4-29-1977

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

No. 27462

IN THE SUPREME COURT

OF THE

STATE OF COLORADO

CITY OF THORNTON, COLORADO, a Municipal corporation of the State of Colorado, acting by and through its Utilities Board, Petitioner-Appellant, vs. THE FARMERS RESERVOIR AND IRRIGATION COMPANY, a Mutual Ditch Company, organized pursuant to the corporation laws of the State of Colorado, et al, Respondent-Appellees.	From the District Court of the County of Jefferson State of Colorado Honorable Roscoe Pile, Judge

ANSWER BRIEF OF

THE FARMERS RESERVOIR AND IRRIGATION COMPANY, Respondent-Appellee

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Dated May 1, 1977.

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INTRODUCTORY

Respondent-Appellee The Farmers Reservoir and Irrigation Company (FRICO) operates as a mutual ditch corporation and distributes water appropriated from various Colorado streams to the lands of its stockholders substantially all of said lands being located in the Counties of Adams and Weld, Colorado. For water distribution purposes, FRICO (original incorporation date - October 3, 1902) at the time it amended its Articles of Incorporation in or about 1928 was divided into five divisions as appears from its Amended Articles (f. 642-643) defined as follows:

Division No. 1 - Marshall Lake Division;

Division No. 2 - Standley Lake Division;

Division No. 3 - Westminster Pipe Line Division (this division is no longer operating);

Division No. 4 - Barr Lake Division; and

Division No. 5 - Milton Lake Division.

At the times of the institution of this condemnation proceeding and as of June 20, 1974, the stock of the company on which water deliveries are allocated and on which annual assessments are paid was owned by a large number of stockholders who own in the aggregate the number of shares allocated to the separate divisions as follows: (f. 629)

DIVISION OF SYSTEM	NUMBER OF STOCKHOLDERS 11-14-73	6-20-74	NO. OF SHARES
Standley Lake	271	285	2,372.478
Barr Lake	291	305	2,757.427
Milton Lake	180	185	1,429.617
Marshall Lake	363	386	1,405.210
TOTALS	1,105	1,161	7,964.732

The creation of the several divisions of the system was for the purpose of water distribution through facilities located geographically within a respective division. A brief description of the FRICO system was made by its President, M. C. Sarchet, as follows: (f. 1968-1976)

> "MR. DICK: If the Court please, I would like to place this up on the board and hand you this stick, Mr. Sarchet, and ask you to step to the map marked Exhibit 1, and as briefly as possible describe the Farmers Company system as shown on that map, starting perhaps in the area in which you have the most present concern, the area on Clear Creek.
>
> A. This is the outline of Standley Lake. It's colored in red. It receives its water supply from Clear Creek through the Croke Canal, which is this red line coming out here and around and emptying into Standley Lake.
>
> Q. You are speaking about an area which would be in the lower left hand corner of the map; is that correct?
>
> A. That's correct.
>
> Q. Now, if we can identify as you go along, perhaps you don't necessarily have to repeat sections--show maybe the directions in which the various canals and reservoirs feed. Proceed.
>
> A. The Bull Canal, down through Dry Creek, an outlet for Standley Lake, follows in a northeasterly direction, serves the area all the way down through to a point about directly west of Ione, or northwest of Fort Lupton (indicating). The area irrigated extends from about the point where the Bull Canal takes out of Dry Creek, which is here, and the area on both sides down through here is irrigated from the Bull Canal. These are various laterals or branches of the Bull Canal and serve an area along those laterals.
>
> Q. There are about five Bull Canal laterals; is that correct?
>
> A. There is a main Bull, plus five laterals.
>
> Q. And the land irrigated through that portion of the system are both in Adams and Weld Counties; is that correct?

A. That's correct.

Q. Did you identify the Croke Canal there, Mr. Sarchet, as the inlet to Standley Lake?

A. The Croke Canal takes out of Clear Creek in the city limits of the City of Golden, follows in a northeasterly direction, winds around through here, and reaches Standley Lake here at the east side.

Q. Now, with reference to the west side of the South Platte, what other divisions are located on the west side?

A. Marshall Lake is located about five miles southeast of the City of Boulder. It derives its water supply from the South Boulder Creek, and it is diverted through the Community Canal to Marshall Lake and out of Marshall Lake through the Lower Community Canal, which runs in a northeasterly direction from Marshall Lake and serves the area principally along that canal down to a point near--between the town of--west of the Town of Dacono.

Q. Now the divisions along the South Platte?

A. Barr Lake is located about five miles southeast of Brighton. It derives its water supply from the South Platte River. The diversion point from the river is in the Riverside Cemetery, and the Burlington and O'Brian canals run in a northeasterly direction from that point and empty into Barr Lake. There are four different canals, or five different canals out of Barr Lake. One is the Speer Canal, which takes out on the west side and follows in a northerly direction and ends down south of LaSalle, irrigates that area. The Neres Canal takes out on the east side, runs in a northeasterly direction and irrigates the area along that canal, which ends near the town of Hudson. And the East Burlington Canal takes out on the east side of Beebe draw and runs in a northeasterly direction and irrigates the area just below it for a distance of about twelve miles. The West Burlington extension takes out on the west side of Beebe draw and runs in a northerly direction a distance of about twelve miles and irrigates the area immediately east and below that canal. Beebe Ditch takes out and follows down the Beebe draw to a point north of Hudson, and at that point the East Neres is diverted from the Beebe draw and runs in a northeasterly direction and irrigates the area south of Kersey, south and east--mostly south of Kersey.

> Milton Lake is located about five miles east of the town of Platteville. It derives its water supply from the South Platte River through the Platte Valley Canal. The diversion from the river is approximately two and a half miles north of the Town of Fort Lupton. The Platte Valley Canal runs in a northerly direction down through here and turns back in a southerly direction and empties into Milton Lake. The Gilmore is the delivery canal out of Milton Lake, runs in a northerly direction for about eight or ten miles, goes around the hill and comes back south and ends at this point about six miles southeast of Kuner. It irrigates the area below it for that distance."

Thornton on page 2 of its Brief states that the focal point of the condemnation action is Standley Lake, a reservoir located in Jefferson County, Colorado.

Among the items of property which Thornton seeks to condemn in this proceeding is the following: (f. 142)

> "All stock owned by The Farmers Reservoir and Irrigation Company in The Golden Ralston Creek and Church Ditch Company, a Colorado corporation."

M. C. Sarchet, President of The Golden-Ralston Creek and Church Ditch Company, testified concerning said company as follows: (f. 2008-2114)

> "Q. Now, you have stated, Mr. Sarchet, that you had been president for a good many years and a director of the Golden-Ralston Creek and Church Ditch Company. Would you in some detail testify just what that operation is.
>
> A. The Golden-Ralston Creek and Church Ditch Company is a carrier ditch company, and the majority of that stock is owned by the Farmers Reservoir and Irrigation Company. The water carried in that ditch is principally statutory water which is delivered to the contractors or consumers under that ditch, and they own a right to purchase each year the number of inches stated in their contract. The total number of inches delivered through the Church Ditch is fifty-seven hundred ten inches, and that is a direct flow right, and we operate that as a carrier ditch and call for the water as it is available on the decrees, and that water is prorated out to the contractors or consumers under that ditch on the basis

of the number of inches they own or contract for in relation to the total number of inches.

Q. Is the Farmers Company the owner of any of the statutory inches of water decreed to the Church Ditch, delivered through the Church Ditch, I mean?

A. Yes, sir.

Q. Do you know how many inches the Farmers Company owns?

A. Eight hundred thirty-three, approximately. There are a small fraction over 833.

Q. And the balance of the fifty-six hundred plus inches is owned by various consumers or statutory users?

A. Users.

Q. The Church Ditch, I believe you stated, is a carrier ditch company, and most of the stock is owned by the Farmers Reservoir and Irrigation Company. Does the stock ownership of the Golden-Ralston Creek and Church Ditch Company by the Farmers Company entitle it to any water in the Church Ditch?

A. No, sir.

Q. The water rights decreed to the Golden-Ralston Creek and Church Ditch Company, is it included in the allocation of the water in Standley Lake Division by the Farmers Company system?

A. I'm not sure I understand.

Q. Is the water carried in the Church Ditch allocated as between Standley Lake and the various stockholders and so forth, in connection with the use of water, allocated on stock?

A. The statutory water owned by the Farmers Reservoir and Irrigation Company, part of that is diverted into Standley Lake, and part of it continues on down the Church Ditch and is delivered to the Community Canal for the use of Farmers Company stockholders under the Community Canal.

Q. Now, with relation to what would be forty-eight hundred inches delivered to statutory users, does that in any way effect any allocation of water in the Standley Lake Division?

A. Only to the extent that water that is diverted into Standley Lake by virtue of the Farmers Company ownership of statutory water.

Q. I mean now the balance of the decreed water in the Church Ditch.

A. No, sir.

Q. It is not a part of the Standley Lake Division at all, is it?

A. No, sir."

It is evident from the quoted testimony that the stock of The Golden-Ralston Creek and Church Ditch Company is a separate and distinct parcel of property. It is a separate parcel of property having a situs of its own which is the principal office and place of business of FRICO in Adams County, Colorado. Inclusion of this separate parcel of property with property located in Jefferson County, Colorado, is contrary to and prohibited by C.R.S. 1973, Sec. 38-1-204, which provides in part as follows:

"No cause shall be heard earlier than ten days after service upon the defendant or upon due publication as provided in section 38-1-103. Any number of separate parcels of property situate in the same county may be included in one petition, and the compensation for each shall be assessed separately by the same or different commissions or juries, as the court may direct. * * *"

STATEMENT OF THE ISSUES

The issues on this appeal have been stated in the "REPORT OF PREARGUMENT CONFERENCE" entered in this proceeding on March 22, 1977, by Justice James K. Groves which report was approved by the Court on the 22nd day of March, 1977.

