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Boulder

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 CON-
SERVANCY DISTRICT, COLORADO
RIVER WATER CONSERVATION DIS-
TRICT, 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.*

BRIEF OF PLAINTIFF IN ERROR,
CITY OF COLORADO SPRINGS.

FILED IN THE
SUPREME COURT
OF THE STATE OF COLORADO
OCT 31 1952

CLERK

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No. 16881
No. 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 CON-
SERVANCY DISTRICT, COLORADO
RIVER CONSERVATION DISTRICT,
F. E. YUST, CLAYTON HILL, GRAND
VALLEY IRRIGATION CO., GRAND
VALLEY WATER USERS
ASSOCIATION,

*Error To The
District Court of
The County of
Summit.*

*Honorable
Wm. H. Luby,
Judge.*

BRIEF OF PLAINTIFF IN ERROR,
CITY OF COLORADO SPRINGS.

I

STATEMENT OF CASE.

Plaintiff in error above named seeks to have reversed the judgment and decree of the District Court of Summit County, Colorado, heretofore and on the 10th day of

March, 1952, entered in two general statutory supplemental adjudications of priorities of right to the use of water for purposes other than irrigation (No. 1806 in said court, No. 16381 herein, and for irrigation purposes No. 1805 and No. 16888) insofar as said decrees involve or affect the rights of said city, a claimant of right to the use of water from the Blue River and its tributaries in Water District No. 36 of the State of Colorado, for municipal purposes. (See appendix hereto at paragraph I) Folios 788 to 828 of the record.

In and by said decrees the trial court awarded to various ditches, canals, tunnels and reservoirs of claimant, the amounts of water claimed to have been appropriated by it, by and through the structures and at the points of diversion set forth and described in its statement of claim filed in said proceedings, and as shown by the testimony on behalf of said claimant introduced in said proceedings. In fixing the date of said appropriations the trial court gave to each thereof the date of May 13, 1948, instead of the earlier dates claimed for said appropriations, under and by claimant's statement of claim filed herein and as supported by the evidence introduced by claimant in the proceedings. The findings and award of the above date is the sole error of which plaintiff in error complains, as shown by its specification of points attached hereto and made a part of this brief.

1. *Pleadings.* While formal pleadings other than a statement of claim on behalf of each claimant are not required in proceedings of this character, in the instant case we are aided by written pleadings filed herein, which quite clearly define the sole and only issue to be determined in this review, as hereinabove stated. These pleadings consist of a statement of claim filed herein by this plaintiff in error, found at folios 143 to 175 of the record, (cause No. 1806, No. 16881 herein) and an abstract of which is incorporated in the appendix attached hereto and made a part of this

brief, as paragraph II thereof. The same claims are made in cause No. 1805.

To this statement of claim, and before the hearing of evidence thereon, certain of the defendants in error filed their objections and protests to and against said claim of said City, as follows:

(a) Objection and protest of The Colorado River Water Conservation District, found at Folios 276 to 323 of the record, No. 16881, and an abstract of which is incorporated in the appendix attached to and made a part of this brief as paragraph III thereof.

(b) Protest and objection of F. E. Yust as found at Folios 360 to 373 of the record No. 16881, and an abstract of which is incorporated in said appendix as paragraph IV thereof.

From the foregoing pleadings it appears that the City of Colorado Springs claims the following appropriations for which it seeks decrees for municipal purposes:

1. Blue River Ditch, taking its water supply from the Blue River, a natural stream in Water District No. 36, a tributary to the Colorado River, in the amount of 200 cubic feet of water per second of time as of date October, 1907.

2. Crystal Ditch, taking its water supply from Crystal Creek, a tributary to said Blue River, in the amount of 40 cubic feet of water per second of time, of date October, 1907.

3. Spruce Ditch, taking its supply of water from Spruce Creek, a tributary to said Blue River, for 60 cubic feet of water per second of time, as of date October, 1907.

4. McCullough Ditch, taking its supply of water from McCullough Gulch, a tributary to said Blue River, 60 second feet of water per second of time as of date October, 1907.

5. East Hoosier Ditch, taking its supply of water from East Hoosier Creek, a tributary of said Blue River, for 50 cubic feet of water per second of time, as of date October, 1907.

6. Hoosier Ditch (Claim No. 1), taking its supply of water from Hoosier Creek, a tributary of said Blue River, for 40 cubic feet of water per second of time, as of date October, 1907.

7. Hoosier Ditch (Claim No. 2), taking its supply of water from Silver Creek, a tributary of said Blue River, for 20 cubic feet of water per second of time as of date October, 1907.

8. 50 cubic feet of water per second of time intercepted by the above named ditches, as of date October, 1907.

9. Hoosier Tunnel, through which the appropriations hereinabove described are carried from the western to the eastern slope of the continental divide, for which a claim is made for waters tapped by and seeping into said tunnel, in amount of 20 cubic feet of water per second of time, as of date October, 1907.

10. Upper Blue Lake Reservoir (also known as Upper Quandary Lake), located across the channel of said Blue River, taking its supply of water from said Blue River, with a storage capacity of 1672 acre feet, for which claim is made for storage, as of date September, 1908.

11. Lower Blue Lake Reservoir (also known as Lower Quandary Lake), located across the channel of said Blue River and taking its supply of water from said river, with a storage capacity of 1474 acre feet, for which claim is made for storage, of date September, 1908.

12. Spruce Creek Reservoir, located across the channel of Spruce Creek, a tributary to said Blue River, taking its supply of water from said Spruce Creek, with a storage

capacity of 1542 acre feet, for which claim is made for storage, of date September, 1908.

13. Mayflower Lake Reservoir, located across the channel of said Spruce Creek, a tributary to said Blue River, with a storage capacity of 618 acre feet, for which claim is made as of date August 3, 1943.

All of the foregoing ditches, canals, tunnels and reservoirs constitute and are a part of the Continental-Hoosier Diversion System, utilized and to be utilized for the diversion and transportation of water from the western slope to the eastern slope of the continental divide, to become a part of and contribute to the water system of said City, for the use and benefit of the inhabitants thereof, for domestic uses, fire protection, sewage disposal, manufacturing and industrial uses, street sprinkling and flushing and other municipal purposes.

All of the water so appropriated as aforesaid, constitutes a desperately needed supplemental water supply for said City and its inhabitants.

The protests of the two protestants above named were based largely upon the grounds that the claimant, the City of Colorado Springs, had not completed any of the appropriations claimed by it, and had not exercised sufficient diligence in the effort to appropriate these waters to entitle the City to the priorities of the dates claimed, or any date.

2. *Issue.* From the foregoing it is clear that the only issue presented to the trial court was whether or not the claimant had constructed or was in the process of constructing, diversion and storage structures to the extent and of the character which would entitle it to a decree, absolute or conditional; and if so, whether or not claimant and its predecessors in interest and title had exercised sufficient diligence to entitle it to the award of a date relating back to the initiation of the work upon the structures by and through which

the diversion and transportation of the waters claimed were to be utilized.

While the claimant in its statement of claim hereinabove referred to claimed the date of October, 1907 for each of the ditches and reservoirs, except the Mayflower Reservoir, as to which it claimed the date of August 3, 1943, at the beginning of the hearing in Open Court (Folio 3254 of No. 16888), claimant advised court and counsel that it would not claim the date of October, 1907 for these appropriations claiming that date, but instead would ask for decrees of date September 27, 1927.

It was conceded by counsel for the protestants at the aforesaid hearing, that after the City of Colorado Springs had acquired title to the rights of the predecessor in title and interest in and to said appropriations, said City had proceeded with due diligence up to the date of said hearing, and was then proceeding with diligence, toward the completion of the described structures. Therefore, the sole issue before the trial court was whether or not the predecessors in interest and title, of this claimant, had prosecuted their efforts to perfect an appropriation of the waters claimed, so as to entitle them to a priority date relating back to said last mentioned date.

The trial court in its decree found that the claimant was entitled to a priority for each of the aforesaid ditches, tunnels and reservoirs, for the amount claimed, as of date May 13, 1948, and so made the award. It will also be noted that each of the priorities above named are awarded upon the express condition that the appropriations be completed with reasonable diligence, and the waters thereof applied to beneficial use within a reasonable time. (Folio 826 No. 16881) See also Folios 825 of the record No. 16881, which is incorporated in the appendix hereto as paragraph I hereof.

3. *Facts.* While the testimony is quite lengthy and the record quite voluminous, there is practically no conflict in evidence, and no testimony was introduced by the protestants which in any manner contradicted the evidence introduced by claimant on the issue presented to the trial court herein as above described. Briefly, the undisputed facts relative to the date of these appropriations, are as follows:

The City of Colorado Springs, in common with all other towns and cities in Colorado, on the eastern slope of the continental divide, has had a serious water problem, almost from its beginnings. Like all settlements in the eastern half of the state, the demand for an adequate water supply for domestic and other municipal purposes, has always exceeded the available water supply. This situation has been more acute in Colorado Springs than in most of the other towns and cities of eastern Colorado. This is due to the fact that settlements in northern Colorado were made in the water shed of a comparatively large river, to-wit: the South Platte and its tributaries; and the settlements in the southern half of Colorado were along the main stem or principal tributaries of another large stream, the Arkansas River. Colorado Springs, however, is located at the headwaters of a comparatively minor tributary to the Arkansas River, to-wit, the Fountain. The water shed producing the water supply for that city covers a very small area, with the attendant limited production. The area furnishing this water supply is only about 20 miles in length, from the divide at Palmer Lake between the South Platte and the Arkansas, and the eastern slope of the Rocky Mountains from Palmer Lake south to Pike's Peak. Hence, while Colorado Springs has from its foundation in the early '70s, been a nationally famous, and beautiful residential city, the struggle on the part of the municipal officers to supply its inhabitants with sufficient water to serve their needs, has been a ceaseless effort. All references to testimony hereafter are to Folio

numbers in Reporter's transcript found in the record in No. 16888 herein.

For a quite comprehensive outline and history of these efforts, see the testimony of witness E. L. Mosely, former City Manager of Colorado Springs, and now employed in an executive capacity by the City of Denver, in the Water Department, which testimony is found at Folios 3597 to 3627 of the record.

The larger part of the testimony introduced on behalf of claimant was directed to establishing the desperate needs of this city for an additional water supply if it were to survive, and the fact that there was no source for additional water available to claimant at any practical or feasible cost, except by the importation of water from the Colorado River Basin. Also, the testimony on behalf of the protestants was directed to an effort to persuade the trial court to deny the claimant a decree for any water from that source. The trial court in its decree recognized the absolute legal right of this claimant to appropriate the waters involved herein, as a matter of law; and also recognized, as a matter of fact, that claimant had done all things necessary to entitle it to a priority for an appropriation, conditioned upon the completion of its works and the beneficial use of the water within a reasonable time. The lower court, however, fixed the date of the appropriation as May 13, 1948, which was the date upon which Colorado Springs carried on with the construction of this system (see testimony of James D. Galloway, Folio 3313), after having acquired, on the 15 day of November, 1947, all the right, title and interest of those who had initiated and prosecuted the program for this transmountain diversion project (see abstract of title Exhibit J)

Claimant at the trial of this case contended, and still contends, that the date of the initiation of these appropriations, was September 27, 1927. This claimed date is based upon the first survey of the predecessor in interest and title,

to plaintiff, James D. Galloway (Folio 3289).

