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FILED IN THE
SUPREME COURT
OF THE STATE OF COLORADO

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SUPREME COURT, STATE OF COLORADO

Case No. 83 SA 365

David W. Bresina

ANSWER BRIEF OF APPELLEE DIVISION ENGINEER

BAR 70 ENTERPRISES, INC.,

Appellant,

v.

TOSCO CORPORATION, and
DIVISION ENGINEER FOR WATER DIVISION NO. 5, STATE OF COLORADO,

Appellees.

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INTRODUCTION

The division engineer for water Division No. 5, Lee Ennewold, submitted a response to the motion to dismiss of Tosco to this court on October 20, 1983. The court is directed to that response (attached) for a statement of the position of the division engineer on the issue of standing of the division engineer to appeal a case in which he did not file a statement of opposition but instead entered the case under the provisions of section 37-92-304(3) as it existed prior to enactment of S.A. 90 by the 1983 legislature.

The court's order of October 27, 1983, setting a brief schedule, raises an additional nuance to the issue by requesting

briefs on the issue of whether a party must make an independent showing that it has been substantially aggrieved by the decision of the water court in order to appeal. The division engineer believes that the same rationale set out in his response of October 20, 1983 applies to the issue of whether a party must be substantially aggrieved in order to appeal, but here briefly addresses the issue more directly.

STATEMENT OF THE ISSUES

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

STATEMENT OF THE CASE

A. Nature of the case

This case involves an appeal by Bar 70 Enterprises (Bar 70) from a decree of the water court granting conditional water rights to applicant-appellee Tosco Corporation (Tosco). During the pendency of this appeal, Tosco has challenged the right of Bar 70 to bring this appeal.

B. Course of proceedings and disposition below

The course of proceedings and the disposition of the case by the water judge are set forth in the statement of facts below.

C. Statement of facts

On December 28, 1979 Tosco filed an application for conditional water rights in the water court for Water Division No. 5. A statement of opposition was filed by Dry Creek Land and Livestock Company. On March 3, 1981 Bar 70 Enterprises filed an entry of appearance. Hearings were held before the water court in which Bar 70 was allowed full participation. After the hearing, the water court entered judgment on April 11, 1983, granting the conditional water rights.

An appeal was taken from the judgment of the water court by Bar 70. On September 12, 1983 Tosco filed a motion to dismiss the appeal. As grounds for the motion, Tosco argued that Bar 70 lacked standing to appeal because it had not filed a timely statement of opposition to the application.

SUMMARY OF ARGUMENT

The division engineer for water Division No. 5, Lee Enewold, adopts his response to motion to dismiss of October 20, 1983 as his position on whether the division engineer has stand-

ing to appeal by virtue of his participation by filing an entry of appearance under C.R.S. 1973, 37-92-304(3) (prior to enactment of S.B. 90 (1983)).

The question of whether the division engineer should be required to make a showing that he was substantially aggrieved before he can appeal is answered by an examination of the statutory duties. The state and division engineers are charged with the responsibility to protect the interest of the public in preserving the water resources of the state and in having courts adhere to correct rules for the allotment and administration of water. If the court were to require the division engineer, in cases where he participated by filing an entry of appearance, to make a showing that he was substantially aggrieved by the order of the court, an unnecessary and unwarranted burden would be imposed on his ability to protect the public interest in the water resources of the state.

ARGUMENT

THE COURT SHOULD NOT REQUIRE THE DIVISION ENGINEER TO MAKE AN INDEPENDENT SHOWING THAT HE HAS BEEN SUBSTANTIALLY AGGRIEVED IN ORDER TO APPEAL A CASE IN WHICH HE PARTICIPATED UNDER AN ENTRY OF APPEARANCE.

As pointed out in his earlier response of October 20, 1983, the division engineer participates in all proceedings of the referee through the consultation process without becoming a party.

C.R.S. 1973, 37-92-302(4). If an entry of appearance were not sufficient to confer party status on the division engineer so that he could appeal the case, he would be forced to file a statement of opposition in each and every case just to preserve his ability to appeal.

