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THE CONTEST FOR THE “NILE OF AMERICA”

KANSAS V. COLORADO (1907)

JAMES E. SHEROW

The United States Supreme Court took its first notice of interstate squabbling over western water courses in the suit *Kansas v. Colorado*, 1907.¹ The decision failed to stem a steady onslaught of interstate water litigation, but the justices did achieve the means to adjudge water disputes between states. To understand the justices' accomplishment, or lack of it, requires what James Willard Hurst called a “social history of law,” law related to society and to ideas outside the narrow confines of jurisprudence. Such a methodology proves a useful means for understanding the significance of *Kansas v. Colorado*.²

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MARKET SYSTEM OF RESOURCE VALUES

The Americans who settled the Arkansas River Valley of Colorado and Kansas shared cultural beliefs about nature. Kansans and Coloradans held what the historian Donald Worster has termed “market culture” values and what other scholars have called the belief in the “domination of nature.” Settlers aspired to create a growing capitalistic economy in the Arkansas Valley by conquering nature through hydraulic engineering in order to ensure economic growth. Thus both sides in the case agreed on the values attributed to nature and to the market.³

As Richard White, Arthur McEvoy, and other historians have noted, Americans ordered their relationship with nature through their legal system. As Hurst has shown, in the marketplace law played an important function in the allocation of scarce natural resources. A complex legal system, fully sympathetic to the domination of nature and market culture values, controlled water usage through the general systems of prior appropriation and riparian rights as defined by state and federal laws and by court decisions. People in the Arkansas River Valley generally developed and protected their inter-

ests in the valley's water through the legal system.⁴

PRIOR APPROPRIATION IN COLORADO

The prior appropriation system embodied in the Colorado state constitution recognizes the right of people to use the publicly owned water of the state. The state established a hierarchy of "beneficial" water use: first, domestic or urban consumption, second agricultural use, and finally, industrial applications of water. Each water user had to possess a court adjudicated priority date. The state engineer regulated diversions from all streams in the state according to the respective dates of the water rights. If two canals operated on a river and one had a water right dated 1870 and the other a right dated 1874, then the 1870 right had to be filled before the person owning the 1874 right could expect to draw any water from the river. Naturally the older the water right the more reliably the river would fill it. The owner of a right had to show a legitimate use of the water to which he or she made claim. If the owner failed in this, then the courts could take away the portion of the water right not "beneficially" used. Usually the canal capacity determined beneficial use and once water was diverted through a headgate the courts considered it beneficially used, regardless of the application of the water.⁵

By 1900 Coloradans, through the prior appropriation system, had put to use all the Arkansas River Valley's water. Nearly one hundred ditch systems irrigated more than 7000 farms on more than 300,000 acres. Pueblo and Colorado Springs had built elaborate public water works serving approximately 50,000 people. The Colorado Fuel and Iron Company, which employed approximately 16,000 people and supplied the High Plains region with coal, managed a complex water system for manufacturing steel and mining coal. The company's canal delivered more than ten million gallons daily to the steel plant. Through prior appropriation, most Coloradans believed they had secured progress with the proliferation of cities, industries, and farms.⁶

RIVER USE IN KANSAS

The Kansas legal system, too, had supported the economic development of the Arkansas River. A weak system of prior appropriation laws had permitted irrigation development of more than 30,000 acres in the Arkansas River Valley in the southwestern portion of the state. In 1905, around the Garden City area, more than one million dollars had been invested in irrigation works, with the Reclamation Service committed to spending an additional \$250,000 on the development of a pump reclamation project.⁷

Farther down the river at Wichita, Kansas, Marshall Murdock, the powerful editor of the *Wichita Eagle* newspaper, and other city leaders sought congressional legislation to deepen the river and make Wichita an inland port—albeit that was a rather boneheaded notion. From 1879 through 1882, in large part through the active petitioning of Wichitans and residents of Arkansas City (near the Oklahoma-Kansas state line), Congress passed four acts for river improvements along the Arkansas River from Fort Smith, Arkansas, to Wichita, Kansas. In the spring of 1880, when the five-hundred-ton steamboat *Tom Ryan* reached Wichita, the excited townspeople warmly welcomed the captain and crew and rewarded them with all the beer and pretzels that they could consume. An enthusiastic Murdock called the Arkansas "The Nile of America," but the river could never support his expectations. In December 1880, an Army Corps snag boat bottomed on a sand bar within sight of a large crowd of well wishers. According to Craig Miner, "The passengers leaped out into a raging river 2½ inches deep. Embarrassed, they declared to the crowd that navigation on the Arkansas was closed for the season," and it has remained shut to Wichita ever after. Still, Murdock and others had used law to bring about the economic development of the Arkansas River.⁸

