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STABILITY OF AGRICULTURAL WATER RIGHTS?

George E. Radosevich and Melvin B. Sabey

Colorado State University

The continuing population influx in the Western states, accompanied by a shift of population from the rural areas, has created substantial growth in the urban communities of the West. With this growth has come an increased need for municipal water supplies. Many municipalities are experiencing serious difficulties in responding to this need since readily accessible supplies are already appropriated and the cost of out-of-basin development and transportation is high. Faced with this necessity of meeting the growing municipal requirements in areas where available water supplies are completely allocated, numerous cities throughout the West are turning to their eminent domain power to affect a reallocation of water from less preferred uses to municipal use. Such actions are based either on an exercise of their position as preferred users or on direct statutory authority. Thus, the issue of municipal acquisition of water rights through the exercise of eminent domain powers has placed in jeopardy the stability of Western agricultural water rights.

A specific case which highlights the critical nature of this issue involves the City of Thornton, Colorado. Since its incorporation in 1956, the City of Thornton has grown from 1¼ square miles to its present land area of 17 square miles, home for 27,000 people.[1] This growth was encouraged by the City of Denver's willingness and ability to supply sufficient water to meet the municipal needs of this suburb. But as suburban growth has continued throughout the Denver area, competition for water supplies has increased. Environmental concerns have recently questioned the wisdom of certain proposed transmountain diversions, and Denver officials now doubt their ability to continue to provide adequate water to meet Thornton's growing demand. The threatening possibility of a limited water supply has caused Thornton officials to seek a dependable alternate source to meet the needs of the growing community. In September of 1974, Thornton filed condemnation proceedings to acquire all properties of the Farmers High Line Canal and Reservoir Company and approximately one-fifth of the Farmers Reservoir and Irrigation Company holdings.

It is apparent that this case has focused on several issues far greater than the taking of water and associated systems from these two water entities. The initiation of this action is only the tip of the iceberg as it becomes much more apparent to other municipalities on the front range that their municipal service requirements for water will far exceed the present supply and the ready acquisition from transmountain sources. The real issue concerns the precedent that will likely initiate similar suits as these municipalities seek to acquire those waters they feel are necessary to sustain rapid growth. Thus, municipal condemnation in this case is of state and public interest and strikes at the heart of the economic base in irrigated agriculture and the potential for future resource management in Colorado.

Three legal questions with significant economic undertones emerge: 1) Does the municipality have a right to condemn water rights and structures? 2) If so, under what conditions? 3) If condemnation is to proceed, what is the basis for compensation?

There is no question under Colorado law that a municipality may acquire water rights systems and appurtenances within or without city limits. This is specifically provided for in the state statutes.[2] All of the other Western states similarly recognize this right either by specific statute or by statutory listing of preferences in water use.[3] Although the answer to the first question is quite clear, we note that current statutes leave much uncertainty as to the latter questions. At present, the conditions necessary for exercise of this power are not clearly defined, nor are the criteria for compensation.

Concerning the conditions under which water may be condemned, the primary interest focuses upon the question of necessity. We suggest legislation which will set out a procedure by which the question of necessity can be determined in light of the state and public interest and in fairness to all parties involved; namely, the condemning body, the party whose property is being

[1] Jim Kirksey, "Thornton Bids for Water Rights," *Denver Post*, 10 September 1974, p. 25, Cols. 1-5.

[2] 31-12-101 *Colorado Revised Statutes 1973*, and 38-6-101 to 122, *Colorado Revised Statutes 1973*.

[3] For reference to specific states, see Clark, Robert Emmet, ed. in chief, *Waters and Water Rights*, Vol. 4, Indianapolis. A. Smith Co., 1970.

condemned, and the general public. Key provisions which would serve as a model are as follows:

I. Prior to instituting any action for condemnation of water supplies and structures, the municipality shall:

1. Prepare or up-date a community growth development plan reflecting present population and resources uses and capabilities and projected population growth and resources requirements, the latter to include all resources requirements to provide for phased development of municipal services.

2. Prepare a detailed statement describing:

a) The properties to be acquired under condemnation and their present uses;

b) The impact upon the county and state from the change or conversion of acquired irrigation and other water supplies to municipal uses, to include economic, social, and environmental effects;

c) The unavoidable adverse and irreversible effects from such taking of properties and rights; and

d) Alternative sources of water supply that may be acquired by appropriation, purchase, lease, conservation or condemnation, and relative acquisitions costs.