The contention of the City is that on said date last mentioned, Galloway, an engineer of long and varied experience, initiated a program for the diversion from the Blue River and its tributaries, and transportation over or through the continental divide, for utilization on the eastern slope, of a considerable quantity of water. To that end the original survey for a preliminary map and statement of claim (Exhibit A, offered in evidence at Folio 3262, admitted at Folio 4116), was begun on said September 27, 1927. This map and statement was filed with the State Engineer in compliance with the statute in that behalf, and was accepted for filing by the State Engineer on July 16, 1929, and was given the office number of 15134.

From September 27, 1927, Galloway and various other persons with whom he became associated from time to time, in an endeavor to finance the construction of this project and complete the appropriation, devoted much time and considerable money each year. The testimony as to these efforts was not contradicted. We contend that as a matter of law, under the decisions hereinafter specifically referred to, this undisputed testimony is conclusive in establishing reasonable diligence sufficient to relate the date of the appropriation back to the initial effort on said September 27, 1927.

The recital of the efforts made by Galloway and those who from time to time were associated with him, in the initiation and prosecution of this vast and important enterprise, is an interesting and dramatic story. It is a vivid demonstration of the vision, courage, persistence and energy of those individuals who, in the face of great difficulties, created and developed a project of permanent value to the economic welfare of the state. Galloway was and is a capable, experienced engineer, who, in seeking to make a highly beneficial use of this natural resource, applied the

type of individual effort which built the bulk of Colorado's empire; and this individual development, even to-day, represents the major part of our vast agricultural domain, and the expansion of our municipalities, in spite of the more spectacular and costly government projects. Such efforts should not be penalized by a narrow and restrictive interpretation of the rule of reasonable diligence.

A brief outline of these efforts by Galloway, and associates year by year, is as follows;

During the year 1928 and part of 1929, he spent considerable time trying to find some one to finance the project (Folio 3289). To that end he contacted and interested The Henrylyn Irrigation District on the eastern slope, which district put up the filing fees, which were afterwards repaid to it, when the District concluded not to take over the project (Folio 3291). In the year 1929 the surveys were continued on the ground, and 75 feet of ditch 10 feet wide and four feet deep, with a slope of one to one, was constructed (Folio 3292). The survey and work performed at that time was of the value of \$2500 (Folio 3295). In the year 1929 Exhibit B was prepared and filed with the State Engineer, numbered 15166, offered in evidence at Folio 3262, and admitted at Folio 4116.

In 1930 he made further surveys to accompany an application to the General Land Office for rights of way, and contacted representatives of The Twin Lakes Irrigation and Reservoir Company, an eastern slope irrigation enterprise, in an effort to interest this organization in financing prise, in an effort to interest this organization in financing that year was about \$1200 (Folio 3296).

In the year 1931 further surveys were made for an amended filing for the application to the government for right of way, and about 100 feet of right of way for the ditch into the tunnel, was cleared (Folio 3299), and con-

tinued attempts were made by one Shields, an associate of Galloway, in an effort to finance the construction of the project (Folio 3300).

In the year 1932 another 100 feet of right of way was cleared and a large number of measurements of stream flow were made, and reports and data for presentation to interested parties, were prepared by Galloway (Folio 3301).

In 1933 another 100 feet of right of way was cleared, continued studies of stream flow were made, and the representatives of the Water Board of the City of Denver were contacted, in an effort to interest that municipality in the construction of this project (Folio 3302). The work done that year was of the approximate value of \$500 (Folio 3303). In the year 1934 a final report as to the result of the water measurements, etc., was prepared by Galloway, and Mr. Shields continued his efforts to interest financial support. The expenditures for that year were about \$600 (Folio 3304). In the year 1935 Galloway completed the report on the water supply, the geology and the estimated cost of the project, and temporary diversions were constructed in an effort to have the water dig its own ditch, all at a cost of about \$400 (Folio 3306). In the years 1936 and 1937 continued efforts were made in contacting various people and interests, including representatives of the Burlington Ditch, the English High Line Ditch, Stanley Reservoir Company and the City of Englewood (Folio 3307). Also further surveys were made to determine the base of the tunnel location, and further studies were made of the geology, including a stratigraphic column showing where the tunnel could be built so that it would not have to be lined (Folio 3308). The expense of this work for this year was about \$600.

From 1938 to 1945 Galloway was absent from Colorado most of the time and the efforts to carry on this

project were made by others, hereinafter referred to. In 1945 Galloway came back to Colorado and renewed his efforts to finance the project with Englewood and Aurora (Folio 3309).

In 1946 and 1947 further efforts were made through a man by the name of A. L. Latham, who succeeded in interesting the City of Colorado Springs in 1947, which resulted in the City acquiring all the rights of Galloway and others interested in this project, on the 15 day of November, 1947 (see abstract of title Exhibit J).

In 1948 Galloway entered the employment of the City as Project Engineer in the prosecution of the development of this enterprise, and continued in that capacity up to the date of this hearing (Folio 3310).

In the prosecution of his work, and on May 13, 1948, the witness prepared final maps and statements of claim for filing in the State Engineer's office (see Exhibits G, H and I, offered in evidence at Folio 3265, and admitted at Folio 4116).

These maps and statements were accepted by the State Engineer for filing under date of October 19, 1948, showing the final and completed plan of the component parts of this project, upon which construction was begun. The date of May 13, 1948, was the date fixed by the trial court as the priority date awarded for the various appropriations involved herein.

In the testimony of Galloway, and at Folio 3311, it is shown that during the time of his absence from the state one H. B. George became interested in this project, caused other maps and statements to be prepared and filed with the State Engineer covering substantially the same appropriations covered by the filings by Galloway. These maps and statements are shown as claimant's Exhibits, C, D, E and F, offered in evidence at Folios 3264-3265 and admitted

at Folio 4116. They were accepted for filing in the State Engineer's office in May and August, 1942, and numbered as follows: Exhibit C, No. 17240; Exhibit D, No. 17093; Exhibit E, No. 17255; Exhibit F, No. 17256.

As to the practical identity of the filings made by Galloway and those by George, see the testimony of Galloway at Folio 3312.

Further as to the development shown by the predecessors in interest of this claimant, in the prosecution of this transmountain diversion enterprise, we have the undisputed evidence of the witness H. B. George, beginning at Folio 3527. From this testimony it appears that George in the latter part of 1941 and early in 1942, became interested in this transmountain diversion project, and had certain maps and statements of claim prepared for filing in the State Engineer's office, hereinabove referred to.

As to the expenditures made by George in the prosecution of this enterprise, we have a compilation introduced in evidence as Claimant's Exhibit L, offered at Folio 3538, and admitted at Folio 4116, being a book of account showing the expenditures made by George from May 11, 1942, to January 1, 1944 (Folio 4116), and Exhibit M, showing supplemental expenditures to June 1, 1945 (Folio 3538). The total of the expenditures shown by the foregoing exhibits was \$7236.63. Included in this amount is construction work actually done by Gillette & Clark Construction Company, in the amount of \$5340.60.

As shown by the testimony of E. L. Mosely, hereinabove referred to, the City of Colorado Springs had for years under consideration, the project of procuring an additional water supply from the only available source, to-wit, the Colorado River or its tributaries. Beginning in 1942 large sums of money were spent by the City to that end. A compilation of these expenditures was made by the

Auditor of the Department and Public Utilities, one H. A. Galligan (Folios 3564 to 3597), and offered in evidence as Exhibits N offered at Folio 3576 and admitted at Folio 4060 and O offered at Folio 3595 and admitted at Folio 4062. From these exhibits it will be seen that up to the date of the hearing of this proceeding a total amount of \$108,073.74 had been expended by the City upon this enterprise.

The witness Douglas C. Jardine (Folios 3729 to 3750) testified that he was a contractor engaged in the general business of dirt moving, tunnel boring, construction of sewers, etc. (Folio 3730). Beginning in September, 1948 and continuing to the date of his testimony, he had been working under a contract with the City of Colorado Springs in the construction of the ditches, tunnels, etc., involved in this action (Folio 3733). He testified that this contract with the City for the construction of these works was in the sum of \$44,152.44, and that his actual cost for the same was \$69,139.78 (Folio 3738).

The witness, Jardine, also testified that he had a contract with the City for the construction of the diversion tunnel, was engaged in building said tunnel and at the time of the hearing had been paid \$25,131.00 for work from the south portal thereof. The tunnel was subsequently completed by Jardine at a cost of about \$650,000.00.

The foregoing is a brief outline of all the evidence introduced in this case going directly to the question of diligence of the claimant and its predecessors from September 27, 1927, to the date of the hearing. There were a number of witnesses for claimant whose testimony had to do with the needs of the City for additional water supply, extent and operation of the appropriations constituting the water system of the City, and the proposed operation of the Continental Hoosier System, as tied into the existing

water works of the City. However, this evidence was neither disputed nor is it involved in the ruling of the trial court, of which plaintiff in error complains, and we will therefore not present any comment on such evidence.

Going directly to the question of diligence on the part the predecessors, of claimant as shown by the evidence hereinabove discussed, in the outset we suggest that it is not disputed that the City of Colorado Springs, succeeded to whatever water rights, appropriations and priorities which were initiated by the witnesses Galloway and George. It is conceded by protestants, and recognized by the trial court, that from and after the time the City acquired these rights and began actual construction, the City had shown due diligence. Hence, the only question to be answered by this court in the reviewing of the trial court's decree, is: Did the expenditure of time, efforts and money by the City's predecessors in interest and title, constitute sufficient diligence to entitle the appropriations to be related back to the date of the beginning of these efforts by Galloway on September 27, 1927?

We confidently assert that under the authorities hereinafter cited, as applied to the facts hereinabove referred to, these efforts were ample, not only to justify, but to compel, the award of a priority of that date.

The most cursory inspection of the foregoing facts discloses that Galloway, George and other associates, conceived the general device and plan of appropriating the waters of the Blue River and its tributaries, to be diverted over or through the Continental divide for beneficial use on the eastern slope. As evidence of that intention, and as notice to the world, thereof, they prepared and filed with the State Engineer, the maps and statements hereinabove referred to and described. We admit that at the time of the initiation of this program the authors thereof had not

definitely fixed upon or determined either what beneficial use might be made of these waters, or by whom or where they might be utilized. As will hereinafter be pointed out, under the law of Colorado, this is not necessary to the initiation of a valid appropriation of water.

We concede that several of the surveys, maps and plats that were made, differed somewhat. However, as shown by the testimony, these changes were the result of more detailed and careful investigation, and the acquisition of engineering and geological data, and did not affect either the amount of the water claimed, or the general location of the points of diversion thereof.

It will be borne in mind that this program was an extended and exceedingly difficult undertaking, involving the expenditure of vast sums of money in the construction of the diversion and transportation works. Necessarily, the completion of the appropriation would depend upon the ability of the originators of the plan to sell, lease or otherwise procure the utilization of the waters produced. Necessarily, some large ditch company, municipality or other organization, which might need this water, and would be in a financial position to assume this very substantial financial burden, must become interested therein. The evidence as heretofore referred to and discussed shows that Galloway, George and their associates, not only spent large sums of money in securing the necessary data to determine the feasibility of the proposed project, but likewise spent a substantial sum each year in the actual construction work, and in an effort to procure a market for the product of the proposed system.