ORIGINS OF KANSAS v. COLORADO

The origins of *Kansas v. Colorado* arose as

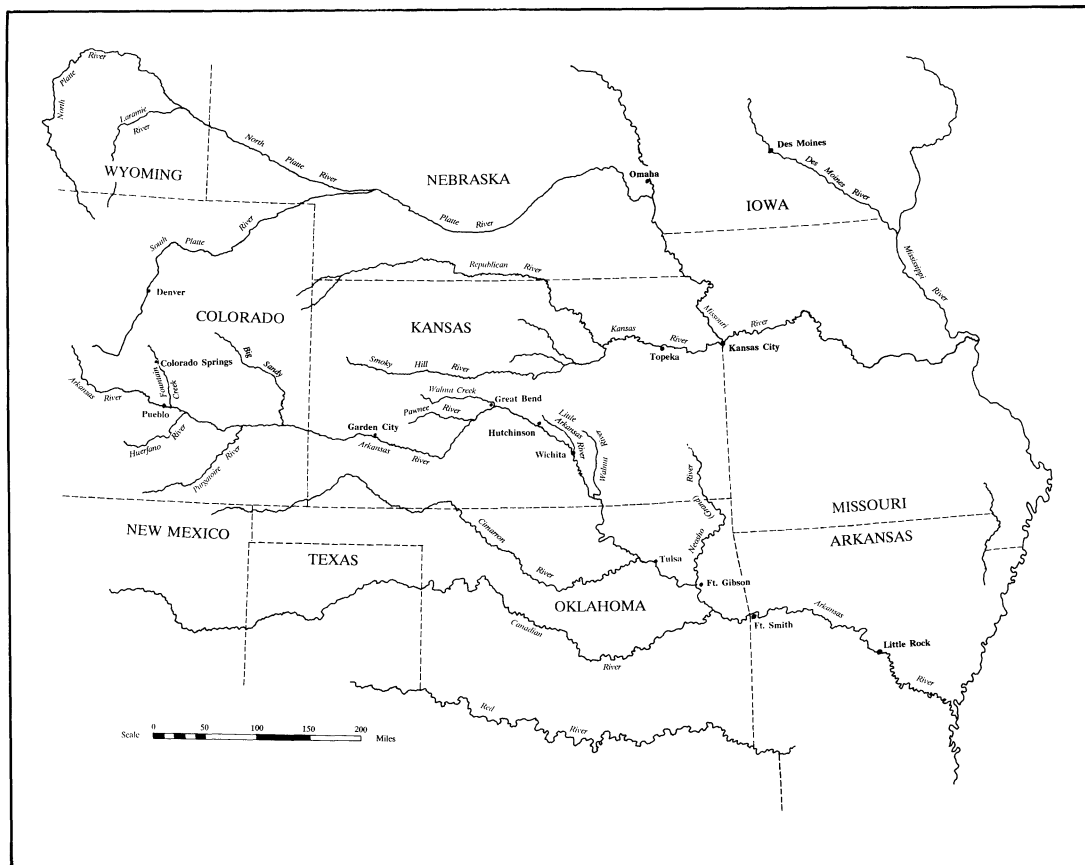


FIG. 1 The Arkansas River and Its Tributaries.

settlers in the Arkansas River Valley erected water consuming enterprises with no expectations of environmental change beyond the creation of a "garden" and commercial prosperity in the arid West through the "conquest" of nature. When water users realized that their numbers had grown until the river was no longer capable of sustaining the original scope of their operations, instead of recognizing the inherent flaws in their values, they looked for someone else to blame.

The contrived demarcation line dividing Kansas and Colorado easily formed several contending camps fighting for control of the Arkansas River. The boundary plagued both states by neatly dividing the river basin in a senseless

way. All of the upper tributaries remained within the confines of Colorado. Development around Garden City depended in part upon the regular flow of the Arkansas River, but control over the stream sources remained in Colorado. Moreover, the people of central and eastern Kansas had little understanding of, or empathy with, irrigation farmers in the western portion of the state. People in western Kansas felt isolated between Coloradans, who they viewed as gobbling up the Arkansas River flow, and people in central and eastern Kansas, who had a difficult time understanding irrigation problems around Garden City.⁹

People in southwestern Kansas longed to do something to better their situation. As early as

1890 or 1891, Charles J. "Buffalo" Jones, the most energetic of all irrigation promoters in Kansas, contemplated a suit against Colorado to uphold the prior appropriative status of his enterprises vis-à-vis Colorado ditch companies. His attorney, Judge Henry Mason, however, warned the case would reach the United States Supreme Court and would cost plenty to pursue. Jones, who could not finance his own ditch systems, voiced local sentiment when he stated: "I didn't want such a big job as that on my hands." In the 1890s, the feebleness of irrigation in southwestern Kansas precluded people like Jones from attempting litigation against the more prosperous systems of Colorado.¹⁰

Nonetheless, the issue came to national attention. In 1890 irrigators in western Kansas informed the members of the special committee of the United States Senate on the irrigation and reclamation of arid lands that Coloradans had deprived them of their fair share of the Arkansas River flow. Garden City newspaper editor J. W. Gregory thought the development of groundwater pumping would prevent Colorado from depriving "us of water by continuing in the dog-in-the-manger policy of preventing the water from crossing the State Line." "If our Colorado neighbors would divide with us," thought Buffalo Jones, "I think we could have a good deal more [water]." He wanted to establish the prior appropriative rights of Kansas ditches over most canals in Colorado. "If the Colorado ditches had given us a prior right we would have had abundance. The Colorado ditches that have been lately built have been taking the supply of water." Jones, Gregory, and other people around Garden City had found their scapegoat.¹¹

The minority report of the Senate committee recommended that, since the states themselves could not be trusted to divide interstate river flows equitably, the "National Government must, therefore, become the arbitrator between [Kansas and Colorado], and it should immediately intervene to divide the waters in some wise and just manner." In the minds of these senators, the allocation of limited water supplies in the arid West logically led to a centralization

of power by the federal government over interstate river flows.¹²

Others, however, hoped to avoid the creation of a national regulatory apparatus over western rivers. John Wesley Powell wanted the major river basins in the West turned into self-governing water districts. The people within each, irrespective and independent of their state governments, would make and administer all laws regarding water usage in the district. In 1895, Orren Donaldson, writing in *The Irrigation Age*, built upon Powell's ideas and suggested, instead of water districts, drawing new states in the West bounded by the contours of river basins. In 1894 Elwood Mead wrote in the same journal that the states should through "mutual concessions and a disinterested recognition of the rights and possibilities of the respective commonwealths interested" resolve their own differences. But water meant economic growth for whoever owned it, and those who controlled the sources of water were not going to share without a fight.¹³

Irrigators like Buffalo Jones could not afford expensive interstate litigation, but people like Marshall Murdock had the political clout to engage the state of Kansas against Colorado. Murdock thought he knew the nature of the Arkansas River and whom to blame for the changes in it. He believed part of the value of the stream came from a vast "underflow" that nourished all crops in the valley. In addition, he thought, if the Army Corps of Engineers properly maintained his "Nile," then the flow could support all forms of river traffic. But changes in the riparian ecosystem around Wichita troubled Murdock. For nearly thirty years he had observed the river flow decreasing, ground water levels falling, and the river channel narrowing. In December 1906, S. S. Ashbaugh, an attorney representing Kansas, told the Court, "Our valley dried out and we no longer have our 'Egypt.'" But what or who had caused this damage?¹⁴

Initially Murdock had held irrigators in western Kansas culpable for changes in the Arkansas River, but more importantly, he later blamed Colorado irrigators. Through the Republican

party, he lobbied the Kansas legislature to support a suit of original jurisdiction in the United States Supreme Court to enjoin Colorado interests from any non-riparian diversions. In 1901 the Kansas legislators heeded Murdock's plea and passed a bill instructing the attorney general to file suit against Colorado.

