantial work and construction expenditures were delayed for 25 years and there is evident a period of many years yet to elapse before there will be a diversion to make a completed appropriation.

Denver's lengthy quotation in its brief, from Water Rights of Deschutes River, 134 Ore. 623, 286 P. 563, shows that "actual construction work was begun in

1903, (on a project of which the first step was in 1900, only 3 years back) and by the year 1904 the first diversion was effected through a flume of 70 cubic feet per second capacity taken out of the Deschules River at the point of posting, about 4 miles above the City of Bend. By 1905 this flume had been increased to a capacity of 742 second feet." Relation to 1900 was rightly ruled here.

This citation is a far cry from Denver's no diversion whatever in 30 years from 1921 and no construction, or other than map filing and investigatory exploratory activities for 25 years until 1946, and since then only ½ mile out of a 23-mile tunnel bored.

In *New Loveland & Greeley Co. v. Cons. Home Supply Co.*, 27 Colo. 525, absence of physical manifestation of work, such as relied on here by plaintiff in error, was held to disqualify the claimant from benefit of the doctrine of relation. Mere "intention," however much asserted, is not enough.

In *Holbrook Dist. v. Ft. Lyon Co.*, 84 Colo. 174, at 187, 269 Pac. 574, the Court quotes:

> "It is just as we said in *New Loveland and Greeley Irr. & Land Co. v. Consolidated Home Supply Ditch Co.*, 27 Colo. 525, 529, 62 Pac. 366: 'Mere intention of an appropriator to build a reservoir and make it a part of a general system of appropriating water, is of itself insufficient to constitute a vested right to store water therein. That intention must be manifested by a completion of the different parts of the general plan and a beneficial use within a reasonable time. This duty is incumbent upon an appropriator who bases his right upon such claim.' "

In *Conley v. Dyer*, 43 Colo. 22, the suit was for injunction against enjoyment of conditionally decreed priorities. They were held perfected, *res judicata*, and not abandoned. The limitation of conditional priorities,

to amounts there found used, was upheld but the decision on the principal point, as to partitioning of several rights of different owners under the same ditch, was reversed. There works had been built and water applied for 16 years. Not so here.

In *Holbrook Irr. Dist. v. Ft. Lyon Canal Co.*, 84 Colo. 174, the Supreme Court refused to relate the claimed canal priority back to a survey three years prior to that on which the construction work was actually done.

Further, that 1928 Holbrook decision, much cited by Denver, deserves quotation, and we do so:

> "An answer to the above questions will be found in the syllabus of *Fruitland Irrigation Co. v. Kruemling* 62 Colo. 160, 162 Pac. 161. It correctly states our view as applied to this case. It reads: 'To invoke the doctrine of relation as applied to the appropriation of water, the appropriator must show, as the first step to which he would refer his right, an open, notorious, physical demonstration, conclusively indicating a fixed purpose to diligently pursue, and within a reasonable time acquire, a right to the use of the water. It must be reasonably calculated to put others on inquiry as to the proposed use, the volume to be appropriated, and the consequent demand upon the source of supply.
>
> * * *
>
> " 'The doctrine is for the benefit of the one who invokes it. Anything tending to its abuse is to be carefully scrutinized.'
>
> "9. We have no doubt, as shown by the company's oral testimony, that the company's officers did, as early as 1900 or 1902, entertain a hope, and possibly an expectation, but without any definite plan, to get water some time from some place on the Arkansas river for storage, as a man might say, and most men believe, 'Some day I shall enlarge my business.' But as said in *Fruitland Co. v. Kruemling*,

supra, at page 167, 'The law does not permit an intending appropriator to invoke the benefit of remote contingencies to unduly extend the doctrine of relation.' " P. 190.

* * *

"18. The soundness of our conclusions concerning the doctrine of relation can be tested by another simple rule, common to all judgments. They must conform to the proof. And relation, when invoked, must have a connection with an actual fact. To the extent that the judgment or decree goes beyond such fact, it does not conform to the proof. As said by Federal Judge Phillips: 'The doctrine of relation, like every other fiction of the law, has its limitations. It can never be made to bear fruit where its root was not planted in some antecedent, lawful right.' *U. S. v. Atchison, T. & S. F. Ry. Co.*, 142 Fed. 176, 187, cited under 'Relation,' Bouvier's Law Dictionary, (3rd Ed.) p. 2862.

