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Fee Simple in Water or a Trend toward Favoring Cities? - City of Grand Junction v. Kannah Creek Water Users Assocation

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A Fee Simple in Water or a Trend Toward Favoring Cities?

City of Grand Junction v. Kannah Creek Water Users Association, 557 P.2d 1173 (Colo. 1976)

Introduction

Several Colorado cases have commented on the necessity for just compensation when water rights are condemned;[1] but the Colorado Supreme Court, in *City of Grand Junction v. Kannah Creek Water Users Association,*[2] addressed itself for the first time to the effect of a *previous* condemnation.[3] Prior to this decision, it could be presumed that any water right acquired by condemnation would entail the same rights and limitations as water rights acquired by appropriation.[4] The *Kannah Creek* case indicates that where a city acquires a water right through condemnation many of the limitations on that right may be disregarded.[5]

The *Kannah Creek* case had its origins in 1911, when the city of Grand Junction, in an eminent domain proceeding,[6] acquired direct-flow[7] water rights from agricultural appropriators along

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[1] *E.g.*, Genoa v. Westfall, 141 Colo. 533, 549, 349 P.2d 370, 379 (1960); Black v. Taylor, 128 Colo. 449, 457, 264 P.2d 502, 506 (1953); Town of Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 426, 94 P. 339, 341 (1908). *See* U.S. Const. amend. XIV, § 1; Colo. Const. art. II, § 15.

[2] 557 P.2d 1173 (Colo. 1976).

[3] City of Grand Junction v. Van Pelt, Civ. No. 1818 (Dist. Ct. Mesa County, Nov. 11, 1911). This action was brought under a Colorado statute providing that:

> [Cities] 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 or persons or corporation.

1877 Colo. Gen. Laws ch. 100, § 2655 (current version at Colo. Rev. Stat. § 31-12-101(78) (1973)). *See* Colo. Rev. Stat. §§ 38-6-201 to 216 (Supp. 1976).

[4] "'Appropriation' means the application of a certain portion of the waters of the state to a beneficial use." Colo. Rev. Stat. § 37-92-103(3) (1973).

[5] See text accompanying notes 40-42, 55-58 *infra* for a discussion of some of the limitations.

[6] *See* note 3 *supra.*

[7] There are "two classes of appropriations . . . , one for ditches diverting water directly

Kannah Creek. The judgment awarded the city a "paramount right" to a "continuous flow" of 7.81 cubic feet per second of water,[8] but made no express mention of storage rights.

Sixty-two years later, in 1973, the city instituted the *Kannah Creek* action to change the manner of use to include the right to store water in Purdy Mesa Reservoir which the city had acquired in 1954. Downstream appropriators protested, alleging the proposed change would result in a diminution in the quality of water available for their decreed appropriations.

The water judge[9] denied the storage right, holding that the city could not divert to the reservoir water not immediately required.

The Colorado Supreme Court reversed, distinguishing between a water right acquired by condemnation and one acquired by appropriation.[10] The court held that the 1911 judgment granted a "paramount right"[11] to the *water itself;*[12] that the *storage right* thus acquired was implied[13] by the circumstances surrounding the 1911 judgment; and that the right was not lost by over fifty years of non-use.[14]

Justices Erickson and Lee dissented, stating that the majority's concept of eminent domain as applied to water rights was erroneous since there can be no fee simple in water—the water right is a mere usufruct[15]—and that under principles of water law,

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from the stream [direct flow], and one for the storage of water, to be used subsequently." Holbrook Irr. Dist. v. Fort Lyon Canal Co., 84 Colo. 174, 191, 269 P. 574, 581 (1928). *Accord,* Handy Ditch Co. v. Greeley & Loveland Irr. Co., 86 Colo. 197, 199, 280 P. 481, 481 (1929). *See* Note, *A Survey of Colorado Water Law,* 47 DEN. L.J. 226, 256 (1970).

[8] Civ. No. 1818 at 22.

[9] The water court has exclusive jurisdiction over all water right determinations within its jurisdiction. COLO. REV. STAT. § 37-92-203(1) (1973).

[10] 557 P.2d at 1176-77.

[11] *Id.* at 1176, 1177.

[12] *Id.* at 1175.

[13] *Id.* at 1177.

