KNH76AP1

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 #: 27047 - SUPREME COURT IN AND FOR WATER DIVISION NO. 4 - THIS APPEAL SEEKS A DETERMINATION OF THE RIGHT OF THE CITY OF GRAND JUNCTION TO STORE 7.81 CUBIC FEET OF WATER PER SECOND TAKEN FROM KANNAH CREEK AND OBTAINED ALMOST 50 YEARS AGO PURSUANT TO AN EMINENT DOMAIN PROCEEDING

CITY DEPARTMENT: PUBLIC WORKS

YEAR: 1976

EXPIRATION DATE: NONE

DESTRUCTION DATE: NONE

INDEX

STATEMENT OF ISSUES PRESENTED FOR REVIEW 1

STATEMENT OF THE CASE
Description of the Case 3
Summary of Proceedings 3
Disposition of the Case 4
Statement of Facts 4

SUMMARY OF THE ARGUMENT 5

ARGUMENT
I. SINCE 1911 THE CITY HAS HAD THE RIGHT TO STORE IN ITS SYSTEM OF WATERWORKS ITS PARAMOUNT RIGHT OF 7.81 CUBIC FEET OF WATER PER SECOND. 6

II. THE CITY'S APPLICATION MUST BE GRANTED IF NO INJURY WILL THEREBY RESULT TO VESTED RIGHTS OF PROTESTORS, AND THERE IS NO EVIDENCE THAT PROTESTORS HAVE VESTED RIGHTS WITH RESPECT TO THE CITY'S PARAMOUNT RIGHT THAT WILL BE INJURED. 14

III. CIVIL ACTION NUMBER 16632 IS IN ERROR WITH REGARD TO THE CITY'S RIGHT TO STORE ITS PARAMOUNT RIGHT, AND THAT HOLDING IS NOT BINDING ON THE CITY AND THE COURT. 17

CONCLUSION 19

TABLE OF CASES CITED

CASES:

C. F. & I. Steel Corporation v. Rooks,
178 Colo. 110, 495 P.2d 1134, 1136 (1972) 15

City and County of Denver v. Sheriff,
105 Colo. 193, 96 P.2d 836, 842 (1930) 13

City of Colorado Springs v. Yust,
126 Colo. 289, 249 P.2d 151, 155 (1952) 15

Cline v. McDowell,
132 Colo. 37, 284 P.2d 1056 (1955) 14,15

Crowe v. Wheeler,
165 Colo. 289, 439 P.2d 50 (1968) 18

First Nat. Bank of Colo. Springs v. Struthers,
121 Colo. 69, 215 P.2d 903 (1950) 18

Ironstone Ditch Co. v. Ashenfelter,
57 Colo. 31, 140 P. 177, 183 (1914) 12

Lower Latham Ditch Co. v. Bijou Irrigation Co.,
41 Colo. 212, 93 P. 483, 484 (1907) 16

Metropolitan Suburban Water v. Colorado River Water,
148 Colo. 173, 365 P.2d 273, 283, 289 (1961) 13

North Sterling Irrigation District v. Riverside
Reservoir and Land Co.,
119 Colo. 50, 200 P.2d 933 (1948) 13

Sigma Chi Fraternity v. Regents of
University of Colorado,
258 F. Supp. 515 (D.C. Colo., 1966) 17,18

Strickler v. City of Colorado Springs,
16 Colo. 61, 26 P. 313, 316 (1891) 11,12

Wheeler v. Northern Colorado Irrigating Co.,
10 Colo. 582, 17 P. 487, 489 (1888) 11

STATUTES:

Colorado Revised Statutes, 1908,
Chapter 147, Section 6798 8

Colorado Revised Statutes, 1908,
Chapter 147, Section 6525, Subdivision 72 10

Colorado Revised Statutes, 1908,
Chapter 147, Section 6525, Subdivision 73 9

Colorado Revised Statutes, 1973,
Section 31-35-401(7), as amended 1975 9

Colorado Revised Statutes, 1973,
Section 37-92-102(d) 13

Colorado Revised Statutes, 1973,
Section 37-92-305(3) 16

OTHER AUTHORITIES:

