5-2-1977

City of Thornton, Acting By and Through Utilities Bd. v. Farmers Reservoir & Irr. Co.

IN THE SUPREME COURT

OF THE STATE OF COLORADO

No. 27462

CITY OF THORNTON, COLORADO, a Municipal Corporation of the State of Colorado, acting by and through its Utilities Board, Petitioner-Appellant, vs. 1. THE FARMERS RESERVOIR AND IRRIGATION COMPANY, a mutual ditch company organized pursuant to the corporation laws of the State of Colorado; et al., Respondents-Appellees.	Appeal from the District Court of Jefferson County Honorable Roscoe Pile, Judge

BRIEF FOR THE COLORADO FARM BUREAU, NORTH COLORADO BOULEVARD LAND ASSOCIATES AND NORTH WASHINGTON LAND ASSOCIATES AS AMICI CURIAE

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STATEMENT OF THE ISSUES

The issues presented in this proceeding are those set forth in the Report of Preargument Conference, dated March 22, 1977, issued by Justice James K. Groves. This brief does not address issue 6 stated in that report.

STATEMENT OF THE CASE

The entities joining in this brief as amici curiae adopt the statements of the case presented in the briefs of the respondents.

SUMMARY OF ARGUMENT

The fundamental issue raised in this proceeding is whether the City of Thornton, as a home rule city, has the authority exclusive of any control by the state legislature to condemn water rights for the use of the city and its inhabitants. This issue is of great significance to all of the people of the State of Colorado because of the scarcity of water, and its unique status in terms of public ownership. If the City of Thornton can condemn water rights without complying with Sections 38-6-201, et seq., C.R.S. 1973 (1976 Supp.)(hereafter may be referred to as "the water rights condemnation statute"), the race by home rule cities to condemn as much water as possible irrespective of their needs will continue. The obvious intent of the legislature in enacting the water rights condemnation statute was to subject the determination of necessity for the condemnation of water rights to a review by persons representing the concerns of people residing outside the boundaries of the entity seeking the condemnation. This independent review was designed to benefit all of the people of the state by ensuring a distribution of water in the public interest.

The City of Thornton's contention in this proceeding is that under Sections 1 and 6 of Article XX of the Colorado constitution it has the authority to condemn water rights, exclusive of any control by the state legislature. Although Thornton does not

state in its brief whether it relies on Sections 1 and 6 as providing an express authority or merely an implied authority to condemn water rights, this distinction is relevant to the Court's inquiry. If the Court concludes that Sections 1 and 6 provide Thornton with express authority to condemn water rights, the Court is confronted with the further questions of whether that express grant of authority conflicts with Section 5 of Article XVI which dedicates the water in Colorado's natural streams to the people of the state, and if a conflict does exist, which constitutional provision must prevail. If, on the other hand, the Court concludes that Thornton has only an implied authority to condemn water rights, the Court is confronted with the further question of whether that implied authority is a matter of statewide concern which is subject to laws enacted by the state legislature.

Sections 1 and 6 do not expressly provide home rule cities with the authority to condemn water rights. The authority to condemn "water works" does not include the authority to condemn "water rights" because such a construction would conflict with Section 5 of Article XVI. Furthermore, because of the inherent transient nature of water, the authority to condemn "water rights" should be distinct from the authority to condemn "water works." Regardless of whether the Court construes Sections 1 and 6 of Article XX as including an express authority to condemn water rights, Section 5 of Article XVI is a specific constitutional provision concerning water rights, and its mandates must prevail.

If the City of Thornton has an implied authority to condemn water rights, it is based upon the authority granted to non-home rule cities by the legislature, and is therefore subject to the same limitations. Because the authority of non-home rule cities is subject to "the state constitution and laws upon that subject," Thornton's authority is likewise limited. Sections 28-6-201, et seq., are the applicable laws concerning the condemnation of water rights. Furthermore, pursuant to Section 5 of Article XVI, the legislature

has a duty to control the subject matter of water rights because it is a matter of statewide and constitutional concern.

Sections 38-6-201, et seq., apply to the City of Thornton pursuant to the provisions of its own charter concerning the exercise of the power of eminent domain. Moreover, these sections are not superseded by Thornton's condemnation action because water rights are not a matter of "purely local concern."

Sections 38-6-201, et seq., apply to the condemnation proceeding against the FRICO shareholders because they were not joined in the proceeding until after the effective date of the statute. The initial petition was void ab initio because Thornton had failed to join the shareholders who were subsequently held to be indispensable parties.

Thornton failed to satisfy the "failure to agree" requirement of Section 38-1-102, C.R.S. 1973, because its initial attempt of negotiation was with FRICO, which was not the real party in interest, and the subsequent offer to the shareholders was to purchase their shares of stock which are significantly different from the water rights which Thornton now seeks to condemn.