[14] *Id.*

[15] 557 P.2d at 1179 (Erickson and Lee, JJ., dissenting). *See* note 40 *infra.* The nature of a usufruct is such that "[a] title by use is not acquired . . . [W]hen the use has been completed the right of the user terminates." Pulaski Irr. Ditch Co. v. City of Trinidad, 70 Colo. 565, 568, 203 P. 681, 682 (1922). It has also been said that:

> [W]e have to consider the peculiar nature of the property designated "a water right," and the title thereto, as distinguished from land. This "right" is said to be intangible and incorporeal. The ultimate title or ownership of the water of the natural streams of this state is, by the Constitution, vested

a change in manner of use from direct flow to storage required additional compensation.[16]

Certainly, the reasoning of the majority is unique in Colorado.[17] Because *the city* had acquired the rights to the 7.81 cubic feet per second of water in an action *in rem,* it could change the manner of use from direct flow to storage without liability.[18] The case also breaks new ground in holding that a storage right can be implied,[19] and that the right so acquired was not lost by failure to apply the water to a beneficial use for over fifty years.[20] Nevertheless, *Kannah Creek* may be indicative of an emerging policy to ensure that cities have adequate water supplies in times of shortage.[21]

The following discussion will consider *Kannah Creek* in light of (1) whether the 1911 decree purported to grant a storage right to Grand Junction, (2) whether the 1911 decree could grant a storage right, (3) if a storage right was obtained, whether it was lost by over fifty years of non-use, and (4) the policies and trends evidenced by this decision.

> in the public, but dedicated to the use of the people, subject to appropriation.

Monte Vista Canal Co. v. Centennial Irr. Ditch Co., 22 Colo. App. 364, 368, 123 P. 831, 832-33 (1912).

[16] 557 P.2d at 1178-79.

[17] Under well-settled water law principles, if the farmers who originally owned the rights to the 7.81 cubic feet per second of water had attempted to change the manner of use from direct flow to storage they would have been subject to injunction if the change would have resulted in injury to other appropriators. *See* text accompanying notes 41-42 *infra.*

[18] 557 P.2d at 1175. One view of eminent domain, the *in rem* theory, is that:

> [T]he acquisition of private property [is] by an exercise of the power of eminent [domain] itself, not upon the title or upon the sum of the titles if there are diversified interests. Upon appropriation all inconsistent proprietary rights are divested and not only privies but strangers are concluded. Thereafter, whoever may have been the owner, or whatever may have been the quality of his estate, he is entitled to full compensation according to his interest and to the extent of the taking, but the paramount right is in the public not as claiming under him by a statutory grant, but by an independent title.

3 NICHOLS, THE LAW OF EMINENT DOMAIN § 9.1 (3d ed. 1976).

[19] *See* 557 P.2d at 1176-77.

[20] *Id.* at 1177. *See* COLO. REV. STAT. § 37-92-103(4) (1973), for a definition of "beneficial use."

[21] *See* text accompanying notes 75-79 *infra.*

I. DID THE 1911 DECREE PURPORT TO GRANT A STORAGE RIGHT?

The *Kannah Creek* court construed the decree of 1911 very liberally in favor of Grand Junction to hold that the decree implied a storage right. The decree did not expressly mention the word "storage."[22] Since direct flow and storage are two different kinds of appropriation,[23] a party decreed only direct flow rights normally could not change his manner of use to storage if others would be injured.[24]

The majority reasoned that the storage right was nevertheless *implied* by the "obvious" need for storage at the time of the 1911 judgment, and by language in the judgment referring to "water works" to be constructed in the future.[25] Earlier Colorado case law has consistently held that, for a water right to exist, intent to appropriate must be coupled with notice.[26] *Kannah Creek* is unique in holding that notice can be implied[27] by obvious need rather than by physical act[28] or filing.[29]

Another puzzling question arises from the language of measurement used by the 1911 decree. The city's water right was decreed in terms of statutory inches or cubic feet per second[30] which are direct flow measurements.[31] A storage right is measured

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[22] 557 P.2d at 1176.

[23] Handy Ditch Co. v. Greeley & Loveland Irr. Co., 86 Colo. 197, 199, 280 P. 481, 481 (1929); Holbrook Irr. Dist. v. Fort Lyon Canal Co., 84 Colo. 174, 191, 269 P. 574, 581 (1928); Greeley & Loveland Irr. Co. v. Huppe, 60 Colo. 535, 538, 155 P. 386, 388 (1916); New Loveland & Greeley Irr. & Land Co. v. Consolidated Home-Supply Ditch & Res. Co., 27 Colo. 525, 528, 62 P. 366, 366-67 (1900).