"And wholly aside from the subject of notice, the Court has no right to allow a decree to which the evidence shows the claimant is not entitled, and will not knowingly do so, even if there should be but one claimant in such proceeding." P. 194.

Here, by 25 years inaction, there certainly was not notice of continuity of effort upon either Colorado Springs or Denver's claim to any contemplating appropriator who would traverse the Blue River and its tributaries.

In the Holbrook case, although the Supreme Court did not allow relation back to the first claimed map filed, it did point out that the ditch company, relatively small compared to Denver, had spent $25,000 in actual construction begun in 1907, on an adjudication which had gotten on to the Supreme Court by 1923. The unit rule of which benefit was given there was for work on diversions on the same river, near together, as notice to intending appropriators from that stream. This is

shown by plat in the court's decision at page 180. Here Moffat Tunnel from the Frasier into Boulder Creek and Jones Pass Tunnel from the Williams Fork into Clear Creek, are far removed from the Snake and Dillon.

To the support of the trial court on lack of diligence here are:

Drach v. Isola, 48 Colo. 134, 109 Pac. 748, in which the Court said:

> "The law will not permit defendants, after a lapse of 15 years from the date of the decree and 23 years after construction of their ditch, to perfect contingent or inchoate right to make further appropriations and thereby take away plaintiff's vested right."

Diligence must be shown from inception to completion.

Klug v. Ireland, 99 Colo. 542, 64 P. (2d) 131.

And *Beaver Brook Co. v. St. Vrain Res. Co.*, 6 C.A. 130, 40 Pac. 1066, announced that an interval from 1882 to 1893 was presumptively too long if some vested right had intervened in the meantime.

Taussig vs. Moffat Tun. Dev. Co., 106 Colo. 384, (1944), is much cited by plaintiffs in error.

The facts there were quite different than here.

That decision arose out of the same Grand County general adjudication in 1937, as that in *Denver v. Sheriff* (1939) 105 Colo. 193. Both opinions were written by Justice Bock. Both are limited to the facts in those cases, which peculiar facts the Court was careful to point out. Those distinguishing facts clearly show that the plaintiffs in error here do not come within those which governed these cases.

The Court there points out, in grounding its decision for a 1932 date of decree for priority on condition, as to an incipient, but incomplete priority:

The priority was only related to July 2, 1932. By the time the adjudication had got to disposition in the trial court, in June, 1937;

> "The survey work for all the component parts was performed." *** "rights of way and options thereto were acquired";

a right of way through Moffat Tunnel, at a minimum charge of $10,850.00 per year had been obtained, work was performed in clearing timber along the proposed ditch lines, about $20,000 had been spent on the project, pp. 389, 390.

All this had been done prior to trial within the five years from 1932, and Justice Bock, for the Court, in the Taussig opinion, said, as to *Fruitland Irr. Co. v. Kruemling*, 62 Colo. 160:

> "We think the facts in the instant case come within the rule there established." (p. 391) "We held that it was unnecessary, under the facts, to declare, as a general principle of law, that the date of commencement of a detailed survey is the proper date of a priority to be awarded in such a controversy." (pfl 392) and again
>
> *"We note, however, that is as well as all other cases which they cite were controversies concerning priorities wherein it was necessary to weigh the evidence as to the conflicting claims. This is not true in the instant case."* (p. 391). 106 Colo. (Italics ours).
>
> "Some of the problems raised may properly be determined when the question of entering a final decree is before the trial court or when they are specifically presented here for consideration."***
>
> *"There is no evidence here that the granting of the conditional decrees is prejudicial to any existing priorities."* (p. 393). (Italics ours).

Here is present the distinction on which that de-

cision was based and the conflicting claims arisen after 1921.

There five years of physical work and outlay of money and obligations in surveys, rights of way, clearing timber for ditch lines along their courses on the West Slope water shed was far more substantial, in notice, in effort toward construction, in continuity, and in time, than the five times as long here, back of 1946, to which Denver seeks to relate a priority without construction.

