KNH75AP4

TYPE OF RECORD: PERMANENT

CATEGORY OF RECORD: **WATER**

NAME OF APPELLEE: KANNAH CREEK WATER USERS ASSOCIATION, LLOYD V. WRIGHT, JENNIE M. WRIGHT, THE KANNAH CREEK EXTENSION DITCH ASSOCIATION AND RALPH KELLING, JR., DIVISION ENGINEER

CASE #: 27046 - SUPREME COURT IN AND FOR WATER DIVISION NO. 4 STATEMENT OF ISSUE - DID THE WATER COURT COMMIT ERROR WHEN IT DENIED THE APPLICATION TO CHANGE THE DIRECT FLOW RIGHTS TO STORAGE RIGHTS?

CITY DEPARTMENT: PUBLIC WORKS

YEAR: 1975

EXPIRATION DATE: NONE

DESTRUCTION DATE: NONE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

IN THE SUPREME COURT

OF THE STATE OF COLORADO

No. 27046

IN THE MATTER OF THE APPLICATION FOR WATER RIGHTS OF THE CITY OF GRAND JUNCTION, COLORADO, a municipal corporation, IN THE GUNNISON RIVER OR ITS TRIBUTARIES: TRIBUTARY INVOLVED: KANNAH CREEK, IN MESA COUNTY.	Appeal from the District Court of Water Div. No. 4
CITY OF GRAND JUNCTION, COLORADO, a municipal corporation, Applicant-Appellant, vs. KANNAH CREEK WATER USERS ASSOCIATION; LLOYD V. WRIGHT; JENNY M. WRIGHT; and THE KANNAH CREEK EXTENSION DITCH ASSOCIATION. Protestors-Appellees.	The Honorable Fred Calhoun, Judge

OPENING BRIEF OF APPLICANT-APPELLANT

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I.

THE RULING OF THE WATER REFEREE, THAT THE WATER RIGHTS DESCRIBED IN THE CITY'S APPLICATION ARE APPROVED AND GRANTED THE ADDED RIGHT OF STORAGE FOR THAT PERIOD OF TIME DURING THE IRRIGATION SEASON THAT SUCH WATER IS NOT REQUIRED FOR THE CITY'S MUNICIPAL PURPOSES, SHOULD BE UPHELD. THE WATER COURT ERRED IN DENYING THE CITY THE RIGHT TO STORE DIRECT FLOW AS REQUESTED IN ITS APPLICATION.

1.1 The Water Court's finding of injury or adverse effect to the Protestors is error and is not supported by the evidence.

1.2 The Water Court's finding that the change requested by the City would result in expansion of use is error and is not supported by the evidence.

1.3 The Water Court's finding that the requested change must be denied by reason of its effect on salinity control and water commitments is error and is not supported by the evidence.

1.4 The Water Court's finding that the City would be required to acquire all down-stream rights in order to be entitled to change the manner of use as described in its Application is error and is not supported by the evidence.

II.

THE WATER COURT ERRED BY NOT APPLYING THE PRINCIPAL OF RES JUDICATA TO THE DETERMINATION OF THE DISTRICT COURT OF MESA COUNTY IN CIVIL ACTION NUMBER 15487 WITH RESPECT TO THE ISSUES OF CONSUMPTIVE USE AND RETURN FLOW.

2.1 The Water Court erred in its finding that the City "maintains that by purchase of the Hallenbeck Water Rights (Exhibit 9) res judicata does not apply."

III.

THE WATER COURT ERRED IN ITS DETERMINATION THAT THE CITY WAS NOT ENTITLED TO THE CHANGE OF WATER RIGHT REQUESTED IN ITS APPLICATION BY REASON OF THE "ABANDONMENT OF ITS REQUEST FOR THE RIGHT TO STORE DIRECT FLOW" IN CIVIL ACTION NUMBER 15487.

IV.

THE WATER COURT ERRED IN ITS DETERMINATION THAT THE CITY WAS NOT ENTITLED TO THE CHANGE IN WATER RIGHT REQUESTED IN ITS APPLICATION BY REASON OF THE DECISION OF THE MESA COUNTY DISTRICT COURT, IN CIVIL ACTION NUMBER 16632.

STATEMENT OF THE CASE

1. Description of The Case

The water right to be determined by the Court is that of the City of Grand Junction to store water from 10.97 cubic feet per second (c.f.s.) direct flow on the North Fork of Kannah Creek when such water is not required immediately for municipal purposes.