50 Denver Law Journal,
293, 307 (1973) 12

IN THE SUPREME COURT

OF THE STATE OF COLORADO

No. 27047

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 THE ISSUES PRESENTED FOR REVIEW

I. THE RULING OF THE WATER REFEREE, THAT THE ORIGINAL DECREE FOR THE CITY OF GRAND JUNCTION PARAMOUNT RIGHT PROVIDED, AND STILL PROVIDES, FOR THE RIGHT TO STORE WATER AS A FUNCTION OF ITS REGULATORY PROCEDURES SHOULD BE UPHELD. THE WATER COURT ERRED IN FINDING THAT THE CITY HAS NEVER HAD STORAGE RIGHTS TO THIS 7.81 CUBIC FEET PER SECOND OF WATER AND DID NOT OBTAIN STORAGE RIGHTS IN THE 1911 JUDGMENT.

1.1 The Water Court erred in finding that the direct flow granted to the City by the Mesa County District Court in Civil Action Number 1818 is not

to be stored as a part of the City's municipal water distribution system.

1.2 The Water Court erred in finding that storage of the City's Paramount Right is illegal or improper diversion.

1.3 The Water Court erred in finding that the Protestors are entitled to use that portion of the City's Paramount Right that could otherwise be beneficially stored by the City.

II. THE WATER COURT ERRED IN DENYING THE CITY'S APPLICATION TO CHANGE THE MANNER OF USE OF ITS PARAMOUNT RIGHT AS DESCRIBED IN THE APPLICATION.

2.1 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.

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

2.3 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.

2.4 The Water Court erred in its failure to allow terms and conditions to be imposed on the request for change to prevent injury.

III. THE WATER COURT ERRED IN ITS DETERMINATION THAT THE DECREE OF THE MESA COUNTY DISTRICT COURT IN CIVIL ACTION NUMBER 16632 IS BINDING ON THE CITY AND THE COURT WITH RESPECT TO THE CITY'S RIGHT TO STORE WATER DIVERTED UNDER ITS

PARAMOUNT RIGHT.

3.1 The Water Court erred in its finding that Civil Action Number 16632 was not appealed.

STATEMENT OF THE CASE

1. Description of Case

The water right to be determined by the Court is that of the City of Grand Junction to store its Paramount Right of 7.81 cubic feet of water per second 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 its paramount water right, to which the Protestors filed a Statement of Opposition (f. 011). (Statements of Opposition were also filed by Lloyd V. Wright, Jennie M. Wright, and the Kannah Creek Ditch Association (f. 008), and Charles V. Hallenbeck, Jr., Clyde A. Hallenbeck and Ann Hallenbeck, Co-Executors of the Estate of C. V. Hallenbeck, Deceased (f. 013). The former have made no appearance, and the latter withdrew their Statement of Opposition (f. 069)). Water Referee E. L. Wilson ruled in November, 1974, "that the original decree for the City of Grand Junction Paramount Right provided, and still provides, for the right to store water as a function of

its regulatory procedures." (f. 086) The Protestors filed protest to Referee Wilson's ruling (f. 089).

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 the 7.81 cubic feet per second "paramount" direct flow (f. 116). This appeal of Judge Calhoun's Order was brought by the City after "Applicant's Motion for Amended Order or New Trial" (f. 125) was denied (f. 135).

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 to their relevancy or materiality (ff. 516-517, 524, 530-536, 539).

(b) The case involves the Paramount Right of 7.81 cubic feet of water per second, acquired by the City through an eminent domain proceeding in 1911 (ff. 510, 514-515) and described in a "Final Rule or Judgment" (Exhibit 4, pp. 1-23, ff. 097-164) and a "Judgment" (ff. 167-230) entered in Civil Action Number 1818.

