5-16-1977

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

IN THE SUPREME COURT

OF THE STATE OF COLORADO

No. 27462

CITY OF THORNTON, COLORADO, a Municipal Corporation of the State of Colorado, acting by and through its Utilities Board,

Petitioner-Appellant,

vs.

1. THE FARMERS RESERVOIR AND IRRIGATION COMPANY, a mutual ditch company organized pursuant to the corporation laws of the State of Colorado; et al.,

Respondents-Appellees.

Appeal from the District Court of Jefferson County

Honorable Roscoe Pile, Judge

REPLY BRIEF FOR APPELLANT CITY OF THORNTON, COLORADO

DAVIS, GRAHAM & STUBBS

John M. Sayre
Donald E. Phillipson
Robert V. Trout
Felicity Hannay

2600 Colorado National Building
950 Seventeenth Street
Denver, Colorado 80202
(303) 892-9400

Attorneys for Appellant
City of Thornton, Colorado

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PREFACE

As both Thornton and the respondents have described in their briefs, this case involves issues of major concern to the citizens of Colorado. Understandably, counsel for some respondents have been disposed to use a certain amount of rhetoric in supporting the positions of their respective clients. So that this rhetoric does not obscure the true nature of this proceeding, however, Thornton is compelled to emphasize two fundamental facts about this litigation.

First, Thornton is a home rule city in Colorado representing many thousands of people using water supplied by its water system within the Thornton city limits and representing additional thousands of people using water supplied by the continuation of its water system outside the Thornton city limits. Second, Thornton recognizes that it must pay fair compensation for the water rights and other property it seeks to condemn in this action. The sole issues at this stage of the case involve Thornton's right to condemn, not the amount of compensation to be paid. In short, Thornton is not the depersonalized entity seeking to steal the respondents' water that respondents' rhetoric would have this Court believe.

In this Reply Brief, Thornton does not attempt to reply to every argument made by each respondent in the numerous answer and amicus briefs filed with the Court. Some of the arguments lack merit on their face and others are based on mischaracterizations of Thornton's initial argument or have been adequately forseen in Thornton's

initial argument. Even with these limitations, however, this Reply Brief is necessarily long because of the myriad of arguments presented by the respondents which are based on their individual perspectives on what is important in this case.

Furthermore, preparation of this Reply Brief for the Court has been complicated by two sets of parties who chose to ignore Justice Groves' Report of Preargument Conference. Respondents Lower Clear Creek Ditch Company, et al. served their answer brief on May 13, 1977 -- seven days after the time allowed by this Court and only three days before this Reply Brief is to be filed. That brief should not even be considered by this Court. FRICO expanded its answer brief to cover two issues shown not be part of this appeal in Justice Groves' Report of Preargument Conference. Apparently FRICO has forgotten that the conference was requested by FRICO itself to simplify the issues on this appeal and thus save time and expense for all parties.

SUMMARY OF REPLY ARGUMENT

The Water Rights Condemnation Act, C.R.S. 1973 §§ 38-6-201 et seq. is unconstitutional as applied to the City of Thornton since the Colorado Legislature cannot take away Thornton's constitutional power to condemn water rights for a local purpose and since the condemnation in the present case is for a local public purpose. In addition, application of the Act to this case would be unconstitutional as retroactive legislation since the action is in rem and began before the Act was passed and since Thornton would be adversely affected by its retroactive application.

The City of Thornton has satisified the "failure to agree" requirements of C.R.S. 1973 § 38-1-102 as to respondents FRICO and its shareholders in the Standley Lake Division, since Thornton's offers to purchase made to each such respondent were reasonable, in good faith, and before the joinder of each such respondent in this case.

Neither the shareholders of FRICO other than those in the Standley Lake Division nor the municipalities owning FRICO stock need be joined in this action since their interests are not affected by its outcome.

The dismissal of FRICO should not be affirmed since it was based solely on the erroneous dismissal of the respondents shareholders.

REPLY ARGUMENT

I. THE WATER RIGHTS CONDEMNATION ACT IS UNCONSTITUTIONAL AS APPLIED TO THE CITY OF THORNTON

A. Thornton has a constitutional right to condemn water rights.

Several respondents have argued that "water rights" is not included in the term "water works" contained in Colorado Constitution Article XX, Section 1, granting home rule cities the power to condemn. They then contend that if water rights are not included within "water works," the power granted by Article XX, Section 1, does not extend to water rights and thus such a power, if any, is solely a creation of statute.

This simplistic argument ignores other pertinent language in Article XX, Section 1, which is underlined in the following passage from that section:

> [each home rule city] 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 . . . .

The phrase "and everything required therefore" which modifies "water works" clearly includes water rights, since water works are worthless without water and water in Colorado is available only from the exercise of water rights.

Even before the people adopted Article XX in 1902, the Colorado Legislature and this Court recognized the need for cities to be able to condemn water rights and provided them with such power.

> Strickler v. City of Colorado Springs, 16 Colo. 61, 26 P. 313 (1891) [Colo. Gen. Stat. § 3312(73) (1883)]

Since home rule cities possess all powers that the Legislature may grant to Colorado cities generally, the power to condemn water rights is clearly encompassed within the condemnation power granted to home rule cities.

> City and County of Denver v. Board of Commissioners, 113 Colo. 150, 156, 156 P.2d 101, 103 (1945)

Furthermore, respondents' assertion that the plain language of Article XX, Section 1, should be ignored simply because the term "water rights" does not appear in Section 1 evidences such a narrow reading of the section as to make meaningless the right to condemn "water works" which is admittedly present in the section. This Court has rejected such narrow interpretations in the context of water works which are constructed or condemned for city use.

City of Grand Junction v. Kannah Creek Ass'n, 557 P.2d 1173 (Colo. 1976) (Grand Junction condemnation action brought in early 1900's under predecessor statute to C.R.S. 1973 § 31-12-101(78))

See also Lavelle v. Town of Julesburg, 49 Colo. 290, 112 P. 774 (1910) (condemnation of land for power house for water works)

The same respondents also argue that there is a conflict between Colorado constitutional provisions relating on the one hand to home rule cities and on the other hand to state waters, and that with this conflict, the provisions relating to state waters must assume supremacy. The conflict asserted is a creation of the respondents' misreading the constitutional provisions on state waters, and not a creation of the people in adopting the relevant constitutional provisions. Colorado Constitution Article XVI, Section 5, provides as follows:

> 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.

Respondents totally ignore the language in this section which states that only the water "not heretofore appropriated" belongs to the public and that such water is subject to appropriation. The present case deals with appropriated waters only and the water rights which evidence those appropriations, which rights are private in nature.

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

Town of Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 94 P. 339 (1908)

If the water rights involved in this case were not private, then no compensation would be owed to the respondents for

Thornton's taking the water in question since it would be subject to appropriation under Article XVI, Sections 5 and 6, of the Colorado Constitution.

See Town of Genoa v. Westfall, 141 Colo. 533, 349 P.2d 370 (1960)

Finally, some respondents assert that the Colorado constitutional provision establishing preferences among certain uses of water within the state shows that the present use by FRICO shareholders is public (and thus not subject to condemnation) and that Thornton is restricted to condemnation of water for domestic uses only. The pertinent Colorado constitutional provision, Article XVI, Section 6, reads as follows:

> 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.