Denver v. Sheriff, 105 Colo. 193 96 P.)2d(836, (1939) is cited by plaintiffs in error.

The main question was erroneous placing restrictive conditions on use of other east slope works in the west slope adjudication.

The decree involved was in three separate parts. The first related to the Frasier River diversion project and the Moffat Tunnel. The second related to the Williams Fork diversion project and the Jones Pass Tunnel. The third related to the Williams Fork reservoir.

A full 1,280 cubic feet carrying capacity Moffat Water Tunnel had been completed at the trial there in 1937. Of it only 335 cubic feet was decreed final. The other 945 was conditional.

That is a 74,000 to 80,000 acre-feet development, surveyed in 1921, requiring formation of the Moffat Tunnel District in 1922, bonding all of Denver's lands, the construction of that tunnel, in the seven years, the taking it over to he ciy in 1929 under a contract to finish it and bring water to Denver, the actual rock moving begun in 1932 and progressed to the point of a 1,280-foot new tunnel built by time of the trial in 1937. Water was diverted and run through it in 1936 and applied to use.

All this was far different than the period of lack of construction by plaintiffs in error and 1948, here prior

to 1946—whereunder it is sought to relate the priorities back to 1921, and 1927, over 25 years of lack of construction. There lack of diligence in construction of works was not the issue. Said the Court there, 105 Colo. 198: "Nor is there any conflict of priority of appropriation involved."

The restrictive conditions by the West Slope Court on Frasier River diversions as related to Denver's East Slope stream priorities was the burden of the brief of Denver there and of the Supreme Court's discussion and decision. It was so succinctly stated in Denver's opening and reply briefs.

The Court in the Sheriff case did not say that Denver alone shall be allowed water for growth. It only decided that the court of one water district cannot impose conditions on use of water decreed out of another water district by another court.

Plaintiff in error's attorneys argue that because they expect to grow and were planning financing, each is excused from construction for the 25-year period back from 1946 when it commenced construction. The argument in effect is that, since, Denver tied up, by construction began in 1932, 74,000 acre feet of water out of the Frasier and Williams Fork Rivers to date of 1921 by the Sheriff case decision, it can without construction tie up another 800,000 acre-feet out of the Blue River because, though not needing it, they urge "premature freezing of large capital investment funds would be a waste." Denver brief p. 32.

The rights to grow of Boulder, Fort Collins, Greeley, Grand Junction, Loveland, Longmont and other cities in the seven counties of Northern Colorado Water Conservancy District and eight counties of Colorado River Water Conservation District, needing water, and their surrounding territory are graciously to submit to "freezing" of their future so "big brother" can have it there waiting 50 years hence.

Denver's brief relies much on the "Sheriff" case and Sec. 195 of Ch. 90 C.S.A. to support this exclusive theory.

We submit:

(1) That the Sheriff case must be judged on the facts and amount of water earmarked for Denver there from the Fraser River and from the Williams River, of which Denver has much yet in reserve for collection.

(2) That mere asking the government for money in 1935 and after other cities and farmers had started the Colorado-Big Thompson Project and the government had already started it financing and investigatory and Fraser river surveys are no reason to excuse lack of work of Denver for 25 years on the Blue River.

(3) That Denver is not beyond the laws. It seeks water for a use it does not now need, but hopes to need in fifty years. Any appropriator must conform to the law of the "dry and thirsty land," which is, that appropriation of water requires diligence in construction.

(4) That to uphold Denver's contentions to date back 25 years from its 1946 first construction and to earmark 1,600 feet for an 800-foot diversion works or tunnel is not Denver's right, nor Colorado water law, but would deter desirable development of this state's water resources.

To date Denver's Blue River priority back to 1921 would be approving, not disapproving, a "dog in the manger" policy.

Denver's prosecution of the Blue River Tunnel certainly is shown by its acts and the record here not to have been a fixed and definite purpose prior to 1946.

The United States Supreme Court rejected a similar claim by a state big in population and resources and

growth and claims it would put the water to a better use, as against a smaller one, in:

Wyoming vs. Colorado, 259 U.S. 449, 66 L.Ed. 999.