(c) In Civil Action Number 16632, Judge William Ela of the Mesa County District Court made a determination (April, 1970) regarding, inter alia, the City's Paramount Right. (Exhibit 5, pp. 1-15, ff. 165-208). The City was storing its Paramount Right of 7.81 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,

pp. 14-15, ff. 206-207); that "Court and counsel have been unable to find any authority which treats a direct flow decree acquired by eminent domain as having any different or additional rights than one acquired otherwise" (Exhibit 7, p. 1, f. 218).

(d) 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 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

I. SINCE 1911 THE CITY HAS HAD THE RIGHT TO STORE IN ITS SYSTEM OF WATERWORKS ITS PARAMOUNT RIGHT OF 7.81 CUBIC FEET OF WATER PER SECOND.

II. THE CITY'S APPLICATION MUST BE GRANTED IF NO INJURY WILL THEREBY RESULT TO VESTED RIGHTS OF PROTESTORS, AND THERE IS NO EVIDENCE THAT PROTESTORS HAVE VESTED RIGHTS WITH RESPECT TO THE CITY'S PARAMOUNT RIGHT THAT WILL BE INJURED.

III. CIVIL ACTION NUMBER 16632 IS IN ERROR WITH REGARD TO THE CITY'S RIGHT TO STORE ITS PARAMOUNT RIGHT, AND THAT HOLDING IS NOT BINDING ON THE CITY AND THE COURT.

ARGUMENT

I. SINCE 1911 THE CITY HAS HAD THE RIGHT TO STORE IN ITS SYSTEM OF WATER WORKS ITS PARAMOUNT RIGHT OF 7.81 CUBIC FEET OF WATER PER SECOND.

The Paramount Right of 7.81 cubic feet of water per second (c.f.s.) was awarded to the City in 1911 by Judgment of the Mesa County District Court in Civil Action No. 1818 (ff. 510, 513-516). The "Judgment" entered February 25, 1911 (ff. 167-230), and the "Final Rule or Judgment" entered November 11, 1911 (Exhibit 4, pp. 1-23, ff. 097-164), both contain language significant to issues on appeal. The action was an eminent domain proceeding and Judge Shackleford, in his "Final Rule or Judgment," used special language that invests the water right involved with the characteristics of both a storage and a direct-flow right:

> It is further considered, ordered, adjudged and decreed by the court that the petitioner, the City of Grand Junction, is the owner in fee of, now has, and at all times hereafter, shall have the right, at any and all times to a continuous flow and use of 300 statutory inches of water per second of time* from Kannah Creek; that said petitioner now has, and at all times hereafter shall have the right to divert said continuous flow of 300 statutory inches of water per second of time from Kannah Creek, at the point of diversion hereinbefore described, for the use of said City of Grand Junction, the petitioner herein, and its inhabitants, under the laws

*Three hundred (300) statutory inches of water per second of time is the equivalent of 7.81 cubic feet of water per second of time (ff. 111, 554, 089).

> of this state, regulating, governing and controlling the use and distribution of water by towns and cities, and the said city now has, and at all times hereafter shall have and exercise control and dominion over said 300 statutory inches of water per second of time for the use of itself and its inhabitants under the laws of the State of Colorado, governing and controlling the use and distribution of water by towns and cities, and the said ownership and use so hereby decreed to the petitioner herein shall be a first, superior and paramount right to a continuous flow of 300 statutory inches of water per second of time over and above all other water rights claimed or asserted in reference to the water of said Kannah Creek or the water arising in the water shed of said stream. (Exhibit 4, pp. 22-23, ff. 162-164).

