12-1-1983

Bar 70 Enterprises, Inc. v. Tosco Corp.

SUPREME COURT, STATE OF COLORADO

Case No. 83 SA 365

SUPPLEMENTAL OPENING BRIEF OF APPEARANT-APPELLANT BAR 70 ENTERPRISES, INC.

BAR 70 ENTERPRISES, INC.,

Appearant-Appellant

vs.

TOSCO CORPORATION,

Applicant-Appellee

and

DIVISION ENGINEER FOR WATER DIVISION NO. 5, STATE OF COLORADO

Appellee.

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

MUSICK AND COPE

Joseph A. Cope, 7633
Robert C. Kerr, 10234

4141 Arapahoe Avenue
P. O. Box 4579
Boulder, CO 80306
Telephone: (303) 447-1974
1-800-332-2140 (Colorado)

SPECIAL COUNSEL FOR APPEARANT-APPELLANT
BAR 70 ENTERPRISES, INC.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

STATUTES

RULES

INTRODUCTION

Appearant-Appellant, Bar 70 Enterprises, Inc. ("Bar 70") filed its opening brief on October 11, 1983 in which Bar 70 raised and briefed the following issues:

1. Whether the Applicant-Appellee, Tosco Corporation ("Tosco"), openly manifested its intent to appropriate a definite quantity of water for a beneficial use through physical acts upon the land sufficient to constitute notice to third parties.

2. Whether the stipulation between Bar 70 and Tosco, by which Bar 70 agreed not to contest Tosco's claim to 100 c.f.s., constituted an admission by Bar 70 that the reconnaissance field trip taken in 1976 was sufficient to openly manifest and put other parties on notice of Tosco's intent to appropriate 200 cubic feet per second (c.f.s) of water, an intent which was not formed until three years after the field trip.

Prior to filing its opening brief, Bar 70 was served with and responded to a motion by Tosco to dismiss the appeal. On October 31, 1983 this Court issued an order which modified the briefing schedule to allow the parties to brief specific issues relating to Tosco's motion to dismiss the appeal. In accordance with the Court's October 31, 1983

Order, Bar 70 hereby submits its Supplemental Opening Brief which specifically addresses only those issues raised by the Court's October 31, 1983 Order. With respect to the substantive issues raised by Bar 70 in this appeal, Bar 70 relies on its original opening brief and no attempt has been made to reargue or expand on that discussion in this supplemental opening brief.

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 order.

2. If substantial aggrievement is a prerequisite to standing to appeal, whether Bar 70 has, in fact, been substantially aggrieved by the grant of Tosco's conditional water rights application.

STATEMENT OF THE CASE

This is an appeal from a judgment of the District Court, Water Division No. 5, granting Tosco a conditional water right to divert 200 c.f.s. of water from the White River with appropriation dates of September 30, 1976 for the first 100 c.f.s. of water and December 11, 1979 for the second 100 c.f.s of water, for industrial, mining, retorting, refining,

dust control, reclamation, domestic, recreational and irrigation uses. Bar 70 seeks reversal of the Water Court's judgment regarding the second 100 c.f.s, and denial of the conditional water right for this second 100 c.f.s.

During the course of this appeal, Tosco filed a motion to dismiss the appeal, to which Bar 70 and Appellee Division Engineer for Water Division No. 5, State of Colorado, responded. Bar 70's supplemental opening brief and the statement of the case herein discuss only those matters which relate to Tosco's motion to dismiss and this Court's Order of October 31, 1983 stating the issues to be briefed.

On December 28, 1979, Tosco filed an application for a conditional water right for 200 c.f.s of water for the proposed Miller Creek Pumping Pipeline on the White River. (Volume 1, pages 1-4). On February 29, 1980 Dry Creek Land and Livestock filed a statement of opposition (Volume 1 pages 8-10) and on March 31, 1980 the Water Referee re-referred the case to the Water Judge. (Volume 1, page 11).