2. Summary of Proceedings

The parties participating in this appeal are the Appellant: CITY OF GRAND JUNCTION ("City"), represented by D.J. Dufford of Graham and Dufford, Grand Junction, Colorado; and the Appellee: KANNAH CREEK WATER USERS ASSOCIATION ("Protestors"), represented by Anthony W. Williams of Williams, Turner and Holmes, Grand Junction, Colorado.

In January 1973, the City submitted an Application for Change of Water Rights (f. 001) to ensure its right to store North Fork direct flow, to which the Protestors filed a Statement of Opposition (f. 009). (A Statement of Opposition was also filed by Lloyd V. Wright, Jenny M. Wright, and the Kannah Creek Extension Ditch Association (f. 011); however, they have made no appearance.) Water Referee E.L. Wilson ruled in November, 1974, that the City's rights on the North Fork of Kannah Creek as described in its Application "are APPROVED AND GRANTED the added right of storage for that period of time during the irrigation season that such water is not required immediately for the City's municipal purposes" (f. 027). The Protestors filed protest to Referee

3. Disposition

Following the protest hearing, Judge Fred Calhoun reversed and remanded Referee Wilson's ruling (April, 1975), ordering a ruling to be entered denying the City the right to store direct flow as requested (f. 040). This Appeal of Judge Calhouns' Order was brought by the City after "Applicant's Motion for Amended Order or New Trial" (f. 045) was denied (f. 051).

4. Statement of Relevant Facts

(a) The facts introduced by testimony and exhibits are not in dispute and were stipulated as to their truth, but not as to their relevancy or materiality (ff. 516-517, 524, 530-536, 539).

(b) The case involves direct flow rights on the North Fork of Kannah Creek that were acquired by the City in approximately 1955, relating basically to the so-called Anderson Ranch (ff. 509, 530-531). These rights are described with particularity in both the City's Application (ff. 002-005) and the Referee's Ruling (f. 023), and the description is attached as Addendum 1, page 18.

(c) In Civil Action Number 15487, Judge William Ela of the Mesa County District Court made a determination (March, 1968) which concerned the same 10.97 cubic feet per second water flow as are dealt with in the instant case (ff.

072-075; 002-005, 023).* In Civil Action No. 15487, the City of Grand Junction requested a change in the point of diversion, alternate points of diversion, and the granting of municipal use in addition to retention of the use for irrigation (ff. 531-532). Judge Ela granted the requests because he determined that no injury to Protestor or any other appropriator would result (f. 067), based on findings that no return flow could become available due to the geographical lay of the land (f. 547); and that direct flow would not become available to Protestors due to 100% consumptive use (ff. 062-066). Judge Ela's findings are excerpted in Addendum 2 (page 19).

(d) During the proceedings in Civil Action 15487, the Protestor consented to change of the points of diversion and using such direct flow rights only for municipal uses and purposes (Exhibit 2, f. 081). The consent acknowledged that all other issues raised by the Protest "shall be deferred for determination by the Court at a later date (Exhibit 2, f. 082).

* The Bolen No. 2 Ditch, Priority No. 1, for .90 cubic feet of water per second of time (f. 072) is misprinted in the City's Application (f. 002) and the Referee's ruling (f. 023) as 1.40 cubic feet of water per second of time. Such clerical error did not, however, abort the purpose of C.R.S. 1973, 37-92-302(2), requiring as part of the Application the amount of water for which change is sought, as potential protestors were adequately put on notice of the water right involved in spite of the error, and the total number of cubic feet per second represented by the Application (10.97 c.f.s.) is accurately stated.

(e) In Civil Action Number 16632, Judge William Ela of the Mesa County District Court made a determination (April 1970) that also concerned, inter alia, the same 10.97 cubic feet per second (c.f.s.) water flow as are dealt with in the instant case (f. 521, Exhibit 5, p.2, ff. 168-169). The City was storing that 10.97 c.f.s. in the Purdy Mesa Reservoir (a/k/a Hallenbeck Reservoir, f.511) when it was not immediately required for municipal purposes,and Judge Ela determined that the City should be enjoined from that practice (Exhibit 5, p.5, f. 178); that "without special change proceedings, not involved in the case at bar, that direct flow decrees could not be subjected to storage." (f. 550, Exhibit 7, p.2, f. 220); and that "the Court recognizes that in Case No. 15487 in this District Court, there was no application to this Court for a change of use from a direct flow decree to a storage decree." (Exhibit 7, p.1, f. 218).