The February "Judgment" contains, in addition to language similar to that quoted from the "Final Rule or Judgment," supra, the following description of the property granted to the City in Civil Action No. 1818:

> The exercise of the right and privilege of diverting water to the extent of a constant flow of 7.81 cubic feet per second of time, of the waters of Kannah Creek, in said County, at or near the point designated in the petition herein, above the headgate of all irrigating ditches heretofore diverting water from said creek, and the superior right of domain to said quantity of water, against all others diverting water from said Kannah Creek, said water so to be taken and diverted to be conducted by a system of water works to be erected by said petitioner to its municipal limits, and to be distributed and used within said limits, for the municipal purposes of said petitioner, and for distribution among its inhabitants for domestic and other like beneficial uses of its inhabitants. (ff. 168-169)

As is evident, the grant to the City in Civil Action No. 1818 is in very broad language. The only limitation on the City's use of its Paramount Right is that of the laws of the state regulating, governing, and controlling the use and distribution of water by town and cities. Research reveals no state law that would interfere with the City's use of its Paramount Right in storage for the benefit of its inhabitants. Surely, the Court envisioned a "system of water works" that would include some storage facilities. Turning to the 1908 Revised Statutes of Colorado, it is clear from a reading of the "Powers and Duties" granted to Trustees of Water Works that the City's system of water works is meant to include reservoirs:

> Chapter 147, Section 6798. Trustees - Tenure - Powers and Duties - Quorum - Existing Boards - Secretary. * * * (S)aid board shall have control of all real estate, owned, controlled by or hereafter acquired by the city, or any board of trustees or other body, used in connection with said water works in operating water works now existing, or hereafter constructed including mains, pipes, reservoirs, buildings, machinery, lands, leases and privileges of every kind, belonging thereto, and property of every kind or description, and the title to same shall vest in said board of trustees, and their successors in office as trustees for the use and benefit of the city or district, and the inhabitants and property there in, supplied from said water works. * * * (Emphasis added)

Sixty years have passed since the judgment was entered in Civil Action No. 1818, and the Colorado Statutes still include reservoirs as part of the "system of waterworks." The modern-day language is different, but the principle remains the same:

> 'Water facilities' means any one or more devices used in the collection, treatment, or distribution of water for municipal beneficial uses, including, but not limited to, uses for domestic, municipal, irrigation, and industrial purposes and including a system of raw and clear water and distribution storage reservoirs, deep and shallow wells, pumping, ventilating, and gauging stations, inlets, tunnels, flumes, conduits, canals, collection, transmission, and distribution lines, infiltration galleries, hydrants, meters, filtration and treatment plants and works, all pumping, power, and other equipment and appurtenances, all extensions, improvements, remodeling, additions, and alterations thereof, and any and all rights or interests in such water facilities. C.R.S. 1973, 31-35-401(7), as amended 1975.

Two other sections of C.R.S. 1908, Chapter 147 are pertinent to municipal use of water:

> Chapter 147, Section 6525, Subdivision 73. Powers of City Counsel and Board of Trustees. They shall have the right and privilege of taking water in sufficient quantity, for the purpose hereinbefore mentioned, from any stream, creek, gulch or spring in the state; Provided that if the taking of such water in such quantity shall materially interfere with or impair the vested right of any person or persons, or corporation, heretofore acquired, residing upon such creek, gulch, or stream, or doing any milling or manufacturing business thereon, they shall first obtain the consent of such person or persons or corporation, or acquire the right of domain, by condemnation, as prescribed by the Constitution and laws upon that subject, and make full compensation or satisfaction for all the damages thereby occasioned to such person, persons or corporation.

The "purpose hereinbefore mentioned" supra, is found in C.R.S. 1908, Chapter 147, Section 6525, Subdivision 72, containing the following:

> They shall have the power to construct public wells, cisterns, and reservoirs in the streets and other public and private places within the city or town, or beyond the limits thereof, for the purpose of supplying the same with water; * * *

The Paramount Right was granted to the City for the purpose of supplying it and its inhabitants with water for municipal purposes. The grant is "in fee" suggesting that the City has practically an unlimited choice of beneficial uses so long as the uses are for municipal purposes and can be accomplished through a system of water works.