A pretrial conference was held on March 3, 1981, and on March 9, 1981, Bar 70 entered its appearance. In an order ~~dated March 30, 1981~~ the Water Judge re-referred the case to the Water Referee for the purpose of making such investigations as are necessary to determine whether or not the statements in the application and statement of opposition are true (Volume 1, page 54). The Referee filed a Report of

Investigation on April 26, 1982 (Volume 1, pages 68-69), but did not issue a ruling. In the Term Day Order of October 13, 1982, the Water Judge set the case for pretrial conference for October 28, 1982, at which time Tosco, Bar 70 and Dry Creek Land and Livestock filed a Joint Pretrial Data Certificate (Volume 1, pages 72-76).

On November 30, 1983, a trial was held before the Water Judge in which counsel for Bar 70 actively participated. Tosco did not object to Bar 70's participation or in any way seek to limit Bar 70's rights as a party to the proceeding.

The Water Court issued its decree on April 11, 1983 and on April 26, 1983 Bar 70 filed a motion for new trial or to alter or amend judgment, and brief in support thereof. In its brief in opposition to the motion for new trial, Tosco did not challenge or in any way contest Bar 70's right as a party to the proceeding to seek a new trial. The motion for new trial was subsequently denied.

On July 15, 1983, Dry Creek Land Livestock withdrew its statement of opposition and Bar 70 filed a notice of appeal. Tosco did not object to or otherwise challenge Bar 70's right to file the notice of appeal.

On July 22, 1983, Bar 70 filed its designation of record (Volume 1, pages 113-115) and once again Tosco did not object. In fact, Tosco filed its own designation of record (Volume 1, pages 116-117).

From the time Bar 70 entered its appearance, to the time this appeal was perfected, Bar 70 has been actively involved in this case with full party status.

SUMMARY OF ARGUMENT

A. BAR 70 HAS STANDING TO APPEAL PURSUANT TO THE EXPRESS PROVISIONS OF C.R.S. § 37-92-304(9)

B. BAR 70 IS A PARTY TO THIS CASE.

1. The Unique Nature Of A Water Right Adjudication Neccessitates That All Water Users Who May Be Affected Are Parties To The Proceeding.

2. Upon Entering Its Appearance Pursuant To C.R.S. § 37-92-304(3), Bar 70 Became A Party To This Proceeding.

3. The Full Right To Protect Bar 70's Water Rights Is Not Diminished Because Bar 70 Achieved Party Status By Entering Its Appearance Pursuant To C.R.S. § 37-92-304(3).

4. The Procedural Framework Of The 1969 Act Does Not Require Or Permit The Implied Construction Urged By Tosco.

5. C.A.R. 1(e) Authorizes Participation In An Appeal By A Party having Entered Its Appearance Pursuant To C.R.S. § 37-92-304(3).

6. Tosco's Argument That Bar 70 Was No More Than An "Amicus Curiae" Has No Legal Basis.

7. The Decision in In Re Oxley Has No Relevance To This Case.

C. IN ADDITION TO BEING A PARTY, BAR 70 WAS AGGRIEVED BY THE ENTRY OF THE DECREE IN THIS CASE AND IS ENTITLED TO APPELLATE REVIEW PURSUANT TO C.R.S. 1973 § 37-92-304(9).

ARGUMENT

A. BAR 70 HAS STANDING TO APPEAL PURSUANT TO THE EXPRESS PROVISIONS OF C.R.S. § 37-92-304(9)

The right to appellate review in a water case is expressly granted in the Water Right Determination and Administration Act of 1969 (1969 Act) at C.R.S. § 37-92-304(9), which provides:

> Appellate review shall be allowed to the judgment and decree, or any part thereof, as in other civil actions, but no appellate review shall be allowed with respect to that part of the judgment or decree which confirms a ruling with respect to which no protest was filed. [Emphasis added].