Under respondents' analysis, every beneficial use of water given a preference ranking is public and therefore no such water rights can be condemned by anyone. Such an interpretation is directly contrary to Colorado Constitution Article XX, Section 1, previous case law, and well recognized statutory law where the right of municipalities to condemn water rights has never been questioned, regardless of the use to which the water was put before the condemnation.

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

See City of Grand Junction v. Kannah Creek Ass'n, 557 P.2d 1173 (Colo. 1976)

It is well established that courts should not strain to find conflicts in constitutional provisions such as respondents attempt here, but rather that the provisions should be read in harmony so that the will of the people can be given effect.

People v. Sours
31 Colo. 369, 74 P. 167 (1903)

The two constitutional sections may be read very easily in harmony. Article XX, Section 1, grants home rule cities the power to condemn water rights for any local purpose (whether domestic, irrigation, or otherwise) regardless what the existing use of the water may be. For example, the condemnation of the property of a private municipal water company by Thornton has clearly been approved by this Court.

City of Thornton v. Public Utilities Commission,
157 Colo. 188, 402 P.2d 194 (1965)

Even if this Court determines that the property sought to be condemned by Thornton in this case is devoted to a "public use," the action can proceed since Thornton, as a home rule city, possesses power to condemn such property.

See Beth Medrosh Hagodol v. City of Aurora,
126 Colo. 267, 273-74, 248 P.2d 732,
735-36 (1952)

Article XVI, Section 6, on the other hand, allows a city to condemn for one purpose water rights being used for a less preferred purpose, whether or not there is another specific constitutional grant of condemnation power to the city (home rule or otherwise).

See Town of Sterling v. Pawnee Ditch Extension Co.,
42 Colo. 421, 94 P. 339 (1908)

Rather than restrict the right of a home rule city to condemn water rights, the preference section supports and expands

that right. Colorado Constitution Article XX, Section 8, supports this interpretation by providing that in the event of conflict with any other constitutional provision, the rights and powers of home rule cities granted in Article XX prevail.

B. Thornton has not waived its constitutional right to condemn water rights.

Thornton's charter clearly provides that Thornton has reserved all powers to condemn water rights and to take such water rights upon paying just compensation to the owner "as provided by law."

> Charter of the City of Thornton, Colorado ¶ 16.7 (f. 1674, Pet. Exh. R).

Some respondents have argued that by stating "as provided by law," Thornton has waived its right to determine necessity. This argument is wholly without merit for two independent reasons.

First, the phrase "as provided by law" only refers to the paying of just compensation. It does not refer to the taking of water rights and thus the determination of necessity which is an integral part of a city's acquiring and taking property.

> Lavelle v. Town of Julesburg, 49 Colo. 290, 112 P. 774 (1910)

Second, in the phrase "as provided by law," the term "law" is not limited to statutes passed by the Colorado Legislature. "Law" includes the Colorado Constitution as well as principles expressed by this Court in its decisions. Thus, by stating "as provided by law," Thornton has adopted for itself all the powers which are given to it by the Colorado Constitution, state statutes, and the decisions of this Court. Under Colorado Constitution Article XX,

Section 1, Thornton clearly has the authority to condemn water rights, and under the decisions of this Court, that authority to condemn includes the determination of necessity.

Rothwell v. Coffin,
122 Colo. 140, 220 P.2d 1063 (1950)

See City and County of Denver v. Board of Commissioners, 113 Colo. 150, 164, 156 P.2d 101, 106 (1945)

C. The Colorado Legislature cannot take away a constitutional right of a home rule city.

Having already been attributed with philosophizing in its main brief, Thornton is compelled to respond to the philosophizing of Jacobucci, et al. with a certain rebuttal philosophy of its own. The Jacobucci, et al. respondents assert that the place for the ultimate decisions and resolutions of "the great twentieth century conflict between agriculture and urban life" (Jacobucci, et al. Brief, p. 20) is the Colorado Legislature and not the Supreme Court. On the contrary, Thornton submits that the place for such ultimate decisions is the people themselves, and the will of the people is expressed most directly in the Colorado Constitution. If the people have spoken on an issue in the Colorado Constitution, then all desires and acts of the Colorado Legislature and the Supreme Court must be subservient to that will of the people so expressed.

Four-County Metropolitan Capital Improvement District v. Board of County Commissioners,
149 Colo. 284, 369 P.2d 67 (1962)

Thornton's argument concerning the Water Rights Condemnation Act, C.R.S. 1973 §§ 38-6-201 et seq., is thus eminently simple and correct. If the Act has any provision which attempts to take away any power granted to Thornton as

a home rule city by the Colorado Constitution, then that provision must be declared invalid. If the Act is so written that the invalid provision is not severable from the Act, then the entire Act is invalid.

As shown in Thornton's main brief, the provisions of the Act which take away the power of Thornton's officials to determine the necessity for condemnation and vest this power in three commissioners and a court are contrary to Article V, Section 35, Article XX, Section 1, and Article XXI, Section 4, of the Colorado Constitution (Arguments I.A-I.B, pp. 20-30). The provision prohibiting condemnation of water rights for future needs in excess of 15 years is also shown to be contrary to Article XX, Section 1, of the Colorado Constitution (Argument I.A.3, pp. 26-27). Finally, a careful comparison of the Water Rights Condemnation Act with a previously existing statute on procedures for condemnation, C.R.S. 1973 §§ 38-6-101 et seq., shows that the invalid provisions are not severable from the Act and thus that the entire Act is invalid (Argument I.C., pp. 30-33).

Respondents make valiant efforts to obscure the fundamental issue and argument of Thornton described above. A review of respondents' arguments shows that the arguments raised are either not pertinent to the facts of the present case or do not in any way affect the merits of Thornton's position.

1. Even statutes covering matters of statewide concern cannot eliminate a specific power granted to a home rule city.

All respondents assert that water rights or condemnation of water rights are matters of statewide concern

and that therefore the Colorado Legislature has exclusive jurisdiction to enact laws covering those subjects. Whether or not matters of statewide concern are involved, the Legislature has no power to enact any law which denies a right granted by the Colorado Constitution.

Four-County Metropolitan Capital Improvement District v. Board of County Commissioners, 149 Colo. 284, 369 P.2d 67 (1962)

As established above and in Thornton's main brief, the Colorado Constitution gives home rule cities the power to condemn water rights and its officers the responsibility to determine the necessity for condemning water rights. Since the Water Rights Condemnation Act has provisions which take away these rights and since those provisions are not severable, the Act is invalid regardless whether the Act is characterized as covering a matter of statewide concern or as establishing court jurisdiction.

Some resondents argue that Colorado Constitution Article XX, Section 1, granting home rule cities the right to condemn, is self limiting to "local concerns" so as to allow the Legislature to enact any law regarding condemnation that deals with matters of statewide concern. A careful examination of that section shows that the argument lacks merit.

Thornton recognizes that Section 1 provides that a home rule city may only condemn water rights for facilities which are "local in use and extent, in whole or in part." This narrow qualification of the right to condemn only limits the character of the water works facility and purpose for which the water rights are to be condemned. It does not limit the location or character of the water rights condemned

for the local facility and purpose, nor does it allow the Legislature to enact statutes under the guise of "statewide concern" which deny the express right of a home rule city to condemn property for those facilities which are local in use and extent. As shown below in part D of this Argument I, in the present case the property which is the subject of the petition in condemnation is to be used in facilities which are local in use and extent as contemplated by Colorado Constitution Article XX, Section 1.