[24] *See* text accompanying notes 41-42 *infra*.

[25] 557 P.2d at 1177.

[26] Colorado River Water Conserv. Dist. v. Rocky Mtn. Power Co., 174 Colo. 309, 317, 486 P.2d 438, 442 (1971); Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 446, 484 P.2d 1211, 1215 (1971); Four Counties Water Users Ass'n v. Colorado River Water Conserv. Dist., 161 Colo. 416, 421, 425 P.2d 259, 261 (1967); City & County of Denver v. Northern Colo. Water Conserv. Dist., 130 Colo. 375, 388, 276 P.2d 992, 999 (1954); Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 588, 17 P. 487, 489 (1888); Sieber v. Frink, 7 Colo. 148, 153, 2 P. 901, 903 (1884).

[27] The dissent pointed out that need is not equated with right. 557 P.2d at 1179.

[28] *See* note 26 *supra*.

[29] In other appropriation states, filing is necessary to secure the right. *See* 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 315-18 (1971). In Colorado filing is only evidentiary to the determination of the dates of intent and notice. Cresson Consol. Gold Mining & Milling Co. v. Whitten, 139 Colo. 273, 283, 338 P.2d 278, 283 (1959); Black v. Taylor, 128 Colo. 449, 458, 264 P.2d 502, 506-07 (1953).

[30] 557 P.2d at 1179.

[31] COLO. REV. STAT. § 37-80-102(8) (1973).

by cubic feet or acre-feet.[32] To hold that a storage right could be decreed in terms of a direct flow measurement, the majority relied on the phrases "continuous flow" and "paramount right" used in the 1911 judgment.[33] The court stated:

> The 1911 judgment must be read as a whole. The lack of direct reference to storage rights and measurements is not fatal. On the contrary, the designation of a "paramount right" in cubic feet per second is a declaration of the City's right rather than as a limitation upon it and is a definite expression of an unlimited right.[34]

The Colorado Supreme Court has previously equated the term "continuous flow" with direct flow.[35] While some authorities have used the term "paramount right" to mean a right greater than that obtained by prior appropriation or by purchase of the rights of another,[36] Colorado cases using the phrase have given it a meaning equivalent only to the appropriative right itself.[37]

II. Could the 1911 Decree Grant a Storage Right?

The *Kannah Creek* court's most important and radical departure from prior law is found in its holding that the 1911 judgment granted a "right to the water itself,"[38] a right which no other American jurisdiction has recognized.[39] The majority opinion purported to recognize the familiar rule that a water right is usufructuary only,[40] and that, while the point of diversion or manner of

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[32] *Id.*

[33] 557 P.2d at 1175, 1176.

[34] *Id.* at 1176.

[35] Baker v. City of Pueblo, 87 Colo. 489, 495, 289 P. 603, 605 (1930). *Cf.* Wolff v. Pomponia, 52 Colo. 109, 114, 120 P. 142, 144 (1911) (where the court used the term "constant flow" rather than "continuous flow"). *But cf.* City of Westminster v. Church, 167 Colo. 1, 13, 15, 445 P.2d 52, 58, 59 (1968) (where the court used the term "continuous flow" as a substitute for direct flow and as distinguished from intermittent direct flow, but then later used the term in the context of "a continuous flow for storage").

[36] City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 252, 537 P.2d 1250, 1289, 123 Cal. Rptr. 1, 35 (1975); 3 Nichols, The Law of Eminent Domain § 9.1 (3d ed. 1976).

[37] City & County of Denver v. Sheriff, 105 Colo. 193, 200, 96 P.2d 836, 840 (1939); Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 587-88, 17 P. 487, 489 (1888); Monte Vista Canal Co. v. Centennial Irr. Ditch Co., 22 Colo. App. 364, 368, 123 P. 831, 832 (1912).

[38] 557 P.2d at 1175.

[39] The early English view was that the landowner had an absolute ownership right to the ground water under his land. But that view was soon rejected in this country. *E.g.*, Basset v. Salisbury Mfg. Co., 43 N.H. 569 (1862).