This provision affirms the right to appeal the water judge's decision as in the case of other civil actions, subject to a single limitation. The single limitation bars appellate review involving a "ruling" by the water referee when no "protest" has been filed with respect to that ruling. This limitation does not apply in this case because the water referee rereferred the application to the water judge instead of issuing a ruling. Since there was no "ruling," there was no opportunity or reason for a "protest."

The general test for standing to prosecute an appeal "in other civil actions" is that the appellant must either: (1) be a party to the action; or (2) be a person substantially

aggrieved by the disposition of the case in the lower court. Tower v. Tower, 147 Colo. 480, 364 P.2d 565, 568 (1961); Miller v. Clark, 144 Colo. 431, 356 P.2d 965, 966 (1960).

Having entered its appearance (Vol. 1, pages 39-41) and having participated in the hearing before the Water Judge, Bar 70 is a party to the action and therefore entitled to appeal pursuant to C.R.S. § 37-92-304(9).

B. BAR 70 IS A PARTY TO THIS CASE.

1. The Unique Nature Of A Water Right Adjudication Necessitates That All Water Users Who May Be Affected Are Parties To The Proceeding.

A water court adjudication is unlike most civil actions in which plaintiffs and defendants are clearly identified and known at the outset of the law suit. In a water case, an applicant initiates an action by filing an application in the appropriate water court, which application sets forth detail regarding the water matter sought to be adjudicated. The defendants, or those who may be affected by the application, are not identified by the applicant because it would be impossible for such an applicant to identify all those on a particular stream system that might be affected and wish to participate in the case.

Rather than requiring the applicant to name specific defendants, the special statutory procedures that govern

water court matters mandate notification procedures designed to alert all water users on the stream system who may be affected by the application. It then becomes the responsibility of the other users, and the Water Court, to protect interests in vested water rights from potentially harmful effects caused by the application.

The reason for the open-ended posture of a water court proceeding and the facility of getting into an adjudication with respect to the participation of parties other than the applicant is that once a decree is entered, all water users are bound by the decree and matters decided in the case are res judicata and cannot be collaterally attacked in subsequent proceedings. City of Westminster v. Church, 167 Colo. 1, 445 P.2d 52 (1968); Gardner v. State, 200 Colo. 221, 614 P.2d 357 (1980).

It has therefore been fundamental to Colorado Water law that all those who may be affected be notified and given an opportunity to be heard. New Cache La Poudre Irrigating Co. v. Arthur Irrig. Co., 37 Colo. 350, 87 P. 799 (1906); Fluke v. Ford, 35 Colo. 112, 84 P. 469 (1905); New Cache La Poudre Irrigation Co. v. Water Supply & Storage Co., 29 Colo. 469, 68 P. 781 (1902).

It has been held by Colorado courts that, because of the unique nature of a water right adjudication, "all users of water affected by said proceeding were, in effect, parties

and had the full right to protect their rights had they so desired." Green v. Chaffee Ditch Company, 150 Colo. 91, 371 P.2d 775, 783 (1962) (Emphasis added). See also, Nichols v. McIntosh, 19 Colo. 22, 34 P. 278 (1893).

Bar 70 owns senior water rights on the White River and is seeking to adjudicate additional water rights on the White River which are junior to those rights claimed by Tosco. Due to its claims for junior water rights, Bar 70 was in effect a party whether Bar 70 appeared or not, and therefore had a full right to protect its rights if it so desired. Bar 70 so desired, and achieved formal party status by filing an entry of appearance.

2. Upon Entering Its Appearance Pursuant To C.R.S.§ 37-92-304(3), Bar 70 Became a Party To This Proceeding

The provisions of the 1969 Act which were applicable when Tosco filed its application and Bar 70 entered its appearance provided three means by which an interested person could formally become a party in a water court proceeding:

(1) Filing a statement of opposition, C.R.S. § 37-92-302(1)(b);

(2) Filing a protest to a referee's ruling, C.R.S. §37-92-304(2)

(3) Filing an entry of appearance in writing prior to the date on which hearings are to commence, C.R.S. §37-92-304(3).