The numerous cases cited by respondents involving ordinances which are in conflict with statutes adopted by the Colorado Legislature covering matters of statewide concern are simply not pertinent here.

E.g. City and County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958)

The present case involves a specific constitutional power granted by the people through their Constitution to home rule cities, not the implied power of a home rule city to legislate on all "local concerns."

2. Colorado Constitution Article XX, Section 1, does not give the Legislature the authority to take away specifically granted constitutional powers under the guise of providing procedures for condemnation.

Some respondents also argue that Colorado Constitution Article XX, Section 1, requires Thornton to follow any statute enacted by the Colorado Legislature governing condemnation proceedings. To be sure, Article XX, Section 1, provides that the city "may enforce such purchase by proceedings at law as in taking land for public use by right of eminent domain." Indeed, Thornton has instituted this

action under the procedures established by the Legislature in C.R.S. 1973 §§ 38-1-101 et seq. and agrees that the Legislature can provide procedures for the condemnation of water rights which do not infringe upon the constitutional powers of the condemning authority. However, the well established rule of construction that statutory or constitutional provisions are to be read consistently so as to give effect to all provisions requires this constitutional provision to be read to allow the Legislature to adopt only those procedures which do not contravene the rights otherwise granted in the same constitutional section.

See People v. Sours,
31 Colo. 369, 74 P. 167 (1903)

3. Respondents strain unsuccessfully to recharacterize the Water Rights Condemnation Act so as to avoid its clear terms which are unconstitutional.

Even a cursory review of the provisions of the Water Rights Condemnation Act shows that the determination of necessity for exercising eminent domain is taken from the municipality and given to the three specially appointed commissioners. Some respondents attempt to legitimize this usurpation of authority simply by stating that the Colorado Legislature has re-established "a condemnation procedure which long was recognized as being valid" (FRICO Brief, p. 19) (referring to C.R.S. 1953 § 50-1-6). This assertion is simply not correct insofar as cities and towns are concerned, as cases in this Court clearly indicate that the determination of necessity is vested in the municipal officials notwithstanding the language of that repealed provision.

Lavelle v. Town of Julesburg,
49 Colo. 290, 112 P. 774 (1910)

Rothwell v. Coffin,
122 Colo. 140, 220 P.2d 1063 (1950)

Respondents do not cite and indeed cannot cite any case which holds that that part of C.R.S. 1953 § 50-1-6 which gives the determination of necessity to three commissioners can be applied to cities and towns, much less to home rule cities. The mere presence of a power long exercised in violation of the Constitution does not authorize such violation.

Leckenby v. Post Printing and Publishing Co.,
65 Colo. 443, 176 P. 490 (1918)

Bedford v. White
106 Colo. 439, 106 P.2d 469 (1940)

Many respondents apparently recognize the weakness of their argument that the transfer of the determination of necessity to three commissioners is permitted by the Colorado Constitution, since they desperately try to give the Water Rights Condemnation Act characteristics which it simply does not have. A brief review of two of these characterizations will show the futility of those attempts.

Respondent Rocky Mountain Fuel Company asserts that the changes are merely procedural since the Act "simply places in issue . . . the issue of fraud or bad faith and vests with a commission, rather than the district court, the right to determine whether or not the taking is necessary" (Rcky. Mtn. Fuel Brief, p. 4). There is no doubt that a court has the authority to strike down the decision of necessity by a municipality upon a showing of fraud or bad faith committed by the municipality.

Arizona-Colorado Land & Cattle Co. v. District Court, 182 Colo. 44, 511 P.2d 23 (1973)

But under the Act, no provision whatever is made for the municipality to make a determination of necessity which

would be given any weight in the proceedings. Instead, the three commissioners are given that exclusive authority to determine necessity and to make all other related decisions.

C.R.S. 1973 §§ 38-6-202(1) and 207

Thus, the Act does not change the procedure for reviewing a municipality's decision on necessity, but rather eliminates that right of decision altogether.

Respondent FRICO boldly asserts that "the 1975 Act does not take the determination of necessity from city officials" and that the "Act does subject the determination of city officials to judicial review" (FRICO Brief, pp. 18-19). As noted above, the Court will search through the Water Rights Condemnation Act in vain to find any reference to, allowance of, or review of a determination of necessity by the municipality filing the petition. Instead, the three commissioners are given that full power and only their determination, without the benefit of statutory standards, is subject to review by the district court.

4. No Federal constitutional questions are raised in this proceeding.

The Jacobucci, et al. respondents argue that Thornton cannot rely upon equal protection or other Federal constitutional rights in this case. Thornton does not and has not asserted any Federal constitutional claim. Thornton recognizes that the people can circumscribe or eliminate its power as a home rule city to condemn water rights by amending the Colorado Constitution.

Board of County Commissioners v. City and County of Denver, 150 Colo. 198, 372 P.2d 152 (1962), appeal dismissed, 372 U.S. 226, 82 S.Ct. 679 (1963)

In the present case, however, the Water Rights Condemnation Act was enacted without any amendments to the Colorado Constitution concerning the powers and authority of home rule cities and their officials, so the question of changing constitutional rights is not present.

D. This condemnation action is to obtain property for a local public purpose, which is within the power of the home rule city Thornton.

Contrary to the assertions of some respondents, Thornton does not contend that it can condemn water rights for any purpose whatever without regard to constitutional limitations. On the contrary, Thornton recognizes that its condemnation powers may only be exercised in the present context to obtain property for "water works . . . local in use and extent, in whole or in part, and everything required therefore."

Colorado Constitution Article XX, Section 1

Thornton does assert, however, that the exercise of condemnation power in this action fits fully within its power to condemn for a local public purpose as that power is described in Colorado Constitution Article XX, Section 1.

1. The condemnation of water rights by a home rule city for use within and without its city limits is for a local purpose under Colorado Constitution Article XX, Section 1.

Respondents FRICO and Jacobucci, et al. argue strenuously that the use to which Thornton will put the water rights sought to be condemned in this action is not "local" as required by Colorado Constitution Article XX, Section 1. This argument is completely refuted by Colorado Open Space Council, Inc. v. City and County of Denver, 543

P.2d 1258 (Colo. 1975), which clearly established the right and power of Denver (and all other home rule cities) under the Colorado Constitution and Colorado statutes to operate water works and supply water users outside its city limits without any limitation of this power to the sale of temporarily "excess" waters.

Colorado Constitution Article XX,
Sections 1 and 6

C.R.S. 1973 § 31-12-101(39)

C.R.S. 1973 § 31-15-708(1)(d)
(Cumm. Supp. 1975)*

Implicit in this decision was the determination by this Court that supplying water to users in areas outside the city limits of a municipality, and the water works necessary therefor, are matters of "local use and extent," since a municipality only has the power to supply water to such extraterritorial users under Article XX, Section 1, when the use and works necessary therefor are local "in whole or in part."

