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Water: Statewide or Local Concern? - City of Thornton v. Farmers Reservoir and Irrigation Co.

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COMMENTS

WATER: STATEWIDE OR LOCAL CONCERN? *City of Thornton v. Farmers Reservoir and Irrigation Co.*

I. INTRODUCTION

Colorado, through its state constitution,[1] delegates to home rule municipalities[2] powers of the broadest possible scope.[3] *City of Thornton v. Farmers Reservoir and Irrigation Co.*[4] was before the Colorado Supreme Court for a decision on the constitutionality of the then recently enacted Condemnation of Water Rights Act[5] as applied to home rule cities and towns.[6] Justice Groves for the majority held as unconstitutional provisions of the Condemnation of Water Rights Act concerning the determination of necessity to acquire water rights. The basis for this determination was that the Act's procedures conflicted with the enumeration of powers delegated by the state constitution to home rule municipalities.[7] Justice Erickson, joined by Justice Carrigan in dissent,

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[1] COLO. CONST. art. XX, §§ 1-9 (1902, § 6 amended 1912, §§ 2, 5 amended 1950, § 9 amended 1970).

[2] The Colorado Municipal League reports that there were 54 home rule cities and towns in Colorado as of 1978. COLORADO MUNICIPAL LEAGUE, DIRECTORY OF MUNICIPAL AND COUNTY OFFICIALS IN COLORADO 41 (1978).

[3] Toll v. City & County of Denver, 139 Colo. 462, 340 P.2d 862 (1959); Fishel v. City & County of Denver, 106 Colo. 576, 108 P.2d 236 (1940). *See generally* J. SACKMAN, NICHOLS ON EMINENT DOMAIN (3d. ed. 1976); Klemme, *The Powers of Home Rule Cities in Colorado* 36 U. COLO. L. REV. 321 (1964).

[4] 575 P.2d 382 (Colo. 1978).

[5] COLO. REV. STAT. §§ 38-6-201 to -216 (Supp. 1976).

[6] Although the parties requested a determination as to whether the Condemnation of Water Rights Act was unconstitutional on its face, the court ruled only relative to home rule cities. 575 P.2d at 387. *See generally* R. CLARK, WATER AND WATER RIGHTS (1967); Gross, *Condemnation of Water Rights for Preferred Uses—A Replacement for Prior Appropriation?*, 3 WILLAMETTE L. J. 263 (1965); Kratovil and Harrison, *Eminent Domain—Policy and Concept*, 42 CALIF. L. REV. 596 (1954); Thomas, *Appropriations of Water for a Preferred Purpose*, 22 ROCKY MT. L. REV. 422 (1950); Trelease, *Preferences to the Use of Water*, 27 ROCKY MT. L. REV. 133 (1955); Note, *A Survey of Colorado Water Law*, 47 DEN. L.J. 226 (1970).

[7] 575 P.2d at 388. Article XX, section 6, of the constitution provides home rule cities and towns with all powers available to the City and County of Denver by § 1. The pertinent part of § 1 provides:

> [home rule cities and towns] shall have the power, within or without [their] 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

would have held the condemnation of water rights to be a matter of statewide concern, and thus outside the jurisdictional sphere of home rule cities and proper for state legislative control.[8]

II. CITY OF THORNTON V. FARMERS RESERVOIR AND IRRIGATION CO.

Thornton is within the expanding northern metropolitan area of Denver, Colorado. To meet the needs of its increasing population, Thornton, through its utilities board,[9] determined the necessity of acquiring new supplies of water.[10] In early 1973 Thornton made an offer to Farmers Reservoir and Irrigation Co. (FRICO), a mutual ditch company,[11] to purchase its Standley Lake Division.[12] The offer was not accepted[13] and in November,

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> 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 [home rule city or town] 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 [home rule city or town] may desire to purchase in whole or in part, the same or any part thereof may be purchased by said [home rule city or town] which may enforce such purchase by proceeding at law as in taking land for public use by right of eminent domain . . . .