ARGUMENT

I. SECTIONS 38-6-201, et seq., C.R.S. 1973 (1976 Supp.) ARE FACIALLY CONSTITUTIONAL.

A. Sections 1 and 6 of Article XX do not expressly provide home rule cities with the authority to condemn water rights.

Section 1 of Article XX provides the City and County of Denver with the authority to condemn certain public works, including water works, for the use of the city and county and its inhabitants. That authority is stated as follows:

> ". . . (the City and County of Denver) shall have the power, within or without its territorial limits, to construct, condemn and purchase, purchase, acquire, lease, add to, maintain, conduct, and operate water works, light plants, power plants, transportation systems, heating plants, and any other public utilities or works or ways local in use and extent, in whole or in part, and everything required therefor, for the use of said city and county and the inhabitants thereof, ..."

This same authority is provided to all home rule cities by Section 6 of Article XX.

The term "water rights" is not used in Sections 1 and 6. For the Court to conclude that these sections provide the City of Thornton with express authority to condemn water rights, it must construe the term "water works," as used in Section 1, to include "water rights." This construction of Section 1 is improper because of the constitutional mandates of Section 5 of Article XVI and, also, because of the transient nature of water. The proper construction of the term "water works" is that it includes water pipelines and equipment, which are stationary and therefore local in nature, but it does not include water, as represented by water rights, which may flow across many boundaries.

Section 5 of Article XVI provides:

> "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."

A construction of Section 1 of Article XX which holds that home rule cities have an express authority to condemn water rights, exclusive of any control by other people of the state through the legislature, would be in direct conflict with the mandate of Section 5 of Article XVI dedicating "the water of every natural stream" to the "use of the people of the state." Provisions of the constitution must be read in connection with each other, and it must be presumed that the language and structure of constitutional provisions were adopted by choice and that discrimination was exercised in the language and structure used. White v. Anderson, 155 Colo. 291, 294 P.2d 333 (1964); See, City of Thornton v. Public Utilities Commission, 157 Colo. 188, 402 P.2d 194 (1965). The Court has a duty, whenever possible, to give effect to the expression of the people through the constitution. See, In re Interrogatories Propounded by Senate Concerning House Bill 1078, ____ Colo. ____, 536 P.2d 308 (1975). Where the Court is confronted with two possible constructions of a constitutional provision, one which is inconsistent with other constitutional provisions and one which is consistent, the Court should adopt that which is consistent. Cooper Motors v. Board of County Commissioners of Jackson County, 131 Colo. 78, 279 P.2d 685 (1955). To be consistent with the mandates of Article XVI, "water works" cannot be construed to include "water rights." Moreover, this Court has held that Sections 5 through 8 of Article XVI comprise "all" of the constitutional provisions having to do with the subject of water rights, and "under these sections, and the legislation enacted pursuant thereto, vested rights to water in natural streams may be acquired." Archuleta v. Boulder and Weld County Ditch Company, 118 Colo. 43, 192 P.2d 891, 894 (1948).

The inherent differences in the nature of water from that of water pipelines and equipment support the proposition that "water rights" are not included in the term "water works." Water

as it flows in public streams may cross the boundaries of many separate entities. Section 5 of Article XVI mandates that the right to the use of this water remain accessible to all of the people of the state regardless of municipal boundaries. To the contrary, water pipelines and equipment are stationary and are, therefore, inherently local in nature. It logically follows that the people through the adoption of Article XX would provide home rule cities with the power to control that which is local in nature, i.e., water works, and provide the legislature, through Article XVI, with the power to control that which is of statewide concern, i.e., the right to use water.

The City of Thornton has not carried its burden in demonstrating that the water rights condemnation statute is unconstitutional. A statute is presumed to be constitutional, Johnson v. Division of Employment, ____ Colo. ____, 550 P.2d 334 (1976), and those who challenge the constitutionality of a statute must prove its invalidity beyond a reasonable doubt. People v. Beaver, ____ Colo. ____, 549 P.2d 1315 (1976); People v. Garcia, ____ Colo. ____ , 541 P.2d 687 (1975).

If the Court concludes that Sections 1 and 6 provide the City of Thornton with an express authority to condemn water rights, the Court must resolve the conflict between those sections and Section 5 of Article XVI. Because Section 5 is a specific constitutional provision concerning water rights, it necessarily dominates any general provisions in Section 1 of Article XX concerning the same subject matter. People ex rel. Boatwright v. Newlen, 77 Colo. 516, 238 P. 44 (1925); People v. Field, 66 Colo. 367, 181 P. 526 (1919). And Section 5 mandates that rights to the use of water remain subject to the control of all of the people of the state.

B. Any authority which a home rule city may have to condemn water rights is an implied authority based upon the statutory authority provided to non-home rule cities which is subject to "the state constitution and laws upon that subject."