We submit that in each case where the fixing of the date of a priority depends upon the doctrine of relation back to the first work done to that end, what constitutes reasonable diligence, is governed largely by the circumstances surrounding each individual enterprise. The prob-

lems involved, the magnitude of the work, the economic and physical difficulties, all must be taken into consideration and given due weight in arriving at a correct solution. There must be a combination on the part of the appropriator, of intention and overt act. In the case at bar there can be no question of the intention, never abandoned or departed from, to complete these appropriations. As to the acts carrying out this intention, the various surveys, investigations, maps, etc., taking into consideration the substantial work actually done, the amount of money and effort actually expended, clearly demonstrates that the originators of this program were more than reasonably diligent under all the circumstances.

In any event, we confidently assert that this court has heretofore held that reasonable diligence has been sufficient to entitle a claimant to the application of the doctrine of relation, in fixing a priority date, which was no greater and perhaps less than that shown by the appropriators in the instant case.

The protestants, by their written objections and protests, their cross examination of the witnesses of claimant, and by the introduction of testimony in support of their objections, took the position, in substance, that not only did the predecessors in interest and title, of this claimant, fail to exercise due diligence in the prosecution of their enterprise, but that they were also barred from the advantage of relationship back to their initial efforts, because:

1. In their original efforts they had not fixed and determined upon a definite place and manner of use for their proposed appropriations.

2. That they did not show in and by their maps and statements of claim, by whom, where, and for what beneficial use the appropriations were to be utilized.

3. That because the locations of several portions of the ditches, tunnels, etc., and the alignment thereof, were changed or modified from time to time, by the filings made with the State Engineer, that this constituted independent appropriations different from that contemplated and noticed by their original survey and filings.

The trial court apparently agreed with this position of the protestants, and followed the same reasoning. This was error, as will be pointed out in our consideration of the authorities on this subject hereinafter to be called to the attention of the court.

LAW OF THE CASE.

The law in Colorado relative to the question as to what is necessary on the part of an appropriator to have the date of his appropriation relate back to the first step taken by him to that end, is clearly defined and well settled by numerous decisions of this court.

Early in our judicial history (1883), and in the case of Sieber vs Frink, 7 Colo. 148, 2 Pac. 901, the doctrine is stated as follows:

“ ‘Although the appropriation is not deemed complete until the actual diversion or use of the water, still if such work be prosecuted with reasonable diligence, the right relates to the time when the first step was taken to secure it’ Ophir M. Co. v Carpenter, 4 Nev. 544; Kelly v. Natoma W. Co., 6 Nev. 109.”

Also, and on page 154 of the above decision, it is stated in substance that what constitutes reasonable diligence is a question of fact, depending upon the circumstances in each particular case.

The foregoing rules were subsequently endorsed and

followed by our appellate courts in a large number of cases, including, among others, the following:

Larimer County Reservoir Company v. People
ex rel, 8 Colo. 614, 9 Pac. 794.

Wheeler v. Northern Colorado Irrigation Company,
10 Colo. 582, 17 Pac. 487.

Water Supply & Storage Co. v. Larimer & Weld
Irrigation Co., 24 Colo. 322, 51 Pac. 496.

Cache La Poudre Reservoir Co. v. Water Supply
& Storage Co., 25 Colo. 161, 53 Pac. 331.

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

Ripley v. Park Center Land & Water Company,
40 Colo. 129, 90 Pac. 75.

Riverside Reservoir & Land Co. v. Bijou Irrigation
District, 65 Colo. 184, 176 Pac. 117.

Schwartz v. King, 65 Colo. 48, 172 Pac. 1054.

Rio Grande Reservoir & Ditch Co. v. Wagon
Wheel Gap Improvement Company, 68
Colo. 437, 191 Pac. 129.

From the cases above cited it will be noted that in arriving at the conclusion as to what constitutes reasonable diligence in a particular case, many things must be taken into consideration, such as limited means of the claimant, difficulty in procuring adequate financial support, the pioneer development in a new country, difficulties in construction and many other factors. It can all be narrowed down to this:

If the appropriator has given notice of his intention to appropriate water from a given source, either by filing with the proper authorities maps and statements of claim, or by actual work in beginning construction on the ground,

sufficient to indicate his intention to appropriate, he is entitled to relate the date of his appropriation back to the first step, providing he persists in his efforts with reasonable diligence sufficient to demonstrate that he has not abandoned his intention to complete the appropriation.

However, a discussion of the general principles of law applicable to this question is more or less academic, for the reason that we have a comparatively recent decision of this court, squarely on all fours with the case at bar, and which supports and positively decides that under circumstances such as obtain in the instant case, the claimant is entitled to a priority as of the date of the beginning of the efforts of his predecessors in interest. That case is *Taussig vs Moffat Tunnel Co.*, decided in September, 1940, and reported in 106 Colo. 384, 106 Pac. (2) 363.

In the case just cited the trial court awarded to the claimant The Moffat Tunnel Water and Development Company, certain conditional decrees covering the appropriation of water on the western slope for utilization on the eastern slope of the continental divide. Protestants objected to these awards on substantially the same grounds, and supported by substantially the same arguments, as protestants in the case at bar presented to and relied upon in the lower court herein, and which were adopted and followed by the trial court. However, in the case cited the Supreme Court held that under the circumstances in that case (which were practically identical with the situation in the case at bar), the trial court was correct in its award to the claimant of conditional decrees going back to the first steps taken by the predecessors in interest and title, to claimant. This case announces the rule of law which is applicable and controlling in the case at bar, and which should have been followed by the trial court in its judgment herein.

In the Taussig case, as in the case at bar, all of the conditional decreed rights involved constituted one system for the collection of water on the western slope, to be distributed to the eastern slope for beneficial use. The ditches and reservoirs belonging to claimant in the cited case, as in the case at bar, took their supply of water from tributaries to the Colorado River. In both cases, the water not having been put to any use at the time of the hearing, only conditional decrees were entered. In the Taussig case the decrees did not undertake to assign a specific amount of water for a specific use, but did assign an aggregate amount of water for all uses in each appropriation. The reason why the statements and conditional decrees did not undertake to allocate the quantity of water to each project under a given decree, was that it was not known at the time of the filing of the statements, or at the time of the hearing, exactly on what location the water would be used, or exactly for what particular purpose. The case at bar differs from the cited case on that point, to this extent, that while at the time of the filing of the maps and statements of claim by the original claimant, Galloway, it was not determined exactly to what location the water would be transported, or exactly where and for what purpose it would be used. However, at the time of the hearing of the instant case, it had been determined and testimony was presented, and not controverted, showing that the water involved was to be beneficially used by and through the water system of the City of Colorado Springs for municipal and irrigation purposes.

In the cited case Section 195, Chapter 90, C. S. A. 1935, is quoted. This section reads as follows:

“Sec. 195. Proof of claim — Decree. — Each claimant for appropriation of water within said water district, whether said appropriation shall have been wholly or partially completed, and through no filing shall have been made in the office of the state engineer, shall appear at said general

adjudication proceedings and file his statement of claim and offer proof in support thereof before the district court or the referee appointed for such purpose, and claims and proofs with respect to partially completed or perfected appropriations shall be presented in the same manner as the claims and proofs for completed and perfected appropriations. The court and referee shall receive and consider all such claims and proofs and if it shall appear that any claimant at said proceedings, or his predecessors in title and claim, has prosecuted his claims of appropriation and the financing and construction of his enterprise with reasonable diligence under all the facts and circumstances surrounding and bearing upon such claim of appropriation, 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, and fixing the maximum amount of water which such claimant shall be entitled to divert under said priority for the purpose of perfecting his said appropriation, and the court, or the referee, shall further condition such priority of right upon the application of water to beneficial use within a reasonable time after date of the entry of said decree with provision that final decree shall be thereafter entered for such amount of water as shall be shown in a subsequent proceeding to have been applied to beneficial use with such reasonable diligence, and that the amount of water so to be thereafter finally decreed to such appropriation shall in no event be in excess of the maximum amount so fixed in said conditional decree. The court, or the referee, shall give to each such conditional decree the number of its priority like as for a completed appropriation awarded in said adjudication proceedings, but with a letter or suffix following such number to distinguish it as a conditional decree."

In the cited case, as in the case at bar, the primary

objection to the claim of claimants, involved a construction of the above section. In the opinion under consideration there follows an outline of what had been done by claimant in compliance with the provisions of the above statute. Preliminary surveys were made by a predecessor of claimant, maps and statements were prepared and filed with the State Engineer, rights of way were obtained for a portion of the proposed canal, and negotiations were carried on for other portions. Holes were drilled on the reservoir site, work was performed in clearing timber along the proposed ditch lines and approximately \$10,000 was spent on this project by the predecessors of claimant, and about the same amount was spent by claimant.

In the opinion under consideration and on page 390 thereof, this court held that these efforts were sufficient to show reasonable diligence. In the instant case much more was done than in the Taussig case, in the way of construction work, and much larger expenditures of money were made. The uncontradicted evidence shows that there was spent by the predecessors in interest of Colorado Springs, a total of approximately \$13000.00, and by the City exceeding the sum of \$100,000.00, to the date of the hearing.

This court in the Taussig case also takes notice of the magnitude of the enterprise, and held (p. 392) that: "the date of commencement of a detailed survey is the proper date of a priority to be related." In the case at bar that date was September 27, 1927, the date of priority claimed by us.

The following quotations from the above cited case correctly and fully state the principles of law which should have been applied by the trial court in the instant case, and if so applied would of necessity have compelled the award of the priority date claimed by us. See pages 382-393 of the opinion, as follows:

"We think the trial court in the instant case, under the evidence before it, was warranted in view of the claims and proofs made, to make the findings and enter the conditional decrees, and that the evidence disclosed a partially completed or perfected appropriation, within the meaning of section 195. That the project is feasible appears from the uncontradicted evidence. A definition of a completed appropriation is not helpful. The requirements of section 197 also indicate the legislative intent to be that no showing of diversion and application to a beneficial use is necessary prior to the entry of conditional decrees. Under this section the court retains supervisory jurisdiction of the question of reasonable diligence and the bona fides of petitioners for conditional decrees.

"Objectors assert that the claim statements are not in conformity with section 153, chapter 90, '35 C. S. A., in this: They fail to give the location of the headgate, and the number of acres of land lying under the proposed project. The only missing recital is as to the latter specification. There is no merit to this objection. No such requirement is found in section 195. Before a final decree can be entered, grounds for this objection must be eliminated. Until then, under the facts before us, no such showing is absolutely necessary. Where, as here, only conditional decrees are involved, unless prejudice is shown, such requirement, for all practical purposes, may be waived.

"It next is contended that an appropriation must be for specific water and for a designated and definite purpose. That is true as to final decrees, but here we are concerned solely with conditional decrees. As already stated, such a requisite under the circumstances, would deny to the water company its right to apply water to a beneficial use. No such statutory requirement exists as to conditional decrees, except the fixing

of the maximum amount of water to be diverted, which was done in the instant case. So long as no water has been applied to beneficial use, we are concerned only with an inchoate and unperfected right. When the water is beneficially applied to a designated use, it becomes a property right and the decree then must take on the elements of definiteness and certainty. Such a situation is not now before us. 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."

It will be noted that the evidence introduced on behalf of the City of Colorado Springs at the hearing in the trial court covers completely and in detail the suggested requirements contained in the opinion above quoted from. We therefore insist that every question raised or presented by protestants in the case at bar, either by pleading or evidence, has been passed upon in the foregoing decision, adversely to the position taken by protestants, and contrary to the decision of the trial court.