(f) Immediately following Judge Ela's decision in Action No. 16632, Mr. C. V. Hallenbeck, one of the defendants, died. Both the City of Grand Junction, plaintiff, and Mr. C. V. Hallenbeck's Estate appealed the decision. The City then acquired an option to buy the water rights at issue in the case from the Hallenbeck Estate, and subsequently purchased those rights. One of the requirements of the option contract (Exhibit 9, pp. 10-11, ff. 324-325) was that the appeal of Case No. 16632 be dismissed (ff. 551-554).

SUMMARY OF ARGUMENT

1. THE CITY'S APPLICATION MUST BE GRANTED IF NO INJURY WILL THEREBY RESULT TO THE PROTESTORS OR OTHER APPROPRIATORS; THERE IS UNREBUTTED EVIDENCE THAT NO INJURY WILL RESULT.

2. FACTS ADJUDICATED IN CIVIL ACTION NO. 15487 ARE BINDING UNDER A THEORY OF RES JUDICATA, BUT THE JUDGMENT ENTERED DOES NOT DEAL WITH STORAGE RIGHTS AND THEREFORE CANNOT BAR A SUBSEQUENT DETERMINATION OF THAT ISSUE.

3. CIVIL ACTION NO. 16632 DOES DEAL WITH STORAGE RIGHTS AND DETERMINES THAT THE CITY DOES NOT HAVE THEM WITH RESPECT TO ITS 10.97 C.F.S. ON THE NORTH FORK OF KANNAH CREEK. THE DETERMINATION THAT SUCH RIGHTS DID NOT EXIST IN 1970, HOWEVER, DOES NOT BAR A SUBSEQUENT APPLICATION IN 1973 TO OBTAIN THOSE RIGHTS.

ARGUMENT

I.

THE CITY'S APPLICATION MUST BE GRANTED IF NO INJURY WILL THEREBY RESULT TO THE PROTESTORS OR OTHER APPROPRIATORS; THERE IS UNREBUTTED EVIDENCE THAT NO INJURY WILL RESULT.

The Water Court's finding of injury or adverse effect to the Protestors (ff. 038-039) is error and is not supported by the evidence. It is the position of the City that certain determinations made by the District Court of Mesa County,

in Civil Action Number 15487 (Exhibit 3, pp. 1-3, ff. 084-092) are res judicata and binding in this action. At findings 1 through 5 of No. 15487, the Honorable William M. Ela found that 100% of the water involved in this particular case had been historically used by the City's predecessor-in-interest 100% of the time; that 100% of the water continued to be used 100% of the time, either for municipal purposes or on the so-called Anderson Ranch for agricultural purposes; and that there could be no return flow due to the geographic lay of the land (Exhibit 3, pp. 1-3, ff. 084-092).

These findings were made in Judge Ela's determination of the City's Application for change of points of diversion, alternate points of diversion, and the granting of municipal use in addition to retention of the use for irrigation (ff. 531-532).

> Our court has said: "An application for change of point of diversion of water having been judicially determined, may not again be litigated as to its injurious effects on the rights of others." San Luis Valley Irrigating Dist. v. Centennial Irrigation Ditch Co., 84 Colo. 502, 272 P.9
>
> City of Colorado Springs v. Yust, 126 Colo. 289, 249 P.2d 151, 154 (1952).

The basis of the City's Application for change of use is well established in Colorado law:

> C.R.S. 1973, §37-92-305 (3). Green v. Chaffee Ditch Co., 150 Colo. 91, 371 P.2d 775 (1962). See, Strickler v. City of Colorado Springs, 16 Colo. 61, 26 P.313, 25 Am. St. R. 245 (1891); City of Colorado Springs v. Yust, 126 Colo. 289, 249 P.2d 151 (1952); all holding that under proper conditions, the manner of use may be changed.

Ackerman v. City of Walsenburg, 171 Colo. 304, 467 P.2d 267 (1970) involved essentially the same issue as is found in this case. The City of Walsenburg had purchased five direct flow rights and petitioned for a decree.

