Denver Law Review

Volume 58 | Issue 3 Article 11

February 2021

Pre-Enforcement Judicial Review: CF & (and) I Steel Corp. v. Colorado Air Pollution Control Commission

Michael Pennington

PRE-ENFORCEMENT JUDICIAL REVIEW: *CF&I STEEL CORP. V. COLORADO AIR POLLUTION CONTROL COMMISSION*

INTRODUCTION

On March 3, 1980, the Colorado Supreme Court, sitting *en banc*, again laid to rest the notion that a person must first violate a statute before its validity can be challenged in court. In *CF&I Steel Corp. v. Colorado Air Pollution Control Commission*,[1] the court reaffirmed its holding in *Colorado State Board of Optometric Examiners v. Dixon*,[2] which first laid the idea to rest in 1968. Two separate cases, *CF&I Steel Corp. v. Colorado Air Pollution Control Commission*[3] and *Colorado Ute Electric Association v. Colorado Air Pollution Control Commission*,[4] had been consolidated because of identical issues. Both actions challenged the validity of certain regulations[5] promulgated by the Colorado Air Pollution Control Commission (the Commission), which the trial court, in each case, had found valid.[6]

Both plaintiffs, CF&I and Colorado Ute, appealed the district court judgments, and, at oral argument, the court of appeals raised *sua sponte* the issue of petitioners' standing to seek judicial review.[7] Interpreting the Colorado Administrative Procedure Act (APA),[8] the court concluded that neither CF&I nor Colorado Ute qualified as "aggrieved or adversely affected" parties since the regulations had not yet been specifically applied against them, and that, therefore, both lacked standing to seek judicial review.[9] The court also concluded that a rule of general application does not constitute final agency action and that Colorado Ute had not suffered injury in fact because it had not applied for and been denied a permit.[10]

I. STANDING TO SEEK JUDICIAL REVIEW

Until 1970, the view of the United States Supreme Court was that a

1. 610 P.2d 85 (Colo. 1980).

2. 165 Colo. 488, 440 P.2d 287 (1968).

3. 606 P.2d 1306 (Colo. App. 1978), *rev'd*, 610 P.2d 85 (Colo. 1980). The other parties in *CF&I Steel* are the respondents Colorado Department of Health, its Division of Administration, and the Air Pollution Control Division of the Division of Administration.

4. 41 Colo. App. 393, 591 P.2d 1323 (1978), *rev'd*, 610 P.2d 85 (Colo. 1980). The other petitioners in *Colorado Ute* are Colorado Association of Commerce and Industry, Tri-State Generation and Transmission Association, Inc., City of Colorado Springs, and Public Service Company of Colorado. The other respondents are the individual members of the Commission, the Air Pollution Control Division of the Colorado Department of Health, Dr. Edward G. Dreyfus, Executive Director, and Environmental Defense Fund.

5. CF&I Steel Corp., a manufacturer of iron and steel products, challenged regulation No. 1, § II.D., known as the "fugitive dust regulation." Colorado Ute Electric Association, Inc., challenged regulation No. 3, § IIH.1.a., which establishes emission standards.

6. 610 P.2d at 88. These regulations were adopted pursuant to the Colorado Air Pollution Control Act of 1970, COLO. REV. STAT. §§ 25-7-101 to -129 (1973).

7. 610 P.2d at 88.

8. COLO. REV. STAT. §§ 24-4-101 to -107 (1973) [hereinafter cited as APA].

9. 606 P.2d at 1307; 41 Colo. App. at 397-98, 591 P.2d at 1327.

10. 41 Colo. App. at 397-98, 591 P.2d at 1327.

person seeking judicial review of an administrative decision must have a legally protected interest adversely affected by the challenged action and that the right invaded must be more than an economic or personal interest—it had to be a right recognized by statute or common law.[11] Over the years, requirements for standing had been gradually liberalized,[12] culminating in a rewriting of standing law in *Association of Data Proecessing Service Organizations v. Camp*.[13]

The petitioners in *Data Processing*, who sold data processing services to businesses, challenged a ruling by the Comptroller of the Currency permitting national banks to make data processing services available to other banks as an incident of their banking services. The Eighth Circuit, applying the legal interest test, affirmed the district court's dismissal for lack of standing.[14] In reviewing the decision, the Supreme Court laid out two tests for standing: first, the challenged action must have caused the plaintiff injury in fact, and second, the interest sought to be protected must be arguably within the zone of interests to be protected by the statute in question.[15] The legal interest test was rejected as a criterion for standing because it went to the merits of the case.[16]

In a recent standing decision, *Simon v. Eastern Kentucky Welfare Rights Organization*,[17] the Supreme Court reaffirmed both *Data Processing* tests and divided the injury in fact question into two parts: first, whether the challenged action has caused injury in fact, and second, whether the injury is likely to be redressed by the relief sought.[18] The respondents, several low income individuals and organizations representing such individuals, failed to satisfy either part of the injury in fact test and were denied standing to challenge an Internal Revenue Service policy which they claimed encouraged hospitals to deny services to indigents.[19]

Despite the result in *Eastern Kentucky*, it appears that the liberalizing trend in standing requirements is here to stay. Now, with the relative ease of satisfying the *Data Processing* test, the focus of justiciability has shifted to the issue of ripeness.[20]

II. RIPENESS

Once the plaintiff has established standing to seek judicial review, the court must still decide if the controversy is "ripe" for review. A major con-

11. Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1938); Alabama Power Co. v. Ickes, 302 U.S. 464 (1938).