Kansans, by beginning in the Supreme Court, had launched a serious attack against the prior appropriation system governing water usage in Colorado. The Kansas riparian doctrine differed distinctly from prior appropriation. It assured to the owner of land on the bank of a river or other body of water the right to use that water. Originating in common law, the doctrine guaranteed a riparian owner the right to his or her water undiminished in quantity and unaffected in quality regardless of the uses of this same water by other riparian owners. Interstate suits of original jurisdiction before the United States Supreme Court usually have entailed issues of great importance. In *Kansas v. Colorado*, the justices viewed themselves as resembling an international tribunal, an alternative to diplomatic negotiations or armed conflict between sovereign states.¹⁵

KANSAS FILES A COMPLAINT

In May 1901 A. A. Godard, the attorney general of Kansas, filed the initial complaint, which made a simple case. Colorado ditch diversions, he argued, had materially depleted the normal Arkansas River flow throughout the entire state to the detriment of the riparian rights of Kansans. The "underflow" of the river, he charged, had sustained major depletion. Reduced surface and ground water flows, so Godard continued, had wrecked the economy all along the river and had ruined navigation below Wichita. He concluded by asking the United States Supreme Court justices to prohibit Colorado from engaging in any form of reservoir and canal building, from issuing any water rights to any interests, from renewing any "expired" rights, or from renewing corporate charters to any company diverting water onto non-riparian land. The only exception Godard allowed was

the diversion of water for "domestic" uses onto riparian land.¹⁶

Later, in June 1903, C. C. Coleman, the newly elected attorney general for Kansas, entered an amended bill of complaint and enlarged the scope of the case. He named seventeen additional defendants: all of the largest water users along the Arkansas River, including the Colorado Fuel and Iron Company and irrigation companies. Now the attorney general could press the Kansas suit whether or not the state of Colorado actually built canals and reservoirs or issued water rights.¹⁷

COLORADO'S RESPONSE

Colorado lawyers attacked the Kansas position with a strong legal arsenal. When the U.S. Congress granted Colorado statehood, so Attorney General Charles C. Post argued, it also sanctioned the prior appropriation system of Colorado imbedded in the state constitution. Therefore, the riparian doctrine in Kansas had no bearing on water uses in Colorado. Moreover, Post claimed Colorado possessed complete sovereignty over the unnavigable river, with the right to dispose of the flow however it desired. The state of Colorado, as Post also pointed out, did not issue water rights. Rather, the state administered a recognized private and perpetual right to divert water. In large part, Colorado's defense attorneys elaborated upon the "Harmon Doctrine." First voiced by Attorney General Judson Harmon in 1895, the doctrine held that a nation possesses sole and absolute jurisdiction within its territory. Building on this line of thought, Colorado lawyers compared their state to a sovereign nation that had the exclusive right to the water within its boundaries.¹⁸

More telling arguments against Kansas came from the lawyers of the private companies in Colorado. D. C. Beamen, the attorney representing the Colorado Fuel and Iron Company, asked what right Kansas had to destroy a multi-million dollar industry. He believed a decision in favor of the riparian doctrine would not square with the protection of private property rights in Colorado. The attorneys for the Arkansas

Valley Ditch Association followed a similar line of reasoning. Fred Sabin and Platt Rogers, who represented this combine of irrigation companies, illustrated how the economy in the entire Arkansas Valley of Kansas had prospered between 1870 and 1890. Real estate values had risen, crop production had increased, and so had income and population. Given these facts, how could Kansans justify tearing apart the economy in the Arkansas Valley of Colorado?¹⁹

Francis K. Carey, the president of the National Sugar Manufacturing Company, which operated a large factory in Sugar City, Colorado, gave one of the clearest expressions of this argument. Kansans, so Carey wrote to N. C. Miller, the Colorado attorney general who followed Post, had "'stood by' and allowed enormous sums of money to be invested on the faith of the [prior appropriation system] adopted by the State of Colorado." Given this, Carey failed to see how the Court could "impair in any way the vested interests of [Colorado] property holders." In this argument, Carey's views substantiate Hurst's position that the nineteenth-century American idea of protecting vested rights had "less to do with protecting holdings than it had to do with protecting ventures." Following Carey's thinking, Kansans' property rights did not deserve the protection due Coloradans' rights achieved through their more energetic exploitation of river flow.²⁰

THE FEDERAL GOVERNMENT INTERVENES

The case quickly became important to more than just Coloradans and Kansans. Frederick Newell, the director of the newly formed Reclamation Service, had taken a keen interest in its development. Newell, along with others in the Department of Interior, worried that if the claims of either Colorado or Kansas were sustained the Reclamation Act could be destroyed. The riparian doctrine would only allow federal reclamation projects of limited scope. If Colorado's view of complete sovereignty over the Arkansas River held, then the Reclamation Service would be at the mercy of a myriad of arid states' water laws, thereby complicating the

management of any interstate project. Newell prevailed upon the U.S. Attorney General's office to intervene in the case, which the Supreme Court allowed in March 1904.

The right to intervene in a suit of original jurisdiction comes when a party, or citizens of one of the states, or in this case the federal government, has a pecuniary interest in the outcome of the suit not represented by either of the litigants. When granted the right to intervene in an ongoing interstate suit, an intervenor then seeks to represent its own interest independently of the contending states. P. C. Knox, attorney general of the United States, Frank L. Campbell and A. C. Campbell, assistant attorney generals of the United States, and H. M. Hayt, the solicitor general, took the most active roles in representing the federal government's case. Frederick Newell, director of the Reclamation Service, and Morris Bien, supervising engineer in the service, also kept abreast of the developments in the suit and often advised the lawyers in the attorney general's office.²¹

All the arguments of federal attorneys maintained the right of the government to regulate interstate streams in the arid states. They admitted the Arkansas was unnavigable in Kansas and Colorado and denied the precedence of the riparian doctrine to the prior appropriation doctrine and the sovereign right of Colorado to control the flow of any interstate river. Only the federal government, these lawyers claimed, could regulate the flows of interstate streams, regardless of navigability.²²

To sustain the government's position, A. C. Campbell, the solicitor general, employed the "Wilson Doctrine," which he summarized in this manner: "the inherent power of the nation exists outside of the enumerated powers in the Constitution in cases where the object is beyond the power of the State, and was a power originally exercised or ordinarily exercised by sovereign nations." Consequently, even though the Constitution remained silent about the government's power to regulate interstate streams in the arid West, it did not exclude the government from exercising regulatory power over these

rivers.²³

In keeping with the procedures in an interstate suit of original jurisdiction, the justices appointed a commissioner (today called a special master) to take testimony to establish the facts of the case. In August 1905 a commission opened its hearings in Wichita. In eighty days in eighteen cities, more than three hundred witnesses took the stand. The stenographer typed more than 8500 pages of testimony and recorded more than 120 exhibits. Seldom in the court's history had it entertained a case of this magnitude. The suit was unique in other respects as well. For example, the justices allowed an unprecedented four days of oral arguments and sat for the first time as a trial court—they cross-examined the attorneys as each presented his oral argument.²⁴