STATEMENT OF THE CASE

Appellant Thornton has in its Brief outlined in detail the matters involved in this appeal and has presented at some length a statement of the facts to the extent that at this point in this proceeding facts have been developed. A "Statement of the Case" is also included in the Answer Brief of Victor L. Jacobucci, et al, Individual Respondents. Respondent FRICO believes that a separate and complete "Statement of the Case" would for the most part be repetitive and therefore will limit its "Statement" to matters which in FRICO's opinion have no support in the record and which, when and if it becomes necessary to have a full evidentiary hearing in this controversy, will be proven to be totally inaccurate.

In the portion of this Brief entitled "INTRODUCTORY," a description of FRICO is set forth and in that description attention has been called to the allocation of FRICO stock for water distribution purposes among four divisions, but this allocation did not for corporate purposes create differences or distinctions in FRICO's shares. FRICO operates and maintains its irrigation system as a unit. All FRICO shares pay the same annual assessment, and the monies derived from such assessment are used to pay the maintenance and operation expenses of the

FRICO irrigation system as a unit. Corporate administration is not divided into four separate operating divisions notwithstanding the allocation of corporate stock for water distribution purposes between four divisions. Thornton, on page 2 of its Brief states:

> "Standley Lake and ditches related to it are owned of record by the Farmers Reservoir and Irrigation Company ("FRICO") and <u>are administered by FRICO's Standley Lake Division</u>.

The underscored language in the immediately above quoted statement is unsupported by facts and is misleading. Geographic location of FRICO's four main reservoirs, Standley Lake, Marshall Lake, Barr Lake and Milton Lake, and the amount of water available for delivery to shareholders located within a geographical area dictated the allocation of FRICO shares for water distribution purposes.

Recognition that ownership of a water right vests in the water user making beneficial application of the water does not justify ignoring the rights and privileges vested in all of FRICO's stockholders. Thornton, on page 7 of its Brief, makes the following statement:

> "After careful review of possible alternatives, Thornton decided that it should acquire the water rights and related property owned by the Standley Lake Division of The Farmers Reservoir and Irrigation Company ("FRICO"). On October 3, 1973, a duly authorized written offer of $9,300,000 was made to FRICO for the purchase of the assets of the Standley Lake Division, $9,300,000 having been the value of the assets determined in a valuation study done for Thornton."

FRICO points out that use of phrases such as "owned by the Standley Lake Division" and "assets of the Standley Lake Division" are both misleading and inaccurate.

On page 10 of its Brief Thornton makes the following statements:

> "b. The purchase offer to FRICO.
>
> Having tried unsuccessfully to acquire sufficient additional water through purchase or lease, and having studied a large number of water supply sources, Thornton decided in the spring of 1973 that its first priority should be the acquisition of the Standley Lake Division of FRICO (f. 1692, 1884-1885). The reasons for selecting the Standley Lake Division were three-fold: (1) the good water rights held by the Division; (2) the storage rights associated with Standley Lake; and (3) the gravity flow from Standley Lake into the Thornton water system (f. 1718, 1884; 1674, 1851, Pet. Exh. P at page 53).
>
> Once Thornton decided to try to acquire the Standley Lake Division, Thornton's special water counsel and its water consultant prepared the property description which appears as Exhibit A to the Petition in Condemnation (hereafter referred to as 'Exhibit A') (f. 386, 1697-1698). This exhibit details the water rights, ditches, land, and related assets of the Standley Lake Division (f. 13-50, 386-387, 950-987, 1698)."

FRICO again calls attention to the unjustified use of the phrase "Standley Lake Division." In particular, FRICO points out the most obvious item of the pieces of property sought to be condemned in which FRICO shareholders whose stock is allocated for water distribution purposes to the Standley Lake Division have only their stock proportionate interest along with all other FRICO shareholders. This item of property in "Exhibit A" (f. 13-50) is as follows:

> "D. Interests in The Golden Ralston Creek and Church Ditch Company and in Church Ditch
>
> 1. All stock owned by The Farmers Reservoir and Irrigation Company in The Golden Ralston Creek and Church Ditch Company, a Colorado corporation.

> 2. The right of The Farmers Reservoir and Irrigation Company to use the Church Ditch as an inlet to Standley Lake. Church Ditch, also known as the Golden City and Ralston Creek Ditch, in Jefferson County, Colorado, has headgates located on the north bank of Clear Creek in the NE 1/4 of Section 32, Township 3 South, Range 70 West of the 6th P.M., 1450 feet south 69°30' west from the northeast corner of said section, and on the north bank of Ralston Creek in Section 2, Township 3 South, Range 70 West of the 6th P.M., at a point 445 feet south 69° west from the center of said section. The Church Ditch extends from its headgate on Clear Creek in a generally north and east direction a distance of about 28 miles to Standley Lake, through Sections 32, 33, 28, 27, 22, 23, 14 11, 12, 2 and 1, Township 3 South, Range 70 West of the 6th P.M.; through Sections 36, 35 and 25, Township 2 South, Range 70 West of the 6th P.M.; and through Sections 30, 29, 32, 33, 34, 28, 29, 30, 19, 18, 17, 16, 9 and 8, Township 2 South, Range 69 West of the 6th P.M."

A short description of The Golden-Ralston Creek and Church Ditch Company, owner of the "Church Ditch" is set forth on pages four and five of this Brief.

Thornton's original assumptions as to "parties interested" in the ownership of several pieces of properties sought to be condemned have been found inaccurate. This Court in Jacobucci v. District Court,____ Colo. _____, 541 P. 2d 667 (1975),which is directly concerned with this condemnation proceeding, set the record straight as to ownership of the right to use water sought to be condemned and certainly to that extent identified the persons with whom there had to be a "failure to agree upon compensation to be paid." Ownership of FRICO general corporate assets was not determined in the Jacobucci case, supra.

The questions to be determined on this appeal being entirely related to procedural matters should be resolved,and the statements of the case made in Thornton's

Brief and the Victor L. Jacobucci et al Brief set forth facts sufficient for such resolution. FRICO submits, however, that a full evidentiary hearing in this eminent domain proceeding, if the same becomes necessary, will in FRICO's opinion establish that Thornton has in its description of property sought to be condemned and upon which it claims to have submitted an offer to FRICO to purchase in the amount of $9,300,000 included not only individually owned "water rights" the loss of which would create individual damages but several other items of property which must be classified as general corporate assets ownership of which is vested proportionately in all FRICO shareholders.

In its Supplemental Brief (pages 13-14) Thornton again desires to have this Court adjudicate the property interests of hundreds of shareholders who have not been made parties to this proceeding. As a condemnor, Thornton is at its risk in not joining any person who may have an interest in the properties sought to be acquired. Thornton may not, however, convert a condemnation action into a quiet title suit which it is seeking. Its duty is to bring before the Court all persons who may have an interest in the property, and subsequent to the condemnation proceeding separate hearings are provided by statute for a determination of the division of funds paid to the Court for the benefit of multiple claimants.

The most rudimentary notion of Due Process demands that before this Court can declare that any persons have no ownership of interest in property, those persons must be afforded an opportunity to be heard.

This Court must therefore decline Thornton's wholly premature invitation to dispossess any person of a property interest before those persons have been made parties.

FRICO notes that an item of property sought by Thornton in its claimed offer to purchase made to individual shareholders is individually owned FRICO stock "at a price of $3,920 per share." Thornton's "package deal" offer clouded ownership of properties sought to be condemned and stymied the "good faith negotiations" necessary to satisfy the condition precedent requirement for a valid and effective condemnation proceeding.

SUMMARY OF ARGUMENT

Thornton, a Home Rule city, as to matters which are "local and municipal" may have exclusive legislative powers. However, as to matters which are of "State-wide concern," Thornton derives no legislative authority from Art. XX of the Colorado Constitution. Legislative authority with regard to matters of "State-wide concern" remains with the State. The dependence of all the people of Colorado upon the waters flowing in the State clearly establishes that all such waters which by the Constitution are declared to be the property of the public must be governed and controlled by the State and not by the governing body of a Home Rule city such as Thornton. The Water Rights Condemnation Act of 1975, Sections 38-6-201 et seq., C.R.S. 1973 (1976 Supplement) applies to all municipalities including Thornton.

The Water Rights Condemnation Act of 1975 does not take away Thornton's power to condemn property for public use but merely establishes procedures which must be followed when the property sought to be condemned includes a "water right." The established procedures when viewed in the light of the importance of water use and distribution in the State of Colorado are neither arbitrary or unreasonable and do not violate any constitutional prohibition. No substantive right of Thornton is unconstituionally denied or impaired by the Water Rights Condemnation Act of 1975. Thornton's admitted failure to comply with the Act justifies affirmance of the trial court's dismissal of action.