Home rule cities have the powers enumerated in Sections 1 and 6 of Article XX and also powers relating to matters which are reasonably implied fields of local concern. City and County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441, 444 (1958). As demonstrated above, Sections 1 and 6 of Article XX do not provide express authority for home rule cities to condemn water rights; therefore, any such authority must be an implied authority as a matter of local concern.

After referring to Sections 1 and 6 in its brief, the City of Thornton argues that Article XX confers on home rule cities every power which the legislature can grant to non-home rule cities and that the legislature has granted non-home rule cities the authority to condemn any property necessary to operate a municipal water system; therefore, Thornton has the authority to condemn water rights under Article XX. City of Thornton Brief at 21. The conclusion of this syllogism is that Thornton has an implied authority to condemn water rights based upon the statutory authority which the legislature has granted to non-home rule cities. Any such implied authority is therefore subject to the same limitations as the authority of non-home rule cities.

The City of Thornton cites C.R.S. 1973, § 31-15-708 (Supp. 1975) as the statutory authority granted to non-home rule cities to condemn any property necessary to operate a municipal water system. That statute appears to be nonexistent. Non-home rule cities, however, are provided the power to condemn water by C.R.S. 1973, § 31-12-101(78), which provides, in part:

> "(Non-home rule cities and towns shall have the authority)(a) [t]o take water in sufficient quantity, for the purpose mentioned in subsection (38) of this section, from any stream, creek, gulch, or spring in the state. If the taking of such water in such quantity shall materially interfere with or impair the

> vested right of any person 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 corporation or acquire the right of domain by condemnation, as prescribed by the state constitution and laws upon that subject, and make full compensation or satisfaction for all the damages thereby occasioned by such person or corporation." (Emphasis added).

Accordingly, any implied authority to a home rule city to condemn water rights based upon the statutory provision for non-home rule cities is subject to "the state constitution and laws upon that subject." The water rights condemnation statute is a law concerning the condemnation of water rights, and therefore, applies. It is also significant that the legislature has separated the authority granted to non-home rule cities to condemn "water" from the authority granted to those entities to condemn "water works." Section 31-12-101(77), C.R.S. 1973, provides as follows:

> "(Non-home rule cities and towns shall have the authority) [t]o condemn and appropriate so much private property as is necessary for the construction and operation of water, gas, or electric light works in such manner as may be prescribed by law; to condemn and appropriate any water, gas, or electric light works not owned by such city or town in such manner as may be prescribed by law for the condemnation of real estate."

This separation of the authority to condemn "water works" from the authority to condemn "water" is consistent with the proposition that the term water works as used in Section 1 of Article XX does not include water rights.

C. Water rights are a matter of statewide and constitutional concern which the legislature has a duty to control.

The implied powers of a home rule city are limited to those powers necessary to carry out the city's functions which are either not of statewide concern or not prohibited by other constitutional provision. City and County of Denver v. Sweet, supra, 329 P.2d at 445. In Sweet, this Court discussed at length the powers of home rule cities. Referring to Article XX, the Court said:

> "Colorado is one of those states of the Union which has constitutional provisions relating to home rule cities. We know of no state with any broader provisions than ours. By Article XX the people in their sovereign capacity created a new agency of government. They vested it with some of the powers previously exclusively reposed in the general assembly. But this grant of power to municipal corporations did not give them authority to legislate on other than their express or reasonably implied fields of local concern. Their power is only a delegated one. This is different from the general assembly which by authority of the sovereign people may legislate upon any subject it desires except as limited by the federal and state constitutions. See Denver v. Tihen, 1925, 77 Colo. 212, 235 Pac. 777." (Emphasis added). 329 P.2d at 444.

The Court also expressed the concern that home rule cities were attempting to assume powers which would make them separate city-states. The Court said:

> "The thinking of that case (Denver v. Mountain States Telephone & Telegraph Co., 67 Colo. 225, 184 P. 604 (1919)) has permeated some of the actions of our home rule cities to the point where today they think of themselves as being like medieval city-states with plenary powers which bar the state from any form of supervision or control of matters which later events show to be either matters of constitutional or state-wide concern." 329 P.2d at 444.

The Court's concern that home rule cities were attempting to take on the power of city-states is particularly relevant to this proceeding. In its challenge to the water rights condemnation statute, Thornton is taking the position that it has exclusive authority to determine the quantity of water it can take from the public streams. To hold that Thornton does have such a power over a matter which transcends the entire state would, in effect, grant it the power of a separate city-state.

Water is a matter of statewide concern. Perhaps the most fundamental consideration in this case is that water, its ownership and its usage, is unique in terms of property rights and public

interest. In these respects, as well as in physical characteristics, it differs from land, chattels or choses in action. Basic to this difference is the constitutional pronouncement in Section 5 of Article XVI that the water in all the natural streams is the property of the public. This underlying public ownership remains inviolate even though a private right to use water may be acquired by appropriation. The principle of public responsibility through the general assembly for this public property was eloquently set forth in the case of Stockman v. Leddy, 55 Colo. 24, 129 P. 220 (1912).