There, changing plans of works and financing as excuses for delays in construction expenditures in the bringing of water from the Laramie River into the Cache la Poudre, though only from 1902 to 1909, in that large undertaking, described by the United States Supreme Court as an "ambitious project," were held not sufficient as against others initiating appropriations downstream in the same period.

A very good reason for this Denver lack of expenditure of physical construction and of money on the Blue River tunnel and works is that, in choosing which of the two systems—the Frasier and Williams and Moffat Tunnel, or the Blue River 23-mile tunnel, it was the engineers' conclusion that the diligence would pay more if put on the Moffat and Jones Pass Tunnels. Riters' testimony (f. 2769) shows that with these and Denver's other supplies Denver, if there be a continuance of recent years' growth, has plenty of water to 1979—30 years. f. 2769, 2876, 2959.

In this connection, it is proper to point out that it is not alone Colorado Springs' and Denver's needs for water which are to be considered by the Courts. Mere bigness is not the determinative criterion of right. Nor is mere claim making by maps, to which Denver's counsel must constantly recur. They have incorporated some of them in their appendix. They have omitted some. With so many able counsel this could hardly be unintentional.

Plaintiffs in error make much of their expectations and quote much from the Sheriff opinion commending Denver's officials in looking ahead for water supplies for Denver's hoped for growth. But other communities of Colorado also have the right to their destined continuance of growth, at rates no less than Denver's. The

cities and farms of the seven counties of Northeastern Colorado, Boulder, Larimer, Weld, Morgan, Logan, Washington, and Sedgwick, and those of the communities in the eight counties on the Colorado in those two conservancy districts have a right to grow, also. Denver has its Frasier River and Williams Fork system, not yet exhausted in its possibilities. The others who have been diligent in Colorado-Big Thompson works since 1933 should not be set back while Denver loitered.

The unit rule, of closely associated work, in one locality is not here. Denver's construction on Frasier River and Williams Fork River and Moffat Tunnel therefrom could not hold up the whole Blue River.

Nor does the state of facts on construction of the Moffat Tunnel, Frasier and Williams Fork Rivers, resulting in the relation of their priorities to 1921, in *Denver v. Sheriff*, 105 Colo. 193, rule here. Blue River "work" did not cause, is not mentioned in, that decision. The City there contracted on January 2, 1929, to do the construction, got the tunnel built so water could run through it in 1936. There was continuity of effort, with assiduity, notorious to those on the Frasier and Williams Fork.

In the Moffat and Jones Pass Tunnels actual construction by rock and earth moving began in 1932, and continued completion was by 1942. The people, in 1932, obligated themselves and their property to pay those costs by a bond issue of $10,000,000. Here they have done 1½% only, in 30 years they would like to relate back.

The Colorado-Big Thompson Project initiation of 1933 had not intervened at that resumption of 1932, nor was its appropriation at all displayed in that case. Denver did construction work there. A very different result might have been the outcome as to the decrees there conditional had the Colorado-Big Thompson appropria-

tion been there ready for adjudication. Northern Colorado Water Conservancy District was not organized until September, 1937.

People ex rel. v. Letford; 102 Colo. 284.

Here, in 1933, it is admitted by plaintiff in error the Colorado-Big Thompson appropriation has intervened, followed by physical work to completion, with continuity of effort and diligence usual to those engaged in like enterprises.

On what is "diligence usual to those engaged in like enterprises," we have in the record here, referred to in the Colorado Springs briefs, page 12, the record that that lesser city, on May 13, 1948, prepared its maps of surveys for filing with the state engineer for constructing a new tunnel, 8000 feet in length, from the Blue River at Hoosier Pass and has finished that tunnel (their brief says) in the two and a half years encompassed thence to the entry of decree here. It cost $650,000 —more than thrice what Denver has spent on Blue River tunnel construction from the beginning. With a one shift, small crew, begun in 1946, Denver has dug 2,850 feet of tunnel. Thereon Denver would have the Supreme Court to say the trial court was in error in not relating Denver's priority back for 30 years, when conflicts with other appropriators are present.

To do so would announce a doctrine of acquisition of water rights contrary to that which those developing irrigation in Colorado have relied on for eighty years. It would be unfair to others who have been developing diversion works by diligent construction of works for applying water to beneficial use, to whose priorities the announced standards of diligence have been applied in fixing the dates to which they relate.