Ownership of the properties sought to be condemned and the nature of the properties sought to be condemned when considered in the light of the alleged "negotiations" (failure to agree) between Thornton and "owner" clearly establishes that Thornton did not satisfy the statutory condition precedent that before commencement of a condemnation proceeding there must be negotiations and "a failure to agree by the parties interested upon the compensation to be paid."

Thornton may not condemn as a public use water rights for the benefit of users or consumers residing outside city boundaries. Thornton, not being legally bound to serve outside users, acts in a proprietary capacity when it does so and, insofar as eminent domain powers are concerned which are tied to "local and municipal" matters and the needs of the inhabitants of the city, it is clear that Thornton has exceeded its power and authority in this condemnation proceeding.

Property sought to be condemned in this proceeding is already devoted to a public use. Section 5 of Art. XVI of the Colorado Constitution provides:

> "Section 5. Water of streams public property. 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."

Preferential grading of water uses - - Section 6, Art. XVI, Colorado Constitution - - establishes a priority between public uses of appropriated water. Municipal use is a multiple use and only to the extent of the water needed for domestic use by the city for its inhabitants can it be stated that a preferential public use exists.

Dismissal of FRICO by the District Court should be affirmed inasmuch as Thornton does not challenge such dismissal or request reversal thereof and the record establishes that indispensable parties were not joined as mandated by this Court in the Jacobucci case, supra.

ARGUMENT

I. THE WATER RIGHTS CONDEMNATION ACT OF 1975 APPLIES TO THORNTON, A HOME RULE CITY

Thornton, on page 22 of its Brief, presents a detailed outline of the provisions of the Water Rights Condemnation Act of 1975 (Sec. 38-6-201 et seq., Colorado Revised Statutes, 1973, (1976 Supp.)), and then states its challenge to the law and its application to Thornton as follows:

> "This review shows that the Water Rights Condemnation Act makes two fundamental changes in the substantive law governing the right of municipalities to condemn. First, the determination of the necessity of exercising eminent domain for the improvement proposed in the petition is taken from the municipality and given to the three commissioners (with the ultimate decision to be made by the court). Second, an absolute limit of 15 years is fixed on future needs which can support the exercise of eminent domain. Each of these changes is contrary to the powers granted to home rule cities under Article XX of the Colorado Constitution."

The following language which is found in Sec. 1 of Article XX is the basis for Thornton's contention that the 1975 Act does not apply to it. The language is as follows:

> " * * *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 therefore, for the use of said city and county and the inhabitants thereof, and any such systems, plants or works or ways, or any contracts in relation or connection with either, that may exist and which said city and county may desire to purchase, in whole or in part, the same or any part thereof may be purchased by said city and county which may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain, * * *"

Initially it is noted that the quoted constitutional language specifically relates to "water works" and when this phrase is taken in context FRICO submits that the "water rights" and the "irrigation structures" which are the subject matter of this condemnation proceeding are not the type of "water works" included within the eminent domain powers granted a Home Rule city. Condemnation of "water rights" and "irrigation structures" by a Home Rule city or by any other municipality is governed by the general laws of the state. It should also be noted here that the right to appropriate water from the natural streams of Colorado is not a listed power under Article XX, but FRICO admits that the municipality has the right to "appropriate" water under the general laws of the state. The general laws of the state also provide for changes in water rights such as changing use, changing place of use and change in time of use, but all of these changes can only be granted upon condition that the rights of other appropriators are not injured. Changes in water rights cause changes in historical stream conditions, and the taking of "water rights" by Thornton if permitted will affect the flow of water in two natural streams, namely Clear Creek and the South Platte River. In People ex rel. Rogers v. Letford, 102 Colo.284, 79 P. 2d 274 (1938), this Court recognized that the use of water and conservancy measures, insuring that the state-wide water supply does full duty before flowing from our borders, is . . . "eminently a matter of state-wide concern." [id at 297] The Water Rights Condemnation Act of 1975 is the legislative expression of policy in this area of state-

wide concern: Home Rule powers yield in light of such interest and policy.

Article XX of the Constitution confers exclusive control upon a city only in matters which are solely of local and municipal concern; in all other matters Home Rule cities remain

> "as much amenable to state control in all matters of a public, as distinguished from matters of a local character, as are other municipalities."

People ex rel. v. McNichols, 91 Colo. 141, 13 P. 2d 266 (1932); Spears Hospital v. State Board, 122 Colo. 147, 220 P. 2d 872 (1950).

In Denver v. Sweet, 138 Colo. 41, 329 P. 2d (1958) at p. 49, it is stated:

> "Whether a particular business activity is a matter of municipal concern to a city under Article XX depends upon the inherent nature of the activity and the impact or effect which it may have or may not have upon areas outside of the municipality."

See also Denver v. Mtn. States Tel. & Tel. Co., 67 Colo. 225, 184 P. 604 (1919), overruled by People v. Mtn. States Tel. & Tel. Co., 125 Colo. 167, 243 P. 2d 397 (1952).

It is immediately apparent that the impact and effect which the condemnation of water rights will have on areas outside of a municipality are inherently vast and far reaching. The economy of whole communities outside of the condemning municipality are threatened. In this action alone Thornton threatens to remove the production of more than 10,000 acres of irrigated lands--all of which are beyond the municipal boundaries. This potential alone establishes

the overwhelming State interest and concern and validates beyond all question the Water Rights Condemnation Act of 1975 as a matter of state interest.

Thornton, by contracting for water services outside of its boundaries, recognizes that water use is not solely of local concern and thus is not solely within Home Rule powers. (Compare Huff v. Colorado Springs, 182 Colo. 115, 511 P. 2d 484 (1973) at p. 112).

Matters of such immediately apparent and wide-reaching impact such as the condemnation of water rights remain subject to regulation by statute. Bennion v. Denver, 180 Colo. 213, 504 P. 2d 350 (1972).

The City of Thornton, whose charter does not purport to be a condemnation code unto itself (nor could it), thus remains subject to State regulation through the Water Rights Condemnation Act. Indeed, condemnation itself regardless of whether it is concerned with water rights has been held not to be within constitutional Home Rule provisions. See State v. Butler, 17 N.W. 2d 683 (Neb., 1945); Ramsey v. Leeper, 31 P. 2d 852 (Okla., 1934); City of Los Angeles v. Koyer, 192 P. 301 (Cal., 1920).

As stated by Antieau in "Local Government Law: Municipal Corporation Law," vol. 1, at p. 3-64:

> "It is not solely a concern of the people of a home rule city when the municipality under eminent domain power attempts to condemn property located outside the city, and here it can be expected that courts will conclude the interest of the people of the state as a whole prevail."

Even though the condemnation of water is subject to State regulation, the 1975 Act does not take the determination of necessity from city officials. The Act does subject

the determination of city officials to judicial review, but such has long been established as the law in Colorado. See Denver v. Commissioners, 113 Colo. 150, 156 P.2d 101 (1945); Otero District v. Enderud, 122 Colo. 136, 220 P.2d 862 (1950); Rothwell v. Coffin, 122 Colo. 140, 220 P.2d 1063 (1950); Pine Martin Mining Co. v. Empire Zinc Co., 90 Colo. 529, 11 P.2d 221 (1932).

In Rothwell v. Coffin, supra, this Court stated succinctly at page 146 of the reported decision:

> "The question of necessity simply involves the necessity of having the property sought to be taken for the purpose intended."

The review of this question under the 1975 Act remains as always a judicial function. The recommendations of the Commission remain as such to the ultimate review and decision by the Court. The initial review by a Commission provided by the 1975 Act re-establishes a condemnation procedure which long was recognized as being valid. See 1953 C.R.S., Section 50-1-6.

Other questions which are properly subject to court review although, strictly speaking, are not part of the question of necessity include:

> " * * *whether or not the petitioner belongs to the class of persons entitled to condemn; whether or not the property sought to be taken belongs to the class of property that is subject to condemnation; whether or not the purpose for which the property is sought to be taken is one for which condemnation is permitted; whether or not the petitioner and the owner have been able to come to an agreement concerning a purchase of the land; and whether or not the act authorizing the proceeding is constitutional; these and similar questions, when raised, are for the court to determine in limine."

Pine Martin Mining Co. v. Empire Zinc Co., supra, at page 534. These questions remain the subject of judicial review whether the 1975 Condemnation Act is effective or not. The Act, however, by setting forth the specific procedures to be followed in the critical area of water rights helps insure that these vital questions will not be disregarded during the course of the eminent domain proceeding.

Nor can Thornton be heard to justifiably complain that it must prepare a more comprehensive statement than previous. (Thornton Brief, p. 24). Such information will permit an informed review by the judiciary - and in any event, the era has now expired in Colorado in which any entity can complain that it does not want to consider (much less plan for) the impact it will have on its surroundings.

Thornton cannot be heard to complain that erroneous standards were - or would be - used to review its determination of necessity. Thornton deliberately chose to altogether avoid the judicial review provided by the 1975 Act. Not only does such action violate the Respondents' Due Process rights, but such forecloses any claim by Thornton that judicial review of necessity might infringe upon legislative prerogatives.

Concerning the 15-year "limitation" upon condemnation for future needs, Thornton's statement at pp. 26-27 of its Brief fully answers the challenge presented. Property can indeed be condemned only for "reasonably foreseeable future needs." The 1975 Act simply provides the State policy and valid determination that 15 years is a "reasonably foreseeable future need." Such a legislative determination in

a matter of such vital interest is eminently reasonable; alternative growth would by stymied by monopolizing water for extended periods - extended periods in which the water may not be used! It may also be noted that the 1975 Act places not one single limiation upon the extent of growth that may be accomodated within 15 years. Any "limitation" is illusory at best.