COLO. CONST. art. XX § 1 (1902).

[8] 575 P.2d at 393.

[9] THORNTON CITY, COLO., CHARTER, § 201(b) (1967) provides:

> The City shall have all the power of self-government and home rule and all power possible for a city to have, under the Constitution of the State of Colorado. The City shall also have all powers that now or hereafter may be granted to municipalities by the laws of the State of Colorado . . . .

Section 1607 of the Charter provides the city with the power to acquire "within or without its corporate limits . . . water, water rights and water storage rights . . . and may take the same upon paying just compensation to the owner as provided by law." The City Utilities Board by § 507(d) has the following powers:

> Subject to the limitations contained in this Charter, the Board shall have and exercise all powers of the City of Thornton granted by the Constitution and the laws of the State of Colorado and by this Charter including, but not limited to the following powers; powers to . . . condemn . . . water and sewer utilities . . . and everything necessary, pertaining, or incidental thereto . . . .

[10] Brief for Appellant Thornton at 9.

[11] A mutual ditch company in Colorado is a nonprofit corporation organized under special statutes for ditch and reservoir companies. COLO. REV. STAT. §§ 742-101 to -117 (1973). For a thorough analysis of mutual ditch companies, *see* Jacobucci v. District Ct., 189 Colo. 380, 541 P.2d 667 (1975).

[12] Standley Lake is one of four similar divisions of FRICO. Brief for Appellee FRICO at 1.

[13] Thornton made a presentation at the FRICO annual stockholders meeting. Thornton, voting its own shares, made a motion to accept the offer. The motion was tabled. This meeting followed a series of letters and discussions with FRICO management. Brief for Appellant Thornton at 13-15.

1973, Thornton commenced condemnation proceedings in the District Court of Jefferson County, Colorado.[14]

The Standley Lake Division of FRICO diverts waters from streams in Boulder and Jefferson Counties for storage in the Standley Lake reservoir located in Jefferson County.[15] The water is carried by canal through Thornton to irrigate 10,000 to 15,000 acres of farmland operated by the FRICO division stockholders[16] in Adams and Weld Counties.

Soon after Thornton began proceedings against FRICO, the FRICO Standley Lake Division stockholders sought intervention as indispensable parties. The district court denied intervention in January, 1975.[17] Thereafter the stockholders brought an original action in the Colorado Supreme Court demanding joinder. In *Jacobucci v. District Court*,[18] a unanimous court opinion delivered in September, 1975, by Justice Erickson held that the more than 270 Standley Lake Division shareholders were indispensable parties to Thornton's proceedings against FRICO.[19] The court held that the shareholders were to be joined in the action if the district court could find that Thornton satisfied the requirement of failure to agree on compensation to be paid for the rights sought to be taken.[20]

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[14] Thornton had originally filed in October, but withdrew and filed again after the offer to FRICO was rejected at the stockholders meeting. Brief for Appellant at 15. The Condemnation of Water Rights Act would require Thornton to file in the district court in the district in which it is located—Adams County. COLO. REV. STAT. § 38-6-202 (Supp. 1976). However, the court did not decide the issue. 575 P.2d at 392.

[15] Brief for Appellee FRICO at 2-6. "Towns and cities are everywhere empowered by either statute or state constitution to condemn private water rights to secure water for public or domestic uses." C. MARTZ, CASES AND MATERIALS ON THE LAW OF NATURAL RESOURCES 144 (1951).

> When no extraterritorial power of eminent domain is expressly granted to a municipality . . . [a]nd in view of the strong policy consideration for allowing a municipality to obtain a water supply for its inhabitants, it is not surprising that, by the weight of authority, an extraterritorial power of eminent domain is implied either from the power to purchase property outside the city, or from the power to condemn a water supply within the city.

R. CLARK, WATER AND WATER RIGHTS § 304.3 (1967).

[16] Brief for Appellee FRICO at 2-6.