3. The information contained in the growth development plan and statement of effects of the condemnation shall be prepared in sufficient detail to provide a meaningful basis for assessment of trade-offs and opportunity costs to the public if the condemnation is approved. These statements shall accompany the petition for condemnation to the appropriate court.

4. The Court shall appoint three disinterested Commissioners, or Arbitrators, free-holders of real estate in the state, one to serve at the nomination of the Governor, one to be a resident of the municipality bringing the action, and one to be a resident from the rural community affected by the proposed action, to determine the issue of necessity of exercising eminent domain, as proposed in the petition.

5. The Court shall present the growth development plan and statement of effects of the condemnation to the Board of Commissioners or Arbitrators, the condemnees, and any interested parties. Any affected or interested party shall be granted standing in the condemnation proceedings.

6. The Departments of Agriculture and Natural Resources shall review the plan and detailed statement and submit their comments to the Board.

II. In any case initiated for the acquisition of water supplies and structures pursuant to this Part, it is the duty of the Commissioners to:

1. Examine and assess the growth development plan and statement of effects from proposed condemnation and make a determination as to the necessity of exercising the power of eminent domain for the proposed purposes;

2. Provide one of the following recommendations to the court based upon its finding:

a) Condemnation is not in the public interest,

b) Condemnation, as proposed, is not in the public interest;

c) Condemnation, as proposed, is in the public interest.

In a recommendation of b), the Commissioners may recommend a least-cost alternative source of water supply as identified in the statement of effects and testimony obtained during deliberations. But, recommendation of a specific least-cost alternative is not binding upon the condemning authority.

The detailed statement to accompany the community development plan is a synthesis of requirements for impact assessment found in the National Environmental Policy Act of 1969 at the federal level, the subsequent rules and regulations prepared by the Corps of Engineers and the Bureau of Reclamation in water matters, and the requirements of several state acts requiring evaluation of the effects of proposed actions. The underlying philosophy of this provision is that the burden for providing the information base should be placed upon the party that is going to benefit from the results of the action. This data base should set out the position of that party so that those directly affected, as well as the public and state, can clearly understand its thinking and objectives. This requirement recognizes that the effects of municipal condemnation of water supply in one county has an impact beyond the political boundary of the county or basin; and further that this impact affects not only the economic base but also the social and environmental parameters of the region.

The theory of this approach should be explained at this point. It is recognized that condemnation of water and structures in lower priority uses is a valid means of municipal acquisition of a needed water supply. It is not the intent to preserve water in agricultural use and thereby prevent the free transfer or sale of this water by the owners in the open market. Our approach favors neither agricultural nor municipal interests. In fact, it is an effort to provide a fair advantage to both parties as well as the entire citizenry of the state. By "fair advantage" we mean that all parties at interest have the unquestionable opportunity to state their case.

This approach has the potential of providing a legal tool for municipalities which would allow them to expand and develop according to their capabilities, and thereby provide a variety of municipal services. Concurrently, it would serve as a justification for controlling growth according to these capabilities. The ability to control growth not only will benefit the municipalities but also will protect the agricultural sector from the wholesale intrusion that normally results from unplanned urban growth.

Part of the theory behind this approach is based upon events which have occurred in cities in several states. In the case of Golden vs the Planning Board of the Town of Ramapo,[4] the town of Ramapo New York provided for

[4]Civil Number 475, New York Court of Appeals, May 3, 1972.

phased growth in its zoning ordinances. Ramapo was able to carry out its ordinances because the regulations were not exclusionary; they sought only to control, not limit, the growth. The ordinances sought to avoid undue concentration of population and facilitated the adequate provision of transportation, water, sewage, schools, parks, and other public requirements. The City of Ramapo prepared a master plan which began in 1964 and developed zoning ordinances consistent with the phase development plan. The court in the Ramapo case stated, "The undisputed effect of these integrated efforts and land use planning and development is to provide an overall program of orderly growth and adequate facilities through a sequential development policy commitment with progressive availability and capacity of public facilities."[5] This is also the intent of the proposed model legislation: to provide municipalities with a mechanism by which, when necessary, they can delineate their capabilities to meet the demands of the public for municipal services.