[40] "The right to the use of water, whether by direct flow, or through storage reservoirs, is a usufructuary right . . . ." Handy Ditch Co. v. Greeley & Loveland Irr. Co., 86 Colo. 197, 199, 280 P. 481, 481-82 (1929). *Accord,* Pulaski Irr. Ditch Co. v. City of Trinidad, 70

use can be changed,[41] such change is permissible only if it results in no material injury to existing rights, junior or senior.[42] Specifically, the court recognized the holding of *City of Westminster v. Church*,[43] where a city had purchased direct-flow rights and attempted to change them to a storage purpose.[44] In *Church* the Colorado Supreme Court had decided: "Defendant City of Westminster could not enlarge upon its predecessors' use of the water rights by changing periodic direct flow for irrigation to a continuous flow for storage. Such a change would necessarily increase the

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Colo. 565, 568-69, 203 P. 681, 682 (1922); Crippen v. White, 28 Colo. 298, 302, 64 P. 184, 186 (1901); Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 589, 17 P. 487, 490 (1888); Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446 (1882); Monte Vista Canal Co. v. Centennial Irr. Ditch Co., 22 Colo. App. 364, 368-69, 123 P. 831, 832-33 (1912); 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 441 (1971); Ross, *Acquisition of Existing Water Rights*, 13 ROCKY MTN. MIN. L. INST. 447, 478 (1967). *See* COLO. CONST. art. XVI, § 5, providing that: "The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." COLO. REV. STAT. § 37-92-102(1) (1973) provides, in pertinent part:

> It is hereby declared to be the policy of the state of Colorado that all waters originating in or flowing into this state, whether found on the surface or underground, have always been and are hereby declared to be the property of the public, dedicated to the use of the people of the state, subject to appropriation and use in accordance with law.

See note 15 *supra*.

[41] CF&I Steel Corp. v. Rooks, 178 Colo. 110, 114, 495 P.2d 1134, 1136 (1972); Ackerman v. City of Walsenburg, 171 Colo. 304, 310, 467 P.2d 267, 270 (1970); City of Colorado Springs v. Yust, 126 Colo. 289, 296, 249 P.2d 151, 154 (1952); Brighton Ditch Co. v. City of Englewood, 124 Colo. 366, 372, 237 P.2d 116, 120 (1951); Colorado Milling & Elev. Co. v. Larimer & Weld Irr. Co., 26 Colo. 47, 51, 56 P. 185, 186 (1899).

[42] City of Westminster v. Church, 167 Colo. 1, 15, 445 P.2d 52, 59 (1968); Farmers Highline Canal & Res. Co. v. City of Golden, 129 Colo. 575, 578-79, 272 P.2d 629, 631 (1954); Enlarged Southside Irr. Ditch Co. v. John's Flood Ditch Co., 116 Colo. 580, 587, 183 P.2d 552, 555 (1947); Handy Ditch Co. v. Greeley & Loveland Irr. Co., 86 Colo. 197, 200, 280 P. 481, 482 (1929); Holbrook Irr. Dist. v. Fort Lyon Canal Co., 84 Colo. 174, 191, 269 P. 574, 581 (1928); New Loveland & Greeley Irr. & Land Co. v. Consolidated Home-Supply Ditch & Res. Co., 27 Colo. 525, 530-31, 62 P. 366, 366-67 (1900); Note, *A Survey of Colorado Water Law*, 47 DEN. L.J. 226, 253-56 (1970). *See* Ackerman v. City of Walsenburg, 171 Colo. 304, 311, 467 P.2d 267, 271 (1970) (when a city buys a direct-flow right and changes the manner of use to storage, the "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.*").

[43] 167 Colo. 1, 15, 445 P.2d 52, 59 (1968).

[44] *Church* is factually similar to *Kannah Creek* except that in *Kannah Creek* the city acquired the direct-flow rights by eminent domain rather that by purchase, and *all* the appropriators along the stream were supposedly compensated for the injury resulting from the change in use by the 1911 judgment. 557 P.2d at 1175.

ultimate consumption from the stream to the detriment of other appropriators."[45]

The *Kannah Creek* court distinguished *Church* on the ground that in *Kannah Creek* the 1911 judgment had condemned rights from *all* appropriators on the stream.[46] Therefore, *assuming*[47] the 1911 judgment had already compensated those appropriators for the additional damage[48] caused by the change to storage sought in 1973, the farmers presently relying on the return flow from the city's use of the 7.81 cubic feet per second of water would have no right to complain.