See City of Thornton v. Public Utilities Commission,
157 Colo. 188, 402 P.2d 194 (1965)

2. The use for which Thornton seeks to condemn water rights is clearly public.

FRICO argues at some length that Thornton cannot condemn water rights for supplying water users outside its municipal boundaries because this is not a public use. Thornton is seeking to condemn water rights for use in its

---

*Counsel for Colorado Farm Bureau, et al. state in their brief that this statute "appears to be nonexistent" (p. 7). These learned counsel should consult Title 31, Colorado Revised Statutes of 1973, 1975 Cummulative Supplement Volume, pp. xiii, 135-36, and 1975 Colo. Sess. Laws Ch. 275, § 1, pp. 1117-18.

municipal water system, which system serves people residing both inside and outside Thornton's city limits. That condemnation to obtain needed municipal water supplies is a proper public purpose which can be achieved through condemnation has long been recognized by Colorado courts:

> To correctly interpret the statutes [predecessors of § 31-15-708] and determine their significance, the purpose must not be lost sight of. To furnish organized communities with an abundant supply of pure and wholesome water is one of the duties imposed on the municipality, and comes clearly within the purview of what is often termed a public use. The right of the legislature to empower towns and cities to exercise the right of eminent domain to secure such results has never been questioned . . . .
>
> Warner v. Town of Gunnison, 2 Colo. App. 430, 432, 31 P. 238, 238-39 (1892)
>
> See 2A Nichols, The Law of Eminent Domain § 7.5153 (3d Rev. Ed. 1976).

This characterization applies to condemnation for municipal uses both within and without a municipality's boundaries since, as shown in Argument VI of Thornton's supplemental brief (pp. 10-12), both the Colorado Constitution and Colorado statutes authorize the use of eminent domain powers for both such uses. FRICO's assertion that Thornton supplies water to outside users in a proprietary, rather than governmental, capacity is irrelevant to this issue since all utility service provided by a municipality, whether within or without its boundaries, is rendered in its proprietary capacity.

> Larimer County v. City of Fort Collins, 68 Colo. 364, 367, 189 P. 929, 930 (1920)
>
> Cerise v. Fruitvale Water and Sanitation District, 153 Colo. 31, 384 P.2d 462 (1963)

FRICO's reliance upon Burger v. City of Beatrice, 181 Neb. 213, 147 N.W.2d 784 (1967), is wholly misplaced. Besides being a decision from another jurisdiction, the decision is easily distinguishable from the instant case on its facts. The city in Burger sought to condemn property solely for the purpose of supplying water to two private industrial plants located outside the city limits, a fact on which the majority opinion heavily relied.

> In our opinion, therefore, the construction of the 4 wells, the withdrawal of the ground water from plaintiffs' lands, and the construction of the 18-inch pipeline was largely for the private use of Phillips and Cominco. . . . The use made of the water by Phillips and Cominco is not such as will be used by the public to such an extent as to make it a public use. 147 N.W.2d at 791.

In contrast, Thornton will use the water available from the water rights sought to be condemned in this action in part to supply the public within its city limits and in part to supply the public outside its city limits.

E. Thornton has standing to challenge the Water Rights Condemnation Act.

Respondents Jacobucci, et al. argue that Thornton does not have standing to challenge the constitutionality of the Water Rights Condemnation Act. This argument is based on a curious alchemy of erroneous assertions, such as the assertion that no municipality has the right to condemn a water right and that the Water Rights Condemnation Act was enacted for the benefit of municipalities and home rule cities such as Thornton.

The argument may easily be refuted by pointing out the preeminent fact in this litigation: Thornton refused to follow the dictates of the Water Rights Condemnation Act in this case and as a result, the District Court dismissed

Thornton's condemnation proceeding for the Standley Lake water rights and facilities which Thornton needs to provide adequate water for the people it serves. The classic means to test the constitutionality of a statute which purports to apply to a person or entity is to refuse to obey that statute.

Stockman v. Leddy
55 Colo. 24, 129 P. 220 (1912)

This is precisely what Thornton has done in the present case regarding the Water Rights Condemnation Act. Accordingly, Thornton has standing to raise the constitutionality of the Water Rights Condemnation Act, since by refusing to obey the Act, it has been adversely affected because its pre-existing condemnation suit has been dismissed.

II. THE WATER RIGHTS CONDEMNATION ACT CANNOT BE APPLIED TO THE JOINDER OF ADDITIONAL RESPONDENTS TO THIS ACTION WHICH WAS PENDING ON THE ACT'S EFFECTIVE DATE.

A number of respondents dispute Thornton's contention that the Water Rights Condemnation Act may not be applied to this condemnation action which was commenced before the Act's July 1, 1975, effective date. Thornton's primary argument on this issue is contained in Argument II of its main brief (pp. 34-38) and will not be repeated here. However, several arguments raised by respondents and amici curiae not addressed in Thornton's main brief require response.

A. A condemnation action commences upon the filing of the petition in condemnation.

FRICO and Colorado Farm Bureau, et al. argue that under Rules 3 and 4 of the Colorado Rules of Civil Procedure this action did not commence as to the shareholders until

they were properly served with process and that therefore the Act, which was in effect at the time they were served, applies to an action against them. This argument is based upon an incorrect understanding of the effect of Rules 3 and 4 and the nature of a condemnation action.

A civil action is commenced and the court has jurisdition over it under Rule 3 at the time of either the filing of a complaint or the service of a summons. The filing of the complaint provides the court with jurisdiction over the plaintiff and the action although service of the summons is necessary to obtain personal jurisdiction over the defendant.

Nelson v. District Court,
136 Colo. 467, 320 P.2d 957 (1957)

An action is commenced as to both plaintiff and defendant at the time the complaint is filed, even in cases in which the statute governing the action is substantially altered between the time the complaint is filed and the time the defendant is served.

Carvalho v. Doe,
7 F.R.D. 469 (D. Hawaii 1947) (statute in effect at time complaint was filed controls even though statute was substantially amended before service of the defendant).

See Stahl v. Paramount Pictures,
167 F. Supp. 836 (S.D.N.Y. 1958).*

---

*Since Rule 3 of the Colorado Rules of Civil Procedure is virtually identical on this point to Rule 3 of the Federal Rules of Civil Procedure, decisions under the federal rule are persuasive authority in Colorado.

Curtis, Inc. v. District Court,
182 Colo. 73, 511 P.2d 463 (1973)

The Colorado decisions cited by Colorado Farm Bureau, et al. are not contrary to this rule since they hold only that service of process is necessary to obtain personal jurisdiction over a defendant.

An analysis of the nature of a condemnation action clearly shows that there has been only one action commenced in this case. As shown in Argument IV.A of this Reply Brief, a condemnation action is an in rem action which is only commenced by proceeding against the property sought to be condemned. Once jurisdiction is obtained over such property, new actions are not commenced against new parties as their interests come to light because the only possible action, that against the property, is already proceeding. Instead, additional parties are joined to the ongoing action.

C.R.S. 1973 § 38-1-104

Therefore, since an action is commenced as to the property upon the filing of the complaint, and since the petition herein was filed on November 14, 1973 (f. 1-50), this litigation was pending as to all parties on the Act's July 1, 1975, effective date. Application of the Act to this litigation can only occur in these circumstances if it is held to be retroactive.

B. Thornton's vested right in its determination of the necessity of this condemnation action may not be disturbed by retroactive application of the Water Rights Condemnation Act.

Respondents and amici curiae also argue that the Act may apply to this litigation pending upon its effective date because it only makes procedural changes in the law and because Thornton possesses no vested or accrued rights which are affected by the Act. The first contention is answered

by the significant substantive changes in the law of condemnation made by the Act as detailed in Argument I.A of Thornton's main brief (pp. 20-27). Even if some of the changes may normally be considered procedural, they are substantive as to Thornton in this case because the effect of their application will be to require the dismissal of this action.