In Denver v. Sheriff, 105 Colo. 193, 96 P.2d 836 (1939), it was established that Denver (a Home-Rule City) could not appropriate water in excess of reasonable future needs, as beneficial application is an essential attribute of a ripened water right. Even appropriations, which cannot injure existing users, are thus subject to use within "reasonable" time. Stating a policy of what is or is not "reasonable" is an essential legislative function. The 1975 Act imposes no growth restrictions on cities - it states simply that water can be adversely taken in whatever quantity can be justified even though it will not be used for 15 years. If any complaint can be made of such a "limitation," it is extraordinarily difficult to sustain that it is unduly restrictive. It is, in fact, unjustifiably liberal, but it is nonetheless the determination of all of the people's interests through the legislature.

The Water Rights Condemnation Act of 1975, as any other statute, is presumed constitutional until the contrary is shown beyond a reasonable doubt. C.B. Q. Ry. Co. v. School District No. 1, 63 Colo. 159, 165 P. 260 (1917); People ex rel. Attorney General v. Barksdale, 104 Colo. 1, 87 P. 755 (1939). Thornton's challenge of the 1975

Act fails woefully before such a standard. No other area than the acquisition and use of water is of such obvious State-wide concern. Thornton's assertion of its Home-Rule powers in this instance must defer to the specific expression of State policy through the 1975 Water Rights Condemnation Act.

Thornton's claim that the 1975 Act which became effective July 1, 1975, cannot govern these proceedings is not supported. No question of retroactivity is presented by the instant circumstances. Particularly as to each Respondent joined after July 1, 1975, the assertion that the 1975 Act has any retroactive effect is unsubstantiated. As to each party served with process in a proceeding, the action is begun anew as to him by the filing of a petition and the service of summons. See Colorado Rule of Civil Procedure 3; cf. Ross v. American Radiator, (Texas, 1974), 507 S.W.2d 806. The fact that Thornton desires the earlier procedures to be maintained cannot support its position that a legislative statute enacted prior to Thornton undertaking to join any of the individual Respondents is ineffective. The law in effect at the time of bringing an action against a particular party respondent must prevail. See Rowe v. Tucker, et al., No. 75-891, Colo. Ct. of Appeals, The Colorado Lawyer, March, 1977, at page 526.

In fact, no party can claim a fixed right to any procedural provision which can be modified at any stage prior to the time of vesting substantive rights. Statutory modifications during the course of a condemnation proceeding

have specifically been upheld as effective for that proceeding by the Courts of California. See Monterey County Flood Control and Water District v. Hughes, 20 Cal. Rptr. 252 (1962).

Thornton cannot in fact join the individual stockholders in this proceeding and maintain its condemnation action in the District Court for Jefferson County because Thornton cannot confer jurisdiction on that Court. Section 38-6-202, 1973 C.R.S. provides that a municipality shall file its petition in the District Court ". . .of the district in which the municipality is situated . . .". Thornton is situated in the County of Adams, and no proceeding can be maintained in the District Court for Jefferson County with parties joined after the effective date of the 1975 Water Rights Condemnation Act.

II. FAILURE TO AGREE - CONDITION PRECEDENT REQUIREMENT NOT SATISFIED

Thornton commencing on page 39 of its Brief calls attention to a number of authorities including several cases of this Court, and the principles of law therein announced upon which Thornton relies are the same principles of law upon which FRICO relies. The disagreement between FRICO and Thornton arises when the mutually accepted legal principles are applied to the facts. As the authorities are cited in Thornton's Brief, no further citation of authorities is deemed necessary and only a short summarization of the legal principles will be herein stated.

FIRST PRINCIPLE: The failure to agree upon compensation by the parties interested is a prerequisite to the commencement of a condemnation proceeding.

SECOND PRINCIPLE: The burden is upon the condemnor (Thornton) to establish a failure to agree.

THIRD PRINCIPLE: Failure to agree upon the purchase price for the property sought to be condemned is sufficiently shown when the condemning authority establishes by competent evidence that it made a reasonable and a good faith effort to reach an agreement with the owner of the property for its purchase.

FOURTH PRINCIPLE: Condemning authority need not continue negotiations when it is clearly evident that the owner will not sell, or, in other words, when it clearly appears that further negotiations would be futile.

a) Parties Interested

The condition precedent to the commencement of a condemnation proceeding is "failure to agree upon compensation to be paid." The "failure" must be by the "parties interested." Thornton elected a "package deal" for condemnation which encompassed "water rights" and other properties which involved separate and distinct ownerships. No "interested party" was afforded the opportunity to "fail to agree" upon compensation to be paid for individually owned or damaged property.

Thornton claims it opened negotiations with its October 2, 1973, letter (Pet. Exh. F) to FRICO. It may be after a full evidentiary hearing the determination will be that as to several of the property items sought to be condemned by Thornton the proper negotiating party was FRICO, but it is now established that FRICO could not be the "party interested" in the "right to use water." Thornton, in its "package deal" offer to FRICO included "water rights" the ownership of which was and is vested in the persons making beneficial application of the appropriated waters. Thornton, by its letter dated October 22, 1975, addressed to individual stockholders offered to purchase from such individual shareholders their right, title and interest in the property sought to be condemned and their FRICO stock. Thornton did not include compensation for "property damaged." FRICO submits that Thornton's second offer is an admission of its noncompliance with the condition precedent to-wit: "failure to agree by

the interested parties." It is noted that the "offer to individual shareholders was made approximately two years after the alleged "offer" made to FRICO and the commencement of this condemnation action. It is also noted that the "offer" to individual shareholders was made subsequent to the decision of this Court in Jacobucci v. District Court, ____ Colo. ____, 541 P. 2d 667 (1975) which involved the right of individual users of water delivered to them by FRICO to participate in this condemnation proceeding and protect their individual property rights. This Court in the Jacobucci case, supra, said:

> "Furthermore, the interests of the shareholders, insofar as the actual appropriation of the water is concerned, are not identical to the corporation. As stated in San Bernardino Valley Municipal Water District v. Meeks and Daley Water Co., 226 Cal. App. 2d 216, 38 Cal. Rptr. 51 (1964):
>
> > 'The water company has an obligation to deliver water, while the shareholder has a right to receive water. The company has no interest in the affected lands of the shareholders; it cannot claim compensation because orchards may dry up and die or because a householder is deprived of water.'
>
> "Farmers is obligated to store and transport the water, while the shareholders in the instant case are not only entitled to receive water, but are the actual owners of the water right itself."
>
> " * * * In effect, what Thornton seeks to condemn is the right to make beneficial application of the water. This right does not belong to the corporation, but to the shareholders. The right of the corporation to hold title to the water rights and other property, and to manage the affairs of the corporation, should be distinguished from the right of the shareholders to use the water on their lands. Were this right to be construed as a trust res, the beneficiaries, not the trustees, would be the ones who beneficially administer the trust res. That this analogy must fail is obvious. The water rights owned by the shareholders of Farmers constitute the right to use the water, not the legal title to the water. Handy Ditch Co. v. Greeley and Loveland Irrigating Co., 86 Colo. 197,

80 P. 481 (1929); Pulaski Irrigating Ditch Co. v. City of Trinidad, 70 Colo. 565, 203 P. 681 (1922). Inasmuch as the right to 'use water' vests solely in the shareholders, and the corporation neither administers nor participates in this actual use, the corporation cannot be deemed the trustee and only proper representative of the shareholders' interests in this matter."

" * * * The condemnation action here in issue has the potential of seriously disrupting the shareholders' property interests. See Potts v. Gordon, Colo. App. , 525 P. 2d 500 (1974). That the water rights owned by Farmers' shareholders are property rights is well established by Colorado law. Billings Ditch Co. v. Industrial Comm'n., supra; Brighton Co. v. Englewood, 124 Colo. 366, 237 P. 2d 116 (1951); Beaty v. Board of County Comm'rs. of Otero County, supra; Comstock v. Olney Springs Drainage District, supra; Kendrick v. Twin Lakes Reservoir Co., supra.

"At least 271 shareholders, as of the date of the petition in condemnation, are faced with the prospect of having their farmlands denied a substantial source of water. The productivity and value of their lands, as well as the assurance of their livelihoods, is in many cases entirely dependent upon the continuing flow of water from Standley Reservoir. No court can ignore the magnitude of disruption which would result in a successful condemnation action by the City of Thornton. Moreoever, each shareholder stands in a different position from the others and is likely to be affected differently by the condemnation action. Their ability to protect those individualized interests would surely be impaired if this action were allowed to proceed in their absence."

