

9-1-2004

**WRWC, LLC v. City of Arvada, No. 02CV1622, 2004 Colo. App. LEXIS 1360 (Colo. Ct. App. July 29, 2004)**

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Jeff Gillie, Court Report, WRWC, LLC v. City of Arvada, No. 02CV1622, 2004 Colo. App. LEXIS 1360 (Colo. Ct. App. July 29, 2004), 8 U. Denv. Water L. Rev. 280 (2004).

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WRWC, LLC v. City of Arvada, No. 02CV1622, 2004 Colo. App. LEXIS 1360 (Colo. Ct. App. July 29, 2004)

plained that if the water court entered a decree and the federal court subsequently determined the United States violated federal law by amending its application, the doctrine of res judicata would prevent the United States from reopening the reserved water rights adjudication. When the court considered the “avoidable potential for conflict between state and federal courts,” it determined that comity favored the stay.

Finally, the court determined that since the federal court had exclusive jurisdiction over the federal claims, the Amendment’s goal of avoiding piecemeal litigation and achieving comprehensive adjudication did not apply to warrant lifting the stay. Balancing competing interests, the court stated the Colorado entities would not suffer as much prejudice from the stay as the environmental groups would suffer if the water court refused to grant the stay, because the Colorado entities were able to intervene in the federal case, but the environmental groups were not able to participate in the settlement negotiations.

The court found the district court retained exclusive jurisdiction over the environmental groups’ federal claims and the district court’s resolution of those claims could require the United States to claim a broader reserved water right for the Black Canyon. Accordingly, the court held that the water court acted within its discretion by staying its proceedings until the district court resolves the federal litigation. Additionally, the court noted the balance of prejudices and competing interests favored upholding the stay.

Justice Hobbs dissented, concluding the water court abused discretion by granting the stay. The dissent stated the court should vacate the stay order, and provided the following four supporting arguments. First, the dissent argued the federal court did not have exclusive jurisdiction over the federal claims and the Amendment favored federal courts to defer jurisdiction to state courts. Second, the dissent argued the stay would deprive the federal courts of the water court’s “comprehensive view of the interaction of all federal and state water rights on the Gunnison River.” Third, the dissent argued that the law favored settlements in proceedings like this where state and federal parties own rights to waters of the same stream. Finally, the dissent argued that by upholding the stay, the majority underemphasized the harm the stay causes to the State of Colorado and its water users by delaying finality. In summary, the court upheld the stay and remanded the case back to the water court.

*Elizabeth Frost*

**WRWC, LLC v. City of Arvada, No. 02CV1622, 2004 Colo. App. LEXIS 1360 (Colo. Ct. App. July 29, 2004)** (holding that a groundwater right, by itself, does not convey the right to use an easement appurtenant to the land the water underlies).

WRWC, L.L.C. (“WRWC”) filed suit in the Jefferson County District Court against the City of Arvada (“Arvada”) and Avset Management Services, L.L.C. (“Avset”) alleging that Avset’s planned subdivision would interfere with WRWC’s use of a road easement that crossed Avset’s land. WRWC also claimed Arvada substantially interfered with WRWC’s right to use a road easement across land that Veldkamp Flowers (“Veldkamp”) had earlier conveyed to Arvada. Both easements were appurtenant easements providing access to Veldkamp’s land, which overlaid WRWC’s groundwater right and was the dominant estate. WRWC requested a preliminary injunction preventing Arvada and Avset from adversely affecting WRWC’s use of the easements. Arvada and Avset in turn requested summary judgment. The trial court found that because WRWC only owned a non-tributary groundwater right and some easements on Veldkamp’s land. Further, WRWC’s interests did not entitle WRWC to use of the easements on either Avset or Arvada’s land. Therefore, WRWC lacked standing and the trial court granted Arvada’s motion for summary judgment. WRWC appealed to the Colorado Court of Appeals.

On appeal, WRWC made three arguments supporting its contention that it was entitled to use the road easement, which the court considered and rejected in turn. First, WRWC argued that because it owned groundwater rights under Veldkamp’s land, it possessed an interest in Veldkamp’s dominant estate sufficient to entitle it to use of the road easement. The court, however, did not agree with this argument. The court reasoned that WRWC’s groundwater right did not convey to WRWC the right to use the easement appurtenant to Veldkamp’s land, because an appurtenant easement generally cannot benefit property other than the dominant estate and Colorado water rights are separate from interests in land.

Next, WRWC argued that its ownership of easements on Veldkamp’s land constituted sufficient interest in Veldkamp’s land to support WRWC’s use of the road easement. On this point, the court found that although the agreement governing WRWC’s easement on Veldkamp’s land stated that the easement “runs with the land,” the agreement did not create a possessory interest to which an easement appurtenant could attach. Therefore, in the absence of a possessory interest WRWC’s easement could not entitle WRWC to use of the road easement, even in conjunction with WRWC’s groundwater right.

Lastly, WRWC argued that the trial court should not have granted summary judgment because further discovery might establish WRWC’s right to use the road easement under alternative theories such as estoppel or easement by prescription. Here, the court stated that WRWC did not raise the issue at trial, so WRWC could not raise it on appeal. The court also stated that in opposing summary judgment WRWC had the burden to set forth specific facts demonstrating the existence of a

genuine issue for trial. The court declared that WRWC's speculation, as to what additional discovery may uncover, was insufficient to meet this burden. Moreover, the court noted that under the Colorado Rules of Civil Procedure, WRWC could have moved for a continuance to conduct further discovery. However, WRWC did not.

In conclusion, the Colorado Court of Appeals rejected all of WRWC's arguments and affirmed the trial court's entry of summary judgment.

*Jeff Gillio*

## CONNECTICUT

**Ace Equipment Sales, Inc. v. Buccino, 848 A.2d 474 (Conn. App. Ct. 2004)** (holding owners of property abutting a non-navigable pond created by a dam have a right to use the pond for recreational purposes when (1) the owners have an obligation to maintain the dam, (2) when the pond bed is owned by another party, and (3) when the owners' deed gives them use of the waterway for industrial purposes).

Hall's Pond ("Pond") is a man-made, non-navigable pond created by damming Conat Brook. Ace Equipment Sales, Inc. ("Ace") and the Buccino family are the only owners of land abutting the Pond and both gained their ownership rights subsequent to the dam's erection. The Buccinos own the deeded right to use the water from the Pond to operate a downstream mill and factory. They also have an obligation to maintain the dam pursuant to an order from the department of environmental protection. Ace owned subaqueous land under the Pond and brought suit seeking a declaratory judgment, injunctive relief, and damages, to preclude the Buccinos from using the Pond for recreational purposes. The Buccinos counterclaimed seeking injunctive relief, a declaratory judgment, and damages. The Superior Court, Judicial District of Tolland, granted Buccinos' motion for summary judgment and awarded damages and injunctive relief. Ace subsequently appealed to the Appellate Court of Connecticut.

Ace relied on the common law rules that stated ownership of the bed beneath a non-navigable lake or pond gave the owner exclusionary rights of use and riparian rights did not attach to merely abutting landowners. Ace further claimed that because the Buccinos' chain of title granted them the right to use the Pond for industrial purposes, specifically to operate a mill and factory that express grant impliedly prohibited them from using the Pond for other purposes, including recreation.

Rather than following the common law rules purported by Ace, the court instead adopted the civil law rule. The civil law rule does not allow owners of subaqueous land under a pond to preclude the use of the pond to abutting landowners who control the existence of the pond itself and use it for recreational purposes. This rule treats ripar-