The second contention is based primarily upon two decisions of this Court, neither of which supports it. The first case, Perry v. City of Denver, 27 Colo. 93, 59 P. 747 (1899), held that the addition by legislative action of further steps to a pending annexation proceeding is not an unconstitutional retrospective law, so long as proceedings already had are not affected. The very statement of this holding distinguishes it from this case. Here, one of the most significant steps of the proceeding, Thornton's determination of necessity, would be reversed by the application of the Act. If the Act is now applied to this pending proceeding, that decision will become a nullity because the Act requires necessity to be determined solely by a three person commission (subject to district court review).

C.R.S. 1973 §§ 38-6-202 and 207

Indeed, a close reading of the Perry decision reveals that it supports Thornton's position rather than respondents'. The statutory change in Perry prohibited submission of the annexation question to the voters and the report of an annexation election unless the annexing city had approved of the annexation. Since the amendment became effective after the election was ordered, the court could have acted to nullify that order also. The Court did not do so, stating:

> [The statutory amendment] did not annul [the court's] order directing the submission of the question of annexation to the voters of the town of Fletcher. 27 Colo. at 96, 59 P. at 748.

Clearly, the court's ordering the election in Perry is analogous to Thornton's determining the necessity of condemnation in this case. Therefore, under the reasoning in Perry, Thornton has a vested right not to have its decision of necessity annulled by statutory changes enacted while the condemnation action was pending.

The second case relied on by respondents, Rowe v. Tucker, 560 P.2d 843 (Colo. App. 1977), is equally inapplicable. Rowe involved a statutory change which occurred before litigation had been commenced and even before a cause of action had arisen. In the present case, the change was made almost two years after the litigation had commenced and after Thornton had gained a vested right in preserving the proceedings that had already occurred.

C. Thornton is protected from retroactive legislation by Colorado Constitution, Article II, Section 11.

Jacobucci, et al. contend in their supplemental brief that Article II, § 11, of the Colorado Constitution provides Thornton with no protection from the enactment of retroactive legislation by the General Assembly. The right of a municipality to the protection from retrospective legislation afforded by Article II, § 11, was clearly established 70 years ago by the Colorado Supreme Court in City of Colorado Springs v. Neville, 42 Colo. 219, 93 P. 1096 (1908), an opinion ignored by Jacobucci, et al.

III. THE CITY OF THORNTON HAS SATISFIED THE "FAILURE TO AGREE" REQUIREMENT OF C.R.S. 1973 § 38-1-102 AS TO RESPONDENT FARMERS RESERVOIR AND IRRIGATION COMPANY SINCE ITS OFFER TO PURCHASE WAS REASONABLE AND IN GOOD FAITH.

FRICO and several other respondents have argued in their answer briefs that Thornton's offer to purchase of October 2, 1973, directed to FRICO, does not satisfy the "failure to agree" requirement of C.R.S. 1973 § 38-1-102 since it was not made in good faith. The District Court found after an evidentiary hearing that Thornton's purchase offer to FRICO was made in good faith and that Thornton had satisfied the requirements of C.R.S. 1973 § 38-1-102 prior to the institution of this action against FRICO on November 14, 1973 (f. 1513-1514, 1643-2505). If there is any evidence in the record to sustain the action of the trial court, this Court is required to find that the trial court did not exceed its jurisdiction or abuse its discretion.

Old Timers Baseball Ass'n v. Housing Authority,
122 Colo. 597, 602, 224 P.2d 219, 222 (1950)

Vivian v. Board of Trustees,
152 Colo. 556, 561, 383 P.2d 801, 804 (1963)

In Argument III of its main brief (pp. 39-43) Thornton has sufficiently answered most of FRICO's contentions in this regard, but several additional points require comment.

(1) Thornton included within its purchase offer certain interests which this Court later determined were "individualized" interests of the shareholders. But this Court said of Thornton's belief that FRICO was a trustee as to such interests: "This contention is not without some support."

Jacobucci v. District Court,
541 P.2d 667, 673 (Colo. 1975)

Thus, the offer was clearly in good faith, notwithstanding Thornton's error.

(2) Colorado Constitution Article XI, Section 2, which appears to prohibit cities from being shareholders in any company, was primarily enacted to prohibit public aid to private railroad companies,

Colorado Central R.R. Co. v. Lea,
5 Colo. 192 (1879)

and to prevent the mingling of public funds with those of private persons.

Lord v. City and County of Denver,
58 Colo. 1, 143 P. 284 (1914)

A non-profit ditch company which exists only to serve water users is surely not the type of company intended to be included within the terms of this prohibition. As this Court has said, "The ownership of the shares of stock is merely incidental to the ownership of the water rights by the shareholders" and "the unique character of these corporations mandates different treatment which is not fully in accord with the principles applicable to corporations in general."

Jacobucci v. District Court
541 P.2d 667, 672 (Colo. 1975)

Indeed, as FRICO notes in its own brief, the cities of Westminster and Northglenn, and the town of Dacono, as well as Thornton, are shareholders of FRICO itself.

(3) At page 33 of its brief, FRICO argues that the Thornton Utilities Board's resolution of October 4, 1973, and the institution by Thornton of a condemnation action on October 5, 1973, constituted a "withdrawal" of Thornton's purchase offer of October 2, 1973. However, on

page 34 of FRICO's brief, FRICO admits that it was unaware of these events on October 12, 1973:

> . . . Mr. Sarchet [FRICO's President] 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.

It also appears that FRICO was unaware of these events until it received J. Castrodale's letter of October 16, 1973, to M.C. Sarchet:

> 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. (FRICO Brief, p. 35) (emphasis added)

Although the record does not reveal when Mr. Sarchet received the October 16 letter, even if the October 4 Utilities Board resolution and the October 5 filing of a condemnation petition evidenced an intention on Thornton's part to "withdraw" its offer, which argument Thornton denies, FRICO was not aware of those actions until on or about October 17, 1973, the date Thornton had specified for a response to its offer. In order to be effective, a revocation of an offer must be communicated to the offeree.

> 1 Williston on Contracts § 56 (Jaeger, 3d Ed., 1957)
>
> 17 C.J.S. Contracts § 50(d) (1963)
>
> See Carlsen v. Hay, 69 Colo. 485, 195 P. 103 (1921)

Therefore, the actions specified by FRICO could not have constituted a "withdrawal" of Thornton's offer, since FRICO did not know of them.

In any case, in his letter of October 16, 1973, to M.C. Sarchet, J. Castrodale (Thornton's City Manager at that time) reiterated Thornton's "desire to hold . . .

negotiations [with FRICO in an effort to achieve a negotiated agreement] even after the commencement by Thornton of a condemnation action . . . ." (f. 1674, 2001, Pet. Exh. L). This is clearly not language that would be used by someone who has withdrawn an offer.

IV. THE CITY OF THORNTON HAS SATISFIED THE "FAILURE TO AGREE" REQUIREMENT OF C.R.S. 1973 § 38-1-102 AS TO THE RESPONDENT SHAREHOLDERS OF THE FARMERS RESERVOIR AND IRRIGATION COMPANY'S STANDLEY LAKE DIVISION.

A common theme of respondents' answer briefs is that because Thornton's purchase offer to the individual shareholders of FRICO's Standley Lake Division was made on or about October 22, 1975, rather than prior to the commencement of this action on November 14, 1973, the application of the principles announced in Stalford v. Board of County Commissioners, 128 Colo. 441, 263 P.2d 436 (1953), requires the affirmance of the dismissal of this action. This argument ignores the plain meaning of the Colorado eminent domain statutes, as well as the vital differences between the facts of the Stalford case and the instant action.