Rather, here, was properly applied, by the trial court, that original doctrine which became ever since the measure for intending appropriators, stated in:

Nevada v. Kidd, 37 Cal. 311, 314, many times cited and followed in Colorado water cases.

We quote from page 314:

> "The principles established in the cases cited are founded in reason. The doctrine is that no man shall act upon the principle of 'the dog in the manger' by claiming water by certain preliminary acts and from that moment prevent others from enjoying that which he is himself unable or unwilling to enjoy and thereby prevent the development of the resources of the country by others."

Denver would have the court so tie up the Blue River for all time to come, backward to 1921 and for another 50 years or more, at the rate it asserts is reasonable diligence.

The Supreme Court volume, 65 Colo., contains much sound water law in cases growing out of the welter of conflicting claims for large projects being constructed in the early part of this century, contested by eminent irrigation counsel.

In *Schwarz v. King*, 65 Colo. 48, 172 Pac. 1054, the express proviso is made: That for delay in construction not to effect loss of right to relate the priority to a date 10 years back, there must have been no later appropriator who had initiated his claim in the interval.

In *Riverside Res. & L. Co. v. Bijou Irr. Dist.*, 65 Colo. 184, 176 Pac. 117, rights of the Empire Reservoir had been initiated in 1905 during the interval between April, 1902, when Riverside had stopped work and 1907, when it resumed. The trial court was affirmed in awarding, on complicating evidence, the Empire the priority relating to the date during failure of the Riverside to prosecute construction with diligent continuity.

This principle was reiterated and followed in:

Trowell Land Co. v. Bijou Irr. Co., 65 Colo. 202, at 208. 176 Pac. 292.

Statutes are cited by Denver's brief, pages 51 and 52, from Session Laws of 1943, Chapter 190. They are not applicable to this case. The proceeding was instituted under the 1942 Act, as is shown by the first Statement of Claim.

1943 Act, Chapter 190, Section 25 (a).

VI. QUIET TITLE CANNOT BE ENTERED IN STATE COURT AGAINST THE PROPERTY OF THE UNITED STATES, TO-WIT, THE PRIORITY OF ITS WATER RIGHT OF ITS COLORADO-BIG THOMPSON BLUE RIVER WORKS.

The United States, in constructing the Colorado-Big Thompson Project and maturing appropriations of water for it, is acquiring title to property. It is acting in its governmental capacity. By construction it has acquired priority for its water right by appropriation.

Oklahoma v. Atkinson, 313 U.S. 508, 85 L.Ed. 1487.

U. S. v. Gerlach, 339 U.S. 725, 738, 94 L.Ed. 1231, 1242.

Supplying of water to the public at large is a governmental function.

People ex rel. v. Letford, 102 Colo. 284, 297.

The statutory water adjudication proceeding is *sui generis* and is in the nature of quiet title by each claimant against each other, here to quiet title against the property of the United States, to-wit, its water right for Green Mountain Reservoir.

Louden Co. v. Handy D. Co., 22 Colo. 102, 43 P. 353.

Officers of the United States were without authority to submit rights of the United States to jurisdiction

in these proceedings against its priority of water right. They properly withdrew its statement of claim for the reservoir, before any evidence was taken.

Stanley v. Schwalbey, 162 U.S. 255.

United States v. Shaw, 309 U.S. 495, 501, 502.

Seiden v. Larson, 188 Fedfl (2d) 661, 665, (certiorari denied, 95 L.Ed. 1373 341 U.S. 950).

A water priority is a property right.

Brighton Ditch Co. v. Englewood, 124 Colo. 366, 372, 237 P. (2d) 116.

The beneficiaries cannot have the right adjudicated in the appellate proceedings. The legal title owner is the one who represents the multitude of users.

Under the Colorado system of adjudication and appropriation, the owner of the legal title represents the water users as appropriators and is the sole one having the right to present the claims for adjudication of its priorities of right.

Randall v. Rocky Ford D. Co., 29 Colo. 430, 68 Pac. 240.

Combs v. Farmers Highline Co., 38 Colo. 420, 431, 88 Pac. 396.