12. *See, e.g.*, Hardin v. Kentucky Util. Co., 390 U.S. 1 (1968); FCC v. Sanders Bros., 309 U.S. 470 (1940).

13. 397 U.S. 150 (1970); *accord*, Barlow v. Collins, 397 U.S. 159 (1970).

14. Association of Data Processing Serv. Organizations v. Camp, 406 F.2d 837, 843 (8th Cir. 1969).

15. 397 U.S. at 152-53.

16. *Id.*

17. 426 U.S. 26 (1976).

18. *Id.* at 38.

19. *Id.* at 42-43.

20. For a general discussion of the ripeness doctrine, see Vining, *Direct Judicial Review and the Doctrine of Ripeness in Administrative Law*, 69 MICH. L. REV. 1443 (1971).

cern of the ripeness doctrine is that courts not waste their time reviewing agency orders that are still subject to revision and, therefore, not final.[21] This concern, however, must be weighed against the need of the aggrieved party to have immediate relief from the alleged harm. As the Supreme Court explained in *Abbott Laboratories v. Gardner*,[22] the basic rationale of the ripeness doctrine "is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."[23]

Abbott Laboratories upheld pre-enforcement review of a regulation requiring drug manufacturers to print the established name of the drug prominently on labels.[24] The Supreme Court analyzed the ripeness problem as requiring an evaluation of both the fitness of the issues for judicial review and the hardship resulting from withholding review.[25] Expanding this analysis, it concluded that where the legal issue is suitable for judicial consideration, review should be granted, despite lack of enforcement, if the regulation requires an immediate and significant change in the parties' conduct, with serious penalties for noncompliance.[26] In allowing pre-enforcement review, the Court apparently felt it would have been unfair to force the drug companies to risk criminal penalties and adverse public reaction in order to test the validity of an administrative decision.

III. RIPENESS IN COLORADO LAW

A. *The Old View*

An early Colorado case, *City of Denver v. Beede*,[27] dealt with the question of pre-enforcement review of an ordinance. Beede, proprietor of the Orpheum theatre, sought an injunction preventing the city of Denver from enforcing an ordinance prohibiting Sunday theatrical performances.[28] The Colorado Supreme Court held that, since the invalidity of the ordinance could be determined in an action to enforce the ordinance, Beede was not without an adequate and complete remedy at law, and, therefore, the injunctive power of a court of equity could not be invoked.[29] To test the validity, Beede had to be willing to take the risk of violating the ordinance.[30]

In *Farmers' Dairy League v. City of Denver*,[31] the court again held that the plaintiff must first violate the statute and then bring up its unconstitutional-

21. *See generally* L. JAFFEE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION, ch. 10 (1965).
22. 387 U.S. 136 (1967).
23. *Id.* at 148-49.
24. *Id.* at 154.
25. *Id.* at 152-53.
26. *Id.* at 154.
27. 25 Colo. 172, 54 P. 624 (1898).
28. *Id.* at 172-73, 54 P. at 626.
29. *Id.* at 175, 54 P. at 625.
30. *Id.* at 175, 54 P. at 627; *accord*, Brunstein v. City of Fort Collins, 53 Colo. 254, 125 P. 119 (1912); City of Canon City v. Manning, 43 Colo. 144, 95 P. 537 (1908).
31. 112 Colo. 399, 149 P.2d 370 (1944).

ity as a defense.[32] *Farmers' Dairy* was relied on heavily in *Colorado State Board of Examiners of Architects v. Rico*,[33] in which an architect sought a declaratory judgment to restrain the Board on the grounds that the statute providing for licensing and regulation of architects was unconstitutional.[34] The court held in *Rico* that a declaratory judgment may not be used to seek judicial review of a statute that adversely affects a particular person, because the proper remedy is to violate the statute and raise its invalidity as a defense.[35]

B. *The New View*

The rather calloused view of *Rico* and its predecessors remained the law in Colorado[36] until *Rico* was expressly overruled by *Colorado State Board of Optometric Examiners v. Dixon*.[37] Dixon and other optometrists sought declaratory and injunctive relief against enforcement of a regulation that prescribed the location in which optometrists could conduct their profession.[38] The optometrists also sought judicial review of the Optometric Board's action under the Colorado APA.[39]

Colorado's APA establishes a uniform system of rulemaking and licensing procedures for state agencies. The judicial review section of the APA provides that any person adversely affected or aggrieved by a final agency action is entitled to judicial review of that action.[40]