Nevertheless, the *Kannah Creek* court realized the *Church* case had not been adequately disposed of.[49] Consequently, the court held that the city had condemned the 7.81 cubic feet per second of water *in fee.*[50] In the court's language, Grand Junction condemned "the right to the *water itself.*"[51] Thus, the court relied heavily upon the proposition that, unlike *Church*, "[t]he original action was not brought pursuant to the statutes dealing with the approriations of water. Rather it was strictly limited to the City's power of condemnation based on eminent domain."[52]

While the court's rationale may be tenable, it ignores the basic distinction between the ownership of land and the right to the *use* of water. A fee simple ownership in water is illogical because of the peculiar interconnection of water rights and because of the physical absurdity of attempting to lay claim to

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[45] 167 Colo. at 15, 445 P.2d at 59.

[46] 557 P.2d at 1175.

[47] Nowhere does the 1911 judgment expressly purport to compensate for the added damage occasioned by the city's change of use to storage. *See* 557 P.2d at 1176-77.

[48] The farmers were originally damaged to the extent that the city's direct-flow use of the 7.81 cubic feet per second of water caused some reduction in the amount of water reaching the farmers. Some of the 7.81 cubic feet per second of water returned to the stream and flowed to the farmers after the city used them. The supreme court's decision apparently allows the city to store the entire 7.81 cubic feet per second without returning any of it to the stream. *See* 557 P.2d at 1177.

[49] First, under ordinary water law principles, the city may have lost the conditional right gained by the 1911 decree by a failure to apply the 7.81 cubic feet per second storage right to a beneficial use with reasonable diligence. *See* text accompanying notes 54-66 *infra*. Second, the dissent pointed out that the condemnor can acquire no greater right than that owned by the condemnee (direct-flow rights). 557 P.2d at 1179. *But see* note 18 *supra*.

[50] 557 P.2d at 1175, 1176.

[51] *Id.* at 1175.

[52] *Id.*

something as elusive as a water molecule. That all the appropriators along Kannah Creek were supposedly compensated by the 1911 judgment looms as a very important fact in this regard, and the majority concedes that any appropriator not paid by the 1911 judgment would now have an action against the city.[53]

III. ASSUMING A RIGHT TO STORAGE EXISTED IN 1911, WAS THAT RIGHT LOST AFTER FIFTY YEARS OF NON-USE?

Like most other western states,[54] Colorado allocates its surface water under a legal system of "prior appropriation."[55] Under this system, one who first couples intent to appropriate with some act giving notice[56] has a right superior to those who begin water projects on the same stream at a later date;[57] *provided* that the

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[53] *Id.* at 1177. See City of Thornton v. Farmers' Reservoir & Irr. Co., No. 27462 (Colo. Feb. 6, 1978), wherein the court equates "water works" and "water rights."

[54] All states west of the 100th meridian apply prior appropriation law for surface water. However, some western states apply a hybrid combining appropriation law with riparian law. Riparianism is the theory used in the eastern states. *See* 1 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 1-3 (1971). COLO. CONST. art. XVI, § 6. "Priority of appropriation shall give the better right as between those using the water for the same purpose . . . ."

[56] Colorado River Water Conserv. Dist. v. Rocky Mtn. Power Co., 174 Colo. 309, 316, 486 P.2d 438, 442 (1971); Elk-Rifle Water Co. v. Templeton, 173 Colo. 438, 445, 484 P.2d 1211, 1214 (1971); City & County of Denver v. Northern Colo. Conserv. Dist., 130 Colo. 375, 388, 276 P.2d 992, 999 (1954); Sieber v. Frink, 7 Colo. 148, 153, 2 P. 901, 903-04 (1884).

[57] COLO. CONST. art. XVI, § 6; COLO. REV. STAT. § 37-92-401(1)(b) (1973).

> (II) As among water rights decreed in the same water district in the same adjudication suit, the historic date of initiation of appropriation shall determine the relative priorities, beginning with the earliest right.
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> (III) As among rights decreed in the same water district in different adjudication suits, all water rights decreed in an adjudication suit shall be senior to all water rights decreed in any subsequent adjudication suit.
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> (IV) As among water rights decreed in the various original adjudication suits in the various water districts of the same water division, the decreed date of initiation of appropriation shall determine the relative priorities in numbered sequence, beginning with the earliest right.
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> (V) As among water rights decreed in the various supplemental adjudication suits in the various water districts of the same water division, the actual priority date of any decree in any district shall not extend back further than the day following the entry of the final decree in the preceding adjudication suit in such district.
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> (VI) If the preceding principles would cause in any particular case a substantial change in the priority of a particular water right to the extent theretofore lawfully enjoyed for a period of not less than eighteen years, then the division engineer shall designate the priority for that water right in accordance with historic practice.

