1-5-1984

Bar 70 Enterprises, Inc. v. Tosco Corp.

SUPREME COURT, STATE OF COLORADO

Case No. 83 SA 365

ANSWER BRIEF OF APPLICANT-APPELLEE TOSCO CORPORATION

BAR 70 ENTERPRISES, INC.,

Appearant-Appellant,

vs.

TOSCO CORPORATION,

Applicant-Appellee,

and

DIVISION ENGINEER FOR WATER DIVISION NO. 5,

Appellee.

APPEAL FROM THE DISTRICT COURT, WATER DIVISION NO. 5, HONORABLE GAVIN A. LITWILLER, WATER JUDGE

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Dated January 5, 1983

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STATEMENT OF ISSUES

1. Whether one who has "participated" under C.R.S. § 37-92-304(3) has standing to appeal by virtue of that fact or must, instead make an independent showing that it has been substantially aggrieved by the court's order.

2. If substantial aggrievement is a prerequisite to standing to appeal, whether Bar 70 Enterprises, Inc. ("Bar 70") has, in fact, been substantially aggrieved by the grant of Tosco Corporation's ("Tosco's") conditional water right application.

3. If Bar 70 has standing to appeal, whether the Water Court erred in finding Tosco properly initiated the appropriation of the second 100 cubic feet per second (c.f.s.) of water for the Miller Creek Pumping Pipeline.

STATEMENT OF THE CASE

On December 28, 1979, Tosco filed an application for a conditional water right for the Miller Creek Pumping Pipeline in the amount of 200 c.f.s. (Volume 1, pages 1-4.) A timely statement of opposition was filed by Dry Creek Land and Livestock on March 29, 1980. (Volume 1, pages 8-10.) Bar 70 filed an Entry of Appearance on March 9, 1981, which gave no indication why it opposed the application or what it's interest in the proceedings might be. (Volume 1, page 39.) On March 3, 1981, the Court referred the matter to the Water Referee to determine whether the statements in the application were true. (Volume 1, page 54.) After a nonbinding Report of Investigation favorable to Tosco issued (Volume 1, pages 68-69), the matter was tried to the Water Court on November 30, 1983.

Prior to the trial, the parties filed a Joint Pretrial Data Certificate, which stated with reference to the Miller Creek Pumping Pipeline the following (Volume 1, page 73):

> 2. Undisputed Facts. All facts are undisputed except as noted in paragraph 3 below.

3. Disputed Issues of Fact. The following disputed issues of fact and law remain to be resolved at trial:

a. In case 79 CW 355, on what date and how did Applicant initiate the appropriation of the second 100 c.f.s. of water claimed?

b. In case 79 CW 355, has Applicant, as a matter of law, properly initiated the appropriation of the second 100 c.f.s. of water claimed?

c. In case 79 CW 355, has Applicant formed and openly manifested the requisite intent to appropriate the second 100 c.f.s. of water claimed?

At paragraphs 10 and 11 (Volume 1, page 76), the parties agreed as follows:

10. . . . [the parties] stipulate that the correct appropriation date for the first 100 c.f.s. of water claimed in [the application] will be September 30, 1976 rather than May 29, 1974 as claimed in the application . . . .

11. . . . Counsel have also exchanged numerous letters in attempting to resolve disputes. Substantially all disputes, except the date of appropriation of the second 100 c.f.s. claimed in 79 CW 355, have been resolved. [Emphasis added.]

There was no dispute at trial that Tosco had properly initiated the appropriation of the first 100 c.f.s. claimed in its application. (Statement of Bar 70's Counsel at Volume 3, page 91, lines 2-5). The only issue at trial as reflected in the Joint Pretrial Data Certificate was whether the appropriation of the second 100 c.f.s. claimed in Tosco's water right application had been properly initiated.

The uncontroverted evidence presented at trial showed that as early as August, 1974, David E. Fleming, Tosco's water consultant, had recommended a pipeline be built from the White River to the proposed Miller Creek Reservoir. Mr. Fleming assumed the pipeline would have a capacity of 100 c.f.s. However, he indicated at that time "[c]apacities can only be determined after a more detailed hydrologic study has been