FARMERS TESTIFY FOR KANSAS

Kansas attorneys built their case through the statements of non-experts. In the closing arguments, C. C. Coleman, the attorney general of Kansas, asserted: "Now, the flow of water is not necessarily a matter of expert testimony." He asked the court to consider the evidence given by farmers whose experiences in the valley led them all to note the lowering of the "underflow" and of the surface flow of the Arkansas River. Conveniently enough, they all dated this occurrence after the great ditch building spree in Colorado in the 1880s.²⁵

The Kansas attorneys made a conscious decision to avoid expert testimony, hoping to overwhelm the justices with the testimony of 120 non-experts who all essentially agreed. Kansas hydrologists, for example Professor Hayworth, the State geologist of Kansas, Professor Robert Hay, or Professor Frank Marvin, Dean of the School of Engineering at the University of Kansas, could have testified, but the attorneys chose not to have these experts take the stand because their studies would not have corroborated the lawyers' argument that the groundwater of the valley was the "underflow" of the river.²⁶

In large part, reliance on the farmers' testi-

mony failed. They had trouble remembering in which season they had seen the river full or dry, and in a great many cases, they could not recall the exact year. They failed to explain how surface flow supplied groundwater when much of the underflow lay in elevations above the river bed. They all noted the narrowing of the Arkansas River channel, the filling of the river bed with silt, and lessened river flows. But had irrigation in Colorado caused these changes or had the river responded to other variables, for example agricultural development in south central Kansas? Plowed farmlands returned less rainfall to the river than did native grasslands. Farming also reduced the number of prairie fires, which allowed the cottonwoods to grow unimpeded along the river banks, thereby contributing to narrowing the channel. The avoidance of expert testimony cost Kansas dearly in building its arguments.²⁷

EXPERTS TESTIFY FOR COLORADO

Colorado attorneys, on the other hand, sought expert witnesses. Louis G. Carpenter, a professor of irrigation engineering at Colorado Agricultural College in Fort Collins, bore the brunt of presenting the scientific evidence discrediting Kansans' arguments. Among his important findings was that rainfall contributed more to the underflow than did the Arkansas River flow, an observation corroborated by federal witnesses. Carpenter illustrated that deforestation in the upper reaches of the valley, not irrigation development, had severely reduced spring runoffs. He graphically illustrated how the porous sands of the Arkansas River absorbed surface flows, which meant little, if any, of the water originating in Colorado ever reached as far as Wichita. He examined a voluminous historical record to illustrate an extremely erratic flowing river long before the development of irrigation in the valley. In total, the testimony given by Coloradans showed little harm done to Kansas through irrigation and prior appropriation.²⁸

Carpenter, though, could not maintain that irrigation in Colorado had little effect on the

Arkansas River flow to the irrigation systems around Garden City, Kansas. Frederick Newell of the Reclamation Service clearly implicated the growth of Colorado irrigation in the 1880s in the diminution of river flow reaching Kansas ditch companies in the 1890s. The emphasis of Kansas attorneys on the riparian doctrine, however, excluded most interests of western Kansas irrigators. In December 1904, the editor of one newspaper at Syracuse, Kansas, wrote: "This seemed to us to be the object aimed at [by Kansas attorneys]—to knock out all the irrigators—Kansas as well as Colorado." The editor wished that Kansas had taken the position that its western ditches had established prior appropriative rights to the river over most of the ditch companies in Colorado.²⁹

Carpenter's research did serve to counter any federal argument that might be made for national control over non-navigable interstate streams. The notable "Elephant Butte" case, also before the Supreme Court, raised questions about federal control over non-navigable western rivers in relation to interstate and international water development on the Rio Grande River. Justice David Brewer, the only supreme court justice who had much of an understanding of western water problems, wrote one opinion for this ongoing litigation that supported federal control over non-navigable streams under certain conditions. Federal courts could stop the appropriation of water on a river's upper reaches, navigable or not, that depleted the flows to the river in its navigable reaches.³⁰

Carpenter proposed a "dual river" theory. His measurements showed only a minute amount of the water flowing out of Colorado reached the navigable portion of the Arkansas River, which he thought began below Fort Gibson, Oklahoma. Moreover, he continued, on numerous occasions the river had failed to flow at all from the western edge of Kansas to the city of Great Bend. Therefore, he claimed, the Arkansas River in reality was two rivers, an upper river fed largely by melted mountain snowpack and occasional runoff from the High Plains, and a lower river, beginning near Great Bend, Kansas, fed by numerous tributaries carrying the

runoff from the sub-humid prairies. Building on Carpenter's findings, the counsel for Colorado maintained that the federal government could not use Brewer's ruling in the Elephant Butte case to assert any regulation over the upper basin.³¹

THE FEDERAL VIEW

Frederick Newell largely agreed with Carpenter's description of the Arkansas River, which precluded a case for federal control based upon Brewer's Elephant Butte decision. Besides, Newell's Reclamation Service in the Department of the Interior had no interest in protecting navigation, a position benefiting the Army Corps of Engineers. He wanted to build dams to store water for the reclamation of arid land. Consequently, the testimony given by the federal government's witnesses voiced the need for greater national regulation of rivers in the arid West and the need to protect the newly created Reclamation Service. Frederick Newell and Elwood Mead warned against applying the riparian doctrine to arid states as it would jeopardize the construction of storage reservoirs, a central feature of most reclamation projects. Also, they could not abide Colorado's notion of complete sovereign control over the flow of interstate streams originating within its borders. For example, if the Service built a reservoir in New Mexico on stream originating in Colorado, then at some future date Coloradans could use the water that had formerly flowed into the New Mexico reservoir, in effect drying it up. Therefore, to facilitate the operations of the Reclamation Service, Newell wanted the federal government to have the power to regulate all interstate streams in the West.³²

To illustrate the need for such a power, the federal government questioned witnesses from Wyoming, a state that also used the prior appropriation doctrine. Like Kansas, Wyoming correctly feared that Colorado's assertion of sovereignty over all its waters would seriously threaten previous developments in Wyoming. J. A. Van Orsdel, Wyoming attorney general, therefore testified in regard to the Laramie River,

a stream originating in Colorado and crossing into Wyoming, where its water was used in irrigation.³³ The federal attorneys built upon this testimony to show that no state could be left free to use water in impertinent disregard of its neighboring states' economies. The corollary to this view was the argument for complete federal control of interstate streams in the West.