[17] The court's theory for refusal to admit the shareholders was that FRICO is the owner of record and acting as trustee for the shareholders. Brief for Appellee Jacobucci at 2-3.

[18] 541 P.2d 667 (Colo. 1975).

[19] Although recognizing authority for the trustee theory (*supra* note 17), the court held that the rights of the stockholders were in the rights to receive the water and were so particularized as to require joinder. 541 P.2d 667 (Colo. 1975).

[20] The failure to agree provision appeared in an amendment to the original opinion

Three months before the supreme court decision in *Jacobucci* the Condemnation of Water Rights Act became effective. Evidently Thornton believed that because condemnation was already in progress the Act was not applicable to it retroactively. The city simply divided the previous offer to FRICO by the number of shares in the Standley Lake Division and forwarded it to the stockholders.[21] Only a few stockholders accepted the offer.

Subsequently the others were joined in the proceeding. After joinder in March, 1976, various stockholders made motions for summary judgment or dismissal based on Thornton's failure to follow the provisions of the Condemnation of Water Rights Act relative to the new parties. The trial court found Thornton would have satisfied all the requirements necessary for joinder under the law as it stood prior to the enactment of the Condemnation of Water Rights Act.[22] However, the new act was found to control[23] and Thornton's failure to follow its provisions required dismissal as to the stockholders, thus also requiring a dismissal as to FRICO.[24] Thornton appealed, contending mainly that the new procedures were unconstitutional as applied to Colorado's home rule municipalities.[25]

III. CONDEMNATION STATUTES

Prior to the enactment of the Condemnation of Water Rights Act, a city or town, whether home rule or statutory,[26] could have proceeded fairly simply in a typical condemnation proceeding against water rights for public use. In Colorado there are two general condemnation statutes,[27] both of which establish procedural rules for the exercise of eminent domain.[28] As to home rule cities and towns, the differences are important only for efficiency,

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in *Jacobucci*. Brief for Appellee Jacobucci at 2 and appendix A.

[21] The original offer was $9,300,000.00. The per share offer was $3,920.00. Brief for Appellant at 17. Brief for Appellee Jacobucci at 5. This equal per share value fails to account for the historical application of each individual shareholder. Baker v. City of Pueblo, 87 Colo. 489, 289 P. 603 (1930); White v. Nuckolls, 49 Colo. 170, 112 P. 329 (1910).

[22] 575 P.2d at 386-87.

[23] *Id.* at 387.

[24] If the shareholders could not be joined, under *Jacobucci* the action as to FRICO had to be dismissed. *Id.*

[25] *Id.* at 386.

[26] Exercise of Municipal Powers—Water and Water Systems, COLO. REV. STAT. § 31-15-708 (1977). *See also* COLO. REV. STAT. §§ 31-35-102 (1977), 38-6-101, -122 (1973).

[27] COLO. REV. STAT. §§ 38-1-101 to -120, 38-6-101 to -122 (1973).

[28] *See* COLO. CONST. art. II, §§ 14, 15 (1902).

and a home rule municipality may proceed under whichever it considers appropriate for its needs.[29]

The general procedure of either of these two statutes is for the condemnor to determine the necessity of the taking and attempt to agree with the owner on compensation.[30] Formal negotiations with the owner need not take place and a simple offer by mail has been held to be sufficient.[31] If there is a failure to agree or accept the offer the condemnor may proceed in district court to determine compensation.[32]

In both statutes the determination of the necessity of acquiring the property is left to the condemnor[33] and may not be reviewed by the court absent a showing of fraud or bad faith.[34] The inseparability of condemnation and the determination of necessity is supported by overwhelming authority[35] and is usually based on the obvious notion that necessity, or what is the public need, is a legislative or political question central to the concept of condemnation.[36] However, it has been pointed out that a legislative determination can only be scrutinized against a constitution and in most states the constitution provides nothing upon which a court may base any opposition to a statute or ordinance determining necessity.[37] Whenever the power to condemn is delegated by the sovereign, necessity is for the delegee to decide, otherwise there would be no power delegated.[38]

The Condemnation of Water Rights Act attempted to re-

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[29] City of Englewood v. Wesit, 184 Colo. 325, 520 P.2d 120 (1974); Toll v. City & Co. of Denver, 139 Colo. 462, 340 P.2d 862 (1959).