> "That the General Assembly, which, under our Constitution, is the representative of the people in making laws, has the power, and is charged with the duty, to protect the state's interest in the natural streams of this state, cannot be questioned. The general purpose which the General Assembly had in mind in passing this act is not only praiseworthy, but strictly within the range of legislative action. From the very beginning of settlement in Colorado territory, and in other arid regions of the West, irrigation has been recognized by federal and state legislation, by the decisions of the federal and state courts, and by the people directly interested, as the declared public policy. These decisions need not be cited. They are abundant. In section 5 of article 16 of our state Constitution as originally adopted, this public policy is thus tersely expressed: '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.' Other sections of the same article make such provision. This language is both emphatic and clear. It is the voice of the people who ratified the Constitution, and declares for all time the public policy of this state which theretofore had been recognized by all the departments of the dual governments. The statutes which were enacted by the earlier sessions of our General Assembly to carry out the provisions of this section provide an elaborate and systematic scheme for the distribution of the waters of the state to those entitled to their use. The state has never relinquished its right of ownership and claim to the waters of our natural

> streams, though it has granted to its citizens, upon prescribed conditions, the right to the use of such waters for beneficial purposes and within its own boundaries. The property right, however, in the natural streams, and the water flowing therein, has never been renounced or relinquished by the state, and it has at all times asserted not only its right of ownership, but the unrestrained right, within its own boundaries, to distribute its waters to those who have, under its authority, acquired, by perfected appropriations, the right to their use." 129 P. at 222.

The right to use this public property, water, can be and is controlled in many respects. Such controls have been developed and enunciated over the years by court decision and by statute. The extent of these controls and the propriety of imposing them derives in large measure from the unique characteristic of water as public property.

Because of the numerous cases concerning water rights brought before it, this Court is familiar with the limitations on the acquisition and use of a water right. The right may be acquired only by applying water to a beneficial use. Section 37-92-103(3), C.R.S. 1973 provides: "'Appropriation' means the application of a certain portion of the waters of the state to a beneficial use." The "use" is for a particular purpose. Section 37-92-103(4), C.R.S. 1973 provides, in part:

> "'Beneficial use' is the use of that amount of water that is reasonable and appropriate under reasonably efficient practices to accomplish without waste the purpose for which the appropriation is lawfully made . . . ."

The use of water can be changed only under certain terms and conditions and by following certain procedures as prescribed by statute. C.R.S. 1973, § 37-92-103(5); 37-92-302(1)(a); 37-92-305(3). The right to use water can be lost through abandonment. Ten years of non-use creates a presumption of abandonment for the purposes of the tabulation of water rights. C.R.S. 1973, § 37-92-402(11).

Recently, the legislature introduced environmental considerations into the matter of acquiring water rights and of changing the use thereof. Under C.R.S. 1973, § 37-92-102(3), the Colorado Water Conservation Board is authorized to appropriate or acquire a water right (commonly called a minimum stream flow water right) for the purpose of leaving water in the stream "as may be required to preserve the natural environment to a reasonable degree." This environmental consideration in the acquisition of a water right is enforceable on changes in other water rights under the basic principle that a junior appropriator may object to any change of a senior right that would change, to the detriment of the junior, the conditions existing on the stream at the time the junior made his appropriation. If the Colorado Water Conservation Board had a minimum stream flow right on a certain stretch of a river, it could object to a change of any other right that would affect the volume of water in that stretch of the river to the detriment of the minimum stream flow right. For example, if the average flow of the stream was 30 c.f.s. and the minimum stream flow right was 25 c.f.s., a change upstream in the point of diversion of another right would certainly affect the stream flow between the original and new point of diversion to the detriment of the minimum stream flow right at some time in the year when the flow was 25 c.f.s. or less.

As demonstrated in the statutes described above, the legislature in performing its duty of controlling the use of this public property has dealt extensively with the matter of "changes of use," including the granting of a right to the people, through the Colorado Water Conservation Board, to control changes of use based upon minimum stream flow rights acquired for the purpose of protecting the environment. Sections 5 and 6 of Article XVI guarantee to the people the right to appropriate water for a beneficial use, and as is clear from these Sections and Section 37-92-103(3)

and (4), C.R.S. 1973, beneficial use means a particular use. The principles concerning the changing of the use of water, the right to which was acquired by appropriation, have developed over the years by court decision and statute. Because the constitution guarantees only that a water right may be acquired by appropriation for a beneficial use and because water is public property, it is not only constitutionally proper, but it is the constitutional duty of the legislature to provide for supervision of such use and any changes thereof.

What the legislature has accomplished in the water rights condemnation statute is to provide for the consideration of certain factors, including environmental factors, in determining the propriety of the change of use of water that would result from the condemnation of water rights by a municipality. The legislature by this statute has simply provided for another measure of public supervision over the use and change of use of this public property. Because this supervision has been prescribed by the elected representatives, who speak for the people, it is simply a supervision by the people themselves of their own property as conferred to them by the constitution.