To further build their case the federal attorneys also used Kansans as witnesses against their own state's official position. B. F. Stocks, a lawyer, represented the Finney County Water Users Association in western Kansas, formed to participate in a proposed federal reclamation project to develop pump irrigation to supplement the available river flow. Stocks testified that enforcement of the Kansas riparian doctrine would make the Garden City area "the desert that it was twenty-five years ago, and the people who have settled here and have expended their money might as well move out."³⁴

OTHER DISAGREEMENTS

Other Kansans besides those around Garden City disagreed with their state's case. In May 1903, J. R. Mulvane, the powerful president of the Bank of Topeka, who had helped finance some irrigation projects in the Arkansas Valley of Colorado, wrote to N. C. Miller, the attorney general of Colorado: "Hoping that you may win, as I think the suit never had any merit in it except to put a fee in the hands of some few attorneys." In July 1904, L. A. Young of the Peerless Mining Company in Wichita offered Miller "any assistance," and the following September one farmer from Wichita wrote to Charles Hayt, an attorney for Colorado, that he looked upon the underflow and sub-irrigation theory as "clear humbug." Hayt forwarded this Kansas farmer's letter to Miller, who must have felt some degree of comfort in knowing the dissatisfaction of some Kansans with their state's case, but as he realized, this discontent did not spell victory for his cause.³⁵

Coloradans were also divided in their support for their state's official position. In the late summer of 1903, Colorado Senator Henry H. Teller

publicly voiced his concern about the possibility of Colorado losing with the destruction of the irrigated economy in the valley as a result. At the same time, Miller actively opposed any legislative appropriations for Colorado's State Canal Number 1, reasoning that if the state removed itself from active canal building, it would undermine Kansas' arguments that Colorado construction projects were diminishing the flow of the Arkansas River.

In August 1904, D. C. Beamen, the attorney for the Colorado Fuel and Iron Company, even made Miller the extraordinary proposal that he employ the Pinkertons "to hunt up facts."³⁶ On the other hand, Francis K. Carey, the sugar manufacturer, could not understand how Miller could "sustain by testimony the broad statement that the method of irrigation adopted in Colorado does not diminish in any material way the flow of the water in the Arkansas River . . . to Kansas." The *Denver Post* publicly accused Louis Carpenter of graft in serving as an expert witness for the state. Many of Carpenter's supporters feared what would happen in the event of losing his expertise and rallied to retain his valuable contributions to the state's cause.³⁷

Together, the Colorado, Kansas, and federal attorneys all had grounds to fear the Supreme Court's reception of their arguments. In 1903, after D. C. Beamen first addressed the justices, he perceived their support for the riparian doctrine. Later, during the closing oral arguments in December 1906, Morris Bien, the supervising engineer for the Reclamation Service, detected a divided court. He realized his count might be wrong, but he thought Justices Melville Fuller, John Marshall Harlan, and David Brewer all supported the riparian doctrine. He saw Justices Rufus Peckham, Joseph McKenna, Oliver Wendell Holmes, William R. Day, and, especially, Edward D. White supporting the prior appropriation doctrine. After the Court's decision, Bien confided in a letter that the justices' shifting views indicated "a very imperfect conception of irrigation and its practical relations to the law." White, at times, even had difficulty simply remembering how many ditches were involved, inflating the number by three hundred

during the oral arguments. These justices had little, if any, real understanding of the nature of rivers, of irrigation, or of the development of the prior appropriation system in the arid West.³⁸

THE COURT DECIDES

On 13 May 1907 the court delivered a decision amounting to less than what any party wanted, but clearly Colorado gained the most. Justice Brewer, a Kansan and probably the most learned justice in irrigation law, wrote the opinion for a unanimous court. Kansas, he stated, was not entitled to a decree restricting the practice of irrigation in Colorado because irrigation in Colorado had worked little, if any, economic harm to the majority of the Arkansas Valley in Kansas. The court agreed with Kansas attorneys that Colorado irrigation had damaged the normal flow of the river into southwestern Kansas, but, in setting the principle of equity, the material damages around Garden City did not outweigh the economic gains rendered to Colorado by the use of the stream. In this decision, Brewer became what Justice White called an "amicable compounder"—one called upon "to adjust rights according to [his/her] conception of equity wholly divested of any rule of law." In becoming an "amicable compounder," Brewer had attempted to create interstate common law.³⁹

Brewer balanced his award to Colorado by holding that in the event of increasing economic damage "there will come a time when Kansas may justly say that there is no longer an equitable division of benefits, and may rightfully call for relief against" Colorado water users. In this Brewer denied Colorado's application of the Harmon Doctrine, or the sovereignty over the water originating within its boundaries. Brewer's decision rested upon an equitable distribution of the economic benefits derived from the river and sidestepped deciding which doctrine, prior appropriation or riparian, governed the interstate flow of the river. Each state had the sovereign right to determine for itself the proper institutions for the control of water but only within their respective boundaries. In the

event of another suit by Kansas, however, Brewer reserved to the court the right to appropriate the Arkansas River flow between the states in effecting equitable economic benefits.⁴⁰

Brewer's opinion put Colorado on alert. The state could not with impunity develop its river resources to the complete disregard of its neighboring states' economies. By concentrating solely upon the economic conditions in the valley, Brewer devised an accounting procedure. He weighed the economic gains registered in Kansas and in Colorado derived from the utilization of river flow. The economic losses suffered around Garden City had not detracted enough from the total gains throughout the valley in Kansas to warrant a deduction from Colorado. So long as this remained the demonstrable case, Colorado had little to fear from Kansas reprisals, but if economic losses occurred in western Kansas while net gains continued in Colorado, the court could make adjustments correcting any imbalances.