[30] COLO. REV. STAT. § 38-1-102 (1973).

[31] Interstate Trust Bldg. Co. v. Denver Urban Renewal Authority, 172 Colo. 427, 473 P.2d 978 (1970).

[32] COLO. REV. STAT. §§ 38-1-102, -6-102 (1973). *See* COLO. CONST. art. II, §§ 15, 19 (1902).

[33] COLO. REV. STAT. §§ 38-1-102(1), -6-105 (1973).

[34] Colorado State Bd. of Land Comm'rs. v. District Court, 163 Colo. 338, 430 P.2d 617 (1967); Wassenich v. City & Court of Denver, 67 Colo. 456, 186 P. 533 (1919). "The court has no power to inquire into the necessity of exercising the power of eminent domain for the purpose proposed, nor into the necessity of making the proposed improvement, nor into the necessity of taking the particular property described in the petitions." COLO. REV. STAT. § 38-6-105 (1973). The only powers conferred upon the courts in the other condemnation statute is determination of compensation. COLO. REV. STAT. § 38-1-102 (1973).

[35] J. SACKMAN, NICHOLS ON EMINENT DOMAIN § 4.11 (3d ed. 1975).

[36] *Id.* at § 4.11(1).

[37] *Id.*

[38] *Id.* at § 4.11(3)(2). A few states require necessity to be reviewed judicially in special circumstances; *e.g.*, Michigan, Montana, New York. *Id.* at § 4.11(4).

move the right to determine necessity from a city wishing to condemn and vest it in a special commission.[39] FRICO and amici curiae argued that the changes were merely procedural and did not affect Thornton's substantive rights to condemn.[40]

The Condemnation of Water Rights Act requires that:

(1) The condemning city must file a petition with the district court outlining the improvements and requesting the appointment of a three member commission to make a determination as to necessity and compensation for taking.[41] The petition is restricted to consideration of needs not in excess of fifteen years.[42]

(2) The city must submit to the commission a community growth plan and detailed statement of the project.[43]

(3) The city must join all owners of property to be condemned or who would be damaged.[44]

(4) There must be a hearing before the commission on the petition and the city must serve a summons on all defendants who must be allowed to appear and be heard.[45]

(5) The commissioners are to report one of the following:

(a) There exists no need and necessity for condemnation as proposed.

(b) There exists a need and necessity for condemnation as proposed.

(c) There exists a need and necessity for condemnation, but it is premature.[46]

(6) A hearing on the report is to be held before the district court with all defendants again having to be served a summons by the city and all defendants again being allowed to be heard.[47]

(7) The court will give a final report which includes a review of the determination of necessity.[48]

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[39] COLO. REV. STAT. § 38-6-202 (Supp. 1976).

[40] Brief for Appellee FRICO at 22. Brief for Amicus Curiae Colorado Farm Bureau, at 8-14.

[41] COLO. REV. STAT. § 38-6-202(1) (Supp. 1976).

[42] *Id.* at § 202(2).

[43] *Id.* at § 203.

[44] *Id.* at § 204.

[45] *Id.* at § 205.

[46] *Id.* at § 207.

[47] *Id.* at § 210.

[48] *Id.* at §§ 210, 214.