Bar 70 did not file a statement of opposition, and since this matter was before the Water Judge with no referee's ruling having been entered, there was no opportunity to file a protest. Bar 70 did, however, enter its appearance in writing prior to the hearing before the Water Judge (Volume 1, pages 39-41).

3. The Full Right To Protect Bar 70's Water Rights Is Not Diminished Because Bar 70 Achieved Party Status By Entering Its Appearance Pursuant to C.R.S. § 37-92-304(3).

Tosco argues in its brief in support of its motion to dismiss that the clear language of the 1969 Act should be construed by implication to deny Bar 70 the right to appeal. Tosco does not, and cannot, cite any provision of the 1969 Act that would deny this right to Bar 70.

Tosco's argument turns on the mistaken notion that one who enters an appearance pursuant to C.R.S. § 37-92-304(3) has somewhat less status than other parties; an entity which can participate fully at trial but which has no right to an appeal. Tosco argues that if this is not the case, then there is no practical difference between one's entering an appearance by filing a statement of opposition or protest, and entering an appearance pursuant to C.R.S. § 37-92-304(3).

Bar 70 acknowledges that there are differences with respect to the three means of entering an appearance in a

water case, and that these are the only practical differences the legislature intended.

(1) One who files a statement of opposition or protest may, like an applicant, request that the hearing be conducted in the county in which the point of diversion of the water right or conditional water right is located. C.R.S. § 37-92-304(4). An appearant pursuant to C.R.S. § 37-92-304(3) cannot make such a request.

(2) The filing fee for a statement of opposition at the time Tosco's application was filed was $15.00; for a protest and an appearance pursuant to C.R.S. § 37-92-304(3), the filing fee was $20.00.

There is absolutely no language in the 1969 Act, however, that even suggests that the practical differences among the three means of entering appearance rest with appellate review and that the right to appeal is not available to one who enters an appearance pursuant to C.R.S. § 37-92-304(3).

The creation, administration, and protection of vested water rights have been recognized by the legislature through its various enactments as some of the most important functions performed by this State, which by virtue of its semi-arid climate finds water its most precious public asset. See

C.R.S. §37-92-102. For this reason, the statutory right to seek appellate review of water court decisions that may injure the holder of a vested water right is an inestimable right, and limitations on that right cannot be regarded lightly.

In view of the gravity with which the legislature has regarded the protection of water rights in this State, it is not reasonable to conclude that it would leave a major limitation on the right to appellate review to implication. It is not reasonable to conclude that the legislature would enact a provision establishing the right to appellate review and specifically include one limitation on that right, but leave an equally broad additional limitation unexpressed, but implied. It is not reasonable to argue that it would enact a specific provision for entry of appearance prior to the hearing before the water judge, but leave to implication such a fundamental limitation on that status as that urged by Tosco. Finally, it is not reasonable to conclude that the legislature enacted a provision for the submission of statements of opposition but felt it unnecesary to express its implied intent that failure to submit a timely statement would cost the water rights holder its right to appellate review of the water judge's decision.

These arguments and conclusions, which are necessary to support Tosco's position, defy all logic and reason. It is a

fundamental principle of statutory construction that additional, implied terms cannot be added to clear and unambiguous statutory provisions. Andrews v. Lull, 138 Colo. 536, 341 P.2d 475 (1959). The provisions of the 1969 Act simply do not provide what Tosco wishes they provided.

4. The Procedural Framework Of The 1969 Act Does Not Require Or Permit The Implied Construction Urged By Tosco.

In its brief, Tosco argues that Bar 70's failure to file a timely statement of opposition somehow deprived the water referee of an opportunity to review the case, that it in fact "prevented the possibility of the Referee entering a ruling" (Tosco Brief at page 8), and that for this reason Bar 70 must be denied the same "standing" to appeal as in the case of one who does file such a statement.