COLO. REV. STAT. § 37-92-401(1)(b) (1973).

project is completed with reasonable diligence, *i.e.*, on the condition that the water is actually applied to a beneficial use within a reasonable time.[58]

Cities enjoy a modified rule of reasonable diligence under *City and County of Denver v. Sheriff*.[59] If there is unappropriated water available, a city can take more than it presently needs in anticipation of normal growth over a reasonable time.[60] However, a city cannot simply reserve these rights; the water must be applied to a beneficial use in the meantime.[61] Given these principles, it is difficult to understand how the majority in *Kannah Creek* could state: "The fact that the City did not utilize a particular reservoir until 1954 is of no moment to this Court."[62] The court apparently relied upon the fee simple approach to hold that the right was perfected through condemnation and could not be lost by a failure to apply to a beneficial use within a reasonable time. Once again, this theory ignores the interconnection of water rights, unless it can be seen as a mere extension of the *City and County of Denver v. Sheriff* doctrine.

It can be argued that the city lost the storage right by abandonment. To lose a water right by abandonment there must be non-use coupled with intent to abandon.[63] A Colorado statute sets up a rebuttable presumption of abandonment after ten years of

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[58] COLO. REV. STAT. § 37-92-103(6) (1973); Colorado Water Conserv. Dist. v. Twin Lakes Res. & Canal Co., 171 Colo. 561, 565, 468 P.2d 853, 856 (1970); Four Counties Water Users Ass'n v. Colorado River Water Conserv. Dist., 159 Colo. 499, 509, 414 P.2d 469, 475 (1966); City & County of Denver v. Northern Colo. Water Conserv. Dist., 130 Colo. 375, 398, 276 P.2d 992, 1004 (1954); Drach v. Isola, 48 Colo. 134, 144, 109 P. 748, 751 (1910); Wheeler v. Northern Colo. Irr. Co., 10 Colo. 582, 588, 17 P. 487, 489 (1887).

[59] 105 Colo. 193, 210, 96 P.2d 836, 844 (1939).

[60] A Colorado statute allows cities of over 200,000 population to lease these reserved water rights. COLO. REV. STAT. § 31-35-201 (1973). *See* note 79 *infra*.

[61] City & County of Denver v. Sheriff, 105 Colo. 193, 203, 210, 96 P.2d 836, 841, 844 (1939); Trelease, *Preferences to the Use of Water*, 27 ROCKY MTN. L. REV. 133, 139-40 (1955).

[62] 557 P.2d at 1177.

[63] " 'Abandonment of a water right' means the termination of a water right in whole or in part as a result of the intent of the owner thereof to discontinue permanently the use of all or part of the water available thereunder." COLO. REV. STAT. § 37-92-103(2) (1973); CF & I Steel Corp. v. Purgatoire River Water Conserv. Dist., 183 Colo. 135, 140, 515 P.2d 456, 458 (1973); City & County of Denver v. Just, 175 Colo. 260, 266, 487 P.2d 367, 370 (1971); New Mercer Ditch Co. v. New Cache La Poudre Irr. Ditch Co., 70 Colo. 351, 353-54, 201 P. 557, 558 (1921); San Luis Valley Irr. Dist. v. Town of Alamosa, 55 Colo. 386, 390-91, 135 P. 769, 771 (1913); Alamosa Creek Canal Co. v. Nelson, 42 Colo. 140, 147, 93 P. 1112, 1114 (1908). *See* Sieber v. Frink, 7 Colo. 148, 154, 2 P. 901, 904 (1884).

non-use.[64] While there is previous case law to the contrary,[65] a recent Colorado statute now states that conditional water rights, *i.e.*, those appropriations which have not yet been put to beneficial use but which meet the initial requirements of intent to appropriate and notice, may be abandoned.[66]

IV. POLICIES AND TRENDS

The *Kannah Creek* court declared that it was in the public interest to condemn water for the city of Grand Junction and therefore the city acquired "not only the ownership, but also the additional right to distribute that water to the citizens of Grand Junction"[67] even though the eventual storage use resulted in additional damage to the water rights of farmers—damage not compensated for by the 1911 decree.[68]

This result seems anomalous; past Colorado Supreme Court decisions have protected the farmer from the ever-growing demands for domestic water supply.[69] Indeed, despite the Colorado Constitution's grant of "preference" to the domestic use of water,[70] the court early held that a city must pay just compensation when it condemns the rights of an appropriator.[71] An early case explained this result by reasoning that municipal use was not a domestic purpose.[72] Later, the landmark case of *Town of*

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[64] COLO. REV. STAT. § 37-92-402(11) (Supp. 1976).