The Ramapo case upheld the position of the community as opposed to the results in Petaluma, California, because the action of Ramapo was the product of farsighted planing calculated to promote the welfare of the community. Petaluma, in an effort to limit its growth rate, maintained that they were unable to provide adequate sewage and treatment facilities and water supplies.[6] In deciding against Petaluma, the U.S. District Court in California noted that, "The Supreme Court has made it clear that the freedom to travel, which includes the right to enter and live in any state or municipality in the Union, has long been recognized as a basic right under the Constitution, or a fundamental right."[7] The Court went on to state that because Petaluma purposefully attempted to limit the population and shift the burden onto surrounding communities, based upon an intentional limiting of acquiring water supplies, the fundamental rights of anyone wishing to move into Petaluma had been violated. For this reason, one of the underlying purposes of this approach is to provide a municipality with the legal foundation that would withstand the pressures of uncontrolled development.

With respect to the agricultural sector, potentially the most viable source for future municipal water supplies, the intent of this legislation is not to prevent the free sale and transfer of water rights and lands or in any way restrict market place transactions or arms-length agreements. Nor is it the intent to preserve agricultural land by restricting the use of the properties. The provisions would come into effect only after the municipality had made an offer to the owners of agricultural water rights and properties and the offer was rejected. At that point it can be presumed that the owners of these properties have elected to maintain the use of their resources or do not consider the price offered commensurate with the value. Provisions of this legislation are designed to insure that both municipal and property owners' interest are given an opportunity for evaluation. Equally important are the provisions which provide for an appraisal of state and public interest in either expanding the urban growth or maintaining water use in its present form.

In the event that condemnation of water is found to be in the public interest, the question of compensation becomes prominent. The general practice throughout the West is to compensate for the loss of water rights according to the present fair market value of the property taken, which literally means its value in irrigation. Since this is not necessarily its true market value, we suggest an alternative approach:

III. In assessing damages, the Commissioners or Arbitrators shall apply the following criteria: Compensation shall be paid based upon either the value of water to the municipality or total net adverse effects upon rights and properties including diminution in irrigation and agricultural improvements, investments and associated opportunity costs of injured parties, stated in monetary terms, whichever is higher.

There is a trend toward this rule of law which was first set down by the Utah Supreme Court in 1943 in Siguaird vs. the State,[8] in which the court applied essentially the same market value criteria as in the proposed legislation. The court stated that in condemning water, the value of the land should be considered, and further, that using the water for irrigation purposes does not restrict the value of the water to that use since the owner could transfer the rights to other uses. For this reason the criteria is established on a dual evaluation; the first being the value of water to the municipality and the second being the value based upon the total net adverse effects upon the rights and properties of the parties adversely affected. Thus, this provision recognizes multiple markets and multiple market values.

Turning from the theoretical to the actual, it is interesting to note how this "model legislation" has fared in legislative action. Early in 1975 Colorado Governor Richard Lamm appointed an Executive Committee to review the municipal condemnation problem, with the intent of developing new legislation to clarify the issues raised by the Thornton case. The Committee turned to Colorado State University for assistance and the model legislation outlined above was drafted.[9] An administration-supported bill, based on this model legislation, was then introduced into the 1974-75 session of the State Legis-

[5] 2 *Environmental Law Reporter* 20297.

[6] *Construction Industry Association vs. the City of Petaluma, 6 Environmental Reporter-Cases* 1453, April 1974, California.

[7] 6 *Environmental Reporter–Cases* 1458.

[8] 142 *Pacific Second* 154.

[9] *Draft: A Bill for an Act Concerning the Taking of Water and Water Rights by Eminent Domain,* drafted by G.E. Radosevich for the Commissioner of Agriculture, State of Colorado, April 1975.

lature.[10] The sections setting forth procedures for determining the necessity of a proposed condemnation in serving the public interest survived legislative debate. But the legislature did amend the compensation section by reverting to a precedent in law with which they felt more comfortable. Specifically, the wording was changed back to "compensation at fair market value." The amended bill passed the House of Representatives, 36 to 29, and the Senate, 22 to 11. The approval crossed party lines as well as urban and rural divisions.

In summary, we are of the opinion that not only Colorado, but the entire West has reached a benchmark in its evolution and economic growth at which point it can no longer proceed with haphazard resource use. In a time when the assimulative capacity of our resources has largely been attained, we are faced not with an era of resource development, but rather an era of resource reallocation and rational management, particularly with respect to water. With time, more and more legislatures will be faced with the task of resolving the kinds of legal and economic issues raised by the Thornton case. The intent of the proposed model legislation outlined in this paper is to look beyond Thornton and the other numerous cities presently involved in a condemnation proceedings, in providing a legal foundation which will enable municipalities to grow in a planned, controlled manner while protecting agricultural water rights from unrestrained encroachment.

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[10] House Bill No. 1555. LDO No. 75 1441/1, First Regular Session, Fiftieth General Assembly, State of Colorado, 1975.