CONCLUSION

In conclusion we respectfully insist that the decree of the trial court should be reversed and the cause remanded to that court with instructions to award to the claimant the City of Colorado Springs a decree for its appropriations as of the date claimed by it in its statements of claim, for the reasons that the uncontradicted evidence presented in this proceeding by claimant established:

1. That the predecessors in interest and title, of this claimant, took the first steps for the appropriations from the Blue River and its tributaries, of the amounts, at the points of diversion claimed by them, and for beneficial

use upon the eastern slope of the Rocky Mountains, on September 27, 1927.

2. That from and after said date up to the time when the City acquired all the said rights and interests of the original claimants, to-wit, the 15th day of November, 1947, said original claimants each and every year, actively and in good faith, performed labor, expended money and made continuous effort toward financing and constructing the project.

3. That at all times between September 27, 1927, and May 13, 1948, all potential future appropriations of water from said source had actual and complete notice of the intended appropriations by the proponents of said program, and of the character and extent of such appropriations, for the beneficial use thereof on the eastern slope.

4. That the claimant the City of Colorado Springs, succeeded to all rights, actual, inchoate and conditional, of the originators of this program, and carried on with diligence toward the completion thereof to the present time.

5. That under the settled rules of law in this state, as heretofore herein pointed out and discussed, this claimant was and is entitled to an award of priorities relating back to the initial steps taken in this project, to-wit, September 27, 1927, and it was manifest error of the trial court to fix the later date complained of.

Respectfully submitted,

F. T. HENRY

City Attorney

A. W. McHENDRIE

*Attorneys for Plaintiff in
Error the City of Colorado
Springs.*

APPENDIX

I.

NO. 1806

THE CONTINENTAL — HOOSIER SYSTEM
FINDINGS

THE COURT DOTH FIND:

FIRST: That the name of the claimant of the above named system, consisting of the various ditches, canals, tunnels and reservoirs, hereinafter enumerated and described, is the City of Colorado Springs, a municipal corporation, organized and existing under and by virtue of the provisions of Article XX of the Constitution of the State of Colorado; and its Post Office Address is City Hall, Colorado Springs, Colorado.

SECOND: That the water, rights to the use of water and appropriations thereof by and through said ditches, canals, tunnels and reservoirs are to become a part of the water System owned by claimant and maintained and operated by the Department of Public Utilities of said City of Colorado Springs, Division of Water and Water Works; Said water and water rights to be used by and for the benefit of the inhabitants of said City and adjacent areas for domestic uses, fire protection, sewage disposal, manufacturing and industrial uses, street sprinkling and flushing, in the irrigation of lawns, trees, gardens, flowers, and parks, and other municipal purposes.

THIRD: The points of diversion of the water and water supply appropriated and to be appropriated by and under said system are each and all situated and located in the County of Summit, in Water District Number 36, Irrigation Division Number Five of the State of Colorado.

FOURTH: That said Continental Hoosier Diversion

System consists of the following described structures and facilities for the diversion, transportation and storage of water appropriated and to be appropriated by and through said system, to-wit:

1. BLUE RIVER DITCH

(a) The headgate and point of diversion of said Blue River Ditch is located at a point on the South bank of the Blue River, a natural stream, in said Water District No. 36, tributary to the Colorado River, from whence the East quarter corner of Section 2, Township 8 South, Range 78 West of the 6th Principal Meridian is south $80^{\circ} 44'$ East a distance of 2096 feet.

(b) The dimensions of said ditch are:

Length, 2006 feet; width on bottom, 10 feet; width on top, 22 feet; depth at high water line, 6 feet; grade is 1.5 feet per 1000 feet; carrying capacity, 360 cubic feet per second.

(c) The construction of said ditch was begun on May 13, 1948 and was carried on, and is being carried on, with due and reasonable diligence.

(d) Said ditch is entitled to a priority for 200 cubic feet of water per second of time as of date May 13, 1948, for and on account of the appropriation made by and through said Blue River Ditch from Blue River; conditioned upon the completion of said ditch and the beneficial application of water therefrom with reasonable diligence.

2. CRYSTAL DITCH

(a) The headgate and point of diversion of said Crystal Ditch is located at a point on the South Bank of Crystal Creek, a natural stream in said Water District No. 36, a tributary to the Colorado River, from whence the

Northwest corner of Section 2, Township 8 South, Range 78 West of the 6th Principal Meridian is South $19^{\circ} 34'$ West a distance of 18,245 feet.

(b) The dimensions of said ditch are:

Length, 15,780 feet; width on bottom, 8 feet; width on top, 11.6 feet; depth at high water line, 1.8 feet; grade, 2.0 feet per 1,000 feet; carrying capacity, 40 cubic feet of water per second.

(c) The construction of said ditch was begun on May 13, 1948, and was carried on and is being carried on with due and reasonable diligence.

(d) Said ditch is entitled to a priority for 40 cubic feet of water per second of time as of date May 13, 1948, for and on account of the appropriation made by said ditch; conditioned upon the completion of said ditch and the beneficial application of water therefrom with reasonable diligence.

3. SPRUCE DITCH

(a) The headgate and point of diversion of said Spruce Ditch is located at a point on the South bank of Spruce Creek, a natural stream in said water District No. 36, a tributary to the Colorado River, from whence the Northwest corner of Section 2, Township 8 South, Range 78 West of the 6th Principal Meridian is South $23^{\circ} 56'$ West a distance of 12,810 feet.

(b) The dimensions of said ditch are:

Length, 20,069; width on bottom, 8 feet; width on top, 14.0 feet; depth at high water line, 3 feet; grade, 2 feet per 1,000 feet; carrying capacity, 100 cubic feet per second.

(c) The construction of said ditch was begun on

May 13, 1948, and was carried on and is being carried on with due and reasonable diligence.

(d) Said ditch is entitled to a priority for 60 cubic feet of water per second of time as of date May 13, 1948, for and on account of the appropriation made by said ditch from Spruce Creek; conditioned upon the completion of said ditch and the beneficial application of water therefrom with reasonable diligence.

4. McCULLOUGH DITCH

(a) The headgate and point of diversion of said McCullough Ditch is located on the South bank of McCullough Gulch Creek, a natural stream in said Water District No. 36, a tributary to the Colorado River, at a point from whence the Northwest corner of Section 2, Township 8 South, Range 78 West of the 6th Principal Meridian is South $28^{\circ} 23'$ West a distance of 6,085 feet.

(b) The dimensions of said McCullough Ditch are:

Length, 15,780 feet; width on bottom, 8 feet; width on top, 15.8 feet; depth at high water, 3.9 feet; grade, 2 feet per 1,000 feet; carrying capacity, 160 cubic feet per second.

(c) The construction of said ditch was begun on May 13, 1948, and was carried on and is being carried on with due and reasonable diligence.

(d) Said ditch is entitled to a priority for 60 cubic feet of water per second of time as of date May 13, 1948, for and on account of the appropriation made by said ditch from McCullough Gulch Creek; conditioned upon the completion of said ditch and the beneficial application of water therefrom with reasonable diligence.

5. EAST HOOSIER DITCH

(a) The headgate and point of diversion of said East Hoosier Ditch is located on the West bank of East Hoosier Creek, a natural stream in said Water District No. 36, a tributary to the Colorado River, at a point from whence the Southwest corner of Section 6, Township 8 South, Range 77 West of the 6th Principal Meridian is South $57^{\circ} 36'$ West a distance of 388.8 feet.

(b) The dimensions of said East Hoosier Ditch are:

Length, 1,877 feet; width on bottom, 8 feet; width on top, 12 feet; depth at high water line, 2 feet; grade, 1.5 feet to 1,000 feet; carrying capacity, 50 cubic feet per second.

(c) The construction of said ditch was begun on May 13, 1948, and was carried on and is being carried on with due and reasonable diligence.

(d) Said ditch is entitled to a priority for 50 cubic feet of water per second of time as of date May 13, 1948, for and on account of the appropriation made by said ditch; conditioned upon the completion of said ditch and the beneficial application of water therefrom with reasonable diligence.

6. HOOSIER DITCH (CLAIM NO. 1)

(a) The Hoosier Creek headgate and point of diversion of said Hoosier Ditch (No. 1) is located on the West bank of Hoosier Creek, a natural stream in said water district No. 36, a tributary to the Colorado River, at a point from whence the Northeast corner of Section 12, Township 8 South, Range 78 West of the 6th Principal Meridian is North $64^{\circ} 35'$ East a distance of 877.8 feet.

(b) The dimensions of said Hoosier Ditch (No. 1) are:

Length, 5,937 feet; width on bottom, 8 feet; width on top, 14 feet; depth at high water line, 3 feet; grade, 1.5 feet per 1,000 feet; carrying capacity, 90 cubic feet per second.

(c) Construction of said ditch was begun on May 13, 1948, and was carried on and is being carried on with due and reasonable diligence.

(d) Said ditch is entitled to a priority for 40 cubic feet of water per second of time as of date May 13, 1948, for and on account of the appropriation by said ditch from Hoosier Creek; conditioned upon the completion of said ditch and the beneficial application of water therefrom with reasonable diligence.

7. HOOSIER DITCH (CLAIM NO. 2)

(a) The Silver Creek headgate and point of diversion of said Hoosier Ditch (No. 2) is located on the West bank of Silver Creek, a natural stream in said Water District No. 36, a tributary to the Colorado River, where said ditch crosses Silver Creek at a point from whence the West Quarter Corner of Section 1, T. 8 S., R. 78 W. of the 6th P. M. is N. 48° 33' W. a distance of 1,375.8 feet.

(b) The construction of said ditch was begun on May 13, 1948, and was carried on and is being carried on with due and reasonable diligence.

(c) Said ditch is entitled to a priority for 20 cubic feet of water per second of time as of date of May 13, 1948, for and on account of the appropriation by said ditch from Silver Creek; conditioned upon the completion of said ditch and the beneficial application of water therefrom with reasonable diligence.

ADDITIONALLY INTERCEPTED WATERS

8. The above enumerated ditches are also entitled to

a priority for 50 cubic feet of water per second of time as of date of May 13, 1948, intercepted by the above named ditches between the respective points of diversion thereof and delivery to the tunnel hereinafter described, provided, however, that the amount of water intercepted by any of the above enumerated ditches shall be in diminution of the amount of water awarded to each of said ditches and the total maximum amount of diversion for the above enumerated ditches shall not exceed the maximum amounts herein awarded to each of said ditches.

FIFTH: All of the water appropriated by the ditches above described are to be carried by and through a tunnel to the Eastern Slope of the Continental Divide which tunnel is known and described as follows:

HOOSIER TUNNEL

(a) The entrance or place of beginning of said tunnel is located at a point in Water District No. 36, from whence the East Quarter corner of Sec. 2, T. 8 S., R. 78 W. of the 6th P. M. is N. $34^{\circ} 33'$ E. a distance of 510.6 feet.

(b) The dimensions of said tunnel are: Height, 6.5 feet; grade, 10 ft. per 1,000 ft.; width, 8 ft.; length, 7,440 ft.; carrying capacity, 400 cubic feet of water per second of time.

(c) The construction of said tunnel was begun on May 13, 1948, and was carried on and is being carried on with due and reasonable diligence.

(d) Said tunnel is entitled to a priority for 20 cubic feet of water per second of time as of May 13, 1948, by reasons of such quantity of water seeping into and being intercepted by said tunnel.

RESERVOIRS

1. UPPER BLUE LAKE (Also known as
UPPER QUANDARY LAKE)

(a) The dam of the above reservoir is located across the channel of the Blue River, a natural stream, tributary to the Colorado River in said Water District No. 36.