" * * *The evidence in the present case does not suggest that joinder would be infeasible. All shareholders of Farmers similarly situated to the petitioners herein are subject to service of process. Provided the City of Thornton <u>establishes by competent evidence a failure to agree upon the compensation to be paid for the rights sought to be taken</u>, the joinder of these shareholders will not deprive the District Court of jurisdiction. See section 38-1-102, C.R.S. 1973; Stalford, et. al. v. Board of County Comm'rs. 128 Colo. 441, 263 P. 2d 436 (1953); Old Timers Baseball Ass'n. v. Housing Auth. 122 Colo. 597, 224 P. 2d 219 (1950). Therefore, pursuant to C.R.C.P. 19, and this court's power under C.A.R. 21, the District Court should join as parties to the condemnation action those

> shareholders in the Standley Lake Division of Farmers whose water rights would be affected by the condemnation action of Thornton as of the date of the initiation of the condemnation action and all parties in interest." (Emphasis Supplied)

Thornton's ignoring the stockholders of FRICO in connection with this offer to purchase prior to commencement of condemnation is in itself sufficient to establish the nonexistence of the jurisdictional condition precedent requirement of failure to agree by the interested parties upon compensation to be paid. It would seem fundamental that in order to be legitimate and effective any offer to purchase, the negotiations with reference thereto, and the failure to agree upon the compensation to be paid, if there is such failure, should be directed to the owner and to property which is subject to condemnation by the condemnor. If the condemnor has no power to condemn particular property, then his offer to purchase and the refusal thereof or failure to agree thereto obviously cannot form the basis of the condemnation suit.

Thornton's $9,300,000 offer to FRICO was a package deal offer covering all of the properties referred to in the Petition in Condemnation. Some of those properties as we will herein point out were beyond the power of Thornton to condemn for its alleged public use. To these properties we now refer.

(a) The City of Westminster, the Town of Dacono and the Northglenn--Northglenn Metropolitan Recreation District are all stockholders of FRICO. Their Standley Lake water rights are already devoted to a public use and are not subject to condemnation by Thornton for its alleged public use.

(b) One of the properties which Thornton seeks to condemn in this proceeding is all of the stock of The Golden-Ralston Creek and Church Ditch Company owned by FRICO. Thornton's acquisition of this stock is prohibited by Art. XI, sec. 2 of the Colorado Constitution, which provides:

> "Neither the state, nor any county, city, town, township or school district shall make any donation or grant to, or in aid of, or become a subscriber to, or shareholder in any corporation or company, or a joint owner with any person, company or corporation, public or private, in or out of the state, except as to such ownership as may accrue to the state by escheat, or by forfeiture, by operation or provision of law; and except as to such ownership as may accrue to the state, or to any county, city, town, township or school district, or to either or any of them, jointly with any person, company or corporation, by forfeiture or sale of real estate for non payment of taxes, or by donation or devise for public use, or by or on behalf of any or either of them, jointly with any or either of them, under execution in cases of fines, penalties or forfeiture of recognizance, breach of condition of official bond, or of bond to secure public moneys or the performance of any contract in which they or any of them may be jointly or severally interested." (Emphasis supplied)

Being so prohibited, of course Thornton has no power to condemn it and yet this property is included in the package purchase offer.

(c) The description of Standley Lake Dam and Reservoir in the Petition in Condemnation includes several hundred acres of land outside Standley Lake Reservoir which is not a part of that reservoir and is not necessary for its maintenance and operation. These several hundred acres are not subject to condemnation by Thornton and its alleged public use. (f. 2150-2167)

(d) Another item included in the package which Thornton seeks to condemn and which is included in Thornton's

package offer consists of FRICO's "Records." Again these Records are not subject to condemnation by Thornton.

While the immediately preceding paragraphs commenting upon some of the items of property included in Thornton's "offer" to FRICO as property not condemnable by Thornton may seem to have no bearing upon negotiations with "parties interested," nevertheless the inclusion of such property by Thornton in a "package deal" does in FRICO's opinion cloud the "offer" made and creates doubt that such "package deal" should be accepted as being the fair, reasonable and good faith commencement of negotiations necessary to establish a "failure to agree."

Thornton commencing at page 10 of its Brief and continuing for several pages describes what Thornton refers to as "The purchase offer to FRICO." Notwithstanding all of Thornton's actions with regard to the "purchase offer" to FRICO, it is clearly apparent from what is narrated hereinabove in this Brief that Thornton, prior to the time of the commencement of this action on November 14, 1973, had not dealt with the "parties interested" in the properties sought to be condemned as required by statute and the decisions of this Court. On page 17 of its Brief Thornton calls attention to its second offer. The title of this section of Thornton's Brief is "The Purchase Offer to FRICO Standley Lake Division Shareholders." This second offer as stated above, was made October 22, 1975, approximately two years after the commencement of this condemnation proceeding. As this Court pointed out in the Jacobucci case, supra,

> "The right to 'use water' vests solely in the shareholders, and the corporation neither administers nor participates in this actual use, * * *"

This "second offer" was a prerequisite to the commencement of a condemnation action having for its purpose the acquisition of a right "vested solely in the shareholders." FRICO submits that the decision of this Court in Stalford et al v. Board of County Commissioners of Prowers County, 128 Colo. 441, 263 P. 2d 436, is controlling under the circumstances present in this controversy, and the dismissal of this action by the trial court should be affirmed.

b) Thornton's Conduct Unreasonable and Lacking in Good Faith

As hereinabove noted, Thornton has the burden to establish that it made a reasonable and a good faith effort to reach an agreement upon the compensation to be paid. In the foregoing section of this Brief under the heading "Parties Interested" FRICO submits that it has been clearly shown that "parties interested" were ignored by Thornton, and this circumstance in and of itself is sufficient to establish Thornton's failure to comply with the condition precedent requirement. However, because of Thornton's detailed analysis of its conduct, it is deemed necessary by FRICO that the attention of the Court be called to the unreasonable ultimatums given by Thornton both as to purchase price and as to time for acceptance.

Thornton's actions as to FRICO can be detailed as follows:

(a) October 2, 1973 -- Resolution of Thornton's Utilities Board (Pet. Exh. A) refers to the A.G. Bowes and Son, Inc. $9,300,000 appraisal.

(b) October 2, 1973 -- Resolution of Thornton's City Council (Pet. Exh. B) authorizes the Utilities Board to expend the sum of $9,300,000.

(c) October 2, 1973 -- Second resolution of Thornton's Utilities Board (Pet. Exh. D) authorizes the City Manager and the Utilities Director to offer FRICO the sum of $9,300,000 for the subject properties. NOTE: There is no authorization to negotiate with FRICO for the purchase price but only to give FRICO an ultimatum "take it or leave it" offer of $9,300,000.

(d) October 2, 1973 -- Letter dated October 2, 1973, (Pet. Exh. F) offers FRICO $9,300,000 as the purchase price for the subject properties. NOTE: This was an ultimatum "take it or leave it" $9,300,000 offer. There was no offer to negotiate the purchase price. Note also that in this letter FRICO was granted until October 17, 1973, to respond to the offer with the statement that if the offer was not accepted by that date eminent domain proceedings would be started.

(e) October 3, 1973 -- FRICO Directors' meeting. A request was made of FRICO to call a special meeting of the stockholders to vote upon the offer contained in the October 2, 1973, letter. Mr. Sarchet, President of FRICO, told the Thornton representatives that the annual stockholders' meeting of FRICO was to be held on November 13, 1973, and that this offer would be brought up at that meeting for discussion.

(f) October 4, 1973 -- Resolution of Thornton's Utilities Board (Pet. Exh. I). This resolution recites

that Thornton made an offer to purchase the subject properties "but the parties have been unable to agree upon the proper value and compensation to be paid to The Farmers Reservoir and Irrigation Company" and then authorizes and directs the immediate institution of a condemnation suit. NOTE: This was the day after the $9,300,000 offer was presented to The Farmers Reservoir and Irrigation Company Board of Directors and thirteen (13) days before October 17, 1973, to which date the October 2, 1973, letter offer granted The Farmers Reservoir and Irrigation Company time to respond to the offer.

(g) October 5, 1973 - - On this date Thornton filed a Petition in Condemnation in the Jefferson County District Court being Civil Action No. 42847. The parties to that petition and condemnation and the petition itself is exactly the same as the parties and the petition in the present and pending case.

Process in Civil Action No. 42847 was never served on FRICO nor did FRICO have knowledge that the condemnation suit had been started until after October 12, 1973.

We submit that the adoption of the October 4, 1973, resolution by the Thornton Utilities Board and the institution of the condemnation suit (Civil Action No. 42847) with the prayer that the compensation to be paid be determined by the court as provided by law and the recording of the Notice of Lis Pendens constituted a withdrawal and termination of the October 2, 1973, letter $9,300,000 offer even if that offer was otherwise valid. As a result of the October 4, 1973, Utilities Board resolution, there was really

no offer outstanding at the time of the institution of the condemnation proceeding on October 5, 1973, which could be accepted or rejected by FRICO and which could form the basis of failure to agree upon compensation to be paid. By that resolution and by the institution of that condemnation proceeding, Thornton elected not to rely upon its $9,300,000 October 2, 1973, letter offer or to negotiate with FRICO with reference to the amount of compensation to be paid but elected, without negotiation with FRICO as to the purchase price, to submit the amount of compensation to be paid to the court for determination.

(h) October 12, 1973 - - FRICO letter (Pet. Exh. K) by Mr. C. Sarchet, President, to Thornton replying to Thornton's October 2, 1973 letter. In this letter Mr. Sarchet stated it would be impossible to give an answer to the October 2, 1973, letter before October 17, 1973, (which was the expiration of the date allowed for response in Thornton's October 2, 1973, letter) for the reason that the Standley Lake Division was a major part of the assets of FRICO and the offer would require stockholder approval. He stated that the annual stockholders' meeting was scheduled for November 13, 1973, and that Thornton's proposal had been placed on the agenda "for discussion" at that meeting. He ends his letter by stating "in view of the above, we feel that any action to condemn this property would be very premature at this time." As is apparent, Mr. Sarchet did not know when he wrote his October 12, 1973, letter that Thornton had already, back on October 5, 1973, filed a Petition in Condemnation.