> ...adjudging that this petitioner is entitled to divert water by means of ditches and reservoirs hereinabove mentioned whenever said water is, and the priorities thereof are, available, to the municipal water system of petitioner for storage for municipal purposes, and to apply said water for municipal purposes and uses, such as are usual, customary, and necessary for municipal water supply. (467 P.2d at pp. 269, 270) (Emphasis added)

The District Court entered the decree requested by the City, and protestants appealed to the Supreme Court, asserting:

> 1. That as a matter of law, the court erred in decreeing that a portion of Walsenburg's direct flow rights could be diverted to storage in its five reservoirs.
>
> 2. That if it is determined that the court properly could decree such a change of right, then the test of non-injury is applicable, and that the finding by the court of non-injury to the senior storage rights of Ackerman and the junior storage rights of Cucharas Irrigation are not supported by the record. (467 P.2d at p. 271)

Justice Day wrote for the Court:

> Suffice it to say that in Colorado Milling & Elevator Co. v. Larimer & Weld Irrigation Co., 26 Colo. 47, 56 P.185, this Court, as early as 1899, said that an appropriation of water for irrigation purposes may be changed to a use for storage, but such a change cannot be made to the detriment of other appropriators whose rights are subsequent to the appropriation for irrigation, but prior to the appropriation for storage. The Court further stated that when the water

> in the stream is needed by the subsequent appropriators, the diversion of the prior appropriator for storage purposes would be limited to what he was entitled to divert for irrigation purposes, both as to amount and time of diversion. The state legislature has given statutory recognition of this rule by providing for such a change, if no injury will result or condition can be imposed to prevent injury. See Session Laws of Colorado 1969, Chapter 373, Sections 148-21-18 et. seq.
>
> 467 P.2d at 271 (Emphasis added)

And in response to protestant's second assertion, Justice Day wrote:

> Taking the record as made, it amply supports the finding of the trial court. Accepting the testimony of the City's expert, as the Court apparently did, Walsenburg sustained the burden of proving that injury had not resulted to other appropriators by reason of the use to which Walsenburg was putting its water. Also, on the basis of the record, protestants did not go forward to show any specific injury to its decreed rights.
>
> 467 P.2d at 272

The Walsenburg case signals approval of the City's Application in the instant case; the City has already adjudicated the matter of injury to other appropriators, and there will be none.

Once the petitioner has made a prima facie case in support of the change in its decreed water right, it is the responsibility of the protestants to show the injury resulting to them. C.F.& I. Steel Corporation v. Rooks, 178 Colo. 110, 495 P.2d 1134, 1136 (1972). (See also, City of Colorado Springs v. Yust,126 Colo. 289, 249 P.2d 151; and Cline v. McDowell, 132 Colo. 37, 284 P.2d 1056 (1955).

The Protestors in the case at bar did not meet its burden of going forward with the evidence.

The Water Court's finding that the change requested by the City would result in expansion of use (f. 039) is error and is not supported by the evidence. Since it has previously been established that the water rights involved in this case, when available for diversion, are used 100% of the time by the City, Protestors can in no way be jeopardized or harmed by storage of the water rights involved. As shown by the Judgment in Civil Action No. 15487, the City has the alternate right to use the water involved on the so-called Anderson Ranch, when the water is not required for municipal purposes. As a matter of practice, as shown by the Judgment in Civil Action No. 15487, even when the water rights were owned by the City's predecessors-in-interest, 100% of the available water had been used 100% of the time for agricultural purposes only. Therefore, there cannot be an enlargement or expansion of use by the City's storage of water.

The Court erred in its finding that the requested change must be denied by reason of its effect on salinity control and water commitments. There is no evidence that the City's storage of its North Fork 10.97 c.f.s. will increase salinity or decrease water available to meet the commitments to which the Water Court refers. In addition, such a determination even if supported by the record, would be immaterial in view of the historical 100% consumptive use of the 10.97 c.f.s.

Further, in the absence of statutory authority or uniform guidelines, "piecemeal" decisions to deny Applications for

change based on such a theory would foster inconsistent and unfair results. Also, no Protestor to the Application on such a theory has appeared in this proceeding. See, Lower Latham Ditch Co. v. Bijou Irrigation Co.,41 Colo. 212, 93 P. 483, 484 (1907), which points out that Protestors may not interpose an objection that consumers other than themselves would be hurt.

The Water Court's finding that the City would be required to acquire all down-stream rights in order to be entitled to change the manner of use as described in its Application (f. 038) is error and is not supported by the evidence. The Water Court seems to reach this finding after an amalgamation of Civil Action No. 15487 and Civil Action No. 1632. First, the Water Court finds res judicata in the fact that the right to store the North Fork 10.97 c.f.s. was not litigated in Civil Action No. 15487, essentially holding that the failure to obtain ajudication of the right to store the North Fork 10.97 c.f.s., in 1968 bars the City from subsequently applying for the right to store said water. The Water Court bases this finding on the erroneous theory that the City "exchanged" the right of storage for Hallenbeck's withdrawal of his protest. There is no evidence in the record that such an "exchange" occurred, but even had such been the case, the City certainly cannot have foreclosed itself from obtaining such future water right determinations as are appropriate in light of changed circumstances and growing municipal population. The Water Court then discusses the outcome of Civil Action No. 16632, that is, the purchase by the City of the Hallenbeck