(b) The initial point of survey is located at a point whence the Northeast corner of Section 3, Township 8 South, Range 78 West of the 6th Principal Meridian bears North $66^{\circ} 30'$ East 3,728 feet.

(c) The total storage capacity of said reservoir is 72,765,000 cubic feet (1,672 acre feet).

(d) The source of supply of water for said reservoir is the said Blue River.

(e) The height of the dam of said reservoir is 65 feet, and the said reservoir is located in Lots 7, 8, 9, and 11, Section 3, and Lots 7 and 8, Section 4, Township 8 South, Range 78 West of the 6th P. M.

(f) Construction of said reservoir was begun on May 13, 1948.

(g) Said reservoir is entitled to a priority for storage purposes as of date May 13, 1948, for 1,672 acre feet of water and on account of the said appropriation by said reservoir; conditioned upon the completion of said reservoir and the beneficial application of water therefrom with reasonable diligence.

LOWER BLUE LAKE (Also known
LOWER QUANDARY LAKE)

(a) The dam of the above reservoir is located across the channel of the Blue River, a natural stream, tributary to the Colorado River, in said Water District No. 36.

(b) The initial point of survey is located at a point whence the Northeast corner of Section 3, Township 8 South, Range 78 West of the 6th P. M. bears North 54° East 503 feet.

(c) The total storage capacity of said reservoir is 64,264,500 cubic feet (1,474 acre feet).

(d) The source of supply of water for said reservoir is the said Blue River.

(e) The height of the dam of said reservoir is 65 feet, and the reservoir is located in Lots 1, 2, and 13, Section 3, Township 8 South, Range 78 West of the 6th Principal Meridian.

(f) Construction of said reservoir was begun on May 13, 1948.

(g) Said reservoir is entitled to a priority for 1,474 acre feet for storage purposes as of date May 13, 1948, for and on account of the said appropriation by said reservoir; conditioned upon the completion of said reservoir and the beneficial application of water therefrom with reasonable diligence.

3. SPRUCE LAKE

(a) The dam of said Spruce Lake is located across the channel of Spruce Creek, a natural stream, tributary to the Colorado River in said Water District No. 36.

(b) The initial point of survey is located at a point whence the Northeast corner of Sec. 22, Township 7 South, Range 78 West of the 6th P. M. bears North $12^{\circ} 44'$ East 5,780 feet.

(c) The height of the dam of said reservoir is 65 feet and the total storage capacity thereof is 67,195,000 cubic feet, (1,542 acre feet).

(d) The source of supply of water for said reservoir is said Spruce Creek.

(e) The reservoir is located in the North half of Section 27, Township 7 South, Range 78 West of the 6th P. M.

(f) Construction of said reservoir was begun on May 13, 1948, and said reservoir is entitled to a priority for 1,542 acre feet of water for storage purposes, as of date May 13, 1948, for and on account of the said appropriation by said reservoir; conditioned upon the completion of said reservoir and the beneficial application of water therefrom with reasonable diligence.

4. MAYFLOWER LAKE

(a) The dam of said Mayflower Lake is located across the channel of Spruce Creek, a natural stream, tributary to the Colorado River, in said Water District No. 36.

(b) The initial point of survey is located at a point whence the Northeast corner of Section 22, Township 7 South, Range 78 West of the 6th Principal Meridian bears North $3^{\circ} 44'$ East a distance of 4,770 feet.

(c) The height of the dam of said reservoir is 55 feet, and the total storage capacity thereof is 26,885,000 cubic feet (618 acre feet).

(d) The source of supply of water for said reservoir is said Spruce Creek.

(e) The reservoir is located in the Southeast quarter of Southeast quarter, Section 22, Township 7 South, Range 78 West of the 6th Principal Meridian.

(f) Construction of said reservoir was begun on May 13, 1948, and said reservoir is entitled to a priority for 618 acre feet of water for storage purposes, as of date May 13,

1948, for and on account of the said appropriation by said reservoir; conditioned upon the completion of said reservoir and the beneficial application of water therefrom with reasonable diligence.

SIXTH: That the ditches, tunnel and reservoirs hereinabove described and for which appropriations are herein claimed, are, and each of them is, a part of a system for collecting and transporting water over and through the Continental Divide from the Pacific Slope of the continent, in Summit County, Colorado, to the Atlantic Slope of the Continent, in Park County, Colorado, to be discharged into the South Platte River, or a tributary thereof; and from thence to be transported from the watershed of said South Platte River, or a tributary thereof, into the watershed of the Arkansas River and discharged into a tributary of said Arkansas River in Teller County, in Water District No. 10, Irrigation Division No. 2 of the State of Colorado to be thence diverted and applied by claimant mainly in El Paso County in the above named Water District and Irrigation Division, for the uses and purposes hereinabove described.

DECREE

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED:

1. That said BLUE RIVER DITCH be and it is hereby numbered 129 and is entitled to Priority No. 142 (C) of date, May 13, 1948, for two hundred (200) cubic feet of water per second of time from Blue River for municipal purposes.

2. That said CRYSTAL DITCH be, and it hereby is numbered 130 and awarded Priority No. 143 (C) of date, May 13, 1948, for Forty (40) cubic feet of water per second of time from Crystal Creek for municipal purposes.

3. That said SPRUCE DITCH be, and it hereby is

numbered 131 and awarded Priority No. 144 (C) of date, May 13, 1948, for sixty (60) cubic feet of water per second of time from Spruce Creek for municipal purposes.

4. That said McCULLOUGH DITCH be, and it is hereby numbered 132 and awarded Priority No. 145 (C) of date, May 13, 1948, for sixty (60) cubic feet of water per second of time from McCullough Gulch Creek, for municipal purposes.

5. That said EAST HOOSIER DITCH be, and it hereby is numbered 133 and awarded Priority No. 146 (C) of date, May 13, 1948, for fifty (50) cubic feet of water per second of time from East Hoosier Creek, for municipal purposes.

6. That said HOOSIER DITCH, under its Claim No. 1, be and it is hereby numbered 134 and awarded Priority No. 147 (C) of date, May 13, 1948, for forty (40) cubic feet of water per second of time from Hoosier Creek for municipal purposes; Priority No. 148 (C) of date, May 13, 1948, for twenty (20) cubic feet of water per second of time from Silver Creek, under its Claim No. 2, for municipal purposes.

7. That said enumerated ditches, numbered 129 to 134 inclusive, are additionally awarded Priority No. 149 (C) of date, May 13, 1948, for fifty (50) cubic feet of water per second of time, for water intercepted by said ditches between the respective points of diversion thereof and delivery to the tunnel hereinafter described for municipal purposes, provided, however, that the amount of water intercepted by any of the above enumerated ditches shall be in diminution of the amount of water awarded to each of said ditches, and the total maximum amount of diversion for the above enumerated ditches shall not exceed maximum amounts herein awarded to each of said ditches.

8. That said HOOSIER TUNNEL be, and it is numbered 135 and awarded Priority No. 150 (C) of date, May 13, 1948, for twenty (20) cubic feet of water per second of time for municipal purposes.

RESERVOIRS

1. That said UPPER BLUE LAKE (Also known as UPPER QUANDARY LAKE) RESERVOIR, be and it is hereby numbered 78 and awarded Reservoir Priority No. 81 (C) as of date, May 13, 1948 for 72,765,000 cu. ft. (1672 acre ft.) of water for storage for municipal purposes.

2. That said LOWER BLUE LAKE (Also known as LOWER QUANDARY LAKE) RESERVOIR, be it hereby is numbered 79 and awarded Reservoir Priority No. 82 (C) as of date, May 13, 1948, for 64,264,000 cu. ft. (1474 acre ft.) of water for storage for municipal purposes.

3. That said SPRUCE LAKE RESERVOIR be, and it hereby is numbered 80 and awarded Reservoir Priority No. 83 (C) of date, May 13, 1948, for 67,195,000 cu. ft. (1542 acre ft.) of water for storage for municipal purposes.

4. That said MAYFLOWER LAKE RESERVOIR be, and it hereby is numbered 81 and awarded Reservoir Priority No. 84 (C) of date, May 13, 1948, for 26,885,000 cu. ft. (618 acre ft.) of water for storage for municipal purposes.

Provided, however, that the priorities awarded for ditches or the Hoosier Tunnel in Paragraphs 1 to 8, both inclusive, of this decree, are limited to a total maximum diversion from the sources therein mentioned, of not more than 400 cubic feet of water per second of time through any combination of ditches and tunnel.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the priorities awarded herein in connection with the Continental-Hoosier System are subject to all of

general conditions applicable to other direct appropriations awarded in this decree, and the reservoirs named in paragraphs 1 to 4, inclusive, are subject to all of the general conditions applicable to other storage appropriations awarded in this decree; and the priorities hereinabove awarded to said ditches, canals and tunnel are hereby awarded upon the express condition that they be completed with due diligence and the water thereof applied to a beneficial use within a reasonable time hereafter, and the priorities hereinabove awarded to the said reservoirs are awarded upon the express condition that said reservoirs be completed with due diligence and water impounded therein and applied to a beneficial use within a reasonable time hereafter.

IT IS FURTHER ORDERED ADJUDGED AND DECREED by the Court that the total amount of water to which the tunnel, ditches and reservoirs herein adjudicated are entitled is computed at the amounts herein stated, whether for the purpose herein stated or for irrigation purposes, and the water used for purposes of irrigation shall be in diminution of water used for the purposes herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that where (C) is affixed to a priority number in the above and foregoing Judgment and Decree it denotes a conditional priority.

(The decree in No. 1805 is in all material matters a duplicate of the foregoing.)

II.

STATEMENT OF CLAIM OF THE CITY OF COLORADO SPRINGS FOR THE CONTINENTAL-HOOSIER DIVERSION SYSTEM

Comes now the above named claimant and makes its statement in the above entitled matter, and states:

1. That Claimant is a Municipal corporation organized and existing under and by virtue of the provisions of Article XX of the Constitution of the State of Colorado; and its Post Office Address is City Hall, Colorado Springs, Colorado.

2. That Claimant is the owner of that certain ditch and reservoir system for the diversion, storage, appropriation and utilization of water, water rights and priorities of right to the use of water for beneficial purposes, known as the Continental-Hoosier Diversion System, consisting of the several diversion ditches, tunnels, reservoirs and transportation facilities hereinafter more particularly described.

3. That the water, water rights and appropriations of water herein claimed is to become a part of the municipal water system owned by said Claimant, and maintained and operated by the Department of Public Utilities of the City of Colorado Springs, Division of Water and Waterworks; said water and water rights to be used by and for the benefit of the inhabitants of said City for domestic purposes, fire protection, sewage disposal, manufacturing and industrial uses, street sprinkling and flushing, in the irrigation of lawns, trees, gardens, flowers and parks, and other municipal purposes.

4. The points of diversion of the water and water supply appropriated and to be appropriated by and under said system are each and all situated and located in the County of Summit, in Water District Number 36, Irrigation Division Number Five of the State of Colorado.

5. That said Continental-Hoosier Diversion System consists of the following described structures and facilities for the diversion, transportation and storage of water appropriated by and through said system, to-wit:

1. BLUE RIVER DITCH

(a) The headgate and point of diversion of said Blue River Ditch is located at a point on the South Bank of the Blue River, a natural stream, in said Water District No. 36, tributary to the Colorado River, from whence the East quarter corner of Section 2, Township 8 south, Range 78 West of the 6th Principal Meridian is South $80^{\circ} 44'$ East a distance of 2096 feet.