[65] Green v. Chaffee Ditch Co., 150 Colo. 91, 105, 371 P.2d 775, 782 (1962).

[66] COLO. REV. STAT. § 37-92-103(1) (1973). " 'Abandonment of a conditional water right' means the termination of a conditional water right as a result of the failure to develop with reasonable diligence the proposed appropriation upon which such water right is to be based."

[67] 557 P.2d at 1175.

[68] Grand Junction, in its appellate brief, stated: "It is true that the 1911 decree is unique; none other like it can be found despite extensive research. The condemning, not of *existing* rights, but of a *first* right, superior to all others, was ingenious." Reply Brief for Appellant at 2, City of Grand Junction v. Kannah Creek Water Users Ass'n, 557 P.2d 1173 (Colo. 1976). *See* note 47 *supra*.

[69] *E.g.*, Town of Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 94 P. 339 (1908).

[70] COLO. CONST. art. XVI, § 6: "[W]hen the waters of any natural stream are not sufficient for the service of all those desiring the use of the same, those using the water for domestic purposes shall have the preference over those claiming for any other purpose . . . ."

[71] Genoa v. Westfall, 141 Colo. 533, 549, 349 P.2d 370, 379 (1960); Town of Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 427, 94 P. 339, 341 (1908).

[72] Montrose Canal Co. v. Loutsenhizer Ditch Co., 23 Colo. 233, 237, 48 P. 532, 534 (1896).

Sterling v. Pawnee Ditch Extension Co.[73] held that because the use of water is a valuable property right, the constitutional preference for domestic use is merely the privilege to condemn and pay for the rights of nonpreferred users.[74]

Nevertheless, *Kannah Creek* is probably best explained not as an anomaly to familiar rules of water law, but as the Colorado Supreme Court's clearest signal of its developing policy to ensure that cities receive adequate water in times of shortage.[75] A number of post-*Church* cases fit the pattern. For example, in *Ackerman v. City of Walsenburg,*[76] the Colorado court was confronted with a situation similar to that in the *Church* and *Kannah Creek* cases. As in *Church,* the city (Walsenburg) had purchased direct-flow rights of farmers and attempted to change the manner of use to storage. Therefore, the condemnation-fee simple approach of *Kannah Creek* was not available. The court, neverthless, circumvented *Church* by holding that downstream appropriators had not proved injury "clearly and conclusively."[77]

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[73] 42 Colo. 421, 94 P. 339 (1908).

[74] *Id.* at 426, 94 P. at 341; Trelease, *Preferences to the Use of Water,* 27 ROCKY MTN. L. REV. 133, 134-37 (1955); Thomas, *Appropriations of Water for a Preferred Purpose,* 22 ROCKY MTN. L. REV. 422, 424 (1950). *See* Carlson, *Report to Governor John A. Love on Certain Colorado Water Law Problems,* 50 DEN. L.J. 293, 309-15 (1973).

[75] Several states have opted for a true preference approach in allowing cities to reserve water rights for future growth. *E.g.,* TEX. WATER CODE ANN. tit. 2, § 5.028 (Vernon) (1972) ("Any appropriation made after May 17, 1931, for any purpose other than domestic or municipal use, is subject to the right of any city or town to make further appropriations of the water for domestic or municipal use without paying for the water."); *see* Trelease, *Preferences to the Use of Water,* 27 ROCKY MTN. L. REV. 133, 136-37 (1955). In California, appropriations for electrical energy and other power-generating purposes are granted subject to appropriations for domestic and agricultural purposes. East Bay Mun. Util. Dist. v. Department Pub. Works, 1 Cal. 2d 479, 35 P.2d 1027 (1934). In Kansas, domestic users may fill barrels from any stream without regard to the prior appropriations of others. KAN. STAT. § 42-311 (1973). Until 1965, a New Mexico statute permitted unincorporated villages with populations exceeding 3,000 persons to take water without regard to prior appropriations. The most drastic example seems to be the California "pueblo right." By virtue of a city's position as the first major settlement on a river during the period of Spanish or Mexican control, the city can take all the water it needs from the river basin without regard to prior appropriations and without compensation. *See* City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 537 P.2d 1250, 123 Cal. Rptr. 1 (1975); 2 W. HUTCHINS, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 145 (1974); C. KINNEY, IRRIGATION & WATER 2590-93 (1912).