Montrose Canal Co. v. Loutsenheizer D. Co., 23 Colo. 233, 234, 48 Pac. 532.

There was not jurisdiction in the State Court to enter a judment against the United States as owner of the Colorado-Big Thompson Project, and against those for whom the United States is trustee of the water rights.

The holder of the legal title of an appropriation and diversion system is the proper party to present its claims for adjudication. That is, the city, not the citizen users, for a municipal system; the company, not the

stockholder users for a mutual irrigation system. Of the Colorado-Big Thompson Project the title is in the United States, which is the proper litigant in this action to quiet title to water rights and to quiet the title of Denver as claimant, against other claimants.

Consent of Congress being absent to litigate its titles in state courts, jurisdiction to determine the title of the United States and of its users in its property in the priority of its water right, in an inter sese proceeding to determine the relative rights of others as against those of the government does not exist in this state court proceeding.

This water right is being adjudicated by orderly processes of the law in the federal court for the District of Colorado. It has been pending there 3½ years.

VII. ADDITIONAL ANSWER TO BRIEF OF COLORADO SPRINGS.

STATEMENT

The relative priority awarded in the March 10, 1952, statutory adjudication decrees to Colorado Springs are as of date May 13, 1948. In its brief, pages 3 to 5, is a recital of its appropriation claimed:

For its Hoosier ditches and tunnel as far back as October, 1907:

For two reservoirs of 1,672 and 1,474 acre-feet respectively, September, 1908, for a third reservoir, Mayflower Lake, August 3, 1943.

The issue is stated as to whether the trial court was wrong in finding sufficient diligence was not shown to relate the priorities of appropriation back to those dates.

Colorado Springs Counsel saw the weakness to claim back to 1907 and relinquished the claims to date earlier, but asked priorities to be decreed to date from

September 27, 1927. That would be ahead of priorities initiated by the Colorado-Big Thompson Project and ahead of priorities of other appropriations shown to have arisen in the 21-year period between 1927 and 1948.

We maintain that the evidence supports the trial court, in the 1948 date.

No application of water to use has been made by any of the works and the relative decrees entered as to all of them are conditional on completion with reasonable diligence.

The conflict is with appropriations initiated in the period between 1927 and 1948.

ARGUMENT

The date from which the trial court found there had been reasonable diligence in prosecuting the enterprise was March 13, 1948. This is the date Colorado Springs first had anything tangible to do with constructing works from the Blue River to appropriate water. It had taken a quit claim from previous promoters November 15, 1947.

The September 27, 1927, date sought is to a survey by a predecessor in title, over 20 years prior to Colorado Springs doing any work. The map of this survey was filed July 16, 1929. It was not prima facie evidence of initiation since not filed within 60 days from the survey. See page 9 Colorado Springs brief.

Schluter v. Burlington Co., 117 Colo. 284, 289, 188 P (2d) 253.

No construction that was substantial on the enterprise was done between 1927 and 1948, the 21-year period. It was rather investigation surveys in 1931 to 1937 for compiling Galloway's report and stream flow measurements and studies for presentation to parties whom

it was sought to interest to finance the construction cost. Among these, it was attempted, unsuccessfully, to interest Denver and Englewood and three South Platte water irrigation companies—Colorado Springs was not approached to buy it.

Thenceforward to 1945 Galloway was absent from Colorado. In 1945 his efforts to again interest Englewood and Aurora came to naught.

On direct examination Galloway listed as an expenditure a 75-foot ditch dug. On cross-examination he admitted it was on a different location, and "wasted effort."

In 1947 Colorado Springs was interested by one Latham and a contract made to quit claim to Colorado Springs whatever rights existed. In 1948 Galloway entered employment of the City to build the project. May 13, 1948, he prepared maps and statements for filing. They were not filed until October 19, 1948, hence were not prima facie evidence of date of initiation. And the different maps differed in plan.

Others, one George among them, in the meantime, investigated the plan to take the water under Hoosier Pass by a tunnel to the Platte and filed maps in May and August, 1942. George claimed total expenditures in surveys to 1945 or $7,236.63 of which $5,340.60 was construction.