The Protestors have argued that since the Judgment does not mention "acre feet," it does not include storage rights (f. 565). "Acre feet" are units of volume measurement, applicable when a once-a-year reservoir filling right is designated. The Judgment does not grant a filling right as such, and inclusion of the term "acre feet" would not have been appropriate. What the Judgment does grant is the right of the City to divert 7.81 cubic feet of water per second of time, at all times, to its system of water works.

The Protestors additionally argue that the City could not have obtained storage rights because the entities compensated had owned only direct flow rights (ff. 564-565). That argument is faulty, however, because the City paid for and took a right superior to that of the existing rights. Every entity on Kannah Creek that was compensated for having yielded to the creation of the City's Paramount Right possessed water rights expressed in priority number. That priority number is not what the City was granted by

the Judgment. It is clear that what the City bought was not the existing rights on Kannah Creek; but, rather a right newly created, a right that took priority over and was superior to the rights in existence. The City paid a tremendous price (f. 515) to obtain the water rights ahead of all the other old priorities; in effect, the City moved all the old priorities back, to begin after the City's Paramount Right had been satisfied. Thus, although Civil Action Number 1818 is classified as an eminent domain proceeding, it is clear that what the City bought was not the existing rights, but a first, superior, and paramount right, over and above all other water rights claimed or asserted. It should be noted that typical storage right decrees, as well as typical direct flow decrees, utilize priority numbers. The City's Paramount Right uses a priority number for neither the storage aspect nor the direct flow aspect of the right, because the right is superior to all other water rights.

The phrase "paramount right" has been used in Colorado water law in two older cases, Wheeler v. Northern Colorado Irrigating Co., 10 Colo. 582, 17 P. 487, 489 (1888) and Strickler v. City of Colorado Springs, 16 Colo. 61, 26 P. 313, 316 (1891). Both cases use "paramount right" to indicate the owner's right to the use of water he has appropriated.

> . . . after appropriation, the title to this water, save perhaps, as to the limited quantity that may be actually flowing in the consumer's ditch or lateral, remains in the general public, while the paramount right to its use, unless forfeited, continues in the appropriator. Wheeler v. Northern Colorado Irrigating Co., supra.

In Strickler v. City of Colorado Springs, supra, it was held:

> We grant that the water itself is the property of the public. Its use, however, is subject to appropriation, and in this case, it is conceded that the owner has the paramount right to such use.

As indicated in 50 Denver Law Journal 293, 307, (1973), water rights are a property right. Although the City could not, in 1911, utilize 7.81 cubic feet of water per second (f. 554), the City paid over $182,000 to provide future water supplies as the area grew (f. 555). The Judgment recognizes the property right nature of the City's purchase, by granting the Paramount Right "in fee" (f. 163). No limitations were placed upon the City's use of its purchase, except that the water be diverted to City's system of water works and beneficially used for the City's inhabitants. Storage within the system of water works to accomplish better resource management of the City's water must be considered a beneficial use. The City has the right to its continuous flow at all times; the storage component of the water works system merely provides greater efficiency in the use of that continuous flow:

> If preferences are to be shown or given to any one to prevent waste, it would seem the use, if it is practicable, should be given to the owner. Ironstone Ditch Co. v. Ashenfelter, 57 Colo. 31, 140 P. 177, 183 (1914).

The Water Court erred in finding that the Protestors are entitled to use that portion of the City's Paramount Right that could otherwise be beneficially stored by the City. "What is beneficial use, after all, is a question

of fact and depends on the circumstances in each case." City and County of Denver v. Sheriff, 105 Colo. 193, 96 P.2d 836, 842 (1930). In accordance with the broad grant to the City in Action Number 1818, if stored water is applied to a beneficial use within a reasonable time, such use meets the requirements of the law. See, North Sterling Irrigation District v. Riverside Reservoir and Land Co., 119 Colo. 50, 200 P.2d 933 (1948). See, also, C.R.S. 1973, 37-92-102(d), which states:

> No reduction of any lawful diversion because of the operation of the priority system shall be permitted, unless such reduction would increase the amount of water available to and required by water rights having senior priorities.