A. Since FRICO is a proper party respondent in this action, Thornton's showing of "failure to agree" with FRICO conferred subject matter jurisdiction of this action upon the District Court.

Several respondents have argued that since Thornton's purchase offer of October 2, 1973, was directed to FRICO, and since this Court's opinion in Jacobucci v. District Court, 541 P.2d 667 (Colo. 1975), later determined that the shareholders in FRICO's Standley Lake Division (as of November 14, 1973) were indispensable parties, the offer to FRICO could not be the basis for claiming satisfaction of the "failure to agree" condition precedent. Thus, those respondents

contend that the jurisdiction of the District Court was never properly invoked, and the action as commenced in November, 1973, was therefore "void ab initio." This argument misconstrues both the Jacobucci decision and the requirements of C.R.S. 1973 § 38-1-102.

An eminent domain action such as this is a proceeding in rem.

> City of Grand Junction v. Kannah Creek Ass'n, 557 P.2d 1173, 1175 (Colo. 1976)
>
> Wilson v. Ross Investment Co., 116 Colo. 249, 260, 180 P.2d 226, 231 (1947)

"The power of eminent domain . . . acts on the land itself, and not on the title or the sum of the titles if there are diversified interests."

> 26 Am. Jur. 2d Eminent Domain § 130, at 789 (1966).
>
> 18 Am. Jur. Eminent Domain § 112, at 738 (1938).

All Thornton was required to show in order to satisfy the condition precedent of "failure to agree" was that it had made a good faith attempt to agree on compensation for the property sought to be acquired.

> Board of County Commissioners v. Highland Mobile Home Park, Inc., 543 P.2d 103, 106 (Colo. App. 1975)
>
> Interstate Trust Bldg. Co. v. Denver Urban Renewal Authority, 172 Colo. 427, 433, 473 P.2d 978, 981 (1970)

Because of the in rem nature of eminent domain proceedings, Thornton's showing of a good faith offer to FRICO was sufficient to confer upon the District Court jurisdiction over the property sought to be acquired. FRICO was certainly a proper and necessary party respondent to this eminent domain proceeding, since it was the owner of record of all of the

property sought to be acquired (f. 634-637, 2561), and the District Court specifically so found after an evidentiary hearing (f. 1514).

See C.R.S. 1973 § 38-1-102

Thornton must also emphasize that in the Jacobucci proceeding, petitioners Jacobucci, et al. argued strenously (and successfully) that they be allowed to join in the instant eminent domain action as respondents. Yet those very same petitioners who consumed eight months of this Court's time with their demand that they be joined in this action are among those respondents who now argue that they should not have been joined after all.

Furthermore, not only did those petitioners know full well at the time they petitioned this Court in the Jacobucci proceeding that no purchase offer had been directed by Thornton to individual shareholders of FRICO's Standley Lake Division, but they also brought that fact to both the District Court's and this Court's attention at that time:

> Intervenors and the class they represent allege affirmatively in response to Paragraph 10 of the Petition in Condemnation that no negotiations have been entered into between Intervenors and the class on the one hand and Petitioner on the other, no offer of compensation has been made, no effort whatsoever has been made to agree upon compensation for the reason that Petitioner has not sought out these Intervenors or any member of the class they represent to offer compensation.
>
> "Original Petition Under Colorado Appellate Rule No. 21" of Victor L. Jacobucci, et al., Exhibit B ("Cross Petition and Objections to Petition"), ¶ 5 of First Defense and Objection, pp. 6-7, Jacobucci v. District Court, Supreme Court No. 26751 (f. 836-837).

Clearly, if this Court had believed that the uncontroverted lack of a purchase offer to individual shareholders prior to November 14, 1973, was relevant to the District Court's

jurisdiction of this matter, it had the power under Colorado Appellate Rule 21 to prevent the District Court from proceeding further with the case.

City of Colorado Springs v. District Court,
184 Colo. 177, 519 P.2d 325 (1974)

It is obvious, however, that this Court recognized the proper presence of FRICO as being sufficient to confer subject matter jurisdiction upon the District Court. Otherwise, it would not have mandated the expensive and time-consuming step of joinder to this action of several hundred shareholders and other respondents.

B. The purchase offer of October 22, 1975, satisfied both the letter and the spirit of the "failure to agree" requirement prior to the joinder of the shareholder respondents.

C.R.S. 1973 § 38-1-102 authorizes a municipality to file a petition in condemnation when "the compensation to be paid for, [or] in respect of property sought to be appropriated . . ., cannot be agreed upon by the parties interested . . . ." The obvious meaning and purpose of the foregoing provision is that if agreement upon compensation can be reached between the condemnor and the persons with an interest in the property, unnecessary litigation will be avoided.

Welch v. City and County of Denver,
141 Colo. 587, 594, 349 P.2d 352, 355 (1960)

When Thornton directed its October 22, 1975, offer to the shareholders of FRICO's Standley Lake Division prior to joining them in this action, that purpose was well served. In fact, several shareholders accepted Thornton's offer and as a consequence were not joined in this action, providing a perfect illustration of the function of prior agreement.

(f. 1195-1196). Furthermore, C.R.S. 1973 § 38-1-104 provides that:

> Should it become necessary at any stage of the proceeding to bring a new party before the court, the court has the power to make such rule or order in relation thereto as may be deemed reasonable and proper . . . . (emphasis added)

This section plainly authorizes the joinder of additional parties at any stage of the proceeding, regardless of when it appears that such joinder has become necessary.

Sections 38-1-102 and 38-1-104 are both parts of the system of general laws governing eminent domain actions in the state of Colorado. As parts of such system, they "must be construed, if possible, so as to be consistent and harmonious one with the other and in their several parts."

> People v. Gibson,
> 53 Colo. 231, 237, 125 P. 531, 533 (1912)

To hold that no joinder of additional parties is permitted under § 38-1-104 unless the "failure to agree" requirement of § 38-1-102 was met as to such parties prior to the filing of the original petition in condemnation would render the joinder provision of § 38-1-104 meaningless and ineffective. Such a holding would be contrary to basic principles of statutory construction, and would lead to the absurd result that additional parties virtually never would be able to be joined to an on-going eminent domain proceeding. Accordingly, Thornton's purchase offer of October 22, 1975, to the shareholder respondents must be held to have satisfied the "failure to agree" requirement of § 38-1-102 prior to the joinder of said shareholders.

C. The Stalford case does not require dismissal of this action.

Stalford v. Board of County Commissioners, 128

Colo. 441, 263 P.2d 436 (1953), has been described at great length in the brief of respondents Jacobucci, et al. and Thornton will not repeat that desciption here. What respondents have failed to note in their lengthy discussions is that in Stalford, no joinder of additional respondents was involved. Rather, the amendment of the condemnation petition in that case which was held to "relate back" was an allegation as to negotiations with the original respondents. Since the condemnor in Stalford had not shown any attempt to agree on compensation with those original respondents prior to the filing of the original petition, the amended petition's allegation as to failure to agree was found to be unavailing to confer subject matter jurisdiction upon the court.

In this case, however, as set forth fully at Argument IV.A of this Reply Brief, the District Court had initial jurisdiction over the action and over the property sought to be acquired, because of the good faith offer to and proper presence of FRICO. Furthermore, as shown in Argument IV.B immediately above, the amendment effectuating the joinder of the shareholders was not made until the required good faith attempt to agree upon compensation with such shareholders had already been properly accomplished, in accordance with the letter and purpose of § 38-1-102. If Thornton's First Amended Petition in Condemnation "relates back" to the date of the commencement of this action, as argued especially by respondents Jacobucci, et al., then surely the amendments must be held to relate back as they were made--i.e., with the "failure to agree" requirement having been duly satisfied.