With the above provisions the Condemnation of Water Rights Act neuters eminent domain by striking at its basis in sovereignty and necessarily at the constitutional delegation of eminent domain to home rule cities by the sovereign—the people of Colorado. The Condemnation of Water Rights Act substitutes a temporary commission for the responsibility of elected officials to determine the needs of the people. Although the opinion of the court does not refer to it, Thornton and amici curiae argued that a state legislative delegation of authority to determine necessity was a delegation of municipal business to a nonelected special commission in violation of article V, section 35 and article XXI, section 4 of the state constitution.[49] As mentioned above, what is necessary is more a political question than anything else and should be decided by political representatives.[50]

IV. Home Rule Cities

Traditionally the powers of home rule cities have been limited to those necessary to control matters of purely local or municipal concern.[51] When these concerns are the subject matter of

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[49] Brief for Appellant Thornton at 29. "The general assembly shall not delegate to any special commission, private corporation or association, any power to make, supervise or interfere with any municipal improvement, money, property or effects, whether held in trust or otherwise, or to levy taxes or perform any municipal function whatever." Colo. Const. art. V, § 35.

> Every person having authority to exercise or exercising any public or governmental duty, power or function, shall be an elective officer, or one appointed, drawn or designated in accordance with law by an elective officer or officers, or by some board, commission, person or persons legally appointed by an elective officer or officers, each of which said elective officers shall be subject to the recall provision of this constitution. . . .
>
> Nothing herein contained shall be construed as affecting or limiting the present or future powers of cities and counties or cities having charters adopted under the authority given by the constitution, except as in the last three preceding paragraphs expressed.

Colo. Const. art. XXI, § 4 (1912). It has been suggested in a novel hypothesis that the exercise of extraterritorial powers denies equal voting rights to affected nonresidents under the authority of the voting rights issues in the Equal Protection Clause, U.S. Const. amend. XIV, § 1. 45 U. Chicago L. Rev. 151 (1977).

[50] *See* note 36 *supra*.

[51] It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters and the enumeration herein of certain powers shall not be construed to deny such cities and towns, and to the people thereof, any right or power essential or proper to the full exercise of such right.

Colo. Const. art. XX, § 6 (1902, amended 1912). *See generally* Dillon, Municipal Corporations § 92 (5th ed. 1911); *supra* note 3.

provisions of home rule city charters or ordinances, such provisions will *usually* supersede any state statute in conflict.[52] Although the concept of supersession is clear, the problem has been to determine what is a local or municipal concern.[53] The Colorado Supreme Court has yet to set down an adequate test as to what is a local matter and admits the difficulty of dealing with the constant flux of the various factors to be considered.[54] However, the court has made it clear that the mere appearance of a provision in a home rule city charter or ordinance in conflict with a state statute does not preclude inquiry into the question of which controls.[55]

The power of a Colorado home rule city or town to condemn and purchase water works within or without its borders is enumerated in the state constitution[56] and reiterated in the Charter of the City of Thornton.[57] Neither Thornton nor amici curiae argued, nor did the court decide, whether water is a statewide concern. Both instead relied heavily on a supremacy argument, *i.e.*, specific enumerations in the constitution prevail over general statements in the constitution and conflicting statutes or cases.[58] In the 1913 case of *People ex rel. Tate v. Prevost*[59] the court was

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[52] Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdictions of said city or town any law of the state in conflict therewith.

. . .

The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.

COLO. CONST. art. XX, § 6. *See* note 51 *supra.*

[53] City & County of Denver v. Pike, 140 Colo. 17, 342 P.2d 688 (1959); City & County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958); People v. Graham, 107 Colo. 202, 110 P.2d 256 (1941). Of particular interest is Denver v. Mountain States Tel. and Tel. Co., 67 Colo. 225, 184 P. 604 (1919), overruled by People v. Mountain States Tel. and Tel. Co., 125 Colo. 167, 243 P.2d 397 (1952), the latter holding that utility rates were a statewide concern.

[54] *See* cases cited *supra* note 53.

[55] *Id.*

[56] *See* note 7 *supra.*

[57] *See* note 9 *supra.*

[58] 575 P.2d at 389.

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.

Reply Brief for Appellant Thornton at 11. Thus, Thornton argued that the statewide/local determination needs to be made only when the delegation of authority is not specific.