The Water Court erred in finding that storage of the City's Paramount Right is illegal or improper diversion. So long as the City takes no more than 7.81 cubic feet of water per second, diverts such flow to its water works system, and applies the water to municipal purposes, the City is legally and properly utilizing its Paramount Right. Prudent management of a municipal water system requires the obtaining of an adequate supply of water not only for immediate use, but for a reasonable time into the future. See, City and County of Denver v. Sheriff, supra. See, also, Metropolitan Suburban Water v. Colorado River Water, 148 Colo. 173, 365 P.2d 273, 283, 289 (1961), which points out that adequate supply in years of minimum runoff and maximum consumption requires planning and that "Courts should not intrude their own opinions to override the studied good-faith opinions of governmental agencies as to future needs of the public for facilities or commodities."

II. THE CITY'S APPLICATION MUST BE GRANTED IF NO INJURY WILL THEREBY RESULT TO VESTED RIGHTS OF PROTESTORS, AND THERE IS NO EVIDENCE THAT PROTESTORS HAVE VESTED RIGHTS WITH RESPECT TO THE CITY'S PARAMOUNT RIGHT THAT WILL BE INJURED.

The Court erred in its determination that the change requested by the City would result in expansion of use. The judgment leaves no doubt that the City acquired the right for a constant and continuous flow of 7.81 c.f.s., subject only to the condition that the water be used for municipal purposes. Insofar as the City's Paramount Right is concerned, there can be no question of enlarged or expanded use, because the right acquired under condemnation was for the constant flow of 7.81 c.f.s.

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

The Protestors could not obtain any vested right with respect to the City's Paramount Right of 7.81 c.f.s., as the Paramount Right to divert such flow is superior to all other rights claimed or asserted, and exists at all times. If the City were not entitled to store said right in the Purdy Mesa Reservoir, the City could still divert the entire amount and utilize it for any municipal purpose. In other words, even if the City is prevented from using its Paramount Right efficiently, the City may still utilize such right totally. That being the case, Protestors have failed to establish that the change requested will affect them adversely. An actual impairment or irreparable injury to the rights of the junior appropriator must be demonstrated by evidential facts and not by potentialities. Cline v. McDowell, 132 Colo.

37, 284 P.2d 1056 (1955). 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).

> Protestants, in turn, insist that petitioner's evidence did not establish that no injury would result to the vested rights of others; that no competent evidence was introduced to establish the allegation of the petition, and that denial of change by the court was therefore necessary. The burden of proof on petitioner in such a proceeding requires him to meet only the grounds of injury to protestants asserted by them. City of Colorado Springs v. Yust, 126 Colo. 289, 249 P.2d 151, 155 (1952).

Although the initial burden may be on the Applicant, the City met its burden of establishing a prima facie case of no injury to Protestors. The Protestors then failed to meet their burden of going forward with the evidence.

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 Paramount Right either increases salinity or decreases 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 superior and Paramount Rights granted the City in Civil Action Number 1818. 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.

As indicated by C.R.S. 1973, 37-92-305(3), the Water Court shall afford Applicant and Protestors with an opportunity to propose terms or conditions which would prevent injurious effect of a proposed change. The Water Court erred in not pursuing this course of action prior to denying the requested change.

> A change of water right or plan for augmentation, including water exchange project, shall be approved if such change or plan will not injuriously affect the owner of or persons entitled to use water under a vested water right or a decreed conditional water right. If it is determined that the proposed change or plan as presented in the application would cause such injurious effect, the referee or the water judge, as the case may be, shall afford the applicant or any person opposed to the application an opportunity to propose terms or conditions which would prevent such injurious effect. C.R.S., 1973, § 37-92-305(3).

III. CIVIL ACTION NUMBER 16632 IS IN ERROR WITH REGARD TO THE CITY'S RIGHT TO STORE ITS PARAMOUNT RIGHT, AND THAT HOLDING IS NOT BINDING ON THE CITY AND THE COURT.