(i) October 16, 1973 - - Thornton's letter (Pet. Exh. L) by J. Castrodale to M. C. Sarchet, President of FRICO. In this letter Mr. Castrodale informed Mr. Sarchet that Thornton had filed a Petition in Condemnation in the Jefferson County District Court on October 5, 1973. He indicated a desire to hold further negotiations with FRICO "in an effort to achieve a negotiated agreement concerning the purchase by the City of Thornton of specific assets of FRICO." Mr. Castrodale further stated "we believe that it is futile to expect the stockholders to accept our offer unless you and we have discussed and resolved as many problems as possible."

(j) November 13, 1973 - - Annual stockholders' meeting of FRICO. A copy of the reporter's transcript is in the record as a part of Petitioner's Exhibit P. References hereinbelow to such transcript will be by page number following the letters "Tr."

Thornton in addition to being a condemnor is also a stockholder of FRICO. Mr. Castrodale then called upon Mr. Jesse Hale to present a motion in behalf of Thornton. Mr. Hale's motion (Tr 57) was that "The offer of the City of Thornton be accepted and that the officers and directors of this company be directed to accept the offer and take such action as is necessary to consummate the transaction."

Mr. Sarchet first ruled upon this motion as follows: (Tr 57)

> "President Sarchet: I don't think this is a proper motion. We put this on the agenda for discussion, not for official action. We felt that we did not have sufficient information from the stockholders or the Board of Directors to take action. I don't think we should attempt to make a snap judgment on a matter of this magnitude."

Following the above ruling, stockholder Judge Jacobucci stated and moved as follows: (Tr 57 et seq.)

> "Judge Jacobucci: It may be appropriate to move to table this motion until we have time to study it."

After discussion, Judge Jacobucci offered the following motion which was duly seconded. (Tr 60)

> "Judge Jacobucci: I'd like to straighten this matter out once and for all. I move this matter be tabled until we have time and opportunity to make a thorough study of the proposal made by Thornton. I believe it's only fair they should allow us this kind of time. You've been kind of pushy up to this point; now tive us time to study this."

This motion was carried by a vote of the stockholders. (Tr 62)

(k) November 14, 1973 - - Thornton dismissed its Petition in Condemnation in Civil Action No. 42847 filed October 5, 1973, and filed its Petition in Condemnation in Civil Action No. 43042 against the same parties as were named in the earlier action.

(l) November 20, 1973 - - Summons in Civil Action No. 43042 (the present action) was served on The Farmers Reservoir and Irrigation Company.

Events subsequent to November 20, 1973, are detailed at some length commencing on page 3 of Thornton's Brief. The property rights of individual shareholders in the properties sought to be condemned began to become evident and, after this Court's Order in Jacobucci, supra, that "at least 271 shareholders" (FRICO submits that the reference should be to all shareholders) should be joined in this action, Thornton describes its action on page 8 of its Brief as follows:

" * * * Thornton sent a letter on October 22, 1975, to each Standley Lake Division shareholder as of November 14, 1973, offering to purchase such shareholder's FRICO stock for $3,920 per share (the present share portion of the $9,300,000 purchase price previously offered to FRICO)."

Excerpts from the Thornton letter of October 22, 1975, which are set forth hereinbelow demonstrate Thornton's continuance of its ultimatum policy which it had followed with FRICO. The excerpts are as follows:

"By this letter, the City offers to purchase all of your right, title and interest in the Property, as evidenced by a stock certificate or certificates allocated to the Standley Lake Division of the Company, at a price of $3,920 per share.

"If you do not accept this offer the City will proceed with its action condemning your interest in the Property."

* * *

"If you wish to accept this offer, please do so by signing this letter in the space provided below and returning it to the City of Thornton, Utilities Board, 9471 Dorothy Boulevard, Thornton, Colorado 80229, no later than 5:00 p.m. Thornton time, November 3, 1975. (A copy of this letter is enclosed for your records.)

"If you accept this offer, the purchase will be closed on November 17, 1975, at 2:00 p.m., Mountain Standard Time, in the offices of the City of Thornton Utilities Board at the above address. The following will be conditions to the City's obligation to purchase your stock and interest in the Property at the closing: (1) that you tender at the closing a special warranty deed to your interest in the Property, on the form supplied with this letter, and a stock certificate or certificates evidencing all of the stock of the Company owned by you, endorsed to the City of Thornton with your signature guaranteed by a bank; (2) that the City be satisfied as to the truth of the representations and warranties referred to in the next paragraph; and (3) that there be no legal restriction preventing the closing."

It is FRICO's firm position that Thornton's detailed narration of its alleged "offer" to FRICO and its alleged "offer" to individual shareholders should be considered as mere surplusage and should be disregarded because the "individualized property rights" of "parties interested" were totally ignored by Thornton prior to the commencement of this action on November 14, 1973, as pointed out hereinabove in the section of this Brief entitled "Parties Interested." It is also FRICO's firm opinion that even if it were determined that the matter of "parties interested" should be decided favorably to Thornton, the dismissal of this action should nevertheless be affirmed because Thornton's alleged negotiations both with FRICO and the individual shareholders were arbitrary and unreasonable and were totally lacking the good faith aspect required by this Court's decisions references to which appear on pages 39 and 40 of Thornton's Brief.

A finding of a good faith effort to reach an agreement as to the "compensation to be paid" cannot be based upon ultimatums and threats such as Thornton made in both its communications with FRICO and its communication with individual shareholders.

III. THORNTON'S ATTEMPTED CONDEMNATION TO SUPPLY "OUTSIDERS" IS NOT FOR A PUBLIC PURPOSE OR USE AND FOR THIS REASON CANNOT BE MAINTAINED

This District Court in its "Order of Dismissal" (f. 1506-1522) ruled (f. 1517)

> "A. Petitioner (Thornton) has the power and authority to condemn water rights for uses within and without its city limits.
>
> B. The condemnation of water rights by petitioner for municipal uses both within and without its city limits is for a public purpose."

Notwithstanding that the "Order of Dismissal" was made following a non-evidentiary hearing, attention is called to certain testimony given by James L. Castrodale, City Manager of Thornton, at a trial court hearing which occurred many months before individual stockholders of FRICO were joined in this action, as follows: (f. 1920-1924)

> "Q. (By Mr. Dick:) Mr. Castrodale, with reference to the water supply that Thornton seeks to condemn, what uses would be made of this water if Thornton is successful in condemning it?
>
> A. All domestic uses that we have to provide, sir.
>
> Q. You tell me domestic uses. Tell me what you include in domestic uses.
>
> A. Lawn irrigation, human consumption.
>
> Q. Is a domestic use in your mind the use of water upon plants, shrubs, lawns, so forth? Is that a domestic use?
>
> A. Certainly.
>
> Q. Is it more of a domestic use than use of water to grow corn and wheat or hay or anything else?
>
> A. I think that is a legal question sir. I am not an attorney.
>
> Q. But you do use the water not only for human consumption. They use it for irrigation of lawns, parks, golf courses, whatever, in the way of recreational areas Thornton has, and you also use it for industrial purposes, too?

A. The City has at the present time no industrial basis, but we are seeking to get one.

Q. You would furnish a supply of water that is presently involved in this condemnation action perhaps to supply that industrial use?

A. I don't know if it would be that water specifically, Mr. Dick, but we would be legally bound to serve it some water.

Q. Now, legally bound. With regard to that Mr. Castrodale, you mentioned that several years back Thornton acquired a water utility system.

A. Water and sewer utility system, yes, sir.

Q. Now, just what does that consist of?

A. Well, I wasn't here at that time, in 1963, but the City of Thornton acquired the Northwest Water Corporation.

Q. And that system includes areas outside the boundaries of the City of Thornton; is that correct?

A. That's right. At that time the Northwest Company had contracts with several areas outside the city limits of Thornton the City of Thornton assumed.

Q. Off-hand, Mr. Castrodale, could you perhaps identify those areas?

A. Primarily Northglenn, but Sherellwood, Western Hills."

While the record presently before the Court does not contain all the evidence that will be presented if this condemnation proceeding continues, Thornton has admitted that a substantial portion of the water rights sought to be condemned by Thornton is not for its inhabitants but is for use of Thornton's non-inhabitants outside the city limits of Thornton. In other words, Thornton's contemplated use is not for local and municipal use. FRICO has and does challenge Thornton's claim of authority or power under the Colorado Constitution, the Colorado Statutes, or the Thornton Charter to condemn the subject water rights

for use outside the Thornton city limits, such challenge being based upon the contentions that the service contemplated by Thornton to inhabitants residing outside the city limits is service for a private purpose and a private use.

That the purpose and use of the condemnation must be public and that the court and not the condemnor has the right and duty to determine whether such purpose or use is public has been the subject of numerous decisions of this Court. The following citations are to two of said decisions: Potashnik et al. v. Public Service Company of Colorado, (1952) 126 Colo. 98, 247 Pac. 2d 137, and Larson et al v. Chase Pipe Line Co., 183 Colo. 76, 514 Pac. 2d 1316.