Only in adjusting economic equity would the court allow itself a say in the case. This position denied Congress the right to control non-navigable interstate streams in the arid West. Brewer limited the federal government's role to preserving or improving the navigability of the Arkansas River, for which, he noted, the government had not made a case—in fact, the federal attorneys had argued the non-navigability of the river, and thus they could not invoke the right of Congress to ensure its navigability. The federal attorneys had therefore fallen back on the Reclamation Service's argument that even without a specific constitutional guarantee, the federal government had the inherent right to regulate interstate streams west of the 100th meridian, irrespective of navigability. Brewer viewed this approach unsympathetically as he strongly backed a state's sovereign right to devise its own water regulatory institutions.⁴¹

RESPONSE TO THE CASE

Predictably, the case greatly disappointed the people in the United States Attorney General's

office and in the Reclamation Service. Morris Bien and A. E. Chandler, legal advisors in the service, thought the decision would require the service to abide by each arid state's water laws. Moreover, some people at the time erroneously thought the decision made the Reclamation Service unconstitutional. The enumerated powers of the Constitution, so wrote Justice Brewer in *obiter dicta*, did not refer to reclamation, leading people like A. L. Fellows, the state engineer from North Dakota and a former district engineer for the service in Denver, mistakenly to suggest that the Reclamation Act of 1902 might be unconstitutional. Bien and Chandler knew Brewer's decision did not rule them out of business, but they warned their field agents to gather material in case a suit arose testing the constitutionality of the Reclamation Act.⁴²

Even though the service regretted the decision, most Coloradans hailed it as a vindication of their cause. As Colorado Attorney General William H. Dickson boasted: "The first man that gets the water keeps it." D. C. Beamen, a little more reserved in his judgment, and with keener insight, thought the court had divided over the need to decide the legitimacy of the prior appropriation and riparian doctrines and knew Brewer's opinion had not exonerated the Colorado practice of prior appropriation. He believed the justices would wait until "a case arose in which it was clear that irrigation alone was responsible for the lack of water" in a neighboring state. C. D. Hayt, a Colorado attorney involved in the suit, correctly observed the key to the decision: "[Kansas] failed to prove damages, and in fact, proved that the lands in Kansas had steadily advanced in value instead of decreased." In addition, Colorado lawyers had an advantage with their expert witness, L. G. Carpenter. They regarded his "testimony . . . as one of the most important features" of the case. Moreover, they unanimously, and mistakenly, thought, as did Hayt, that Brewer's opinion would "end the controversy."⁴³

For some time the decision severely lessened enthusiasm in south central and eastern Kansas for ever resuming such a proceeding, but irri-

gation interests around Garden City, bitterly unhappy about the manner in which Kansas attorneys had defended them, looked to a new benefactor to press their cause. By and large, they gathered to support the United States Irrigating Company in its suit asking for a federal court decree establishing the prior appropriation rights of Kansas ditches to Colorado canals. The sugar company, backed by wealthy Colorado businessmen, took on Colorado irrigation enterprises beginning in 1910, and interstate conflict over the Arkansas River flow continued unabated.⁴⁴

LESSONS FROM THE CASE

Lessons from *Kansas v. Colorado* are many. First, people in the Arkansas River Valley on the High Plains had built beyond the ability of the region's water resources to support their ambitions. The justices simply did not deal with that reality but only considered the economics of the suit. Colorado water users possessed certain vested property rights derived from the development of river flow. Kansans owned such rights as well; they just failed to show how the use of river water in Colorado had adversely affected their economy. Nonetheless, as economic development continued—the construction of sugar factories, growing cities, more irrigation—the resources to support such growth became ever thinner.

What *Kansas v. Colorado* ignored, and what no one at the time recognized, was how a capitalistic system premised on growth and the domination of nature could provide for all water users in an area of limited river flow. For Kansans it proved much easier to charge Coloradans with consuming too much river flow than it was to understand their own impact on the environment. As for Coloradans, they had established the prior appropriation system as a means of economic development, not one of environmental adaptation. They reserved the fruits of this growth, and the right to utilize the river flow, solely unto themselves. Greedy Kansans, so far as they were concerned, had no right to take from them. But as users claimed more water

rights, and as urban, industrial, and agricultural development continued apace, even Coloradans ran out of water for all of their aspirations. Litigation and water lawyers multiplied as Coloradans contended among themselves and with Kansans.

The attempts to resolve the issue since then have not worked either. Two interstate water suits between private interests in Kansas and Colorado, another interstate suit between the states, the building of three large storage reservoirs in the Arkansas River Valley in Colorado (two by the Army Corps of Engineers and one by the Bureau of Reclamation), and an interstate compact regulating John Martin Dam and Reservoir for the benefit of both Colorado and Kansas simply have not solved the problem of economic growth dependent on the Arkansas River flow. Not surprisingly, the expansion of groundwater pumping in Colorado after 1950, drought in the 1970s, and one state's general distrust of the other led the Kansas attorney general to file another complaint in the United States Supreme Court in 1986.

Maybe, albeit doubtfully, the United States Supreme Court will produce a ruling that will settle the rights of Colorado and Kansas to the Arkansas River flow. Even if the Court can resolve this current bout, in all probability the resulting peace will be short lived. The waters of the region can only be stretched so far to cover the increasing demands of new industry, growing cities, and irrigated farms. Therefore, the inhabitants of the Arkansas River Basin must learn something they have not: to adjust their economic and cultural ambitions to nature's reality. Only then will the battle for the "Nile of America" end.

NOTES

1. The case was decided in the October 1906 session of the Supreme Court and thus appears in the 1906 volume of court reports. The decision was announced on 13 May 1907, however, so the case is conventionally dated 1907.

2. James Willard Hurst, *Law and Social Order in the United States* (Ithaca: Cornell University Press, 1977), pp. 42-47; for a notable achievement in this

direction, see Arthur F. McEvoy, *The Fisherman's Problem* (Cambridge: Cambridge University Press, 1986), pp. 13-14.

3. Donald Worster, *The Dust Bowl* (New York: Oxford University Press, 1979), p. 6.

4. Richard White, *Land Use, Environment, and Social Change: The Shaping of Island County, Washington* (Seattle: University of Washington Press, 1980), p. 74; and McEvoy, *The Fisherman's Problem*, p. 14. For a discussion of how the prior appropriation doctrine has been used as a tool for furthering economic growth, see William Lilley II and Lewis L. Gould, "The Western Irrigation Movement, 1878-1902: A Reappraisal" in *The American West: A Reorientation*, Gene M. Gressley, ed. (Laramie: University of Wyoming, 1966), p. 63; Donald J. Pisani, "Enterprise and Equity: A Critique of Western Water Law in the Nineteenth Century," *Western Historical Quarterly* 18 (January 1987): 15-37; and Donald Worster, *Rivers of Empire: Water, Aridity, and the Growth of the American West* (New York: Pantheon Books, 1985), pp. 83-96.