[59] 55 Colo. 199, 134 P. 129 (1913).

asked to respond to a pattern of arguments similar to those in *Thornton v. FRICO*. The claim in *Prevost* was that the Home Rule Amendment enumeration of powers to control municipal elections and to assess property taxes did not relate to matters of local or municipal concern. Without making a value judgment on the claim the court replied that these subjects,

> are declared local and municipal matters, and they have been so declared by the people themselves. If they were not so before the amendment, they are so now, in the towns and cities of the state having two thousand inhabitants, whose people elect to be governed under their own charter.[60]

Unfortunately, the supremacy argument does not reach the important question of whether water in Colorado is a statewide or local concern.

V. WATER: STATEWIDE OR LOCAL CONCERN?

Whether water is a statewide or local concern is a complicated political paradox and as with other political questions is probably not a subject for the courts but rather for the people of Colorado to decide. The obvious solution to the delegation of the power of eminent domain over water rights to home rule cities is to invoke the political process for amending the constitution.[61] However, it is too simplistic to base changes in water administration on the mere statement that water is an overwhelming statewide concern. It is misleading to point to sections of the constitution, to legislative policy of statutes, or to cases which start off, "The water of every natural stream . . . is hereby declared to be the property of the public . . ."[62] or, "[i]n this dry and arid region, a right to the use of water appropriated for beneficial

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[60] 55 Colo. at 215, 134 P. at 134.

[61] City & County of Denver v. Sweet, 138 Colo. 41, 329 P.2d 441 (1958). Such an amendment was proposed in the 1978 Colorado General Assembly. The pertinent section of the proposed amendment which has been postponed indefinitely is as follows:

> The taking of water rights by eminent domain pursuant to the provisions of paragraph (a) of this subsection (1) shall be subject to such limitations, procedures, requirements, and prohibitions, including limitations as to the necessity for such taking, as may be prescribed by the general assembly. Such limitations, procedures, requirements, and prohibitions shall be those specified in part 2 of article 6 of title 38, Colorado Revised Statutes 1973, as amended, in the form existing on January 1, 1979, unless and until modified thereafter by the general assembly.

H.R. Concurrent Resolution 1006, 51st Gen. Assembly, 2d Reg. Sess., HOUSE J., Apr. 23, 1978.

[62] COLO. CONST. art. XVI, § 5.

purposes is of great value. . . ."[63] It is misleading because these sections, statutes, or cases after such pronouncements then proceed to discuss authority which has been delegated to local concerns. The consistent statewide legislative policy regarding water appears to be to delegate to local bodies or agencies all significant authority to deal with the problems. Certainly water is not a statewide concern in the same sense as liquor licenses, commercial transactions, motor vehicle operation, or public utilities.[64] Each water problem has unique geographical, environmental, social, and political considerations which must be balanced. Water is a statewide matter, but the state's way of dealing with it is to make it a local matter.

The Condemnation of Water Rights Act is supposedly the latest assertion of statewide water policy. In fact, nearly the opposite is true. Nowhere in the statute is it said that the appointed commission must consider the impact of the proposed improvement on the state as a whole. Only the effects of the proposed condemnation on the county and suitable river basin area need be considered within the "detailed statement."[65] Only the condemnor and owner of property taken or damaged participate in the inquiry by the commission.[66] The "community growth plan" as its title indicates, is a report on local matters.[67] At only one point in the Condemnation of Water Rights Act procedure is it mentioned that there may be participation by "any interested party" other than those directly affected, and that participation is after the initial hearing and recommendation by the commission.[68]

Even with the scope of the inquiry limited as it is, it would be tremendously expensive to draw up community growth plans and detailed statements, particularly for small towns. Thornton, for example, would have had to draw up an impact statement for at least four counties[69] and three drainage basins, including that

[63] Town of Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 426-27, 94 P. 339, 340 (1908).

[64] *See* cases cited note 53 *supra*.