made." (Volume 4, Exhibit A, pages 13-14 and Volume 3, pages 16-20 and pages 53-55.) At about that same time, Tosco arranged for a five (5) year gaging program on Miller Creek (Volume 3, page 9, lines 9-10 and page 25, lines 3-12). In 1976, a number of Tosco employees investigated alternate pipeline routes and visited the proposed sites of the Miller Creek Reservoir and Miller Creek Pumping Pipeline. The personnel collected data and made geologic, engineering and environmental evaluations. They walked the entire route of the proposed pipeline and took a number of photographs. (Volume 4, Exhibit B, Volume 3, pages 19-20.) At that time it is undisputed that Tosco had formed an intent to divert water from the White River via the Miller Creek Pumping Pipeline. The location of the axis of the reservoir was determined and the contour lines of the expanded Miller Creek Reservoir basin were extended out on topographic maps. (Volume 4, Exhibit B, Miller Creek Reservoir.) Further studies culminated on December 11, 1979, with the conclusion that the pipeline would have a capacity of 200 c.f.s. (Volume 3, pages 60-61.) At the same time these studies were taking place, negotiations were initiated with the owners of the land along the pipeline route. (Volume 3, page 23, lines 1-7.) As a result of the above, the application was filed.

SUMMARY OF ARGUMENT

The right of appeal in water matters is governed by the same rules as other civil matters. An entity must either be a party or show itself to be aggrieved. Bar 70's entry of appearance failed to elevate it to party status. Nor has it shown itself in anyway aggrieved by the Water Court's decision herein. It therefore has no standing to appeal that court's decision. On the other hand, because of the State Engineer's unique position to oversee the public's interest, it always has standing to appeal decisions of the Water Court which impinge upon that interest.

The requirements for the initiation of a conditional water right have been set forth in numerous Colorado cases. There must be an intent to appropriate coupled with a physical manifestation of that intent. It is undisputed Tosco had the requisite intent. The physical acts performed by Tosco were consistent with those recognized by this Court as being sufficient to give notice of the overt manifestation of a party's intent to initiate the appropriation of a conditional water right. Bar 70 implicitly recognized the sufficiency of Tosco's acts when it entered into a stipulation with regard to a portion of the application which is not herein appealed.

On this appeal, Bar 70 has attempted to change its theory of the case. This Court should not consider those issues not presented to the Water Court.

ARGUMENT

A. Bar 70's Participation in the Trial Herein Did Not Give it Standing to Appeal, Simply by Virture of That Fact.

Tosco in its Brief in Support of its Motion to Dismiss enumerated various arguments as to why Bar 70 lacked standing to prosecute its appeal herein. Rather than repeat those arguments, Tosco incorporates by reference its previously filed brief. However, in view of the supplemental brief filed by Bar 70, certain points require further explication.

1. The Statutory Framework Indicates An Appearant is Not The Status Equivalent of a Party

Prior to its amendment in 1983, C.R.S. § 37-92-304(3) stated in part:

> All persons interested shall be permitted to participate in the hearing [before the Water Judge] either in person or by counsel if they enter their appearance in writing prior to the date on which hearings are to commence . . .

The only prerequisite for an entry of appearance was the payment of a $20.00 filing fee. The statute did not require any showing by the appearant as to why a statement of opposition had not been filed. It did not require the showing of any interest in the application. It also gave the Water Court no discretion in permitting the appearant full rights of participation in the hearing as long as the entry was properly filed.

The statutes indicated that an appearant was of a different status than one filing a statement of opposition. Prior to July 1, 1983, the filing fee for a statement of opposition was $15.00 (C.R.S. § 37-92-302(1)(d)), while that for an entry of appearance was $20.00 (C.R.S. § 37-92-304(3)). Additionally, under C.R.S. § 37-92-304(4), only the applicant, or one who has filed a statement of opposition or a protest, may request that the situs of the hearing be the county where the point of diversion is located. An appearant is not granted this right.

This latter differentiation is significant in that the provision is analagous to the rules governing venue contained in C.R.C.P. 98. It has been held that only a party to a proceeding may apply for a change of venue, while an amicus curiae cannot. State ex rel Young v. Niblack, 229 Ind. 596, 99 N.E.2d 839 (1951). This gives further credance to the argument advanced in Tosco's Motion to Dismiss filed herein that a person who files an entry of appearance is not the status equivalent of a party but fills a role similar to that of an amicus curiae.

2. Participation in a Hearing Does Not Grant Party Status

It is undisputed that Bar 70 filed its entry of appearance pursuant to the statute as it then existed. As a result, Bar 70 had a right "to participate in the hearing" before the Water Judge. However, the right to participate is

not equivalent to the right of appeal. These rights are governed by different subsections of the statute.

The right of appeal in water matters is governed by C.R.S. § 37-92-304(9). It simply states:

> Appellate review shall be allowed to the judgment and decree, or any part thereof, as in all other civil actions . . .