First, the 1969 Act simply does not so provide. It does not make the filing of a statement of opposition a precondition to standing to seek appellate review under C.R.S. §37-92-304(9). If the legislature had intended to establish this condition, it would have done so.

Second, the issue in a proceeding involving an application for change of water right is fixed by substantive law. The water judge had the statutory duty to protect the water rights of non-appearing parties from injury. See C.R.S. §37-92-304(2). Indeed even if decrees are silent as to protection of vested water rights, courts are obligated to read

into such decrees appropriate limitations, conditions or restrictions by operation of law. Farmers Highline Canal and Reservoir Co. v. City of Golden, 84 Colo. 576, 272 P.2d 629 (1954). The applicant, moreover, always has the burden of sustaining the application. As a result, a statement of opposition is not necessary to join the essential issue in this case -- the absence of injury to other vested water rights holders -- in the way that a complaint and answer are necessary in a civil action. At most, the statement of opposition will raise unusual issues of fact before the water referee so that he may: (1) rerefer the matter to the water judge; or (2) take notice of them in issuing a ruling.

The failure to file a statement of opposition by Bar 70 did not deprive the water referee of any opportunity to evaluate the application submitted by Tosco. The water referee independently decided -- on the basis of a statement of opposition that was filed -- that the issues were substantial enough to warrant rereferral of the entire matter to the water judge. Having decided to rerefer the matter on the basis of the substantial issues raised by the timely objector alone, additional issues raised by Bar 70 would have been superfluous with respect to the decision to rerefer the matter.

Tosco's position that the filing of a statement of opposition is an implied precondition to appellate review, moreover, would nullify a person's right to protest a ruling by the referee. In a normal proceeding, the application is filed, and one may file a statement of opposition, enter an appearance before the referee, or await the referee's ruling and protest that ruling. Further, he may even wait to just prior to the hearing before the judge and enter an appearance then.

Tosco's interpretation would result in the loss of this right if the referee rerefers the application to the water judge. This is an unreasonable interpretation. The reasoned view is that, rereferral notwithstanding, water matters are so important that persons are permitted to enter an appearance and participate fully in the adjudication proceeding at any time prior to the hearing before the judge.

The reason this issue arises is due to the nature of adjudication proceedings after the 1969 Act. As this court discussed in the Bunger v. Uncompahgre Valley Water Users Association, 192 Colo. 159, 557 P.2d 389 (1976), adjudication proceedings prior to 1969 were one civil action commenced by one party to which other claimants joined. Everyone received notice of everything done in the case. Under the 1969 Act, however, adjudications are continuous and the only means of

notice of the application is the published resume of applications filed. Rather than participate in every case, the legislature permitted interested parties to monitor proceedings and if it proved necessary, enter into those proceedings either by statement of opposition, protest, or appearance prior to the hearings.

A person exercising this privilege was secure in the knowledge that his rights of participation would be protected and his right to appeal preserved regardless of the stage at which he entered the proceeding.

The failure to submit a statement of opposition, moreover, does not deprive the water judge of the opportunity to review the issues, including those raised by one who enters an appearance prior to the hearing. In cases where the referee issues a ruling, the issues will be presented to the judge not by the statement of opposition but by protests filed with respect to the ruling. In a case analogous to this one, this Court held that a statement of opposition is not a precondition to appellate review of a water judge's judgment and decree on a protested ruling. See Wadsworth v. Kuiper, 193 Colo. 95, 562 P.2d 1114 (1977).

In the Wadsworth case, the state engineer was found to have standing to appeal the water judge's decision even though he had not filed a statement of opposition before the water referee. After the referee issued his ruling, the

state engineer filed a protest, and then sought and was granted appellate review of the water judge's decision. In its review of the case, this Court observed:

> While it is not directly involved here, we find significance in the succeeding subsection (3) [of §37-92-304] which permits 'all persons interested' to participate in a hearing upon filing a fee for entry of appearance of $20.00, even though they have not previously entered an appearance and have not filed any statement of opposition, protest or other document.