[65] COLO. REV. STAT. § 38-6-203 (Perm. Supp. 1976).

[66] *Id.* at § 206(1).

[67] *Id.* at § 203(1)(a).

[68] *Id.* at § 210.

[69] Adams, Boulder, Jefferson, and Weld Counties would be included, because the FRICO system goes through all four. Brief for Appellee FRICO at 2-6.

of the South Platte River.[70] Recalling that the Condemnation of Water Rights Act is presumably still effective relative to non-home rule cities and towns,[71] a qualified town should be encouraged to become a home rule municipality prior to commencement of any expansion of its water system, thereby avoiding the act's expensive procedures. Such a result places the burden on the smallest towns which do not qualify for home rule status.[72] These towns are the least able to afford the expense and have the least significant quantitative impact on available water supplies. The result is that the most localized communities bear the burdens of a program implemented to deal with a statewide concern.

The qualifications of the commissioners appointed under the Condemnation of Water Rights Act are also based on an overriding awareness that the matter is a local concern. One commissioner is from the condemning municipality, one is from the area affected, and the third is a disinterested party,[73] not a representative of statewide interests.

With these thoughts in mind, it is hard to accept an argument that the Condemnation of Water Rights Act is an implementation of statewide policy in the sense that it should supersede a constitutional delegation of authority to home rule municipalities. The Condemnation of Water Rights Act is itself a delegation to local authority. Nor does it seem a valid argument that the shift of the determination of necessity to a special commission is to a body that would be more responsible than elected officials. This seems particularly true in light of article V, section 35 of the state constitution,[74] the ability of a party to get review of necessity by showing bad faith on the part of the city,[75] and the whole concept of representative government.

Other examples of similar delegations in Colorado with respect to condemnation of water rights are in the statutes concern-

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[70] Clear Creek and South Boulder Creek would also be included. *Id.* Peculiarly, the basins included in the detailed statement do not need to be feeders of the irrigation system. COLO. REV. STAT. § 38-6-203(1)(b)(II) (Supp. 1976).

[71] 575 P.2d at 387.

[72] Essentially any town with a population of 2,000 may qualify for home rule status. COLO. CONST. art. XX, § 6 (1902, amended 1912).

[73] COLO. REV. STAT. § 38-7-202(1). (Supp. 1976).

[74] *See supra* note 49.

[75] *See supra* note 34.

ing water districts,[76] drainage districts,[77] river basin authorities,[78] sanitation districts,[79] underground water management districts,[80] rights of way for irrigation ditches,[81] county commissioners' powers to set water rates[82] (also in the constitution),[83] county court jurisdiction over ditch damage,[84] and the power of *statutory* cities and towns to condemn and purchase water works within or without their boundaries.[85]

The provisions in the Colorado Constitution beyond the home rule amendments can also be interpreted as constructing the framework for delegation of authority to local concerns. Article XVI, section 5 has been held to establish the rule of priority of appropriation as distinguished from the doctrine of riparian rights.[86] By diversion to a beneficial use, which is a matter of local law,[87] the right to use the water vests in the appropriator[88] on a first in time, first in right basis.[89] It may be argued that riparian rights are more local by nature than are rights by appropriation, but riparian rights are necessarily local relative to the natural stream bed, whereas appropriation is local relative to the location of the individual appropriator and his beneficial use. The difference is geographical. That an individual with a senior right to water by appropriation may take his share for beneficial use regardless of whether there is enough in a dry season for junior appropriators is an odd manifestation of a pronounced statewide

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[76] COLO. REV. STAT. §§ 32-4-101 to -547. (1973 and Supp. 1975).

[77] *Id.* at §§ 37-20-101 to -33-101.

[78] *Id.* at §§ 37-93-101 to -108.

[79] *Id.* at §§ 37-4-101 to -547.

[80] *Id.* at §§ 37-90-101 to -141.

[81] COLO. CONST. art. XVI, § 7 (1902); COLO. REV. STAT. § 37-86-104 (1973).