(b) The dimensions of said ditch are:

Length, 2006 feet; width on bottom, 10 feet; width on top, 22 feet; depth, at high water line, 6 feet; grade is 1.5 feet per 1000 feet; carrying capacity 360 cubic feet per second.

(c) The construction of said ditch was begun in October, 1907, and was carried on, and is being carried on, with due and reasonable diligence.

(d) Claim is hereby made for 200 cubic feet of water per second of time as of date October 1907, for and on account of the appropriation made by and through said Blue River from Blue River.

2. CRYSTAL DITCH

(a) The headgate and point of diversion of said Crystal Ditch is located at a point on the South bank of Crystal Creek, a natural stream in said water District No. 36, a tributary to the Colorado River, from whence the Northwest corner of Section 2, Township 8, South, Range 78 West of the 6th Principal Meridian is South $19^{\circ} 34'$ West a distance of 18245 feet.

(b) The dimensions of said ditch are:

Length 15780 feet; width on bottom, 8 feet; width on top, 11.6 feet; depth, at high water line, 1.8 feet; grade 2.0 feet per 1000 feet; carrying capacity 40 cubic feet of water per second.

(c) The construction of said ditch was begun in October, 1907, and was carried on with due and reasonable diligence.

(d) Claim is hereby made for 40 cubic feet of water per second of time as of date October, 1907 for and on account of the appropriation made by said ditch.

3. SPRUCE DITCH

(a) The headgate and point of diversion of said Spruce Ditch is located at a point on the South bank of Spruce Creek, a natural stream in said Water district No. 36, a tributary to the Colorado River, from whence the Northwest corner of Section 2, Township 8 South, Range 78 West of the 6th Principal Meridian is South $23^{\circ} 56'$ West a distance of 12810 feet

(b) The dimensions of said ditch are:

Length, 20,069 feet; width on bottom, 8 feet; width on top, 14.0 feet; depth, at high water line, 3 feet; grade, 2 feet per 1000 feet; carrying capacity 100 cubic feet per second.

(c) The construction of said ditch was begun in October, 1907, and was carried on with due and reasonable diligence.

(d) Claim is hereby made for 60 cubic feet of water per second of time as of date October 1907, for and on account of the appropriation made by said ditch from Spruce Creek.

4. McCULLOUGH DITCH

(a) The headgate and point of diversion of said McCullough Ditch is located on the South bank of McCullough Gulch Creek, a natural stream in said Water District No. 36, a tributary to the Colorado River, at a point from whence the Northwest corner of Section 2, Township 8

South, Range 78 West of the 6th Principal Meridian is South $28^{\circ} 23'$ West a distance of 6085 feet.

(b) The dimensions of said McCullough Ditch are:

Length, 15780 feet; width on bottom, 8 feet, width on top, 15.8 feet; depth, at high water, 3.9 feet; grade, 2 feet per 1000 feet; carrying capacity 160 cubic feet per second.

(c) The construction of said ditch was begun in October, 1907, and was carried on with due and reasonable diligence.

(d) Claim is hereby made for 60 cubic feet of water per second of time for and on account of the appropriation made by said ditch from McCullough Gulch Creek.

5. EAST HOOSIER DITCH

(a) The headgate and point of diversion of said East Hoosier Ditch is located on the West bank of East Hoosier Creek, a natural stream in said Water District No. 36, a tributary to the Colorado River, at a point from whence the Southwest corner of Section 6, Township 8 South, Range 77 West of the 6th Principal Meridian is South $57^{\circ} 36'$ West a distance of 388.8 feet.

(b) The dimensions of said East Hoosier Ditch are:

Length, 1877 feet; width on bottom, 8 feet; width on top, 12 feet; depth, at high water line, 2 feet; grade, 1.5 feet to 1000 feet; carrying capacity, 50 cubic feet per second.

(c) The construction of said ditch was begun on October, 1907, and was carried on with due and reasonable diligence.

(d) Claim is hereby made for 50 cubic feet of water per second of time for and on account of the appropriation made by said ditch.

6. HOOSIER DITCH, (CLAIM NO. 1)

(a) The Hoosier Creek headgate and point of diversion of said Hoosier Ditch (No. 1) is located on the West bank of Hoosier Creek, a natural stream in said Water District No. 36, a tributary to the Colorado River, at a point from whence the Northeast corner of Section 12, Township 8 South, Range 78 West of the 6th Principal Meridian is North $64^{\circ} 35'$ East a distance of 877.8 feet;

(b) The dimensions of said Hoosier Ditch (No. 1) are:

Length, 5937 feet; width on bottom, 8 feet; width on top, 14 feet; depth, at high water line, 3 feet; grade, 1.5 feet per 1000 feet; carrying capacity 90 cubic feet per second.

(c) Construction of said ditch was begun in October, 1907, and carried on with due and reasonable diligence.

(d) Claim is hereby made for 40 cubic feet of water per second of time for and on account of the appropriation by said ditch from Hoosier Creek.

7. HOOSIER DITCH (CLAIM NO. 2)

(a) The Silver Creek headgate and point of diversion of said Hoosier Ditch (No. 2) is located on the West bank of Silver Creek a natural stream in said Water District No. 36, a tributary to the Colorado River, where said ditch crosses Silver Creek at a point from whence the West quarter corner of Section 1, Township 8 South, Range 78 West is North $46^{\circ} 33'$ West a distance of 1375.8 feet.

(b) The construction of said ditch was begun in October, 1907, and was carried on with due and reasonable diligence.

(c) Claim is hereby made for 20 cubic feet of water per second of time for and on account of the appropriation by said ditch from Silver Creek.

Claim is also made for 50 cubic feet of water per second of time as of date October 1907, intercepted by the above named ditches between the respective points of diversion thereof and delivery to the tunnel hereinafter described.

All of the waters appropriated by the ditches are to be carried by and through a tunnel to the Eastern slope of the Continental Divide which tunnel is known and described as follows:

HOOSIER TUNNEL

(a) The Westerly entrance or place of beginning of said tunnel is located at a point in Water District No. 36, from whence the East quarter corner of Section 2, Township 8 South, Range 78 West of the 6th Principal Meridian is North $34^{\circ} 33'$ East a distance of 510.6 feet.

(b) The dimensions of said tunnel are:

Width, 8 feet; length, 7440 feet; carrying capacity 400 cubic feet of water per second of time.

(c) The construction of said tunnel was begun in October, 1907, and was carried on with due and reasonable diligence.

(d) Claim is hereby made for 20 cubic feet of water per second of time by reason of such quantity of water seeping into and being intercepted by said tunnel as of date October, 1907.

RESERVOIRS

The following reservoirs have been completely surveyed, but not constructed, to-wit:

1. UPPER BLUE LAKE (also known as
UPPER QUANDARY LAKE)

(a) The dam of the above reservoir is located across

the channel of the Blue River, a natural stream, tributary to the Colorado River in said Water District No. 36.

(b) The initial point of survey is located at a point whence the Northeast corner of Section 3, Township 8 South, Range 78 West of the 6th Principal Meridian bears North $66^{\circ} 30'$ East 3728 feet.

(c) The total storage capacity of said reservoir is 72,765,000 cubic feet (1672 acre feet).

(d) The source of supply of water for said reservoir is the said Blue River.

(e) The height of the dam of said reservoir is 65 feet, and the said reservoir is located in Lots 7, 8, 9 and 11, Section 3, and Lots 7 and 8, Section 4, Township 8 South, Range 78 West of the 6th Principal Meridian.

(f) Construction of said reservoir was begun by survey in September, 1908.

(g) Claim is hereby made for 1672 acre feet for storage purposes as of date September, 1908, for and on account of the said appropriation by said reservoir.

2. LOWER BLUE LAKE (Also known as
LOWER QUANDARY LAKE)

(a) The dam of the above reservoir is located across the channel of the Blue River, a natural stream, tributary to the Colorado River, in said Water District No. 36.

(b) The initial point of survey is located at a point whence the Northeast corner of Section 3, Township 8 South, Range 78 West of the 6th Principal Meridian bears North 54° East 503 feet.

(c) The total storage capacity of said reservoir is 64,264,500 cubic feet, (1474 acre feet.)

(d) The source of supply of water for said reservoir is the said Blue River.

(e) The height of the dam of said reservoir is 65 feet, and the reservoir is located in Lots 1, 2 and 13, Section 3, Township 8 South, Range 78 West of the 6th Principal Meridian.

(f) Construction of said reservoir was begun by survey in September, 1908.

(g) Claim is hereby made for 1474 acre feet for storage purposes as of date September, 1908, for and on account of the said appropriation by said reservoir.

3. SPRUCE LAKE

(a) The dam of said Spruce Lake is located across the channel of Spruce Creek, a natural stream, tributary to the Colorado River in said Water District No. 36.

(b) The initial point of survey is located at a point whence the Northeast corner of Section 22, Township 8 South, Range 70 West of the 6th Principal Meridian bears North $12^{\circ} 44'$ East 5780 feet.

(c) The height of the dam of said reservoir is 105 feet and the total storage capacity thereof is 67,195,000 cubic feet, (1542 acre feet.)

(d) The source of supply of water for said reservoir is said Spruce Creek.

(e) The reservoir is located in the North half of Section 27, Township 7 South, Range 78 West of the 6th Principal Meridian.

(f) Construction of said reservoir was begun by survey in September, 1908, and claim is hereby made for 1542 acre feet of water, for storage purposes, as of date Septem-

ber, 1908, for and on account of the said appropriation by said reservoir.

4. MAYFLOWER LAKE

(a) The dam of said Mayflower Lake is located across the channel of Spruce Creek, a natural stream, tributary to the Colorado River, in said Water District No. 36.

(b) The initial point of survey is located at a point whence the Northeast corner of Section 22, Township 7 South, Range 70 West of the 6th Principal Meridian bears North $3^{\circ} 44'$ East a distance of 4770 feet.

(c) The height of the dam of said reservoir is 65 feet, and the total storage capacity thereof is 26,885,000 cubic feet (618 acre feet.)

(d) The source of supply of water for said reservoir is said Spruce Creek.

(e) The reservoir is located in the Southeast quarter of Southeast quarter, Section 22, Township 7 South, Range 70 West of the 6th Principal Meridian.

(f) Construction of said reservoir was begun by survey on August 3rd 1942, and claim is hereby made for 618 acre feet of water, for storage purposes, as of date August 3, 1943, for and on account of the said appropriation by said reservoir.

6. That the ditches, tunnel and reservoirs herein above described and for which appropriations are herein claimed, are, and each of them is, a part of a system for collecting and transporting water over or through the Continental Divide from the Pacific Slope of the Continent, in Summit County, Colorado, to the Atlantic Slope of the Continent in Park County, Colorado, to be discharged into the South Platte River, or a tributary thereof; and from thence to be transported from the watershed of said South

Platte River into the watershed of the Arkansas River and discharged into a tributary of said Arkansas River in El Paso County, in Water District No. 10, Irrigation Division No. 2 of the State of Colorado, to be thence diverted and applied by Claimant in said last named County, Water District and Irrigation Division, for the uses and purposes hereinabove described.

7. Maps and statements of the said Continental-Hoosier Diversion System and amended and supplemental maps and statements thereof have heretofore been filed in the office of the State Engineer of Colorado, and approved by him, as of the numbers and dates following, to-wit:

No. 15134, July 16, 1929
No. 15166, August 24, 1929
No. 17093, May 25, 1942
No. 17240, May 14, 1942
No. 17255, August 17, 1942
No. 17256, August 18, 1942
No. 17952, October 19, 1948
No. 17953, October 16, 1948
No. 17954, October 16, 1948

Copy of each of the above filed maps and statements were likewise filed in the Office of the County Clerk and Recorder of said Summit County, Colorado.