In the landmark case of Fellhauer v. People, 167 Colo. 320, 447 P.2d 986 (1969), this Court enunciated "the new drama of maximum utilization" as a concept to be emphasized and followed in the administration of water, which is the carrying out of the public control over this public property in the public interest. As a part of this concept the Court pointed out the "principle that the right to water does not give the right to waste it." It is submitted that the water rights condemnation statute is an implementation of this public interest program having to do with the maximum utilization of water. The statute relates to the control of these basic aspects of water use: beneficial use, change of use and waste. It requires consideration of what would be beneficial

use by a municipality; it concerns the change of use that would take place when a municipality acquires water rights by condemnation; and it implicitly includes within its purview the matter of waste that would take place in unnecessary acquisitions of water by a municipality. With regard to the question of "necessity," the statute requires consideration of the effects of the condemnation proceeding on areas outside of the municipal boundaries. External factors, as well as internal factors, must be considered because water and water rights are a matter of statewide concern.

If the acquisition of a water right by a municipality is unnecessary in terms of statewide concerns, then there is a potential waste in terms of statewide usage of this public property. An unnecessary use of water constitutes waste. The water rights condemnation statute addresses the matter of maximum utilization in terms of forestalling the wasteful competition for water rights that is a real probability as municipalities through condemnation powers will likely seek to compete for the limited amount of water which is available. Without controls, as contemplated by this statute in the statewide interest, it is a virtual certainty that municipalities such as Thornton will seek to acquire water rights involving amounts of water in excess of their current needs so that they can hold such water rights for possible future uses and preclude acquisitions by other municipalities. It is a matter of common knowledge that the value of water rights increases steadily and this would be one of the basic reasons for such competition. If there is to be maximum utilization of water in the public interest, then the state must be free to utilize controls such as are set forth in the statute in question.

If, as contended by the City of Thornton, it has a right to condemn water rights and this right to condemn derives from the constitution, which this brief specifically denies, then clearly

such right to condemn being delegated to a municipality must be subservient to the constitutionally derived right and duty of the people through their elected representatives to control the use, the change of use, and waste of the public property, water, that would be involved in the condemnation. Again the difference between water and other types of property, particularly land, that are involved in condemnation must be emphasized. The most that Thornton can claim is that it has an implied power under the constitution to condemn water rights. The people's ownership of water under the constitution is clear.

The fact that a right to use water is a property right does not in any way preclude legislative control over changes of use or waste. To the contrary this Court has recognized that the right to use water is for a particular purpose and that use may be changed only under certain conditions. If the courts and the legislature can specify conditions such as those mentioned above, then certainly they can provide that change through condemnation can take place only under the conditions set forth in the water rights condemnation statute. Although the right to use water for a particular purpose may be a property right, the underlying and overriding property right is the ownership of the water by the people.

II. SECTIONS 38-6-201, et seq., C.R.S. 1973 (1976 Supp.) APPLY TO THE CITY OF THORNTON.

A. The City of Thornton charter provides that the city may exercise its right of eminent domain "as provided by law."

A home rule city which adopts a charter pursuant to Article XX is bound by the provisions of that charter. See, International Brotherhood of Police Officers, Local No. 127 v. City and County of Denver, 185 Colo. 50, 521 P.2d 916 (1974). Section 16.7 of the City of Thornton charter provides that the city may exercise its right of eminent domain "as provided by law." The law of

eminent domain with regard to the condemnation of water rights is provided by Sections 38-6-201, et seq. Accordingly, the City of Thornton, by its charter, is required to comply with that law.

B. The City of Thornton's condemnation action does not supersede sections 38-6-201, et seq., because the condemnation action does not pertain to a purely local matter.

If the Court concludes that the City of Thornton has an implied authority to condemn water rights based on C.R.S. 1973, 31-12-101(78), the authority granted to non-home rule cities, the water rights condemnation statute necessarily applied to Thornton because, as discussed herein, the authority granted to non-home rule cities is prescribed by "the state constitution and laws upon that subject." If, however, the Court concludes that Thornton has an express authority to condemn water rights or an implied authority broader than that of non-home rule cities, the Court must determine if Thornton's condemnation action supersedes the requirements of Sections 38-6-201, et seq.