It is submitted that Thornton has no legal duty to supply water to users outside its city limits and when it voluntarily does so it is not acting in a governmental capacity but only in a proprietary capacity. Englewood v. Denver, (1951) 123 Colo. 290, 229 Pac. 2d 667; City of Fort Collins v. Park View Pipe Line Co., (1959) 139 Colo. 119, 336 Pac. 2d 716; City of Colorado Springs v. Kitty Hawk Development Co., (1964) 154 Colo. 535, 392 Pac. 2d 467, cert. den. 379 U.S. 647, 85 S. Ct. 612; National Food Stores, Inc., v. N. Wash. St. Water & Sanitation Dist., (1967) 163 Colo. 178, 429 Pac. 2d 283; Brownbriar Ent., Inc. v. City of Denver, (1972) 177 Colo. 198, 493 Pac. 2d 352.

The fact that the service of a water supply by Thornton to the "outside user," even considering them as members of the public, may be of benefit to the outside users does not convert that use into a public use.

As stated by the Supreme Court of Illinois in Gaylord v. Sanitary District of Chicago, (1903) 204 Ill. 576, 68 N.E. 522, 524 --

> "It is also the settled doctrine of this court that, to constitute a public use, something more than a mere benefit to the public must flow from the contemplated improvement. The public must be to some extent entitled to use or enjoy the property, not as a mere favor or by permission of the owner, but by right. * * *"

Minnesota Canal & Power Co. v. Koochiching Co., et al., (1906 - Minn.) 97 Minn. 429, 107 N.W. 405. The pertinent holdings by the Supreme Court of Minnesota in this case are condensed in the following sections of the Syllabus:

2. "In proceedings to condemn private property, every reasonable doubt as to the authority must be resolved in favor of the landowner."

3. "When the purposes stated in the petition are part public and part private, the right to proceed must be denied."

4. "A use is not public, unless, under proper regulations, the public has the right to resort to the property for the use for which it was acquired independently of the will or caprice of the corporation in which the title of the property vests upon condemnation."

Nothing has come to our attention indicating that the outside users have any right to a water supply from Thornton except at the will or caprice of Thornton evidenced by contracts which Thornton may have voluntarily entered into. As we know, the Colorado Supreme Court in Thornton v. Public Utilities Commission, (1965) 157 Colo. 188, 402 Pac. 2d 194, has held that Thornton, in acquiring the Northwest Utilities Company water rights and properties by purchase, acquired them free from jurisdiction of the Public Utilities Commission. Thus, Thornton acquired said water rights and properties in a proprietary capacity which forms the basis of its sale of water by contract within and without the city limits.

Another relevant holding in the Minnesota Canal & Power Company case, supra, is that, where a condemnor seeks in the one proceeding to condemn for two purposes, one of which is public and one of which is not public, the whole condemnation proceeding falls. Applying that doctrine to the present case, even if Thornton might have power to condemn the subject water rights for its municipal purposes and for its inhabitants within the city limits, the fact that it goes beyond this and seeks to condemn for outside use which is not a public use requires the entire proceeding to fall.

We are not unmindful of court cases within and without the State of Colorado holding that, where a municipality has power to supply its inhabitants with electric, water or other utility service and can condemn for that purpose, it has the power to sell any surplus product which it may develop to "outsiders" until such time as the municipality itself may need it. However, these authorities are irrelevant to the present situation and, therefore, we see no necessity of citing and distinguishing them. In the instant case the question of Thornton's right to sell any "surplus" water which it may acquire for its municipal and its inhabitants' use until such time as it may need that surplus for such use is not involved. What is involved is the express effort of Thornton in this proceeding to condemn water rights not for its own use or for the use of its inhabitants, but for the use of outsiders. It is this claimed power which we contend does not exist.

To illustrate the distinction between the sale of "surplus" water to outsiders and the condemnation of water rights for the express purpose of selling, leasing or otherwise furnishing them to outsiders we limit our citations to two cases.

Kaukauna Water Power Co., et al., v. The Green Bay & Mississippi Canal Co., (1891) 142 U.S. 254, 35 L. Ed. 1004, 1011 --

> "The true distinction seems to be between cases where the dam is erected for the express or apparent purpose of obtaining a water power to lease to private individuals, or where in building a dam for a public improvement, a wholly unnecessary excess of water is created, and cases where the surplus is a mere incident to the public improvement and a reasonable provision for securing an adequate supply of water at all times for such improvement. No claim is made in this case that the water power was created for the purpose of selling or leasing it, or that the dam was erected to a greater height than was reasonably necessary to create a depth of water sufficient for the purposes of navigation at all seasons of the year.* * *"

Burger, et al., v. City of Beatrice, Nebraska (1967) 181 Neb. 213, 147 N.W. 2d 784. This case is most pertinent both from a factual standpoint and for a clear pronouncement of the legal principles involved. The water supply of the City of Beatrice was derived through wells. It wanted to extend its water well field and for that purpose sought condemnation of an easement over the plaintiff-landowners' lands for the drilling of wells thereon. The evident purpose of the extension of the water well field was two-fold, one for increased water supply to the inhabitants of Beatrice within the corporate limits and the other for the furnishing of a water supply to some commercial fertilizer plants located outside the city limits owned by Phillips Petroleum Company and Cominco Products Company. The plaintiff-landowners sought an injunction against the condemnation proceedings upon the grounds that the condemnation was for a private purpose and not for a public purpose because of the intended furnishing of water to the outside fertilizer plants. The lower court denied the injunction, but the Nebraska Supreme

Court reversed. There are a majority opinion, a concurring opinion and a dissenting opinion. We quote somewhat at length from the majority opinion and the concurring opinion of Mr. Justice Spencer.

From the majority opinion
(147 N.W. 2d 788-792)

> "A city in engaging in the production and distribution of water for the benefit of its inhabitants is engaged in a proprietary capacity rather than a governmental one. The distinction between its governmental status and its proprietary capacity have been made in the past by this court. In Henry v. City of Lincoln, 93 Neb. 331, 140 N.W. 664, 50 L.R.A., N.S., 174, this court in dealing with the nature of the city's proprietary capacity said: 'It is no part of its duty, as a municipal corporation, to engage in a purely business or commercial enterprise. When it seeks and obtains from the Legislature permission to engage in such an enterprise, its act in so doing is purely voluntary on its part, and it thereby assumes a third relation, separate and distinct from the dual relations above considered. While occupying this third relation, no governmental functions or corporate duties, as a municipality, devolve upon it. It is then engaged in an ordinary business enterprise, and is bound by all the rules of law and procedure applicable to any other private corporation or person engaged in a like enterprise. It has no greater or higher privileges or immunities than are possessed by any other private corporation.' (citing case) (147 N.W. 2d 788-789)
>
> "When it assumes the status of a private utility company in the production and distribution of water for the benefit of the inhabitants of the city, it subjects itself to the same rights and liabilities of a private water company. When it engages, therefore, in a public utility business, it must provide water service to all inhabitants alike who desire it at the same rate for the same service.
>
> "It cannot properly be said, and it is not here contended, that the production and distribution of water as above stated is not for a public purpose. Nor can it be said, and it is not here contended otherwise, that the city does not enjoy the right of eminent domain, both within and without the limits of the city, for the purpose of providing an adequate water supply to provide the needs of the city and its inhabitants. The question here raised is whether or not the taking of easements for water to supply users outside the corporate limits of a city is for a public or private purpose. The question is one of first impression in this state.
> (147 N.W. 2d 789)

* * * * * * * * * * * *

"There is evidence in this record that there was and is a need on the part of Beatrice for additional water for use in emergencies, anticipated growth, and increased use by the city and its inhabitants in the future. We do not here hold that condemnation may not be proper in the fulfillment of these needs. But where a condemnation proceeding under the power of eminent domain purports to take property both for a public use and for a substantial private use as distinguished from a mere incidental private use, the right to proceed by condemnation must be denied. (citing cases) When the public use is separable from the private use, the court may proceed as to such public use and deny the taking and compensation for the private use. (citing cases)

"It appears to us that the attempt of Beatrice to take the easements on plaintiffs' lands by eminent domain, insofar as the use by Phillips and Cominco is concerned, is an attempt to obtain private property against the will of the owners for a private purpose, even though for compensation, under the guise of an exercise of its power of eminent domain. This it cannot do. (citing cases)

"We conclude that the taking of the easements in the instant case by the power of eminent domain as against the plaintiffs is void to the extent that it is for the private benefit of the Phillips and Cominco companies. To the extent that a need is shown for the taking for the benefit of Beatrice and its inhabitants, if such need is separable, the proceeding may be sustained. In any event, the City of Beatrice should not be permanently enjoined. The injunction, if granted, should run against the present proceeding to the extent that it is unlawful. The judgment is reversed and the cause remanded for further proceedings consistent with this opinion."
(147 N.W. 2d 791-792)

From the concurring opinion
(147 N.W. 2d 796)

"The dissenting opinion argues that when property is held by a municipally owned utility, public use logically should not be governed by the geographic governmental property lines of the municipal corporation owning and operating the utility. I have no quarrel with this statement if it is confined to the sale of excess water. Here, however, the municipality is not selling excess water, but is taking private property to obtain the water it wishes to sell. I cannot agree this is for a public use, because the

city apparently has ample water for city purposes. It is a mere subterfuge to obtain water for the specific benefit of two private corporations located 6 miles beyond its geographic boundaries. If it can do this for these corporations, what would prevent it from extending its jurisdiction to the far boundaries of the state? Thre must be a line where the right of eminent domain ends. I believe that line is properly drawn in the majority opinion. Condemnation statutes are in derogation of general right and of common law modes of procedure, and should be strictly construed. Webber v. City of Scottsbluff, 155 Neb. 48, 50 N.W. 2d 533.