[76] 171 Colo. 304, 310, 467 P.2d 267, 270-71 (1970).

[77] *Id.* at 310, 467 P.2d at 270. This language seems contradictory to the court's concession that the "burden of proof to establish that a change of use will not injure the rights of other users from the same source rests on the petitioner." *Id.*

This is somewhat contrary to the language of the earlier *Church* case that "[s]uch a change [to storage] would necessarily increase the ultimate consumption from the stream to the detriment of other appropriators."[78] Other recent cases also point to this developing policy of domestic "preference".[79]

CONCLUSION

The determination that all appropriators or their predecessors who were injured by the change in use to storage had somehow been compensated by the 1911 judgment condemning their direct flow rights is probably the salient feature of this case factually. Under existing Colorado water laws, further compensation to the Kannah Creek farmers should have been required. In holding that a city may in some instances acquire a fee simple in water taken by condemnation, the court brushed aside three basic principles of water law: (1) the principle of usufructuary rights, (2) the doctrine of beneficial use, and (3) the principle that no change in use can be made if it injures other appropriators.

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[78] 167 Colo. at 15, 445 P.2d at 59.

[79] *E.g.*, Metropolitan Suburban Water Users Ass'n v. Colorado River Water Conserv. Dist., 148 Colo. 173, 365 P.2d 273 (1961). In that case the court held that the Colorado water compensation statute for transmountain diversions did not apply to Denver. *See* COLO. REV. STAT. § 37-45-118(b)(IV) (1973). The court stated: "We find nothing in the Constitution which even intimates that waters should be retained for use in the watershed where originating." 148 Colo. at 202, 365 P.2d at 288-89. The court also distinguished an earlier case which had held against Denver and held that construction begun on one phase of a project would be applied to another phase in a different area for purposes of showing reasonable diligence. *Id.* at 202-03, 365 P.2d at 289 (distinguishing City & County of Denver v. Northern Colo. Water Dist., 130 Colo. 375, 276 P.2d 992 (1954)).

In two cases decided the same day, in 1972 the Colorado Supreme Court developed doctrines which give cities almost absolute ownership of water in certain circumstances. In Metropolitan Denver Sewage Disposal Dist. No. 1 v. Farmers' Reservoir & Irr. Co., 179 Colo. 36, 499 P.2d 1190 (1972), the court held that the usual rule for change of point of diversion does not apply to change of point of return of "waste water." *Id.* at 41-42, 499 P.2d at 1193. In City & County of Denver v. Fulton Irr. Ditch Co., 179 Colo. 47, 506 P.2d 144 (1972), the court held that a city may re-use, make successive uses for different purposes, and dispose of water by lease or sale where the water has been imported by transmountain diversion by the city. *Id.* at 52, 57, 506 P.2d at 146, 149.

In a recent opinion, the Colorado Supreme Court held that home-rule cities are not subject to certain provisions of the Water Rights Condemnation Act, COLO. REV. STAT. §§ 38-6-201 to 216 (Supp. 1976). Among the sections held unconstitutional was one which provides that no municipality may condemn water rights for any anticipated or future needs in excess of fifteen years. *Id.* § 38-6-202(2). The court did not decide whether these provisions would be invalid as applied to cities without home-rule charters. City of Thornton v. Farmers' Reservoir & Irr. Co., No. 27462 (Colo. Feb. 6, 1978).

The *Kannah Creek* case, being a severe aberration from prior law, presented more questions than it answered. For example, may other cities in Colorado now claim a fee simple right in water taken under previous condemnation actions, even though their condemnees could not have claimed such a right? Because *Kannah Creek* is an anomaly in Colorado water law, it may be limited to its facts.

Kannah Creek may also signal a movement toward preferential treatment for cities. The court's other recent decisions in the area of cities' water rights support this view. In any event, the case clearly demonstrates a recognition that, in times of shortage, the thirst of the populace must be given the "paramount" priority.

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