WHEREFORE, Claimant prays that a decree be entered herein awarding, decreeing and granting to this Claimant, for the use and benefit of its residents and inhabitants, priorities of rights to the use of water, to the ditches and reservoirs, as of the dates and for the amounts hereinabove set forth and claimed.

That as to any portion of said project which shall remain uncompleted at the time of the entry of the decree herein, that said decree be entered as a conditional decree, conditioned upon the application of water mentioned and

described in said Decree to the beneficial uses therein described with due diligence.

III

PROTEST OF THE COLORADO RIVER WATER CONSERVATION DISTRICT AGAINST THE CLAIM OF THE CITY OF COLORADO SPRINGS

Comes now the Colorado River Water Conservation District, hereinafter referred to as the District, and hereby protests and objects to the statement of claim of the City of Colorado Springs, hereinafter referred to as the City, and also objects to the allowance in this proceeding of a decree, conditional or otherwise, in favor of the City for any priority rights in this proceeding, and as grounds for this protest the District respectfully represents and shows:

I.

That the Blue River Ditch, the Crystall Ditch, The Spruce Ditch, the McCullough Ditch, the East Hoosier Ditch, the Hoosier Ditch (Claim No. 1), and the Hoosier Ditch (Claim No. 2) have never been constructed; that if any rights of appropriation under said ditches, or either of them, where ever initiated, the work of construction of said ditches was not prosecuted with due diligence; and that any right to invoke the doctrine of relation has long since been lost. That in truth and in fact any inchoate right to appropriate water in any quantity or quantities through said ditches, or any of them, was long since abandoned and lost.

II

That the Upper Blue Lake Reservoir (also known as Upper Quandary Lake) and the Spruce Lake Reservoir have never been constructed, no water has ever been impounded

in said reservoirs, and no appropriation of water has ever been made on account of storage in said reservoirs, or either of them. That if any inchoate rights to the storage of water in said reservoirs were ever initiated, any conditional rights accruing from such initiation have long since been lost for the reason that the work of construction of the dams and other features of said reservoirs was not prosecuted with due diligence. That in truth and in fact any rights to or under said reservoirs, and any and all appropriations, inchoate or otherwise connected therewith, have long since been lost and abandoned.

III

That as the District is informed and believed, and so alleges, the Hoosier Tunnel, if the same was ever constructed at all, has been permitted to cave in and has never been repaired for years, and that any appropriation initiated or perfected by means of said tunnel has long since been abandoned.

IV

That as the District is informed and believes, and so alleges, no work of construction has ever been done or performed on the Mayflower Lake or Reservoir. That the pretended appropriation claimed thereunder has never been completed, either wholly or partially.

V

That prior to the 26th day of October 1937, a proceeding was instituted in this court in Cause No. 1709 entitled, "In the Matter of the Adjudication of Priorities of Water Rights in Water District No. 36 for Purposes of Irrigation"; that prior to said date another proceeding was instituted in this court in Cause No. 1710 entitled, "In the Matter of the Adjudication of Priorities of Water Rights in Water District No. 36 for Purposes other than Irriga-

tion." That said proceedings, and each of them, were general adjudication proceedings, and notices of such proceedings were duly and regularly given. That all claimants of water and water rights in said District No. 36 in the State of Colorado were parties to said proceedings. That the subject matter of said action had to do with the adjudication and establishment of the priority rights of those parties who had initiated appropriations for the use of water for any purpose in said Water District No. 36. That the subject matter of said proceedings is the same as the subject matter of this proceeding.

VI

That on or about the 26th day of October 1937, final decrees adjudicating the rights of all persons were entered in said causes. That the last appropriation awarded in said proceedings was Priority No. 252, relating back to and dating from the 1st day of June 1936. That the City did not appear in said proceedings, and did not assert any claim to the rights now claimed by said City. That said City is estopped and barred from asserting any priority date for any of its claims prior to the 26th day of October 1937, under the provisions of Sections 182 and 183, Chapter 90, C.S.A. 1935.

VII

That the alleged rights of appropriation now claimed by the City were initiated prior to April 19, 1919, according to the allegations of the statement of claim filed by the City, which date is the effective date of the passage of an Act entitled, "An Act to Make Further Provisions for Settling the Priority of Rights to the Use of Water for Irrigation and Other Beneficial Purposes", the same being Chapter 147, Page 487, of the Session Laws of 1919 of the State of Colorado, and also prior to the 22d day of March 1921, the date of the enactment of a similar Act entitled, "An Act

Relating to Irrigation", being Chapter 152, Page 482, of the Session Laws of Colorado of 1921. That said Acts now appear as Sections 190 to 200, both inclusive, Chapter 90, C.S.A. 1935.

(a) That the City did not submit for adjudication or determination its alleged claims, as now asserted, at the first general adjudication proceedings had in the District Court of Summit County after the enactment of said Statutes, and did not file any claims or similar claims for said filings in the office of the State Engineer.

(b) That by reason of the facts aforesaid the claims now asserted by the City are barred and conclusively presumed to be abandoned by virtue of the provisions of said Acts, and particularly under and by virtue of the part of said Acts now appearing as Sections 191 and 195, C.S.A. 1935, if said laws be valid.

(c) That if said laws be invalid, then the City has not made any appropriation of water so as to entitle it to a decree, conditional or otherwise.

WHEREFORE, the District asks that the alleged claims of the City of Colorado Springs be denied in their entirety, or if any appropriation whatsoever is granted, that the same be as of the date subsequent to the year 1942.

SECOND GROUND OF PROTEST

For a second ground of protest, the District alleges and shows:

1. The District is the claimant of the following ditches, reservoirs and water rights:

(a) The Second Extension and Enlargement of the Wilcox Canal, situate in Water Districts 39 and 70 in Irrigation Division 5 of the State of Colorado.

(b) The Battle Axe Reservoir. Said reservoir is situate on Meadow Creek in Grand County, Colorado. The dam is across Meadow Creek, a tributary of the Colorado River. The height of the dam is 104 feet. The initial point of survey is located at a place whence the north quarter corner of Section 14, Twp. 1 N., Range 75 W. of the 6th P. M. bears N. $77^{\circ} 29' W.$, 1800 feet. The total capacity of said reservoir is 378,979,000 cubic feet of water for which claim is made by the District for all the purposes set forth in subdivisions (a), (b) and (c) of Paragraph 2 of the statement of claim of this District on file in this cause, and also for stream regulation and to preserve fish. Said reservoir is situate in parts of Sections 11, 12, 13 and 14 of said township and range.

Work was commenced on said reservoir on the 26th day of June 1938, and claim is made for an appropriation for storage of water as of said date. The source of supply of said reservoir is Meadow Creek.

Said reservoir is situate in Water District No. 51, Irrigation District No. 35. The estimated cost is \$462,000.

(c) The Goose Pasture Reservoir.

(d) The Wheeler Reservoir.

That a statement of claim, describing and pertaining to the said Second Enlargement of the Wilcox Canal, the Goose Pasture Reservoir and the Wheeler Reservoir, has been filed in this cause by this District, and reference is made to said statement of claim for fuller particulars and for a complete description of the said Second Enlargement of the Wilcox Canal, the Goose Pasture Reservoir and the Wheeler Reservoir.

2. That the District is one of those users and consumers of water from the Colorado River and its tributaries for whose benefit certain features and parts of the project

known as the Colorado-Big Thompson Project have been constructed and provided. That in addition, by reason of the duties and obligations imposed upon the District by law, it represents all the users, consumers and appropriators of water from the Colorado River and its tributaries within the District, who benefit from use of the waters which are stored in the Green Mountain Reservoir or which pass through the power plant at said reservoir.

3. That said project was initiated by the United States under the Reclamation Act of June 17, 1902 (43 U. S. C. A. 371, et seq). The Act of Congress, which made the initial appropriation for said project, provided for construction of the Green Mountain Reservoir in accordance with the plan described in Senate Document No. 80, Seventy-fifth Congress. That a copy of Senate Document No. 80 was filed with the Clerk of this Court as a part of the proceedings in this case on the 28th day of June, 1949, and reference is made thereto for the full terms of said Document.

4. Said Document is a contract made and entered into between the representatives of the water users and consumers of the Western Slope of Colorado, who take or use water from the main stem of the Colorado River and its tributaries reaching said river above Grand Junction, and representatives of water users on the Eastern Slope of Colorado who benefit by water exported to Northeastern Colorado by the said Colorado-Big Thompson Project. Said contract was designed to settle and adjust conflicting claims to the use of water from the Colorado River. Said contract or Document was approved by the Secretary of the Interior and by Act of the Congress as above set forth.

5. That the following component parts of said Colorado-Big Thompson Project have been completed:

(a) The Green Mountain Reservoir, with a storage capacity of 156,545 acre feet of water.

(b) The Green Mountain Power Plant, through which 1726 cubic feet of water per second of time of the direct flow of the Blue River have been utilized and appropriated to a beneficial use in generation of electricity.

6. For a more complete description of said reservoir and of said power plant, reference is made to paragraphs 1 and 2, pages 9 to 11, inclusive, of Exhibit B attached to the complaint filed in Case 2782 in the District Court of the United States for the District of Colorado, wherein the United States of America is plaintiff, and this District, the City and County of Denver, the City of Colorado Springs, and the South Platte Water Users Association and others are defendants, a copy of which complaint was filed in this cause on June 28, 1949, in connection with the motion for continuance made by the District, which complaint, with the exhibits attached thereto, is by reference made a part of this protest.

7. That work of construction of said Green Mountain Reservoir and of said Power Plant was commenced by the United States on or before April 17, 1936, and thereafter said works were completed and the waters appropriated thereby were applied to a beneficial use with due diligence.

8. That the purposes for which said reservoir and power plant were constructed are, among others:

(a) To provide replacement water for rights already vested, taking water from the Colorado River and its tributaries to the extent the natural flow of the Colorado River is concurrently diverted to Eastern Colorado.

(b) To provide water for the development of oil shale and for irrigation of new lands in Western Colorado.

(c) To provide a constant flow of 1250 cubic feet of water per second in the Colorado River at the point where the so-called Shoshone Power Plant is located, to be used for

irrigation, domestic and manufacturing purposes, present and prospective, including the generation of electricity, in Western Colorado, and to fulfill the obligation to deliver water to the lower basin states and to the Republic of Mexico under the obligations imposed upon Colorado by the terms of the Colorado River Compact and the treaty between the United States and the Republic of Mexico.

9. The District avers that the legal title to said Green Mountain Reservoir and said Power Plant is in the United States of America, and as such the United States is empowered to operate and control said works and the appropriations made thereby in accordance with the terms of said Contract, Senate Document No. 80, but that the District and others similarly situated, who are represented in this proceeding by the District and who are consumers and parties for whom benefit said Contract was made, and beneficiaries under a trust relationship thereby created, appear herein as such consumers.

10. The said Green Mountain Reservoir and the Power Plant hereinabove described are only component parts of a much larger project, features of which are situated in other irrigation districts and other irrigation divisions, and the various parts of said project have been designed and constructed for the benefit of numerous appropriators in various irrigation districts and divisions in the State of Colorado. That in order to obtain a complete determination of the rights of all those claimants and parties in interest, whose alleged rights may conflict with the rights of the United States of America, the latter has instituted an action as above set forth in the United States District Court for the District of Colorado to obtain an interpretation of Senate Document No. 80, and to settle and determine all conflicting rights to the use of the waters of the Blue River and its tributaries, and in order to obtain such a complete determi-

nation of all issues so involved, the United States does not appear as a claimant in this proceeding.