The parties herein are in agreement that the test for determining standing to prosecute an appeal is that an appellant:

> must either be a party to the action or he must be a person substantially aggrieved by the disposition of the case . . . Miller v. Clark, 144 Colo. 431, 356 P.2d 965 (1960).

Bar 70 assumes that because it participated in the hearing below it automatically assumed party status. Furthermore, it argues that because the statute is silent on whether one who enters an appearance has a right of appeal it must be assumed that the right exists. However, decisions of this Court in similar circumstances indicate the opposite is true. "Had the legislature intended [to grant the] right of appellate review it would have so provided." Regional Service Authority v. Board of County Commissioners, 199 Colo. 501, 618 P.2d 1105 (1980).

In Kornfeld v. Perl Mack Liquors, Inc., 193 Colo. 442, 567 P.2d 383 (1977) the petitioner applied for a retail liquor store license. The respondent, an owner of a nearby liquor store, appeared and presented evidence at a hearing before the county commissioners pursuant to C.R.S. § 12-47-140(5) which permitted any "party in interest" to participate. This Court rejected the respondent's appeal even though the petitioner named the respondent as a defendant in the action filed in the district court. This Court stated:

> Respondent was certainly a proper "party in interest" and could participate

> in the presentation of evidence and the cross-examination of witnesses at the public hearing concerning petitioner's license application. In our view, however, the descriptive term "party in interest," as used in the statute, grants only the limited right to participate in the evidentiary hearing and not the right to participate as a party in judicial proceedings to review the action of the licensing authority. Had the legislature intended otherwise, it would have expressly so provided.

In Woda v. Colorado Springs, 40 Colo. App. 173, 570 P.2d 1318 (1977) the Court of Appeals dismissed the appeal of a "party in interest," recognizing that this rendered the licensing authorities' decision final and unappealable.

It is insignificant that the Kornfeld and Woda cases dealt with a "party in interest" whereas this case involves an "interested party." Indeed, if there is a distinction, "party in interest" as used in those cases is meant to apply to a much more narrow and discernable class than the term "interested party" as used in the water statutes. Bunger v. Uncompahgre Valley Water Users Association, 192 Colo. 159, 557 P.2d 389 (1976).

Nor is it significant that the above cited cases were initiated as quasi judicial proceedings before an administrative body, whereas the instant case involves a hearing before a Court. In Regional Service Authority v. Board of County Commissioners, supra, this Court found that the Service Authority Act, C.R.S. § 32-7-101 et. seq. provided for a public hearing in the district court. However, since the legislature did not provide for appellate review of the district court's findings in determining the sufficiency of a petition under that Act, no right of appellate review existed. Thus, participation in a hearing before the district court does not in itself make one a "party" for purposes of appeal.

B. Bar 70 Has Not Shown Itself to be Aggrieved.

Even if Bar 70 was not the status equivalent of a "party" in this matter, it could nevertheless prosecute this appeal if it could show itself to substantially aggrieved by the Water Court's decree. To be substantially aggrieved there must be:

> the denial to the party of some claim of right, either of property or of person or the imposition upon him of some burden or obligation. Wilson v. Board of Regents, 46 Colo. 100, 102 P.1088 (1909).

See also Beals v. Tri-B Associates, 644 P.2d 78 (Colo. 1982).

In its Supplemental Brief (pages 8-9), Bar 70 eludes to the principal, stated in Farmers Highline Canal and Reservoir Co. v. Golden, 129 Colo. 575, 272 P.2d 629 (1954), that "all users of water affected by [a water] proceeding were, in effect, parties and had full right to protect their rights had they so desired." The complex interrelationship of streams makes it impossible for an applicant in a water adjudication to name every person or entity that may be affected by an application. Therefore, it is incumbent upon those who may be potentially affected to come forward and protect their rights. If Bar 70, either in its entry of appearance or in the hearing before the Water Court, had identified itself as a user of water which may have been potentially affected by Tosco's application herein, it may have had standing to appeal this matter. However, the record is absolutely devoid of any such reference. All that exists is a suggestion by counsel at the March 3, 1981 hearing that Bar 70 was acquiring property in the vicinity of an unidentified Tosco reservoir site. (Volume 2, page 11.) Bar 70's Entry of Appearance (Volume, 1, page 39) does not hint at whether it owns water rights or how it might be affected by the application. At the hearing itself, Bar 70 again chose to remain silent as to whether it had water rights which might be adversely affected by the application or that it might be "aggrieved" by the result of the proceeding.