Wadsworth v. Kuiper, supra, 562 P.2d at 1119.

In that case, the role of the statement of opposition was far greater than in the present case, because the water referee actually conducted extensive hearings in his review of the application in light of the statements submitted in the process of issuing his ruling. Nevertheless, the Court recognized that the submission of statements of opposition is simply not a prerequisite to appellate review. In the language quoted above, as in C.A.R. 1(e), the Court recognized that the key to participation and appellate review is the entry of appearance -- whether by statement of opposition, protest, or simply written entry of appearance prior to the hearing where no ruling has been issued by the water referee.

5. C.A.R. 1(e) Authorizes Participation In An Appeal By A Party Having Entered Its Appearance Pursuant To C.R.S. § 37-92-304(3).

C.A.R. 1(e) provides:

> The notice of appeal . . . for review of the whole or any part of a judgment and decree [in a proceeding concerning water rights] shall designate as appellant the party or parties filing the notice of appeal and as appellee all other parties whose rights may be affected by the appeal and who in the trial court entered an appearance, by application, protest, or in any other authorized manner. [Emphasis added].

Bar 70 entered its appearance in an authorized manner; pursuant to C.R.S. § 37-92-304(3). If Tosco had appealed this case, Bar 70 would have been named an appellee and could have fully participated in the appeal. If Tosco's position is to be adopted, however, Bar 70 could not participate in an appeal as an appellant. Such a position is absurd, and Tosco has cited no authority which advocates such an inequitable arrangement for appeals.

Bar 70 could fully protect its interests in an appeal had it won at the trial court level, and had Tosco appealed. Bar 70 must have an equal right to protect its interests at the appellate level if it loses in the trial court. The "full right to protect" one's rights, stated in Green v. Chaffee Ditch Company, 150 Colo. 91, 371 P.2d 775, 783 (1962) (emphasis added), must include the right to appeal, otherwise there is no full right.

6. Tosco's Argument That Bar 70 Was No More Than An "Amicus Curiae" Has No Legal Basis

In its brief, Tosco argues that Bar 70, having entered its appearance prior to the hearing, was no more than a mere participant, or an amicus curiae, and thus has no standing to appeal.

As in the case of its other arguments, Tosco's position suffers by the absence of the slightest bit of supporting language in the 1969 Act. The alleged limitations on Bar 70's role are simply not in the 1969 Act, and cannot be grafted onto it by Tosco. The term "participant" does not appear in the 1969 Act or in the Colorado Appellate Rules. The term "amicus curiae" does not appear in the 1969 Act.

In addition, the right of Bar 70 to participate to the fullest extent at the hearing before the water judge, guaranteed by §37-92-304(3), goes far beyond the rights of any amicus curiae. Once Bar 70 entered its appearance in this matter, it fully participated in every aspect of the proceeding. Bar 70 was a party to a joint pretrial data certificate and fully participated in the hearing that was held on November 30, 1982. Bar 70 extensively cross-examined Tosco's witnesses at that hearing. Having entered its appearance pursuant to C.R.S. § 37-92-304(3), Bar 70 could have called its own witnesses, and submitted its own exhibits. Bar 70 filed a motion for new trial.

All of these activities are beyond the scope of those which can be achieved by an amicus curiae. To suggest, as

Tosco does, that Bar 70's role in the proceedings was based on a lesser status than any party, has no merit.

Tosco's only authority for the position that an appearant pursuant to C.R.S. § 37-92-304(3) plays a lesser role than other parties is an implication articulated by then-Water Judge Lohr in Case No. W-2686. As Bar 70 has discussed in its response to Tosco's motion to dismiss, previously filed herein, Case No. W-2686 went on to appeal in this Court in Case No. 80 SA 400, and the very issue of whether an appearant who participated in a hearing could appeal was raised, briefed and decided in favor of the appearant. Tosco therefore, has no authority for its "mere appearant" or "amicus curiae" argument.