If an entry of appearance were sufficient to give a right of appeal only if, in addition, a showing were made that the division engineer had been substantially aggrieved, the division engineer would again be forced to file statements of opposition in all cases because of the difficulties that might be encountered in making such a showing due to the unique status of the state officials charged with administration of the state's water resources.

The division engineer, unlike most other parties to water adjudications, owns no water rights. (The Water Rights Determination and Administration Act of 1969, C.R.S. 1973, 37-92-101 et seq. does not require that parties to an adjudication own water rights that may be affected.) He instead has statutorily imposed duties to administer water rights and protect the public's interest in the water resources of the state. C.R.S. 1973, 37-92-202, 301. He cannot make a showing that he has a water right which has been injuriously affected by a water court decision.

In Wadsworth v. Kuiper, 173 Colo. 95, 562 P.2d 1114 (1977), this court dealt with the state and division engineers' standing

to file a protest when they had not previously filed a statement of opposition and, as is always the case, owned no water rights which had been adversely affected. In Wadsworth this court found that the state engineer had standing based on the statutory construction of the 1969 Act and also based on inferences in the Colorado Constitution (Colo. Const. art. XVI, sec. 5) which affirm the public's vital interest in preserving the water resources of the state and in having the courts adhere to correct rules for the allotment and administration of water. The state engineer and division engineer are the state officials charged with protecting those interests.

Just as the 1969 Act no longer requires one to be the owner of an affected water right in order to participate in water adjudications, it does not require that the division engineer make a showing that he has been substantially aggrieved before he can appeal. To place such a requirement on the state or division engineer in cases where his participation has been through an entry of appearance would not serve the public interest recognized in Wadsworth, supra.

The case law varies widely as to what is required for one to be substantially aggrieved. E.g., Coopersmith v. Denver, 156 Colo. 459, 399 P.2d 743 (1965); Tower v. Tower, 147 Colo. 480, 354 P.2d 565 (1961); Miller v. Clark, 144 Colo. 431, 356 P.2d 965 (1960). Generally, such a requirement involves a showing of a

diminishment of one's property rights or an increase in his burdens. See Re Michigan-Ohio Bldg. Corp., 117 F.2d 191 (7th Cir. 1941). If such a requirement were placed in the division engineer's right to appeal it is unclear what right he would have to show to have been substantially aggrieved. While it might be possible to show in some instances that the office of the state or division engineer had been substantially aggrieved, such a showing might not address whether the vital public interests represented by the state and division engineer had been substantially aggrieved. If a showing were required that those vital public interests had been substantially aggrieved the burden of making a showing of injury to such broad and unique interests would be overly burdensome and not serve that public interest.

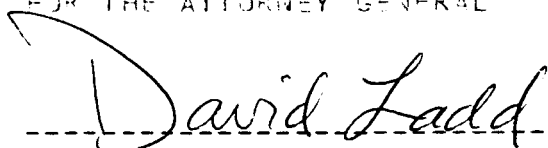
CONCLUSION

The filing of an entry of appearance in cases initiated prior to the enactment of S.B. 90 is sufficient to preserve the division engineer's right to appeal. The Water Rights Determination and Administration Act of 1969 does not require the division engineer to make a showing that he has been substantially aggrieved in order to appeal a case in which he participated under an entry of appearance. To judicially add such a requirement might frustrate the policies set out in the 1969 Act and the Colorado Constitution and would most certainly create an unneeded

burden on the division engineer's ability to carry out his statutorily mandated duties. This court is respectfully requested to reject the argument of Tosco insofar as it would limit the ability of state water officials to appeal a judgment of the water court.

Respectfully submitted this 5th day of January, 1984.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the within
ANSWER BRIEF OF APPELLEE DIVISION ENGINEER upon all parties
herein by depositing copies of same in the United States mail,
postage prepaid, at Denver, Colorado this 5th day of January
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