water rights, commenting that such purchase did not divest the City of its abandonment of storage rights. Even if the so-called "Exchange" between Mr. Hallenbeck and the City occurred and even if such an "exchange" remained binding between the City and Mr. Hallenbeck (despite Mr. Hallenbeck's death and the total divestment by his estate of the interests which were involved in the controversy) third parties (the Protestors herein) cannot claim any advantage thereby. The Water Court's conclusion, therefore, that the Protestors have a right to rely on the City's "abandonment" of storage rights, and that the City's only method of shedding such "res judicata" is to acquire all down-stream water rights on Kannah Creek, is error. The Statutes provide a much less cumbersome route to change the manner of use, i.e., to show that the other appropriators will not be injured thereby.

II.

FACTS ADJUDICATED IN CIVIL ACTION NO. 15487 ARE BINDING UNDER A THEORY OF RES JUDICATA, BUT THE JUDGMENT ENTERED DOES NOT DEAL WITH STORAGE RIGHTS AND THEREFORE CANNOT BAR A SUBSEQUENT DETERMINATION OF THAT ISSUE.

Judge Ela's Judgment in Civil Action No. 15487 neither grants nor denies the City's right to store its 10.97 c.f.s. At that time, the petition was dealing only with the change of direct flow rights (f. 548). As Judge Ela states in his Order Disposing of Pending Motions for New Trial or to Alter or Amend Judgment in Civil Action No. 16632 (Exhibit 7, p.1, f. 218): "...the Court recognizes that in Case No. 15487 in this District Court there was no application to this Court

for a change of use from a direct flow decree to a storage decree."

A discussion of the theory that an "abandonment" of the City's right to request storage rights took place prior to the entry of judgment in Civil Action No. 15487 is contained supra, at pages 13 and 14 of this Brief.

III.

CIVIL ACTION NO. 16632 DOES DEAL WITH STORAGE RIGHTS AND DETERMINES THAT THE CITY DOES NOT HAVE THEM WITH RESPECT TO ITS 10.97 C.F.S. ON THE NORTH FORK OF KANNAH CREEK. THE DETERMINATION THAT SUCH RIGHTS DID NOT EXIST IN 1970, HOWEVER, DOES NOT BAR A SUBSEQUENT APLICATION IN 1973 TO OBTAIN THOSE RIGHTS.

Appellees contend on a theory of res judicata, that the City is now barred from applying for storage rights (f. 572). Appellees cite Civil Action No. 1632, in which Judge Ela entered Judgment in April 1970, as final determination of the City's right to store or not to store its 10.97 cubic feet per second direct flow rights (ff. 572-573). Looking to the language of that opinion itself, it is clear that Judge Ela's determination was in the nature of a judgment of the City's rights at that time, which he concluded did not include the right to store the North Fork 10.97 cubic feet per second direct flow (Exhibit 5, pp.1-15, ff. 165-208). Such a ruling certainly does not preclude a subsequent application for such right. A careful reading of Judge Ela's "Order Disposing of Pending Motions for New Trial or to Alter or Amend Judgment" in Case 16632 (Exhibit 7, page 2, f.220) reveals that his decision was based upon the situation as he

encountered it, and no Application for Change of Water Rights was involved:

> ...without special change proceedings, not involved in the case at bar,... direct flow decrees could not be subjected to storage.

In addition, there is a further reason why the theory of res judicata is inadequate to prevent the City from applying for the right to store its 10.97 cubic feet per second water rights.

Immediately following Judge Ela's decision in Case No. 16632, Mr. C. V. Hallenbeck, one of the defendants, died. Both the City of Grand Junction, plaintiff, and Mr. C. V. Hallenbeck's Estate appealed Judge Ela's decision. The City then acquired an option to buy the water rights at issue in the case from the Hallenbeck Estate, and subsequently purchased those rights. One of the requirements of the option contract (Exhibit 9, pp.10-11, ff. 324-325) was that the appeal of Case No. 16632 be dismissed (ff. 551-554). The appeal, at that point, was unquestionably moot, since the City had acquired the rights at issue. So that the Hallenbeck interest could recoup the bond they had filed with the Supreme Court, the appeal was dismissed, and no further action was taken at that time. Continuation of the appeal could have served little purpose, but to congest the Court.