7. The Decision In In Re Oxley Has No Relevance To This Case

Tosco cites In Re Oxley, 182 Colo. 206, 573 P.2d 1062 (1973), in support of its position. That case involved the denial of a protest filed out of time. This Court held that for a protest to be valid, it must be filed with the $20.00 fee within the time required by §37-92-304(2). The case did not involve the issue of what limitations exist on the right to appellate review of a water judge decision. The case did not address, nor did it concern, the issue of whether a statement of opposition is a precondition to appellate review.

What the case did hold is that the provisions of the 1969 Act must be strictly construed where the Act contains a precondition to participation in the proceeding. The 1969 Act requires a $20 filing fee and a statement of the reasons for the protest as preconditions to protest and in the absence of the fee and statement the protest is not valid. Similarly, the 1969 Act permitted participation in a hearing by entry of appearance and payment of the $20 filing fee prior to the hearing. Since Bar 70 complied fully with this provision, it must be strictly construed to vest Bar 70 with full party status with the commensurate rights of participation inherent in the appearance before the Court. These include the right to appellate standing under §37-92-304(9) and C.A.R. 1(e).

C. IN ADDITION TO BEING A PARTY, BAR 70 WAS AGGRIEVED BY THE ENTRY OF THE DECREE IN THIS CASE AND IS ENTITLED TO APPELLATE REVIEW PURSUANT TO C.R.S. § 37-92-304(9).

The 1969 Act expanded the class of persons who could participate in a water court proceeding and expressly provided for participation by entry of appearance. In contrasting the previous Adjudication Act of 1943 which was repealed and replaced by the 1969 Act, the Colorado Supreme Court stated:

> The 1943 Act expressly limited participation in adjudication suits to an owner or claimant of any water right in the water district or outside of the

> water district. C.R.S. 1963, 148-9-10(3) and (4). According to that statute, to have standing a person was required to show both ownership of water rights and possible injury thereto.
>
> The 1969 Act, however, is not so limited. The phrase used in the 1943 Act, "owner or claimant of any water right" has been replaced with the phrase "any person who wishes." The expansion by the 1969 Act of the class of persons who may object in a water adjudication is not limited to the filing of objections and supporting documents. "Interested persons" in section 37-92-304(3), C.R.S. 1973, can only reasonably be interpreted to refer to the "persons" whose capacity to protest or object is generally described elsewhere in the Act. Any person who qualifies under other sections, (e.g., section 37-92-302(1)(b), section 37-92-304(2) and (4)), is not barred from participating in the hearing mandated by his action.

Bunger v. Uncompahgre Valley Water Users Association, 192 Colo. 159, 557 P.2d 389, 392 (1976).

The broadened class of participants advocated by the 1969 Act is necessitated by the nature of a water court proceeding. Due to the complexities and hydrologic interconnections that constitute a river system and its users, it is often difficult at the time an application is filed to forecast all the ramifications of a given water right. The 1969 Act is structured to provide the greatest facility possible for protecting interests in water, and the Act should be construed to allow parties the fullest protection contemplated by the legislature.

The issue before the water judge in the present case was whether Tosco had taken the necessary first step to initiate a conditional water right, specifically whether Tosco had made an open manifestation of its intent to appropriate the second 100 c.f.s. for the Miller Creek Pipeline. It is axiomatic that if Tosco was not entitled to a conditional water right for the second 100 c.f.s., but nevertheless received a decree, all other users of the White River who initiated water rights after Tosco claimed to initiate its right to the second 100 c.f.s. would be injured. There would simply be 100 c.f.s. less available for these other water rights. It was for this reason that Bar 70 challenged Tosco's right to the second 100 c.f.s.