The Water Court erred in its determination that the decree of the Mesa County District Court in Civil Action Number 16632 is binding on the City and the Court with respect to the City's entitlement to store water under the decree obtained in Civil Action Number 1818.

To begin with, Civil Action Number 16632 was appealed (ff. 551-554), so the Water Court's finding that it was not appealed (ff. 114-115) is error. One of the issues that the City was appealing was the determination by the Trial Court that the Paramount Right could not be stored in the Purdy Mesa (Hallenbeck) Reservoir (f. 551).

Subsequent to the initiation of the Appeal, the City 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. 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 Nat. Bank of Colo. Springs v. Struthers, 121 Colo. 69, 215 P.2d 903 (1950). See, also, Crowe v. Wheeler, 165 Colo. 289, 439 P.2d 50 (1968).

Civil Action Number 16632 was not a change proceeding. Mr. Hallenbeck had brought the suit to force the City to stop storing certain water rights, including the Paramount Right, in the Purdy Mesa Reservoir. The City has initiated the instant case, a change proceeding, several years later and should not be barred from obtaining such determinations as are required by the changing population of the City.

Query, since Action No. 16632 was not a change proceeding, even if the Appeal had been finally determined (instead of dismissed by reason of the parties' application for dismissal), and the Court had held that the City does have the right to store its Paramount Right in Purdy Mesa Reservoir, would that decision have been binding on any party other than the Hallenbecks? Surely, the decision would not have bound those who had no notice of the action and no opportunity to join.

Civil Action Number 16632 is not binding on the City and the Court because it never reached final determination and because the action was strictly a matter between those party to it. The decision of the Trial Court with respect to the City's storage of its Paramount Right was error, as indicated by the foregoing Argument in this brief concerning

the nature of the Paramount Right. The Water Court erred in considering the City and Court bound by that decision.

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,

D. J. Dufford
GRAHAM and DUFFORD
900 Valley Federal Plaza Building
P. O. Box 2188
Grand Junction, Colorado 81501

GRAHAM AND DUFFORD
ATTORNEYS AT LAW
SUITE 900 VALLEY FEDERAL PLAZA
P. O. BOX 2188
GRAND JUNCTION, COLORADO 81501

GEORGE S. GRAHAM
D. J. DUFFORD
H. K. WEBSTER
G. DALE WILLIAMS
HUGH D. WISE
LAIRD T. MILBURN

SAM P. LOCKARD
JILL S. KINCAID

AREA CODE 303
TELEPHONE 242-4614

February 25, 1976

Mr. James Patterson
Superintendent of Utilities
City Hall
Grand Junction, Colorado 81501

Re: Our File No. 01430 00 004

Dear Jim:

Enclosed are two copies of the opening Brief which I prepared for the Applicant-Appellant.

Warm regards.

Sincerely,

D. J. Dufford

D. J. Dufford

cs

Enclosures

GRAHAM AND DUFFORD
ATTORNEYS AT LAW
SUITE 900 VALLEY FEDERAL PLAZA
P. O. BOX 2188
GRAND JUNCTION, COLORADO 81501

GEORGE S. GRAHAM
D. J. DUFFORD
H. K. WEBSTER
G. DALE WILLIAMS
HUGH D. WISE
LAIRD T. MILBURN

SAM P. LOCKARD
JILL S. KINCAID

AREA CODE 303
TELEPHONE 242-4614

April 29, 1976

Mr. James Patterson
Superintendent of Utilities
City Hall
Grand Junction, Colorado 81501

Re: In the District Court
Water Case No. W-1719 and W-1720
Now on Appeal before Supreme Court
Case No. 27046 and 27047

Dear Jim:

Please find enclosed copies of the briefs filed by Kannah Creek Water Users Association and copies of our reply briefs thereto. All briefs are now before the Supreme Court for review. Oral argument has been scheduled for Wednesday, June 9, in Denver.

I shall keep you advised of further developments in this matter.

Warm Regards!

Very truly yours,

D. J. DUFFORD

jam

Enclosures