[82] COLO. REV. STAT. § 37-85-103 (1973).

[83] COLO. CONST. art. XVI, § 8 (1902).

[84] COLO. REV. STAT. §§ 37-89-102, -104 (1973).

[85] *Id.* at § 31-15-708.

[86] Colorado has a system of prior appropriation for beneficial use to detemine water rights priority and subsequent distribution. The system, since its inception, has been generally based upon the concept of first in time, first in right. Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882). This general rule is subject to modification by the Colorado Constitution which provides "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." COLO. CONST. art. XVI, § 6. *See* note 6 *supra.*

[87] Snyder v. Colorado Gold Dredging Co., 181 F.62 (8th Cir. 1910); Cascade Town Co. v. Empire Water and Power Co., 181 F. 1011 (D. Colo. 1910).

[88] Coffin v. Left Hand Ditch Co., 6 Colo. 443 (1882).

[89] *See* note 86 *supra.*

concern with water, particularly when there is no attempt to set a hierarchy of beneficial uses[90] other than that which appears in article XVI, section 6, of the Colorado Constitution.

Article XVI, section 6, of the constitution very generally sets priorities for water use in the order of domestic, agricultural, and manufacturing.[91] Since all significant amounts of water in Colorado have been appropriated, article XVI, section 6, has been held effective only in establishing the right to condemnation of water for domestic purposes.[92] Condemnation and the determination of necessity, as mentioned above,[93] are local political matters, hence, the application of article XVI, section 6, is also local.

VI. CONCLUSION

Water in an arid region has substantial emotional appeal,[94] but Colorado cannot afford to allow this to obscure the history and complex nature of water systems. Nor should it be ignored that agriculture uses approximately 95% of the water available in Colorado[95] and any impact on the state as a whole because of municipal condemnation would be slight. The above arguments serve the purpose of pointing out that it is by no means the case that water is nor could be a purely statewide matter. Water problems are a mixture of state, local, and individual concerns.

Thornton has no more power to condemn water rights than

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[90] *See* Carlson, *Report to Governor John A. Love on Certain Colorado Water Law Problems*, 50 DEN. L.J. 293 (1973).

[91] *See* note 86 *supra*.

[92] Nevius v. Smith, 86 Colo. 178, 279 P. 44 (1929); Town of Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 94 P. 339 (1908). *See* Carlson, *supra* note 90, at 310.

[93] *See* notes 35-38 and accompanying text *supra*.

[94] *See, e.g.*, "The great twentieth century conflict between agriculture and urban life . . . ." Brief for Appellee Jacobucci at 20.

[95]

COLORADO WATER USE

WATER WITHDRAWALS FROM SUPPLY

USE	1970 ACRE FEET	PERCENT OF TOTAL
PUBLIC SUPPLY	459,000	2.7%
RURAL	45,000	.3%
IRRIGATION	15,876,000	94.7%
INDUSTRY	393,000	2.3%
TOTAL	16,773,000	100.0%
DENVER	213,074	1.3%

From the United States Geological Survey, *reprinted in* CONTINUING LEGAL EDUCATION IN COLORADO, WATER LAW FOR THE NON-SPECIALIST PRACTITIONER 1 app. (1977).

many special districts in Colorado.[96] FRICO and its Standley Lake Division shareholders on the other hand have no more claim than any other owners facing loss of property by condemnation. Any change in water rights condemnation for implementation of a statewide plan, whether statutory or constitutional, will have to be far more comprehensive and farsighted than the Condemnation of Water Rights Act's focus on cities and towns, particularly in light of the lesson learned from the ruling in *City of Thornton v. Farmers Reservoir and Irrigation Co.* and the resultant burden on Colorado's smallest towns.[97] Any change in the delegation of powers to home rule cities will have to be done by those responsible for the delegation—the people of Colorado.

Jeffrey Herm

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[96] *See* notes 76-85 *supra*.

[97] *See* note 72 and accompanying text *supra*.