The action taken by the City of Thornton in seeking to condemn water rights can supersede the requirements of Sections 38-6-201, et seq., only if that action is in conflict with those provisions and the action pertains to a purely local matter. Vela v. People, 174 Colo. 465, 484 P.2d 1204, 1205 (1971). Because Thornton has refused to comply with the water rights condemnation statute and because the actions taken by Thornton do not meet the requirements of the statute, the conflict is apparent. The issue which must be resolved is whether the condemnation of water rights can be said to be a "purely local matter." If water rights are deemed to be a matter exclusively of local concern then the City of Thornton could take a condemnation action without meeting the requirements as provided by the state legislature. If, on the other hand, water rights are a matter of more than a purely local concern, any action by Thornton which is inconsistent with the water rights condemnation statute would be invalid. Huff v. Mayor and City Council of the City of Colorado Springs, ____ Colo. ____,

512 P.2d 632, 634 (1973); Bennion v. City and County of Denver, 180 Colo. 213, 504 P.2d 350 (1972).

As has been demonstrated herein, water rights by constitutional mandate have been declared to be a statewide concern. Although Thornton understandably has a local interest in providing water for its inhabitants, it cannot be said that this matter is one of "purely local concern."

III. THE WATER RIGHTS CONDEMNATION STATUTE APPLIED TO ANY RESPONDENTS JOINED AFTER ITS EFFECTIVE DATE.

A. The statute applied to the shareholders' water rights because the First Amended Petition was a new action as to the shareholders.

Although the original petition to condemn in this action was filed prior to the effective date of the water rights condemnation statute, the shareholders of the Standley Lake Division of FRICO were joined after that date. The proper issue before this Court is not whether the statute applied retroactively to the initial action, but whether it applied to those shareholders subsequently joined. As to the shareholders, the statute could only have a prospective effect because the action was not commenced as to them until after the statute became effective. In an eminent domain proceeding, as in any other civil action, the Colorado Rules of Civil Procedure, and specifically Rules 3 and 4 thereof, govern what constitutes commencement of the action. See, Jacobucci v. District Court, ____ Colo. ____, 541 P.2d 667, 674 (1975). Under Rule 3, an action is commenced either by the filing of a complaint with the court or by the service of a summons on the defendant, and if the court has subject matter jurisdiction, it has such jurisdiction from the time that either is done. This rule has been interpreted by this Court to mean that a court does not have jurisdiction over the person of a defendant and an action does not commence as to a defendant until that defendant is properly served with process. Clopine v. Kemper, 140 Colo. 360, 344 P.2d 451 (1959); Nelson v. District Court, 136 Colo. 467, 320 P.2d 959 (1947); Empire Ranch and Cattle Co. v. Coldren, 51 Colo. 115, 117 P. 1005 (1911).

Accordingly, although this action was commenced prior to the effective date of the statute, the action was not commenced as to the shareholders until they were served with process and properly joined as a party.

An analogy can be drawn to the tolling of the statute of limitations as to persons who are made defendants, but not as to defendants who are joined after the statute is run. In Hellerstein v. Mather, 360 F. Supp. 473 (D. Colo. 1973), the court held: "[A]s a general rule, legal proceedings do not toll limitations as to one not a party thereto." In Hoffman v. Halden, 268 F.2d 280, 304 (1959), the Ninth Circuit similarly held that the addition of new defendants to an action by means of an amended complaint was subject to the bar of the statute of limitations as applied to those defendants because "this is like the institution of a new action against new parties."

B. The import of Jacobucci is that the action was improperly commenced and therefore its actual filing date was that of the filing of the First Amended Petition.

A condition precedent to any condemnation is the failure of the owner and condemning entity to agree on the value of the property to be taken. Mulford v. Farmers Reservoir & Irrigation Co., 62 Colo. 167, 161 P. 301 (1916). Section 38-1-102, C.R.S. 1973, imposes an affirmative duty on that entity to negotiate with the proper party in good faith. If the entity fails to do so, a court lacks jurisdiction to hear the petition in condemnation. Mulford v. Farmers Reservoir & Irrigation Co., supra. The holding in Jacobucci was merely that indispensable parties had not been joined, which was the only issue before the Court.

The district court in its "Order Dismissing Action" (at p. 6), dated October 6, 1976, concluded that it lacked jurisdiction over the subject matter of the action. This conclusion was based upon the court's holdings that it did not have jurisdiction over the respondents joined after the effective date of Sections 38-6-201, et seq., because Thornton had not complied with those Sections,

and that, under the Jacobucci decision, it did not have subject matter jurisdiction as to FRICO because of the failure to join indispensable parties.

It is submitted that the district court lacked jurisdiction ab initio because of the failure of Thornton to negotiate with and join indispensable parties, the appropriate FRICO shareholders. The failure to join an indispensable party is a ground for dismissal of an action. C.R.C.P. 12(b)(7). In a condemnation action the "joinder" of interested parties occurs through negotiation with them even prior to the filing of a petition. This Court in holding the shareholders were indispensable (Jacobucci), in effect, held that FRICO was not the proper or primary party interested in the property and directed Thornton to begin anew by negotiating and if necessary petitioning as to the shareholders. Thornton in response to that mandate started over in October, 1975. This Court's order of a joinder of parties rather than a dismissal of the prior action meant only that the new petition could be filed as an amended petition in the original case. The essence of the Jacobucci decision was an order to commence a new proceeding.