The term "aggrieved" is not defined in the 1969 Act. However, a similar standard is used in the Colorado Administrative Procedure Act, C.R.S. § 24-4-101 et seq. Relying on a decision by the Colorado Court of Appeals, this Court described aggrieved or adversely affected as follows: ". . . when one's rights, privileges, or duties are directly and adversely affected by the [administrative] action . . ." CF&I Steel Corporation v. Colorado Air Pollution Control Commission, 199 Colo. 270, 610 P.2d 85, 91 (1980).

Bar 70's involvement in this case has been to protect its claims to junior water rights on the White River. If

Tosco's right to the second 100 c.f.s. is granted, that right will be senior to Bar 70's rights, which will result in 100 c.f.s. less water being legally available for Bar 70. In other words, but for Tosco's claim to the second 100 c.f.s. that water would be available to Bar 70 and every other water user with rights junior to Tosco.

The issue raised in this appeal which has been presented in Bar 70's Opening Brief, is whether Tosco could so tax the doctrine of relation back to use the activities undertaken during September 1976 field trip as the open physical manifestation of the intent to appropriate the second 100 c.f.s., which intent was not formed until the application was filed three years later. If future applicants are allowed to follow Tosco's course of conduct, applicants will be free to increase the amount of conditional water applied for anytime after the open manifestation of their intent, whether or not the intent, so manifested, bears any relationship to the amount of water ultimately claimed.

The aggrievement caused by entry of a decree in this case is that all water users, including Bar 70, who had or may have any claim to the second 100 c.f.s. or portion thereof will have rights which will be directly affected by the decree. According to the provisions of C.A.R. 1(e) and C.R.S. § 37-92-304(9), any of those affected parties could

seek an appeal had they entered their appearance in any authorized manner as Bar 70 has done.

CONCLUSION

Bar 70 entered its appearance pursuant to C.R.S. § 37-92-304(3) and fully participated in the hearing in this matter. As such, Bar 70 was a party in the case and accordingly had the right to appeal pursuant to C.R.S. § 37-92-304(9) and C.A.R. 1(e).

If this appeal is dismissed, a very important issue regarding the initiation of a water right will not be presented to this Court. The error alledged by Bar 70 goes to the issue of notice in the form of the physical manifestation of Tosco's intent to appropriate. If that notice was deficient under the law, persons who may be injured by the application may not be in this case. Bar 70 brought the notice issue to the attention of the Water Court, and has raised the issue in this appeal. It is incumbent upon this Court to protect those other water users just as it is incumbent upon this Court to protect Bar 70's interests.

Bar 70 as a party has raised the issues on appeal in its opening brief. The appeal should go forward, the judgment of the Water Court should be reversed, and the conditional water right for the second 100 c.f.s. of water should be denied.

Respectfully submitted this 5th day of December, 1983.

MUSICK AND COPE

By Robert C Kerr

Joseph A. Cope, 7633
Robert C. Kerr, 10234

P.O. Box 4579
Boulder, Colorado 80306
Telephone: (303) 447-1974
Colorado 1-800-332-2140

SPECIAL COUNSEL FOR APPEARANT-
APPELLANT BAR 70 ENTERPRISES, INC.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing SUPPLEMENTAL OPENING BRIEF OF APPELLANT was placed in the U.S. Mail, first class postage prepaid on this 5th day of December, 1983, addressed to the following:

David W. Brezina
Clerk of the Supreme Court
Colorado State Judicial Bldg.
2 E. 14th Ave.
Denver, Colorado 80203

H. Michael Spence, Esq.
Jacques S. Ruda, Esq.
1120 Colorado State Bank Bldg.
1600 Broadway
Denver, Colorado 80202

David Ladd, Esq.
Assistant Attorney General
1525 Sherman Street, 3rd Floor
Denver, Colorado 80203

Martha Dunne Healy