A case is "moot" when a judgment, if rendered will have no practical legal effect upon the existing controversy.

Sigma Chi Fraternity v. Regents of University of Colorado, 258 F. Supp. 515 (D.C. Colo. 1966).

The duty of the Supreme Court, as well as of every other judicial tribunal, is to determine actual and real controversies by a judgment that can be put into effect, and not to give opinions on questions that are moot.

see. First National Bank of Colorado Springs v. Struthers, 121 Colo. 69, 215 P.2d 903 (1950).

See also, Crowe v. Wheeler, 165 Colo. 289, 439 P.2d 50 (1968).

CONCLUSION

The Water Court's denial of the City's Application for Change of Water Right is not supported by the evidence and must be reversed. The Water Referee was correct in granting the City's Application, and the Water Court should enter its Order in compliance with the Referee's Ruling.

Respectfully submitted,

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ADDENDUM 1

The City is the owner of the following described water rights totalling 10.97 cubic feet of water per second of time:

A. The right to divert .90 cubic feet of water per second of time under Priority No. 1 out of the North Fork of Kannah Creek through the headgate of the Bolen No. 2 Ditch with appropriation date of May 6, 1882.

B. The right to divert .95 cubic feet of water per second of time under Priority No. 2 out of the North Fork of Kannah Creek through the headgate of the Hentschel Ditch with appropriation date of May 1, 1883.

C. The right to divert 5.76 cubic feet of water per second of time under Priority No. 3 out of the North Fork of Kannah Creek through the headgate of the Seegar & Bedford Ditch with appropriation date of May 1, 1885.

D. The right to divert 1.40 cubic feet of water per second of time under Priority No. 4 out of the North Fork of Kannah Creek through the headgate of the Bolen No. 1 Ditch with appropriation date of May 5, 1882.

E. The right to divert 1.96 cubic feet of water per second of time under Priority No. 5 out of the North Fork of Kannah Creek through the head-

gate of the Bauer Ditch with appropriation date of February 5, 1883 (ff. 002-005, 023).

ADDENDUM NO. 2

1. That * * * return flow or its substitute equivalent (direct flow by-pass of the head gates of the Petitioner under the limited decree of July 11, 1967 when Petitioner cannot utilize the whole percentage of the flow up to 10.97 c.f.s. of the North Fork for municipal purposes only) is essential to the Protestor's case to establish injury from Petitioner's requested relief. (f. 062)

2. That the Court accepts Walter Anderson's testimony as the truth of the matter as to no return flow based upon his intimate sixty-four years experience in personally operating the water system for the Anderson Ranch, or for a short number of years, where he only observed such operation. His total lack of grounds for bias plus his personal intimate knowledge and continued observations combined with his demeanor on the witness stand was most impressive to the Court. The detailed professional engineering study of Mr. Jex is fully corroborative to the effect that no water user on North Fork or on Kannah Creek could be injured by Petitioner's requested relief. (f. 063)

3. Lastly in the matter of return flow, it is uncontroverted that substantially, all of the water used on the Anderson Ranch for reservoir filling and for stock and a large part of the irrigation water on the Anderson Ranch crops, as used by the North Fork appropriators, since the 1888 Decree, is used on portions of the Ranch where the geographical lay of the land causes any drainage to be away from the North Fork stream bed. It rather goes into the Whitewater Creek watershead, or as the witness Anderson put it, "into the desert," and is of no possible use to the Kannah Creek users. (f. 064)

4. That 100% of 10.97 c.f.s. has been used, when available, 100% of the year, on the Anderson Ranch property since the dates of appropriation of the combined ditches Bolen No. 2, Hentschel, Seegar and Beford, Bolen

No. 1, and Bauer. Evidence of couldburst flood water and high snow melt run off occasionally by passing gates of the Petitioner and its predecessors, so as to reach the confluence with Kannah Creek, becomes immaterial because such bypass never occurred at a time when 10.97 c.f.s. (combined direct flow, plus flood or runoff) or less, was being diverted by Petitioner, or its predecessors. (f. 064)

5. With the return flow issue disposed of, the Protestor's only theory is that he will pick up some benefit from Petitioner's inability to use the whole of the North Fork direct flow rights at all times for municipal uses. This becomes immaterial because municipal use is 100% consumptive as it affects Protestor, and when not used for municipal purposes, but used on the Anderson Ranch, then Protestor is in no different position now, compared to the conditions under the 1888 Decree. (f. 066)