D. Thornton's offer of October 22, 1975, to the shareholders of FRICO's Standley Lake Division was reasonable and in good faith.

Several respondents argue that the offer letter of October 22, 1975, sent by Thornton to the FRICO shareholders whose stock was allocated to the Standley Lake Division on November 14, 1973, was inadequate for various reasons. Thornton has sufficiently addressed most of respondents' contentions in this regard in Argument IV.A of its main brief (pp. 44-47). However, the contention of a number of respondents that the purchase price offered to shareholders was improper requires a response.

These respondents argue that the offer price was inadequate because it was not "individualized" or did not purport to include compensation for damage to individual shareholders' land on which the water is used. These contentions misconstrue the duty of a condemnor in making an offer to purchase property sought to be acquired for a public purpose. All that is required is a reasonable and good faith effort or attempt to agree upon compensation.

> Board of County Commissioners v. Highland Mobile Home Park, Inc., 543 P.2d 103, 106 (Colo. App. 1975)
>
> Interstate Trust Bldg. Co. v. Denver Urban Renewal Authority, 172 Colo. 427, 433, 473 P.2d 978, 981 (1970)

If the offeree finds the amount of the condemnor's offer to be insufficient to compensate him for the damage he feels he will incur, he need only refuse to sell at that price, and the question of compensation will then be referred to a commission or jury for determination. As this Court has previously stated:

> To try the question of jurisdiction in limine on a controverted question of fact as to the amount of

> damages, would have, in effect, been a trial of the cause in advance upon its merits before the court.
>
> Colorado Fuel & Iron Co. v. Four Mile Ry. Co., 29 Colo. 90, 94, 66 P. 902, 903 (1901) (involving a controverted question of damages as it related to the federal jurisdictional amount)

Clearly in this case the respondents are asking for a similarly premature determination by this Court of questions relating to damages and compensation which properly belong to the commission or jury at the valuation and award stage of this action. In fact, each and every case cited by respondents Jacobucci, et al. dealing with the issue of damage to property not taken, is a case arising from alleged errors in the valuation and award stage of an eminent domain proceeding, and not from any objection to condemnor's attempts to agree on compensation.

> Farmers' Reservoir and Irrigation Co. v. Cooper, 54 Colo. 402, 130 P. 1004 (1913)
>
> Wiley Drainage District v. Semmens, 80 Colo. 365, 250 P. 527 (1927)
>
> Mack v. Board of County Commissioners, 152 Colo. 300, 381 P.2d 987 (1963)
>
> Wassenich v. City and County of Denver, 67 Colo. 456, 186 P. 533 (1919)
>
> Fenlon v. Western Light & Power Co., 74 Colo. 521, 223 P. 48 (1924)

Furthermore, Thornton's offer price was derived from a valuation report made by a reputable appraiser. (f. 1698-1702; 1674, Pet. Exh. F--Bowes letter.) That valuation report was based in part on the appraiser's study of "recent prices paid for stock in the Standley Lake Division of the Farmers Reservoir and Irrigation Company and for stock in the Farmers Highline Canal and Reservoir Company." (Bowes

letter, supra, p. 2). The appraiser also studied information relating to numerous other transactions involving transfers of water rights. (Bowes letter, supra, pp. 2-3.) For Thornton to accept its expert appraiser's opinion as to a reasonable per-share price is eminently sensible and reasonable, especially since market price for voluntary transfers of FRICO stock would reflect the value to the selling shareholders of the use of their water and the loss in value of their land or facilities resulting from a transfer of the water to someone else.

Amici curiae Colorado Farm Bureau, et al. argue that Thornton's October 22, 1975, letter was an offer to purchase from the respondent shareholders their FRICO stock, and since the offered price was based on a valuation report that included only the value of water rights, whereas the stock represented an interest in other FRICO assets as well, the offer price was thus improper. This argument is erroneous for two reasons.

First, the letter of October 22, 1975, was not an offer to purchase stock per se, as the following excerpt from the letter demonstrates:

> By this letter, the City offers to purchase all of your right, title and interest in the Property [the water rights, ditches, reservoir, and related property sought to be acquired], 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. (f. 1209)

Second, as noted hereinabove, the valuation report from which the per-share offer price was derived was not based entirely on the value of water rights, but was based in part on the free market price of FRICO shares in voluntary transfers. (f. 1674, Pet. Exh. F--Bowes letter.) Surely,

that free market price must be said to have included a component reflecting an interest in FRICO's corporate assets, like the price of any company's stock.

Finally, respondents Jacobucci, et al. have argued that the offer of October 22, 1975, was inadequate because "[w]ater cannot be condemned separate and apart from land." (Jacobucci, et al. Brief, pp. 6, 17). This statement is nonsense. This Court has stated:

> the right to the use of the water for irrigation is a right not so inseparately connected with the land that it may not be separated therefrom.
>
> Strickler v. City of Colorado Springs, 16 Colo. 61, 70, 26 P. 313, 316 (1891)
>
> See 26 Am. Jur. 2d Eminent Domain §§ 85, 135 (1966)

This principle was recently affirmed by this Court in a case involving water rights which were acquired by a municipality "separate and apart from land" in an eminent domain proceeding.

City of Grand Junction v. Kannah Creek Ass'n, 557 P.2d 1173 (Colo. 1976)

V. THE CITY OF THORNTON IS NOT REQUIRED TO JOIN IN THIS ACTION THE SHAREHOLDERS OF THE FARMERS RESERVOIR AND IRRIGATION COMPANY WHOSE SHARES ARE NOT ALLOCATED TO THE STANDLEY LAKE DIVISION.

FRICO has argued that the shareholders of FRICO whose shares are allocated to divisions other than the Standley Lake Division were intended to be included within the phrase "all parties in interest" as used by this Court in the Jacobucci decision, and thus must be joined as indispensable parties. Thornton has addressed this notion in Argument VII of its supplemental brief (pp. 13-14). Thornton is compelled to reply to an additional argument made by FRICO in this regard.

FRICO's basis for claiming that all FRICO shareholders must be joined in this action appears to be that in addition to water rights, Thornton seeks to acquire various items of property which are "general corporate assets ownership of which is vested proportionately in all FRICO shareholders." (FRICO Brief, p. 11.) Even if this were true, which Thornton does not concede, it would not mandate the joinder in this action of all FRICO shareholders.

FRICO's theory ignores the rationale of the Jacobucci decision, which was that the Standley Lake Division shareholders were indispensable parties because of their individual interests in the water rights represented by their shares of FRICO stock. This Court said in Jacobucci:

> 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 to proceed in their absence.
>
> Jacobucci v. District Court, 541 P.2d 667, 675 (Colo. 1975)

But this is manifestly not the case as to "general corporate assets" of the company. As to such assets, which represent no "individualized interests," and as to which each shareholder stands in an identical position (in proporation, of course, to the number of shares owned by such shareholder), FRICO itself is charged with the duty of protecting the shareholders' interests. Kinney described this duty:

> The relations between private incorporated water companies . . . organized as mutual corporations . . . is that of contract . . . .
>
> . . . .
>
> From this contract springs a trust relation between the company and its stockholders or share-

> holders, with which the corporation is charged to conduct the common business in the interest of the stockholders, and furthermore, the corporation being a trustee for its stockholders, it is bound to protect their interests. C. Kinney, Irrigation & Water Rights § 1482 (2d Ed. 1912) (footnotes omitted), quoted in Jacobucci v. District Court, 541 P.2d 667, 673 (Colo. 1975)

FRICO is thus clearly the proper party to protect the shareholders' interests as to "general corporate assets" of the company, so all shareholders do not need to be joined in this action.