C. The application of the water rights condemnation statute to this case in toto is not a retroactive application prohibited by the constitution or by statute.

The City of Thornton argues that any application of the water rights condemnation statute to this case is retroactive. It contends this offends Article II, Section 11 of the Colorado Constitution and C.R.S. 1973, § 2-4-202, which basically mandate that legislation be only prospective in application. It is conceded that this is the general rule with regard to substantive changes in law. But the application to the water rights condemnation statute does not retrospectively impair any right or add any liability as to Thornton's already completed actions in the case. All that Thornton had done, prior to the effective date of the statute, was petition the court. No rights vested with the mere filing of that petition. Such rights to property vest only upon an award by the commission (or jury) and an order of the court. Thornton suffered

no prejudice by the additional requirements and limitations of the statute because, regardless, it was compelled to file an amended petition after the statute became effective to comply with Jacobucci. As of that date, Thornton had not acquired or received anything, no commission had been called, and no award had been made.

A case closely analogous to the circumstances presented here is Perry v. City of Denver, 27 Colo. 93, 59 P. 747 (1899). There persons in the town of Fletcher sought annexation of the town to Denver. By procedure they petitioned the county court, which duly ordered an election held. Subsequent to this order, the legislature passed an amendment to the annexation statute further requiring that the city to be enlarged consent by ordinance to the annexation. The electors of Fletcher subsequently voted the annexation and the parties returned to request a decree of annexation. This Court held that the failure of Denver to consent to the enlargement deprived the county court of power to enter the decree. In dealing specifically with the contention that the application of the new law violated Colorado's constitutional prohibition as to retroactive legislation, the Court defined a retroactive law as one.

> "which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect to transactions or considerations already past. (citations omitted)." (emphasis added). 59 P. at 748.

The Court ruled that completion of certain preliminary procedures gave the petitioners no vested right to have the case finally determined according to the existing law. Of the additional requirement of the annexing city's consent, the Court concluded:

> "(t)his was merely a further condition under which annexation could be effected. True, it was a new feature; but in prescribing it the proceedings already had were not in any manner affected, for it operated only upon contingencies happening after its passage." 59 P. at 748.

Reviewing Thornton's proceedings, the requirement that it petition and that a commission be appointed under the water rights

condemnation statute could not have impaired any of Thornton's vested rights or attached new disabilities because the amended petition could have, and should have, complied with the new law. The mere filing of a petition creates no vested right. No ruling or proceeding is accomplished thereby, no act is taken to the petitioner's detriment. The only rights or proceedings which vested would be the attachment of venue and satisfaction of negotiation with FRICO. Venue, however, does not constitute a vested right and a change of venue to the district of the municipality (Thornton), does not in any way impose additional obligations or liabilities on petitioner. The negotiation with FRICO, if sufficient, would not be nullified in any way by the filing of a new petition. Even if the new law nullified that negotiation, Thornton cannot claim prejudice because it had to reinstitute negotiation in accordance with the Jacobucci decision. The limitation imposed by the new statute restricting the amount of water taken to satisfy a 15-year need is merely a further definition of necessity as designated in the law. It requires merely that a municipality cannot condemn in one proceeding more than is necessary to meet that need. Regardless of whether such a limitation substantively impairs rights implicit in prior law, Thornton cannot establish the limitation has injured its position because it has not had a commission or jury hearing, much less a decree giving it title.

Finally, Thornton cannot claim the application interfered with any vested right where it was its own lack of diligence which caused a "retroactive" application of this statute. Thornton chose to ignore the shareholders from the start by failing to properly negotiate with them for the water rights. (Infra, at paragraph IV(A.)) Moreover, Thornton affirmatively opposed the shareholders' cross petition to intervene pursuant to C.R.S. 1973, § 38-1-109. Thornton's opposition prolonged the previous appeal of this proceeding. At any time, Thornton could have made the previous appeal moot by

confessing the right of the shareholders to intervene and with diligence, it could have taken all the necessary steps with regard to those parties prior to the enactment of C.R.S. 1973, § 38-6-201, et seq. Arguably, Thornton could have avoided the application of that statute to its condemnation action. In choosing to oppose the intervention of the shareholders, Thornton alone caused the delay, and thereby, waived or abandoned any objection it may have otherwise interjected to the application of this law and is estopped from objecting now. See, Colorado Bank v. Western Co., 36 Colo. App. 148, 539 P.2d 501 (1975); Papano v. Manning, ____ Colo. App. ____, 538 P.2d 1337 (1975).

IV. THE CITY OF THORNTON DID NOT SATISFY THE "FAILURE TO AGREE" CONDITION PRIOR TO FILING EITHER ITS ORIGINAL OR ITS AMENDED PETITION.