The City of Colorado Springs, other than investigations, spent no money on prosecuting this enterprise prior to 1948. The tunnel was begun that year and by 1951 and before the decree herein was completed at a cost of $650,000. Colorado Springs brief, p. 15. It was 8,000 feet long.

Credit on construction cannot be taken for the water measurements and studies, geological tests and investigations prior to 1948. They were simply, as in the

Wyoming vs. Colorado Laramie Poudre Project case, in efforts to demonstrate the feasibility of the Project. The expenditures were promotional in the twenty years.

Galloway and George were speculators in a claim for public water. They were not digging a ditch and tunnel underneath Hoosier Pass for their own use. In 20 years they could not get the money to build it. Nor did they in that twenty years time spend an average of 1/10 of 1 per cent of its cost per year. It was not substantial, for a twenty-year period, or commensurate with the size of the project.

They had no diligence in construction to sell to Colorado Springs in November, 1947, and the City did not by that quit-claim acquire any diligence related back to 1927 or ahead of its own efforts, which, when expended, accomplished the tunnel construction in two years.

There is no right to invoke the doctrine of relation back to survey and investigatory work unless work of construction has been prosecuted with due diligence.

Colorado Springs' quitclaim from Galloway, et al., in late 1947 gave no relation back to 1927 where rights of other appropriators had arisen in that twenty years. No rights to so relate the appropriation were passed by the assignment.

Colo. L. & W. Co. v. Rocky Ford Co., 3 C.A. 545, 34 Pac. 580.

Holbrook Dist. v. Ft. Lyon Co., 84 Colo. 174, 186, 190, 194.

Wyoming v. Colorado, 259 U.S. 419, 66 L.Ed. 999, 1024, 1025.

Distinguishing the citations of plaintiff in error, Colorado Springs:

We have previously discussed nearly all of the cases cited by Colorado Springs' counsel in connection with answer to Denver.

We will here notice the others:

Ripley v. Park Center L. & W. Co., 40 Colo. 129, (90 Pac 75), was a far different set of circumstances. There the work was initiated in 1903 and completed by time of the adjudication in 1904—a short period.

Plaintiff in error also cites *Water S. & S. Co. v. Larimer & Weld Irr. Co.*, 24 Colo. 322, 51 Pac. 496. In that case the priority was related, not to a survey but to date physical construction was begun, July 8, 1890, and the claimant there diverted water by its appropriation the same year, began to apply it to beneficial use about two years after the date of priority awarded and completed the reservoir in less than three years from that date awarded.

As to the *Taussig vs. Moffat Tunnel Dev. Co.*, 106 Colo. 384, case, much relied on, we again call attention to the distinguishing element there. The Court pointed out that no conflicting appropriations were shown. "There is no evidence here that the granting of the conditional decrees is prejudicial to any existing priorities." p. 393. Decree was entered in June, 1937, before Northern Colorado Water Conservancy District was formed. The period between that day and the date of priority conditionally awarded, July 21, 1932, was only five years, the time and showings and evidence of conflicting appropriations here is far different, where it is sought to relate back for a period of twenty-one years.

Cache la Poudre Irr. Co. v. Larimer & Weld Res. Co., 25 Colo. 144, is not in point here. It only holds diligence as affecting priorities, that the decreed priority attaches to the ditch not the claimant persons, and if some of the claimants, but not all, use it, it is not material to junior appropriators which ones do so apply the water to use.

Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, was on fixing water rates on water use contracts. It was not to excuse diligence for doctrine of relation.

Nor is *Lar. Co. Res. Co. v. People*, 8 Colo. 614, in point here. It held a reservoir dam may be across a stream bed.

We cite and discuss above the cases in 65 Colo., *Riverside v. Bijou*, 65 Colo. 184, and *Schwartz v. King*, 65 Colo. 48, as being in favor of the trial court's decision on doctrine of relation here.

Nor is *Rio Grande Co. v. Wagon Wheel Co.*, 68 Colo. 437, 191 Pac. 129, in point. It was on seepage claim for exclusive priority. The priority decreed as proper was dated in part to 1896, in part to 1902. The Supreme Court pointed out there, p. 440: "It conclusively appears that work was done or money expended by plaintiff in error on this property in every year from 1896 until 1909," and "in October, 1911, water was turned into the reservoir which was used in 1911 upon lands."—far different from the lack of work and of water diversion in the period embraced here.