VI. REPLY TO POINTS RAISED BY RESPONDENTS WHICH ARE OUTSIDE THE SCOPE OF THE "REPORT OF PREARGUMENT CONFERENCE"

A. The Jacobucci decision did not mandate the joinder of the City of Northglenn or the Town of Dacono as respondents in this action.

Amicus curiae City of Northglenn has argued that the decision of this Court in Jacobucci mandated its joinder as a respondent in this action. FRICO's brief argues the same as to both Northglenn and the Town of Dacono. Both arguments are unfounded.

The mandate of this Court in Jacobucci is perfectly plain:

> 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.
>
> Jacobucci v. District Court,
> 541 P.2d 667, 675-76 (Colo. 1975)
> (emphasis added)

Thornton has stated that it has no intention of condemning any interest of the City of Northglenn (f. 2518-2520), nor any interest of the Town of Dacono (f. 2273), nor, in fact, the interest of any municipality (f. 2430). That being so,

Northglenn and Dacono are not "shareholders . . . whose water rights would be affected by the condemnation action . . .," and are plainly not within this Court's mandate in Jacobucci.

Interestingly, Northglenn includes at page 8 of its brief the statement "Thornton's counsel apparently read the Jacobucci case the same way [as Northglenn], for he moved for an order permitting the joinder." Northglenn has it completely backwards. Thornton's motion to join Northglenn and Dacono was made on January 17 and 18, 1975, eight months before the Jacobucci decision. It was after reading the opinion of the Court in Jacobucci that Thornton determined that such joinder would be improper and unnecessary, and acted accordingly.

B. The dismissal of FRICO should not be affirmed.

FRICO has made the curious argument in its brief that Thornton has not challenged the dismissal of FRICO, and thus, FRICO's dismissal should be affirmed. It bases this interesting position not on the "Conclusion" of Thornton's main and supplemental briefs, but rather on several statements contained in Thornton's "Summary Argument".

It seems elemental that in order to determine the relief sought by an appellant upon an appeal, one should consult the conclusion of that appellant's brief. The "Conclusion" of Thornton's supplemental brief reads as follows:

> For the reasons stated in its Brief for Appellant and the supplemental reasons stated above, Thornton requests this Court to reverse the order of the District Court dismissing this eminent domain proceeding . . . . (emphasis added)

The "Conclusion" of Thornton's main brief contains substantially similar language.

Thornton submits that it is understood by this Court, even if not by FRICO, that "the order of the District Court dismissing this eminent domain proceeding" caused the dismissal of all respondents, including FRICO, and that it is the dismissal as to all respondents which Thornton would have this Court reverse. Since FRICO's dismissal was purely derivative, resulting only from the dismissal of the shareholder respondents, Thornton did not believe the matter merited separate argument. (See f. 1522) Hopefully, any ambiguity in this regard has been laid to rest.

CONCLUSION

For the reasons stated in its Brief for Appellant, Supplemental Brief for Appellant, and Reply Brief above, Thornton requests this Court to reverse the order of the District Court dismissing this eminent domain proceeding, to affirm all other rulings of the District Court on jurisdictional issues, to affirm this Court's description of "all parties in interest" in the Jacobucci decision to exclude FRICO shareholders other than those within the Standley Lake Division, and to remand this case to the District Court for further proceedings under C.R.S. 1973 § 38-1-101 et seq. relating to the valuation of the property and rights sought to be condemend.

DAVIS, GRAHAM & STUBBS

John M. Sayre, Reg. No. 2948

Donald E. Phillipson, Reg. No. 1328

Robert V. Trout, Reg. No. 7190

Felicity Hannay DEP
Felicity Hannay, Reg. No. 6895

Attorneys for Petitioner-Appellant
City of Thornton, Colorado
2600 Colorado National Building
950 - 17th Street
Denver, Colorado 80202
Telephone: (303) 892-9400

Address of Petitioner-Appellant
City of Thornton, Colorado

8992 North Washington Street
Thornton, Colorado 80229

CERTIFICATE OF SERVICE

I hereby certify that on May 16, 1977, the foregoing REPLY BRIEF FOR APPELLANT CITY OF THORNTON was served on all other parties to this action by mailing two copies to their respective counsel at the addresses below:

Respondent 1

Robert A. Dick, Esq.
John P. Akolt, III, Esq.
AKOLT, DICK AND AKOLT
1660 Lincoln Street
Denver, Colorado 80202

Respondent 2

John U. Carlson, Esq.
Charles M. Elliott, Esq.
HOLLAND & HART
730 Seventeenth Street
P. O. Box 8749
Denver, Colorado 80201

Respondents 127, et al. (including 290)

Gilbert Goldstein, Esq.
Alan A. Armour, Esq.
GOLDSTEIN, ARMOUR & LONNQUIST, P.C.
1234 Bannock Street
Denver, Colorado 80204

Respondent 120 (through Bovimport, Inc.)

Steven M. Hannon, Esq.
440 Steele Park
50 South Steele Street
Denver, Colorado 80209

Respondent 147

Melvin Dinner, Esq.
630 Greeley National Plaza
Greeley, Colorado 80631

Respondent 159

Raphael J. Moses, Esq.
MOSES, WITTEMYER, HARRISON and WOODRUFF, P.C.
P. O. Box 1440
Boulder, Colorado 80302

Respondent 200

Joseph M. Montano, Esq.
GORSUCH, KIRGIS, CAMPBELL, WALKER and GROVER
1200 American National Bank Building
Denver, Colorado 80202

Respondents 310, 324, 327

Lynn A. Hammond, Esq.
P. O. Box 701
Loveland, Colorado 80537

Respondent 315

David J. Miller, Esq.
804 Seventeenth Street
P. O. Box 1424
Greeley, Colorado 80631

Respondent 354, 388

Joseph P. Constantine, Esq.
911 Midland Savings Building
Denver, Colorado 80202

Respondent 387

Michael L. Ehrlich, Esq.
BERENBAUM, BERENBAUM, WEINBERGER and SUSMAN
1507 United Bank Center
1700 Broadway
Denver, Colorado 80202

Amicus Curiae City of Northglenn

Wayne B. Schroeder, Esq.
VRANESH AND MUSICK
P. O. Box 871
Boulder, Colorado 80306

Amicus Curiae Colorado Municipal League

Susan K. Griffiths, Esq.
Dee Wisor, Esq.
4800 Wadsworth Blvd., Suite 204
Wheat Ridge, Colorado 80033

Amici Curiae Colorado Farm Bureau, et al.

Robert F. Welborn, Esq.
John D. Faught, Esq.
1518 United Bank Center
1700 Broadway
Denver, Colorado 80290

Amici Curiae Lower Clear Creek Ditch Co; et al.

Lysle R. Dirrim, Esq.
C. V. Phelps, Esq.
25 South Fourth Avenue
P. O. Box 439
Brighton, Colorado 80601

Donald E. Phillipson