For the first time in this litigation, Bar 70 asserts in its Supplemental Brief (page 9) that it is the owner of senior and junior water rights on the White River. However, it is a well established principle that "[s]tatements made in the briefs of litigants cannot supply that which must appear from a certified record . . . " Laessig v. May D & F, 157 Colo. 260, 402 P.2d 183 (1965). Such material, which was not presented to the trial court, cannot be considered by this Court on appeal. Lambert v. Haskins, 128 Colo. 433, 263 P.2d 433 (1953), Zigone v. Zigone, 136 Colo. 39, 314 P.2d 304 (1957).

Even at this late date, Bar 70 has never stated specifically which of its rights, if any, will be adversely affected by the granting of Tosco's application herein. Nor has Bar 70 articulated what that adverse effect will be. In other words, Bar 70 has presented this Court with an abstract attack on the Water Court's ruling without any showing it is in fact aggrieved. As such, the appeal should be dismissed. Kornfeld v. Perl Mack Liquors, Inc., supra, Beals v. Tri-B Associates, supra.

Tosco's concern is not merely with a technical evidentiary omission. As Bar 70 has stated in its Supplemental Brief (page 8), the unique nature of water court proceedings tend to make them rather open ended. Therefore, it is important for an objector to articulate its concerns. In the absence of a statement in the record as to its own water rights, it was impossible for the referee, the water judge or the applicant to fashion a decree which would specifically take into consideration Bar 70's water rights.

Tosco does not dispute that one who entered an appearance under C.R.S. § 37-92-304(3) prior to its amendment in 1983, as Bar 70 did, need not state its interest in the proceeding. It may be by remaining silent and appearing at a late date such a party may gain the tactical advantage of "surprise" at the hearing, even though that runs contrary to the spirit of the Rules of Civil Procedure. Hawkins v. District Court, 638 P.2d 1372 (Colo. 1982). In fact, testimony before the legislative

committees, including that of Bar 70's counsel, regarding abuses with respect to entries of appearance led to the legislature to amend the statute and adopt more stringent requirements for intervention similar to C.R.C.P. 24. Senate Committee on Agriculture, Natural Resources and Energy, Hearings on S.B. 90, February 3, 1983 and February 10, 1983. However, in failing to articulate to the Water Court what its water rights were and how they might be impinged by the Court's ruling, Bar 70 has failed to show that it is an aggrieved party so as to have standing to appeal to this Court.

C. The State Engineer's Office, By Virtue of its Charge, Has Standing to Appeal Judgments of the Water Court.

The State of Colorado has filed a brief herein whereby it argues that the State Engineer should have the right of appeal in cases where it has only filed an entry of appearance. Tosco agrees that the unique position of the State requires that it be granted the right of appeal in all cases affecting water resources of the state. However, those special circumstances do not extend to individual appearants.

In Wadsworth v. Kuiper, 193 Colo. 95, 562 P.2d 1114 (1977), it was stated "the public has a vital interest in preserving the water resources of this state." That case further found that the state through the State or Division Engineer's office could appear in judicial proceedings to preserve water resources and adhere to correct rules for its allotment and administration. In recognition of this charge, this Court adopted C.A.R. 1(e) which provides in part "[i]f not an appellant, the division engineer shall be an appellee . . ." Decisions of the Water Court which affect the administration and allotment of water resources necessarily have the potential of denying or burdening the property interests of the public and because there exists the potential of the public being "aggrieved" the state must have the opportunity to become a party on appeal. Private entities may assist the Water Court in its review of applications by filing an entry of

appearance. However, it would be unreasonable to extend this "watchdog" role to include the right of appeal since this Court has recognized that role rightfully belongs to the State Engineer.

D. Tosco Properly Appropriated the Water Claimed in its Application.

1. The Law Governing Appropriation of Conditional Water Rights

This Court has set forth the general principles governing the initiation of a conditional water right on numerous occasions:

> A conditional water right is the "right to perfect a water right with a certain priority upon the completion with reasonable diligence of the appropriation upon which such water right is to be based." Section 37-92-103(6), C.R.S. 1973. Rocky Mountain Power Co. v. Colorado River Water Conservation District, 646 P.2d 383 (Colo. 1982).

The concept of conditional water rights is a legal fiction developed by courts and statutorily adopted by the legislature because very early in this state's history it was recognized that large scale water projects may take years or even decades to complete. Valuable water rights would otherwise be lost if they could not relate back to the "first step" taken toward their appropriation. Note, A Survey of Colorado Water Law, 47 Den. L.J., 226, 239-240 (1970).