"I support the view of the majority that when the Legislature delegates the power of eminent domain to a municipality, it must be used for the public use of the municipality. In providing water for domestic purposes for the city, and individual users within the city, it is serving the public purpose as such municipality. When it seeks to secure additional water to serve persons outside the corporate limits of the city, it is not serving a public purpose of the city. The fact that it is permitted to enter into contracts with persons beyond the city limits for the sale of excess water is not, as I view it, an extension of the power of condemnation to secure water in excess of the needs of the city for the purpose of the unlimited extension of its facilities.

"The dissenting opinion is wholly concerned with the rights of the city, and the extension of its power to serve private industries outside of the geographical boundaries of the city. It wholly ignores the rights of the landowners whose property is being taken for purposes beyond those necessary for the use of the city and its inhabitants. Those rights in this situation are paramount."

The necessary conclusion from the above is that Thornton's attempt to condemn the Standley Lake water rights for the express purpose of furnishing a water supply to non-inhabitants of Thornton outside the Thornton corporate limits is not for a public purpose for which the right to condemn is granted by the Colorado Constitution, but is for a private purpose only, which purpose is denied by the Colorado Constitution.

IV. PROPERTY SOUGHT TO BE CONDEMNED IS DEVOTED TO A PUBLIC USE

Sections 5 and 6 of Article XVI of the Colorado Constitution provide:

> "Section 5. Water of streams public property.--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."

> "Section 6. Diverting unappropriated water--priority preferred uses.--The right to divert the unappropriated waters of any natural stream to beneficial uses shall never be denied. Priority of appropriation shall give the better right as between those using the water for the same purpose; but when 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, and those using the water for agricultural purposes shall have preference over those using the same for manufacturing purposes."

From these constitutional provisions the following appear:

(a) The primary or original ownership of the waters in the Colorado public streams is in the public.

(b) The waters in the public streams are subject to appropriation for any beneficial use, and;

(c) Certain uses are granted a priority or preference over other uses, domestic use being given the highest priority. It will be noted that the preference is not limited to one decreed right as against another decreed right, but would cover an undecreed appropriation as against another undecreed appropriation.

Municipal use is a multiple use. All uses, domestic, agricultural and manufacturing, are involved. All uses are public uses and, except for the preferential grading of uses

in the Constitution, there would be no superior right to the use of public waters. No constitutional provision and no statute authorizes condemnation for "municipal use," which would have the effect of substituting one domestic use for another domestic use, one agricultural use for another agricultural use and one manufacturing use for another manufacturing use.

Public property is involved in this action, and the manner in which such public property may be used has been dictated by the people of Colorado. FRICO recognizes that the constitutional gradings control and that a domestic user of public waters having a junior priority upon payment of compensation can either subordinate or eliminate a user having a senior priority for agricultural use or manufacturing use. However, when the condemning authority seeks to obtain the right to use public waters which are already devoted to uses dictated by the public, such authority must limit its acquisition to the waters needed to supply its requirements for the highest constitutional grading, i.e., domestic purposes. If a municipality having an adequate supply of public waters for domestic purposes found itself in a position where it needed additional public waters to establish a "green belt" or a "manufacturing complex," FRICO submits that there is no constitutional or statutory provision authorizing the municipality to condemn public waters devoted to agricultural uses or manufacturing uses. The people of the State of Colorado created the priority of uses of the public waters. Municipal use that is "multiple use" has no preferential public use as against agriculture or manufacture uses except only to the extent

that "domestic use" is involved.

A recitation of Thornton's proposed uses of the public waters involved in this controversy is set forth on pages 39 and 40 of this Brief. Appropriation of public waters from the streams of Colorado followed by beneficial application emerges as a "water right." Condemnation proceedings does not and cannot create a "water right." Section 37-92-102, C.R.S. 1973, which is entitled "Legislative declaration" provides in the first sentence of subparagraph (1) as follows:

> "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."

In the last sentence of subparagraph (3) of said Section 37-92-102, the following appears:

> "Nothing in this article shall be construed as authorizing any state agency to acquire water by eminent domain, or to deprive the people of the state of Colorado of the beneficial use of those waters available by law and interstate compact."

FRICO submits that "agricultural use" is both by the Constitution and by statute declared to be a "public use," and such "agricultural use" is subordinate to only one other public use, namely "domestic use." The phrase "municipal use" should not be construed so as to permit evasion of the water use preferences established by the Constitution.

V. FRICO DISMISSAL SHOULD BE AFFIRMED

The District Court in its "Order of Dismissal" (f. 1506-1522) entered its "CONCLUSION AND ORDER" as follows:

> "Although the Court has found all jurisdictional issues except the applicability of the Water Rights Determination Act in favor of petitioner, that Act and petitioner's failure to comply with its new provisions are fatal to the maintenance of this action. Since all respondents except FRICO must be dismissed for petitioner's failure to comply with the Water Rights Determination Act, the mandate of the Colorado Supreme Court that all shareholders of the Standley Lake Division of FRICO as of November 14, 1973 be joined in this action has not been met, so the action against FRICO must also be dismissed.
>
> IT IS THEREFORE ORDERED that the motions to dismiss under Rule 12(b) (1) and the motions for summary judgment of dismissal under Rule 56 of the Colorado Rules of Civil Procedure be granted and that this action against FRICO and all respondents be dismissed for this Court's lack of jurisdiction over the subject matter of the action."

The mandate of this Court was stated in Jacobucci v. District Court, supra, in the following language:

> "Therefore, pursuant to C.R.C.P. 19, and this court's power under C.A.R. 21, the District Court should join as parties to the condemnation action those shareholders in the Standley Lake Division of Farmers whose water rights would be affected by the condemnation action of Thornton as of the date of the initiation of the condemnation action and all parties in interest."

It is FRICO's position that all of its shareholders are "parties in interest," but even if the mandate of this Court as quoted above should be determined to be applicable only to FRICO's shareholders in the Standley Lake Division, Thornton did not comply. The record before this Court discloses that the Town of Dacono and the City of Northglenn were at all relevant times owners of FRICO shares of stock allocated for water distribution purposes to the Standley

Lake Division. Neither the Town nor the City have been joined as respondents in this condemnation action.

Thornton in its "STATEMENT OF THE ISSUES" on page 1 of its Brief makes no reference to the dismissal of the action as to FRICO and nowhere in its Brief does Thornton discuss or argue the invalidity of the dismissal of FRICO. Thornton does, on page 19 of its Brief in its "SUMMARY OF THE ARGUMENT" make the following statements:

> "Petitioner-Appellant City of Thornton submits that the order of the District Court dismissing this action for lack of jurisdiction should be reversed since the action was dismissed only on the basis of Thornton's failure to comply with the invalid Water Rights Condemnation Act, C.R.S. 1973, §§ 38-6-201, et seq. (f. 1516, 1521-1522)."
>
> * * *
>
> "Thornton also submits that the findings and rulings of the District Court regarding all other jurisdictional issues should be affirmed."

Thornton's request that "all other jurisdictional issues should be affirmed" should be granted. The "all other jurisdictional issues" includes the dismissal of FRICO.

The principle relied upon by FRICO in its request that the judgment of dismissal of the action as to FRICO be affirmed is stated in Subparagraph (d) of Rule 1, C.A.R., Volume 7 C.R.S., 1973, which provides in part as follows:

> "Each party in this brief required by C.A.R. 28(a) shall state clearly and briefly the grounds upon which he relies in seeking a reversal or modification of the judgment or the correction of adverse findings, orders, or rulings of the trial court. He will be limited to the grounds so stated although the court may in its discretion notice any error appearing of record."

CONCLUSION

The issues to be considered on this appeal have been established by "Report of Preargument Conference" entered in this cause on March 22, 1977, by Justice James K. Groves. Facts developed in this proceeding to date permit resolution of such issues. FRICO submits that under the developed facts and the applicable law, it may be concluded that

(a) The Water Rights Condemnation Act of 1975 is constitutional and applies to Thornton;

(b) Compliance with the provisions of the Water Rights Condemnation Act of 1975 is mandatory as to condemnation proceedings commenced after its effective date;

(c) Thornton commenced condemnation proceedings against individual respondents after the effective date of the Water Rights Condemnation Act of 1975;

(d) Thornton did not comply with the provisions of the Water Rights Condemnation Act of 1975;

(e) Thornton did not satisfy the condition precedent requirement (failure to agree) prior to the commencement of this condemnation proceeding as against FRICO or as against individual respondents;

(f) Thornton is not empowered by the Colorado Constitution, statutes or court decisions to condemn "water rights" for use by consumers residing outside the boundaries of the city;

(g) The "water rights" sought to be condemned in this action are already devoted to a "public use;"

(h) Dismissal of FRICO not challenged by Thornton, and should be affirmed.

Each and every one of the conclusions enumerated above justify the dismissal of this condemnation proceeding.

Dated May 1, 1977.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of April, 1977, the foregoing Brief for Respondent The Farmers Reservoir and Irrigation Company 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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