11. That the City and its predecessors in interest did not prosecute the work of construction on the system now claimed by said City with due diligence, but on the contrary stood by and permitted the United States to spend large sums of money, sums in excess of \$7,000,000, in the construction of the Green Mountain Reservoir and Power Plant without in any manner asserting any of the prior rights now claimed by said City. Said City not only acquiesced in said expenditures and construction work on the part of the United States, but actively participated with the Bureau of Reclamation in investigations to find other plans and other works and sources of water supply, different from those now claimed by it.

12. By reason of the facts aforesaid, the City is not entitled to any priority right under its present claim; or, if it be entitled to a right, it should be subsequent to the year 1938.

WHEREFORE, the District prays that the claim of the City be denied in its entirety, and for such other and further relief as may be appropriate.

IV.

Comes now F. E. Yust, who will hereafter be referred to as the "protestant", and protests against and objects to the entry by this court of any decree, conditional or otherwise, in favor of the claimant City of Colorado Springs, in accordance with the statement of claim of said City of Colorado Springs heretofore filed herein on the day of, 19....., or otherwise; and in support of his said objection and protest, protestant states as follows:

I.

That protestant is the owner of the following described lands, which are located in the County of Grand, and in Water District No. 36 of the State of Colorado:

NE one-quarter NW one-quarter, NE one-quarter S one-half NW one-quarter, N one-half SW one-quarter, NW one-quarter SE one-quarter, SE one-quarter NW one-quarter NW one-quarter Sec. 19; S one-half SW one-quarter, NW one-quarter SW one-quarter, Sec. 20; E one-half NW one-quarter, W one-half SE one-quarter, E one-half SW one-quarter, W one-half NE one-quarter Sec. 29; Lots 2 and 3, SE one-quarter NW one-quarter; E one-half SW one-quarter NW one-quarter SE one-quarter, E one-half SE one-quarter, Sec. 30; W one-half NE one-quarter, SE one-quarter NW one-quarter, NW one-quarter SE one-quarter, Sec. 32; all in Twp. 1 N., R. 80 W. 6th P. M.

Lots 4 and 5, SW one-quarter NW one-quarter Sec. 5; Lot 1, SE one-quarter NE one-quarter Sec. 6; all in Twp. 1, S., R. 80 W. 6th P. M.

Lots 5, 6, 7 and 9 Sec 1; Lots 5 to 10 inclusive Sec. 2; Lots 2, 5, 6, 7, and 8 Sec. 3; Lots 1, 2, 3, SE one-quarter SW one-quarter, S one-half SE one-quarter Sec. 4; NE one-quarter NE one-quarter Sec 9; N one-half NW one-quarter Sec. 10; E one-half NE one-quarter (less 20 acres) Sec. 11; Lots 1, 2, 3, S one-half NW one-quarter, N one-half NE one-quarter Sec 12; all in Twp. 1 S., R. 81 W. 6th P. M.

S one-half NE one-quarter, W one-half SE one-quarter, NE one-quarter NE one-quarter Sec. 23; N one-half NW one-quarter Sec. 24; E one-half SE one-quarter Sec. 25; SW one-quarter NW one-quarter, SW one-quarter Sec. 26; SE one-quarter SE one-quarter Sec. 27; NE one-quarter

ter, S one-half Sec. 34; NW one-quarter, W one-half SW one-quarter, Sec. 35; all in Twp. 1 N., R. 81 W. 6th P. M.

II.

That protestant is the owner of the following described rights to the use of water, and appropriations for irrigation, domestic and other beneficial purposes, the water represented by which has been, is being and will continue to be used by him and his predecessors and successors in title to the above described lands, for the irrigation of the same, and for domestic and other beneficial purposes, to-wit:

1. The Loback Ditch, taking its supply of water from the Blue River, the headgate and point of diversion whereof is located on the east bank of said Blue River whence the south quarter corner of Section 28, Township 1 North, Range 80 West of the 6th P. M. bears north $28^{\circ}18'$ west 712 feet. On the 28th day of October, 1937 said Loback Ditch was by this court awarded Appropriation Priority No. 243 in Water District No. 36 of the State of Colorado for 18.33 cubic feet of water per second of time as of December 31, 1930.

2. The right to divert and apply to the lands of protestant, through and by means of said Loback Ditch, and in addition to the amount of water decreed thereto as hereinbefore alleged, and under the provisions of Section 19 of Chapter 90, C.S.A. for 1935, 18.33 cubic feet of water per second of time, statement of claim wherefor has heretofore been filed herein, and testimony and evidence supporting which claim has been presented to the court in these proceedings, wherein it is claimed that said right exists as of the date the lands of protestant, irrigated thereby, were first used and occupied as meadow ground.

been filed in these proceedings, and testimony and evidence

3. The Call Ditch, statement of claim for which has

supporting the same submitted herein, wherein is claimed 5.92 cubic feet of water per second of time for irrigation and domestic purposes from and out of the Blue River, as of date July 31, 1949, which right will be prejudicially affected by the claim made by the City of Colorado Springs.

4. The Dry Creek Ditch, statement of claim for which has heretofore been filed in these proceedings, and testimony and evidence supporting the same introduced, which ditch takes its supply of water from Dry Creek, a tributary of the Blue River, and from the Blue River and by means of which protestant claims the right to 15 cubic feet of water per second of time for irrigation and domestic purposes from and out of Dry Creek and Blue River as of date July 30, 1949, which right will be prejudicially affected by the claim made by the City of Colorado Springs.

5. The Griggs Reservoir, statement of claim for which has heretofore been filed in these proceedings, and evidence and testimony introduced supporting the same, by means of which the protestant claims the right to store, and thereafter to apply to beneficial uses, for irrigation and placcatorial purposes, 40.8 acre feet of water as of date June 24, 1948, the source of supply thereof being Beaver Creek, a tributary of the Blue River, which right of the protestant will be prejudicially affected by the claims made by the City of Colorado Springs herein.

III.

That the claimant City of Colorado Springs, has not, in good faith, or with the diligence required by the statutes of the State of Colorado, initiated or prosecuted any work, by survey or otherwise, on or since the day of, 19....., or at any other time, for the purpose or with the intention or effect of appropriating any of the waters of the Blue River or of any of the tributaries

thereof, for the uses or purposes set forth in its statement of claim or for any other uses or purposes, or applying the same to any beneficial use whatsoever.

IV.

That any and all work, of whatsoever kind, which has been done or is claimed to have been done by the claimant City of Colorado Springs, as set forth in its statement of claim herein and heretofore filed, was and has been exploratory and speculative, for the purpose of determining the practicability and feasibility, at some undetermined and unspecified date or time in the future, of initiating an appropriation of water from the Blue River and its tributaries, for the purposes specified in its statement of claim, or for some one or more of said purposes, and was not done for the purpose or with the intention of effecting an actual appropriation of said water.

V.

That the protestant joins in the protest herein and heretofore filed by the Colorado River Water Conservation District, and joins in each and all of the grounds of protest therein urged.

VI.

Protestant further states that he has not been and is not now financially able to cause such research and engineering investigation to be made as would be necessary to be made to place him in a position to make all of the protests and objections to the claims of the City of Colorado Springs which the facts may justify; that additional grounds of protest and objection will be developed from the testimony on behalf of claimant, City of Colorado Springs, and protestant's cross examination of the claimant's witnesses. Protestant, therefore, reserves the right to request the court, upon

completion of the testimony presented on behalf of the claimant City of Colorado Springs, and following his cross examination of witnesses called by said claimant, to file a supplemental protest and objection to said claim, and to incorporate therein such additional grounds of protest as may be developed from such testimony.

WHEREFORE, protestant prays the court as follows:

1. That the claim of Colorado Springs be denied in its entirety.
2. If it be determined by the court that the claimant City of Colorado Springs is entitled to a decree, conditional or otherwise, of a right to the use of water for municipal purposes, the date of initiation of such right be fixed as of a date later than the dates of the respective claims of the protestant as herein set forth.
3. That protestant have such other and additional relief as may be just and proper in the premises.

No. 16881
No. 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 CON-
SERVANCY DISTRICT, COLORADO
RIVER WATER CONSERVATION DIS-
TRICT, 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.*

SPECIFICATION OF POINTS

I.

The trial court erred in rendering its judgment and decree herein denying to plaintiff in error the City of Colorado Springs, its claim for the award of priorities of right to the use of water for purposes other than irrigation, to the

following named ditches, canals, tunnels and reservoirs, as of the dates hereinafter set forth, to-wit:

1. Blue River Ditch as of date September 27, 1927.
2. Crystal Ditch as of date September 27, 1927.
3. Spruce Ditch as of date September 27, 1927.
4. McCullough Ditch as of date of September 27, 1927.
5. East Hoosier Ditch as of date September 27, 1927.
6. Hoosier Ditch (Claim No. 1) as of date September 27, 1927.
7. Hoosier Ditch (Claim No. 2) as of date September 27, 1927.
8. Additional intercepted waters by above structures as of date September 27, 1927.
9. Hoosier Tunnel as of date September 27, 1927.
10. Upper Blue Lake Reservoir, also known as Upper Quandary Lake, as of date September 27, 1927.
11. Lower Blue Lake Reservoir, also known as Lower Quandary Lake, as of date September 27, 1927.
12. Spruce Lake Reservoir as of date September 27, 1927.
13. Mayflower Lake Reservoir as of date August 3, 1942. For the reason that said judgment and decree is contrary to the evidence, against the weight of the evidence and contrary to the law.

II.

The trial court erred in rendering its judgment and decree herein awarding to the said ditches, tunnels and reservoirs priorities of dates as follows:

1. Blue River Ditch as of date May 13, 1948.
2. Crystal Ditch as of date May 13, 1948.
3. Spruce Ditch as of date May 13, 1948.
4. McCullough Ditch as of date May 13, 1948.
5. East Hoosier Ditch as of date May 13, 1948.
6. Hoosier Ditch (Claim No. 1) as of date May 13, 1948.
7. Hoosier Ditch (Claim No. 2) as of date May 13, 1948.
8. Additional intercepted waters by above structures as of date May 13, 1948.
9. Hoosier Tunnel as of date May 13, 1948.
10. Upper Blue Lake Reservoir, also known as Upper Quandary Lake, as of date May 13, 1948.
11. Lower Blue Lake Reservoir, also known as Lower Quandary Lake, as of date May 13, 1948.
12. Spruce Lake Reservoir as of date May 13, 1948.
13. Mayflower Lake Reservoir as of date May 13, 1948. For the reason that said judgment and decree is contrary to the evidence, against the weight of the evidence, and is contrary to the law.

III.

The trial court erred in not approving, adopting and entering herein the decree tendered by said claimant, the City of Colorado Springs, to said court, in and by which the ditches hereinabove named were awarded the priority dates hereinabove set forth in paragraph I hereof, for the reason that said decree and judgment so tendered by said claimant was in accordance with and proved by all the evi-

dence relative thereto, introduced herein, and was and is in compliance with and supported by the law applicable thereto.

Respectfully submitted,

F. T. HENRY,
City Attorney

A. W. McHENDRIE
*Attorneys for Plaintiff in Error,
the City of Colorado Springs.*