The granting of a conditional water right decree is a determination by the court

> . . . that the first steps toward appropriating a certain amount of water have been taken and the decree establishes the date when this occurred . . . The priority date of the completed appropriation relates back to the date established by the conditional decree so long as the applicant has proceeded with

> due diligence thereafter to perfect the appropriation. Section 37-92-305(1). Colorado River Water Conservation District v. Vidler Tunnel Water Co., 197 Colo 413, 594 P.2d 566 (1979).

In order for there to be a first step toward the appropriation, this Court has consistently held that two elements "must coexist:"

> First, the applicant for a conditional water right must have an intent to take the water and put it to beneficial use. Second, the applicant must demonstrate this intent, by an open physical act sufficient to constitute notice to third parties. Colorado River Water Conservation District v. Denver, 642 P.2d 510 (Colo. 1982), citing, Twin Lakes Reservoir and Canal Co. v. Aspen, 192 Colo. 209, 557 P.2d 825 (1976) and Central Colorado Water Conservancy District v. Denver, 189 Colo. 272, 539 P.2d 1270 (1975).

See also Colorado River Water Conservation District v. Vidler Tunnel Water Co., supra.

The sufficiency of the application turns upon the facts of each individual case and must therefore be determined on an ad hoc basis. Rocky Mountain Power Co. v. Colorado River Water Conservation District, supra; Harvey Land & Cattle Co. v. Southeastern Colorado Water Conservation District, 631 P.2d 1111 (Colo. 1981); Central Colorado Water Conservancy District v. Denver, supra; and Four Counties Water Users Association v. Colorado River Water Conservation District, 159 Colo. 499, 414 P.2d 469 (1966).

In most instances the intent to appropriate precedes the manifestation of that intent. However, that is not always the case. "Either of the elements of intention or open physical demonstration may precede the other under some circumstances." Bunger v. Uncompahgre Water Users Association, 192 Colo. 159, 557 P.2d 389 (1976). The logical reason for permitting an appropriation where the physical act precedes the intent to appropriate a fixed amount is that at the time when

an actual physical act with respect to the right takes place it may not be readily apparent how much water may actually be susceptible to diversion. That fact may only become apparent after engineering and hydrological studies have taken place. This is what occurred in the instant case and this reasoning has been relied upon by this Court in at least three instances in permitting the granting of conditional water decrees where the physical act preceded the intent to divert a fixed amount of water. See, Harvey Land & Cattle Co. v. Southeastern Colorado Water Conservancy District, supra; Twin Lakes Reservoir and Canal Co. v. Aspen, supra; and Elk-Rife Water Co. v. Templeton, 173, Colo 438, 484 P.2d 1211 (1971).

2. Tosco's Manifestation of Intent In Initiating Its Conditional Water Right Was Legally Sufficient

In its opening brief (at page 8), Bar 70 has stated that it does not contest that Tosco exhibited the requisite intent to appropriate a definite quantity of water. It does, however, contest whether Tosco properly manifested that intent. A comparison of Tosco's physical activity on the land with a similar case wherein this Court found sufficient physical activity on the land clearly indicates that Tosco's activities were legally sufficient to sustain the Water Court's finding that an appropriation had been initiated.

In Elk-Rifle Water Company v. Templeton, supra, between May 23, 1963 and June 18, 1963, officials or agents of the applicant openly manifested their intent to appropriate water for the Main Elk Weeler Gulch Pipeline and the Main Elk Reservoir by doing the following:

> Compiled water supply information from published records of the U.S. Geological Survey; obtained and examined maps and other publications; obtained aerial photographs from the U.S. Department of Agriculture; investigated alternate pipeline routes and determined upon the one subsequently claimed; made several visits to the main Elk Reservoir site; determined upon a proposed location for

> the axis of the dam; located U.S. Government Survey Monuments, which were subsequently used in making statements of claim and maps, by use of the hand level and published topographic maps, extended out the contour lines of the reservoir basin, where the same were not covered by the topographic map, and computed the carrying capacity of the reservoir at various elevations; and also determined the capacity of 32,400 acre feet at a dam height of 172 feet between elevations of 5748 and 5920 feet.