VIII SUMMARY

That the appropriation of Colorado-Big Thompson Project intervened between 1921 and 1946 is admitted. That Denver's construction of diversion works, before 1946, on the Blue River, was only investigatory, exploratory, is in evidence. Compared to total cost, the construction expenditures of Denver before 1946 and of Colorado Springs, before 1948, were trivial and for determining feasibility, either of borrowing money, or of reasonable water cost. Even since 1946, Denver has only accomplished a little over one-half mile of a 23-mile tunnel, and that with a small, one shift crew.

The Denver plan was not definite or fixed before 1946. The Colorado Springs plan was not fixed before 1948. Other appropriators in the 25 years from 1921 to 1946 were proceeding with physical work for diversion structures on the Blue River with assiduity and continuity of effort.

Denver and Colorado Springs, each striving to have the doctrine of relation stretched for their benefit, and unable to stand alone, lean upon each other. They seek to have the Supreme Court create a precedent to relate back 25 years and 21 years, respectively, beyond their works of construction, priorities of appropriations yet not complete, while they investigated, in times of changing idea, trivial expenditure and speculative holding, and while they pursued more tangible water projects from other rivers. During that period of inaction on the Blue River by plaintiffs in error, others were encouraged to, and did, initiate and perfect appropriations of great cost and notorious physical construction on the stream.

Neither city was a "pioneer grubbing and clearing land and providing a means of living to make a home on new lands." They had great resources of credit available to them in borrowing and in taxing power for water works.

The trial court here awarded to Denver that same measure of doctrine of relation which has been applied to others, according to the decisions on doctrine of relation on which those other appropriators seeking to make appropriations from Colorado streams.

It was liberal, in view of the extent of effort shown since 1946. Under the statute and decree the date to be determined for each partially completed appropriation is "the date from which such reasonable diligence shall be shown to have been exercised." That date is not earlier than the 1946 date awarded Denver by the trial court.

The Colorado-Big Thompson works water appropriation priority can only be represented, for adjudication, by the title owner, the United States. There is not jurisdiction here to try its title.

Denver's bigness and hoped for growth give it no more claims on special concessions than are due the many urban and farming communities of the Northern Colo-

rado Water Conservancy District and Colorado River Water Conservation District. They also have water needs from increasing population growth. Denver has so much water now it cannot use it all but rents out to farmers a substantial part, has yet an undeveloped resource for other water out of the Frasier and Williams Fork Rivers. Denver has already been given ample earmarking of water from those two other Colorado River tributaries in Grand County.

Denver was accorded, in 1937, a yet inexhausted, distant growth quota of water from Frasier River and Williams Fork River where physical work by Denver was active, which were so completed as to deliver water to Denver in 1936. Colorado Springs was awarded conditional priorities dating to 1948. Neither before those years had "shown due diligence in the construction of such projects."

CONCLUSION

The works of these conflicting rights of defendants in error, other appropriations intervening in the periods of inaction of plaintiffs in error, past which these two plaintiffs in error by argument now seek preference, were properly regarded by the trial court in entering its findings and decrees of relative priorities to take the water of the public—the Blue River.

Denver and Colorado Springs were awarded priorities. The dates awarded them for their incomplete appropriations are right.

As was said in *Holbrook Irr. Dist. v. Ft. Lyon Canal Co.*, 84 Colo. 174, at p. 194:

> "And wholly aside from the subject of notice, the Court has no right to allow a decree to which the evidence shows the claimant is not entitled, and will not knowingly do so, even if there should be but one claimant in such proceeding."

This is a constructive and developing state, where exists great need of water for its farms and its cities in the South Platte Valley and in the Colorado River Valley, where reliance has been had upon the accepted standards of diligence in construction as fixing the date to which an appropriation is to be related. That doctrine of eighty years should not be now revoked to reverse the trial court here, where the deserts of others' initiated rights so forcefully are in evidence.

Neither Denver or Colorado Springs has just ground to complain of its date awarded.

The findings and decree of the trial court should be affirmed.

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