A. Negotiations with FRICO, regardless of their sufficiency as good faith dealing, were not addressed to the proper parties and were therefore insufficient to satisfy Section 38-1-102, C.R.S. 1973.

The City of Thornton concedes that satisfaction of the failure-to-agree requirement of C.R.S. 1973, § 38-1-102 is jurisdictional. City of Thornton Brief at 39. Mulford v. Farmers Reservoir & Irrigation Co., 62 Colo. 167, 161 P. 301 (1916) clearly so holds. The language in Mulford has further been construed to require negotiation between the condemning authority and the property owner before submission of the matter to the court. Old Timers Baseball Assoc. v. Housing Authority, 122 Colo. 597, 224 P.2d 219 (1950); Stalford v. Board of County Commissioners, 128 Colo. 441, 263 P.2d 436 (1953). Assuming the trial court was correct in ruling there was sufficient evidence of good faith negotiation to comply with the statute in that respect, the fact remains that Thornton did not negotiate with the actual property owners, the shareholders. Thornton asserts that because addition of parties in a condemnation may occur at any time, prior negotiation should be construed as required only before the joinder of those parties and not necessarily prior to initial filing of the

petition. But Thornton misinterprets Jacobucci. The import of the opinion with regard to negotiation is that negotiation with the shareholders should be held, not because they were additional parties, but because they were the real parties in interest. With the shareholders so situated, negotiation and petitioning as to FRICO's rights alone is superfluous. The only meaningful action is to be taken as to the individual shareholders. If the negotiations with them were successful, FRICO's consent would be unnecessary and it could not object unless such sale were in violation of FRICO articles or by-laws. As previously stated, the issue of whether the district court originally had proper jurisdiction of the petition without negotiation with FRICO shareholders was not before this Court in Jacobucci. Had the issue been before this Court on an appeal of the ruling on such a motion, the Court would be compelled to order a dismissal for lack of jurisdiction. No party raised that issue before this Court. The trial court, in effect, dealt with this issue on remand and concluded that Thornton had satisfied C.R.S. 1973, § 38-1-102, ab initio. Because negotiation was not held with the shareholders, the court erred in this conclusion.

B. The offer to FRICO shareholders did not comply with the "failure-to-agree" requirement of Section 38-1-102, C.R.S. 1973, because it sought to purchase property significantly different from that it seeks to condemn.

The First Amended Petition in condemnation seeks to condemn certain water rights and contracts and other rights incident thereto. By its letter of October 22, 1975, the City of Thornton offered to purchase from the shareholders their stock in FRICO. In that letter Thornton recited the appraised value of the water rights and stated that it was determining the value of each share of stock by dividing the value of the water rights by the number of shares of stock. This offer did not take into account that a share of stock would evidence an interest in other assets of the ditch company as well as the water rights. It is an obvious fact that a share of stock is not the same thing as the water right. Any

mutual ditch company, such as FRICO, would have a bank account from which it paid its expenses and into which would be deposited receipts from assessments and other items. At any given time a shareholder would have a proportionate interest in the funds in this bank account that would be available to him on dissolution and distribution in connection therewith. FRICO held certain shares of the Standley Lake Division or shares of the Alpha Corporation in its treasury (f. 1676, Stipulation of July 10, 1974). A shareholder would have an interest in these treasury shares or the proceeds thereof.

It is true that with respect to mutual ditch companies, as emphasized by this Court in Jacobucci, a share of stock represents an interest in the water rights of the ditch company, but this does not make it the same thing as the water rights. This Court in Jacobucci simply directed that the shareholders be made parties to any proceeding to condemn the water rights. It did not direct the City of Thornton to purchase the stock of the shareholders.

Although the relationship between a share of stock in a mutual ditch company and the water rights of the ditch company is direct, as emphasized in Jacobucci, nevertheless for the City of Thornton to offer to purchase the stock when it sought to condemn the water rights is as though a condemnor that wanted to acquire a piece of land which was the sole real property asset of a corporation offered to purchase the stock of that corporation without regard to the effect of other personal property assets on the value of the stock. Consequently, Thornton did not negotiate for what it seeks to condemn, water rights.

CONCLUSION

For the reasons stated above, the Court should affirm the trial court's holdings that Sections 38-6-201, et seq. (1976 Supp.), are constitutional; apply to the City of Thornton; and apply to all respondents joined after their effective date. Further, the Court should hold that the City of Thornton failed to satisfy the "failure-to-agree" requirement of Section 38-1-102, C.R.S. 1973, prior to either its original or its amended petition.

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CERTIFICATE OF SERVICE

I hereby certify that on May 2, 1977, the foregoing BRIEF FOR THE COLORADO FARM BUREAU, NORTH COLORADO BOULEVARD LAND ASSOCIATES AND NORTH WASHINGTON LAND ASSOCIATES AS AMICI CURIAE was served on all other parties to this action by mailing a copy to their respective counsel at the addresses below:

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