Significantly, the only actual on site work mentioned in this review were the visits to the reservoir site. No mention is even made of a visit to the pipeline site. A comparison with the evidence presented by Tosco reveals that unlike the applicant in Elk-Rifle, which obtained water supply information from published information, beginning in 1974, Tosco arranged and paid for a five (5) year gaging program to determine the water supply on Miller Creek (Volume 3, page 25, lines 3-7.) Just as in Elk-Rifle, Tosco investigated alternate diversion sites and determined upon the one claimed. (Volume 3, page 34, lines 13-17; Volume 4, Exhibit B, White River Diversions.) As in Elk-Rifle, the reservoir site where the water from the pipeline would be stored was visited. (Volume 4, Exhibit B, Miller Creek Reservoir.) In addition, Tosco personnel walked the entire route of the pipeline. (Volume 3, pages 19-20.) Environmental and geologic data was collected and photographs were also taken. (Volume 4, Exhibit B.) There is no indication that any of these physical acts on site were done by the applicants in Elk-Rifle. Just as in Elk-Rifle, the contour lines, the axis and the capacity of the reservoir which would store the pipeline water were determined and extended out on a topographic map. (Volume 4, Exhibit B, Miller Creek Reservoir. Volume 1, page 72.) When the carrying capacity of the pipeline was finally fixed, the application was filed. (Volume 3, pages 27-28.) The only acts listed in Elk-Rifle which Tosco did not accomplish was to obtain aerial photographs

from an agency of the United States or locate a survey monument. Neither of those acts, however, give notice to third parties that an applicant intends to appropriate water. In sum, Tosco believes its on site activities demonstrated its intent to appropriate water to the same, if not greater, extent as that approved by this Court in the Elk-Rifle case.

Bar 70's reliance on Fruitland Irrigation Co. v. Kruemling, 62 Colo. 160, 162 P. 161 (1916) in arguing Tosco's physical acts of appropriation were deficient, is misplaced. It is true the Court in that case disregarded certain reconnaissance work as being a first step toward the appropriation of a conditional water right. The reason given for not accepting the work was not that such work was incapable of giving notice to third parties. Rather, at the time the work was done in that case, the Court found that the applicant had no fixed intent to appropriate water. The Court stated that at the time of the field survey, "there was not, and in the very nature of things could not have been any definite and fixed intention to proceed further." 62 Colo. 166-167. In this case, Bar 70 has conceded Tosco had "the intent to appropriate a definite quantity of water." (Bar 70's Opening Brief, page 8, emphasis in original.)

Furthermore, unlike the applicant in Fruitland, Tosco does not claim on this appeal the date of the field trip as the appropriation date for the second 100 c.f.s. of its application. Rather, it recognizes, as did the Water Court, that its appropriation date is the date its intent and the physical act coexisted, which was December 11, 1979.

In other cases, this Court has recognized that the first step in a conditional water appropriation is often making a survey of the project. Elk-Rifle Water Co. v. Templeton, supra; Four Counties Water Users Ass'n v. Colorado River Water Conservation District, 159 Colo. 499, 414 P.2d 469 (1966); and Taussig v. Moffat Tunnel Water and Development Co., 106 Colo. 384, 106 P.2d 363 (1940). Tosco's activities were consistent with those cases. After examining all the evidence before it,

the Water Court determined that the activities of Tosco taken together were sufficient to be an open physical demonstration of Tosco's intent to appropriate the water claimed. It is the duty of this Court "to carefully examine the record for evidence to support the judgment of the trial court." Kiefer Concrete, Inc. v. Hoffman, 193 Colo. 15, 562 P.2d 745 (1977). Where such evidence exists, as in this case, the trial court's judgment should be affirmed. Stubblefield v. District Court, 198 Colo. 569, 603 P.2d 559 (1979).

3. There Is No Legal Requirement That Activities on the Land Must Indicate the Extent of a Conditional Water Right Appropriation

Bar 70, in its Opening Brief, argues that in order to constitute effective notice to third parties, the open physical act required for initiating a conditional water right must given an indication of the extent of the proposed appropriation. This has never been a requirement for a conditional water decree. In Taussig v. Moffat Tunnel Water and Development Co., supra, the applicant conducted various surveys on components of a water project. Seven conditional decrees were entered. However, even at the time of the hearing, the applicant "did not undertake to allocate the quantity of water to each project under a given decree [because] it was not known . . . ." How then could a third party possibly have been appraised of the extent of an appropriation from such a component merely by observing the survey? Rather, the purpose of the final step is not to given an indication in itself of the size of the appropriation, but "to put others on inquiry" that an appropriation is contemplated. Holbrook Irrigation District v. Fort Lyon Canal Co., 84 Colo. 174, 190, 269 P. 574 (1928).