5. For additional discussions regarding prior appropriation doctrine, see G. E. Radosovich, K. C. Nobe, D. Allardic, and C. Kirkwood, *Evolution and Administration of Colorado Water Law: 1876-1976*, (1976; rpt. Littleton, Colorado: Water Resources Publications, 1985), pp. 16-26; Robert G. Dunbar, *Forging New Rights in Western Waters* (Lincoln: University of Nebraska Press, 1983), pp. 59-72.

6. *Kansas v. Colorado*, Oral Arguments of Counsel on Final Hearing, December 17th, 18th, 19th, and 20th, 1906, Oral Argument of Mr. Nelson H. Loomis, for Complainant, p. 41; and Oral Argument of David C. Beaman, Solicitor for Defendant the Colorado Fuel and Iron Company, pp. 61-64 (microfiche card 55, University of Colorado Law Library, Boulder [UCLL]). For population figures of Colorado Springs and Pueblo, see Suzanne Schulze, compiler, *A Century of the Colorado Census* (Greeley, Colorado: University of Northern Colorado, 1976), pp. 1930-33.

7. *Kansas v. Colorado*, Oral Arguments of Counsel on Final Hearing, December 17th, 18th, 19th, and 20th, 1906, Oral Argument of Mr. A. C. Campbell for Intervenor, pp. 91-92 (microfiche card 56, UCLL); for information on prior appropriation in Kansas, see Anne M. Marvin, "The Fertile Domain: Irrigation as Adaptation in the Garden City, Kansas Area, 1880-1910" (Ph.D. diss., University of Kansas, 1985), pp. 212-18; and Wells A. Hutchins, *The Kansas Law of Water Rights* (Topeka: Kansas State Printer, 1957), p. 24.

8. *Kansas v. Colorado*, October Term, 1901, No. 3, Original, "Testimony and Proceedings in the Above Entitled Cause before Special Commissioner Granville A. Richardson," Vol. 1, R. E. Lawrence's Testimony, pp. 338, 471-72 (location #47932, Colorado

State Archives, Denver [CSA]); and H. Craig Miner, *Wichita: The Early Years, 1865-80* (Lincoln: University of Nebraska Press, 1982), pp. 149-50.

9. Walter H. Schowe, "The Geography of Kansas: Hydrogeography," *Transactions of the Kansas Academy of Science* 56 (June 1953): 175.

10. *United States Irrigating Company v. Graham Ditch Company*, Circuit Court of the United States, District of Colorado, No. 5578, Transcript of Evidence, C. J. Jones' Testimony, Vol. 11, p. 5108 (location #48000, CSA).

11. U.S. Senate, *Report of the Special Committee on the Irrigation and Reclamation of Arid Lands*, Sen. Report 928, 51st Cong., 1st sess. (Washington, D.C.: Government Printing Office, 1890), pp. 186, 201-2.

12. *Ibid.*, p. 112.

13. Wallace Stegner, *Beyond the Hundredth Meridian: John Wesley Powell and the Second Opening of the West* (1953; rpt. Lincoln: University of Nebraska Press, 1982), pp. 202-38; Orren Donaldson, "Irrigation and State Boundaries: A Problem of the Arid West and Its Solution," *The Irrigation Age* 8 (February 1895): 47-53; and Elwood Mead, "An Unsolved Western Problem: The Division of the Waters of Inter-State Streams," *The Irrigation Age* 7 (July 1894): 15.

14. *Kansas v. Colorado*, Marshall Murdock's Testimony, Vol. 1, pp. 9-10 (location #47936, CSA); and *Kansas v. Colorado*, Oral Arguments of Counsel on Final Hearing, December 17th, 18th, 19th, and 20th, 1906, Argument of S. S. Ashbaugh, p. 24 (microfiche card 55, UCLL).

15. Hutchins, *The Kansas Law of Water Rights*, pp. 38-48; n.a., "The Original Jurisdiction of the United States Supreme Court," *Stanford Law Review* 2 (July 1959): 669, 681-83.

16. *Transcript of Record. Supreme Court of the United States. October Term, 1905. No. 7, Original. The State of Kansas, Complainant, v. The State of Colorado et al., and the United States, Intervenor. In Equity*, Vol. 1, "The State of Kansas, Complainant, v. The State of Colorado, Defendant. Bill in Equity," (Washington, D.C.: Judd & Detweiler, Inc., Printers, 1905), pp. 6-19; and *Kansas v. Colorado*, Brief of Complainant on Final Hearing (microfiche card 28, UCLL).

17. *Transcript of Record*, "The State of Kansas, Complainant, v. The State of Colorado et al., Defendants. Amended Bill in Equity," pp. 62-75.

18. *Ibid.*, "The State of Kansas, Plaintiff, v. The State of Colorado, Defendant. Demurrer to Bill," pp. 23-25; and "The State of Kansas, Complainant, v. The State of Colorado, Defendant. The Answer of the State of Colorado, Defendant, to the Bill of Complaint of the State of Kansas, Complainant," pp. 46-57; and *Kansas v. Colorado*, Brief on Behalf of the State of Colorado on Final Hearing (micro-

fiche cards 46-49, UCLL); and "Brief of the State of Colorado in Reply to Brief of Intervenor" (microfiche card 52, UCLL); Robert D. Scott, "Kansas V. Colorado Revisited," *The American Journal of International Law* 52 (July 1958): 432.

19. Scott, "Kansas V. Colorado Revisited," p. 432; "The State of Kansas, Complainant, v. The State of Colorado et al., Defendants. Answer of the Colorado Fuel and Iron Company to Amended Bill," pp. 190-208; and *Kansas v. Colorado*, Brief of Counsel for the Arkansas Valley Sugar Beet and Irrigated Land Company and other Individual Defendants, in Support of their Motion to Dismiss the Bill of Complaint Herein (microfiche card 45, UCLL).

20. Francis K. Carey to N. C. Miller, 16 October 1903, Department of Law, Attorney General, General Correspondence (location #18384, CSA).