Even in those cases where the physical act precedes the formation of the intent to appropriate a fixed amount of water, there is no requirement that the act indicate the extent of the appropriation to third parties. In Elk-Rifle, supra,

Bar 70 claims (Opening Brief at page 12) that "[t]he activity on the land was . . . commensurate with the intent which was later declared." That on site activity, however, only consisted of visiting the reservoir site and locating survey monuments. Such activity gives absolutely no indication of the extent of the contemplated appropriation.

Nor is it relevant that the intent to appropriate a fixed amount of water followed within days after the completion of the initial field work, whereas in the instant case the amount was fixed three years after the field work. In Twin Lakes Reservoir and Canal Co. v. Aspen, supra, the applicant in 1936 had been awarded a conditional decree with a 1930 appropriation date. The system was partially constructed. In the early 1970's, the applicant discovered that its system had a carrying capacity of an additional 100 c.f.s. In 1973, it applied for a conditional decree for that 100 c.f.s. using the physical acts performed in 1930 as the basis. This Court found that the forty-three years between the physical act and the crystallization of the applicant's intent to appropriate made no difference. Thus, to use Bar 70's illustration, if an observer had asked the applicant regarding this conditional right between 1930 and 1970, it would not only have been unable to quantify the amount, it would have been unaware it existed. Therefore, how could a third party have been appraised of the extent of the appropriation at the time the work was done when the applicant did not learn of it for some forty years? Certainly this is a much more extreme case than that involved in Tosco's application. At the time of Tosco's field trip in 1976, it had a fixed intent to appropriate more than 100 c.f.s. At that point, it had simply not determined how much more (Volume 3, page 34, Lines 5-7).

Even in Harvey v. Southeastern Colorado Water Conservancy District, supra, discussed in Bar 70's Opening Brief at page 12, an observer of applicant's construction of wells and intermittent use of water therefrom for irrigation for over 30 years, would not have been aware of the full extent

of the contemplated use of the rights until the filing of the application. (In that case, however, this Court remanded the matter to the Water Court for a determination if and when the applicant formed the requisite intent.)

E. Bar 70 Has Adopted a Different Ground of Opposition On Appeal Than That Presented To the Water Court

1. Bar 70 Should Be Bound By Its Prior Stipulation

Prior to the trial in this matter, Bar 70 and Tosco entered into a stipulation reflected in the Joint Pretrial Data Certificate (Volume 1, page 76) which stated:

> . . . [The parties] stipulate that the correct appropriation date for the first 100 c.f.s. of water claimed in [the application] will be September 30, 1976, rather than May 29, 1974, as claimed in the application.

As reflected at paragraph 3 of the Joint Pretrial Data Certificate (Volume 1, page 73), the only disputed issues at trial involved the second 100 c.f.s. claimed in the application. In explaining the stipulation and why Bar 70 and Objector Dry Creek Land and Cattle did not oppose the application with respect to the first 100 c.f.s., counsel for Bar 70 stated:

> I felt from reviewing their evidence in detail that they could substantiate a claim and was willing to stipulate to it as of a hundred second feet September 30, 1973, based upon the work preceding it . . . (Volume 3, Page 91, Lines 2-5).

Based upon this representation, the Trial Court was amply justified in concluding that Bar 70 agreed that the physical acts on the ground were sufficient to justify granting the application with respect to the first 100 c.f.s. claimed in the application.

Counsel for Bar 70 argued at that time that it opposed the second 100 c.f.s. of the application because it

felt once Tosco had determined it required an additional 100 c.f.s., an additional physical act was necessary to complete the appropriation. (Volume 3, page 91.)

As expressed in Bar 70's Brief in support of its Motion for New Trial:

> Bar 70 expressly disputed whether the Applicant had formed a bona-fide intent to double its beneficial use of water under a new water right for 200 c.f.s. and whether the Applicant had undertaken any overt act which was sufficient to put third parties on notice of the enlarged claim. (Volume 1, page 86, emphasis added.)

As more specifically stated in its Motion for New Trial (Volume 1, page 83, paragraph 2.a.), Bar 70 contended that work done prior to the formulation of Tosco's intent to divert the second 100 c.f.s. could not serve as the overt physical act for such appropriation.

This position is clearly in error in that this Court has held on at least three occasions that the intent to appropriate could be formed after the physical act was performed. Elk-Rifle Water Co. v. Templeton, supra,; Twin Lakes Reservoir & Canal Co. v. Aspen, supra; and Harvey v. Southeastern Colorado Water Conservancy District, supra. Apparently recognizing this fact, Bar 70, in this appeal, has taken a different position. It now does not contest that Tosco formed the requisite intent to appropriate the water claimed in the application. Rather, it argues that Tosco failed to perform requisite physical act necessary to appropriate a conditional water right, not only with respect to the second 100 c.f.s. claimed in the application, but by implication also the the first 100 c.f.s. claimed in the application (even though that is not an issue on this appeal), since the same acts were involved in initiating the appropriation.

Bar 70's current position contradicts the statement of its counsel to Judge Litwiller in this action referenced supra, as to the purpose and reason for the stipulation entered into by the parties. "Under the water laws of Colorado [the

Court] must accord credibility to the stipulation of the parties." United States v. Northern Colorado Water Conservancy District, 608 F.2d 422, 430 (10th Cir. 1979). Facts stipulated to by the parties may not be disregarded and are to be considered as facts in the case without further evidence. F & D Property Co. v. Alkire, 385 F.2d 97 (10th Cir. 1967) and United States v. Sommers, 351 F.2d 354 (10th Cir. 1965). A party to an action cannot stipulate to particular facts and later change its mind when its theory of the case changes. Eisenson v. Eisenson, 158 Colo. 394, 407 P.2d 20 (1965). By stipulating that the first 100 c.f.s. claimed in the application were properly appropriated Bar 70 has conceded the sufficiency of the physical act with respect to that appropriation. Bar 70 should not be heard to contest the sufficiency of the same act with respect to the second 100 c.f.s. claimed, and it should be bound by the stipulation.

2. The Water Court Determined This Matter Independently of the Stipulation Entered Into By Bar 70

Furthermore, regardless of whether Bar 70 should be bound by its stipulation in this matter, the Water Court made an independent investigation of the matter based upon the evidence presented in granting the subject decree. (Volume 1, page 80, paragraph 8.) Bar 70's stipulation simply verified the Court's own conclusion. Indeed, the Water Court in its oral findings (Volume 3, page 96, lines 3-17) indicated that the particular acts on the ground were not [and are not] subject of dispute and they were sufficient to initiate a conditional appropriation of water.

3. This Court Should Not Consider Matters Not Raised in the Court Below

It is axiomatic that an issue not raised in the trial court may not be raised for the first time on appeal. See, e.g., Matthews v. Tri-County Water Conservancy District, 200 Colo. 307, 613 P.2d 889 (1980). As discussed, Bar 70

argued to the Water Court that Tosco had not formed the intent nor performed a physical act necessary to initiate the appropriation of the second 100 c.f.s. of the conditional water right, because the intent was formed after the physical act was performed. Now Bar 70 concedes Tosco had the requisite intent, but argues the acts which were performed were insufficient to initiate the appropriation of the second 100 c.f.s. Because this was not argued to the Court below, this Court should not consider the argument at this time.

CONCLUSION

Bar 70 became involved in this case fifteen (15) months after Tosco filed its application by filing an entry of appearance as then permitted by statute. Neither this simple filing or its participation at the trial elevated Bar 70 to the status of a party in this case. Nor has Bar 70 shown itself to be an "aggrieved party" in that it has never shown how it would be adversely affected by the decision of the Water Court herein. It, therefore, does not have standing to prosecute this appeal. On the other hand, because the public has a vital interest in protecting and preserving water resources of the state, the State Engineer has standing to appeal decisions which have the potential of harming the public's interest.

Notwithstanding Bar 70's status herein, Tosco presented sufficient evidence to the Water Court to sustain its finding that Tosco properly initiated its conditional water right appropriation herein. It is now undisputed that Tosco had the requisite intent to appropriate the water claimed in its application. The physical acts performed by Tosco were sufficient to appraise third parties of Tosco's intent to appropriate water and were consistent with those approved in other cases by this Court. There is no requirement that the physical act performed on the land manifest the extent of the claimed appropriation.

Bar 70 had previously stipulated that Tosco had properly appropriated the first 100 c.f.s. of the application. Since

the same physical act was used to appropriate the first 100 c.f.s. as the second 100 c.f.s., Bar 70's stipulation amounted to an admission regarding the sufficiency of physical act and should be bound by that stipulation. In any event, the Water Court independently reviewed the facts of this case and found Tosco had properly initiated its appropriation. In addition, Bar 70 has attempted to raise issues on appeal different from that presented to the Water Court. This Court should not consider those arguments on appeal.

For the above stated reasons, the judgment of the Water Court should be sustained.

Respectfully submitted this 5th day of January, 1984.

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CERTIFICATE OF MAILING

I hereby certify that, on this 5th day of January, 1984, I did deposit in the United States mail, at Denver, Colorado, the foregoing Brief, with sufficient postage affixed thereto, addressed as follows:

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