21. Donald J. Pisani, "State v. Nation: Federal Reclamation and Water Rights in the Progressive Era," *Pacific Historical Review* 51 (August 1982): 276.

22. *Transcript of Record*, Petition of Intervention on Behalf of the United States, pp. 235-40; *Kansas v. Colorado*, Brief for the United States on Final Hearing, 5 September 1906 (microfiche cards 34-35, UCLL); Summary of Solicitor Generals Oral Argument Filed by Leave of Court with Some Additional Considerations, 24 December 1906, pp. 1-23 (microfiche card 39, UCLL); Brief for the United States on Final Hearing (microfiche card 56, UCLL).

23. *Kansas v. Colorado*, Summary of Solicitor General's Oral Argument Filed by Leave of Court; with Some Additional Considerations, pp. 10-11; Oral Arguments of Counsel on Final Hearing, December 17th, 18th, 19th and 20th, 1906: Argument of A. C. Campbell, pp. 119-20 (microfiche card 56, UCLL). See Lucien Hugh Alexander, "James Wilson, Patriot, and the Wilson Doctrine," *North American Review* 183 (16 Nov. 1906): 971-89.

24. C. C. Coleman to N. C. Miller, 4 May 1904, and Summary of Testimony, untitled, n.d., Colorado Attorney General, Correspondence, location #18348, CSA; *Kansas v. Colorado*, Statement of Complainant in Support of Motion for a Rule to Assign the case for Hearing, p. 1-3 (microfiche card 28, UCLL); n.a., "The Original Jurisdiction of the United States Supreme Court," p. 688.

25. C. C. Coleman to Morris Bien, 10 January 1907, enclosed "copy of C. C. Coleman's argument before the Supreme Court," p. 7, U.S. Department of Interior, Reclamation Service, Correspondence re: Suit of *Kansas v. Colorado*, Record Group 115, File 665, National Archives, Washington, D.C.

26. *Kansas v. Colorado*, Louis G. Carpenter's Testimony, Vol. 5, pp. 2260-65 (location #47936, CSA).

27. D. C. Beamen, summarized in his Brief for Defendant, The Colorado Fuel and Iron Company,

on Final Hearing, pp. 47-59 (microfiche card 51, UCLL).

28. *Kansas v. Colorado*, Louis G. Carpenter's Testimony, Vol. 5, pp. 2259-87. Carpenter even quoted findings from geologists associated with the colleges in Kansas to prove his points about the "underflow," witnesses whom Kansas attorneys never had testify. See also Charles S. Slichter's Testimony, Vol. 11, pp. 5141-228; and U.S. Department of Interior, Geological Survey, *The Underflow in Arkansas Valley in Western Kansas*, by Charles S. Slichter, Water Supply and Irrigation Paper, no. 153 (Washington, D.C.: Government Printing Office, 1906).

29. *Kansas v. Colorado*, Frederick H. Newell's Testimony, Vol. 10, pp. 4876-77 (location #47961, CSA).

30. Ira G. Clark, "The Elephant Butte Controversy: A Chapter in the Emergence of Federal Water Law," *Journal of American History* 61 (March 1975): 1006-33.

31. *Kansas v. Colorado*, Louis G. Carpenter's Testimony, Vol. 5., pp. 2037-309, 2663-65.

32. *Kansas v. Colorado*, F. H. Newell's Testimony, Vol. 10, pp. 4854, 4870-76, and 4903; and Elwood Mead's Testimony, Vol. 11, p. 5275 (location #47960, CSA).

33. *Transcript of Record*. Vol. 1, J. A. Van Orsdel's abstracted testimony, pp. 1055-61.

34. *Ibid.*, Vol. 2, B. F. Stocks's abstracted testimony, pp. 1475-91.

35. J. R. Mulvane to N. C. Miller, 2 May 1903; L. A. Young to N. C. Miller, 13 July 1904; J. R. Sites to Charles D. Hayt, 27 September 1904; Department of Law, Attorney General, General Correspondence, location #18384, CSA.

36. "Spread it Out," *Topeka Journal*, 11 August 1903, L. G. Carpenter Scrapbooks, Vol. 1, Western History Collections, Denver Public Library; N. C. Miller to William A. Hill, 13 April 1903, Department of Law, Attorney General, Letterpress Book, location #19101, CSA; D. C. Beamen to N. C.

Miller, 3 August 1904, Department of Law, Attorney General, General Correspondence, location #18384, CSA.

37. Francis K. Carey to N. C. Miller, 16 October 1903, Department of Law, Attorney General, General Correspondence, location #18384, CSA; and "Denver Post Makes Vicious Attack on Prof. Carpenter," *Denver Republican*, 8 June 1905.

38. D. C. Beamen to Charles D. Walcott, 11 November 1903; Morris Bien to A. E. Chandler, 22 December 1906, U.S. Department of Interior, Reclamation Service, Correspondence re: Suit of *Kansas v. Colorado*, Record Group 115, File 665, National Archives; and *Kansas v. Colorado*, Oral Argument of Mr. Nelson H. Loomis, p. 52 (microfiche card 55, UCLL).

39. *State of Kansas, Complainant, v. State of Colorado et al., Defendants, The United States of America, Intervenor*, 206 U.S., pp. 672-76 (1906); and *Kansas v. Colorado*, Oral Argument of Mr. Nelson H. Loomis, pp. 58-60 (microfiche card 55, UCLL).

40. *Kansas v. Colorado*, 206 U.S. pp. 653-67 (1906); and Mark J. Wagner, "The Parting of the Waters—The Dispute Between Colorado and Kansas Over the Arkansas River," *Washburn Law Journal* 24 (1984): 101-102.

41. *Kansas v. Colorado*, 206 U.S., pp. 653-67 (1906).

42. Pisani, "State v. Nation," pp. 276-82; A. L. Fellows to Morris Bien, 1 June 1907; and Morris Bien to A. L. Fellows, 5 June 1907, U.S. Department of Interior, Reclamation Service, Correspondence re: Suit of *Kansas v. Colorado*, Record Group 115, File 665, National Archives; *Fort Collins Evening Courier*, 9 July 1907, L. G. Carpenter Scrapbooks, Vol. 1.

43. "Colorado Wins Out in Famous Water Case," *Pueblo (Colorado) Daily Chieftain*, 14 May 1907.

44. *United States Irrigating Company v. Graham Ditch Company, et al.*, "Transcript of Evidence," C. J. Jones' Testimony, Vol. 11, pp. 5108-15.