In *Dixon*, the Optometric Board contended that the trial court lacked jurisdiction to grant a preliminary injunction restraining the Board because no final action had been taken,[41] thereby making the APA judicial review provisions inapplicable. The court rejected this argument and held that the

---

32. *Id.* at 405, 149 P.2d at 372.
33. 132 Colo. 437, 289 P.2d 162 (1955).
34. *Id.* at 438, 289 P.2d at 163.
35. *Id.* at 442-43, 289 P.2d at 165.
36. *But see* Memorial Trusts v. Beery, 144 Colo. 448, 356 P.2d 884 (1960).
37. 165 Colo. 488, 440 P.2d 287 (1968).
38. *Id.* at 491, 440 P.2d at 288.
39. APA, *supra* note 8.
40. The judicial review section reads, in part:

> (1) In order to assure a plain, simple, and prompt judicial remedy to persons or parties adversely affected or aggrieved by agency actions, the provisions of this section shall be applicable.
> (2) Final agency action under this or any other law shall be subject to judicial review as provided in this section, whether or not an application for reconsideration has been filed, unless the filing of an application for reconsideration is required by the statutory provisions governing the specific agency . . . .
> (3) An action may be commenced in any court of competent jurisdiction by or on behalf of an agency for judicial enforcement by any final order of such agency. In such action, any person adversely affected or aggrieved by such agency action may obtain judicial review of such agency action.
> (4) Any person adversely affected or aggrieved by any agency action may commence an action for judicial review in the district court within thirty days after such agency becomes effective . . . .

COLO. REV. STAT. § 24-4-106 (Supp. 1979).

41. 165 Colo. at 491-92, 440 P.2d at 289. The final "action" referred to was the occurrence of the effective date of the regulation. The complaint was filed on May 27, 1966, but the effective date was June 1. Therefore, the Board argued, the district court was without jurisdiction to issue an injunction.

regulation at issue did constitute final agency action and, therefore, was subject to judicial review.[42]

In regard to the issue of pre-enforcement review of the regulation, the court considered the Uniform Declaratory Judgments Act[43] and rule 57(b) of the Colorado Rules of Civil Procedure.[44] Exercising the liberal construction expressly required by the statute and rule, the court rejected the proposition that an aggrieved person must first violate a statute before its validity can be tested in court.[45] In doing so, the court expressly overruled *Rico* and those cases following it.[46] Thus, in *Dixon*, the court clearly changed the law concerning pre-enforcement review and brought Colorado into harmony with a substantial and growing number of jurisdictions.[47]

The cases on judicial review decided after *Dixon* appear to follow the rule laid down there,[48] although there is some reason for confusion. As will be discussed later in this comment, the court of appeals relied on several of these confusing cases in support of its *Colorado Ute* opinion.[49]

IV. *CF&I STEEL*

In the instant case, the Colorado Supreme Court reaffirmed *Dixon* and clarified the Colorado law on standing and pre-enforcement review. It remains unclear, however, why the court of appeals chose to ignore *Dixon*.[50]

In ruling that the plaintiffs lacked standing under the APA, the court of appeals relied on its determination that the regulations in question were of general application.[51] According to its interpretation of the APA, a party has sufficient interest and standing to seek judicial review only if the rule or order commands or prohibits action on the part of that specific individual.[52] If the command or prohibition, however, is nonspecific as to whom it applies or merely formulates licensing procedures or regulatory criteria, then persons who may be subject to it are not adversely affected until the rule or order has

---

42. *Id.* at 492-93, 440 P.2d at 289.

43. The pertinent part reads as follows: "Any person interested . . . or whose rights, status, or other legal relations are affected . . . may have determined any question of construction or validity . . . and obtain a declaration of rights, status, or other legal relations thereunder." COLO. REV. STAT. § 13-51-106 (1973).

44. COLO. R. CIV. P. 57(b) reads the same as COLO. REV. STAT. § 13-51-106 (1973).

45. 165 Colo. at 494, 440 P.2d at 290.

46. *Id.*

47. As Justice Pringle wrote for the court:

> In these days when respect for the law and conformity to it are of prime concern to all, it seems to us inappropriate to continue to demand that one adversely affected by a law which he contends is invalid on its face violate that law in order to obtain a declaration of its validity or invalidity.

Id.

48. *Accord*, Johnson v. District Court, 195 Colo. 169, 576 P.2d 167 (1978); Moore v. District Court, 184 Colo. 63, 518 P.2d 948 (1974). *Contra*, Wimberly v. Ettenberg, 194 Colo. 163, 570 P.2d 535 (1977); Cimarron Corp. v. Board of County Comm'rs (El Paso), 193 Colo. 164, 563 P.2d 946 (1977); Board of County Comm'rs (Otero) v. State Bd. of Social Servs., 186 Colo. 435, 528 P.2d 244 (1974).

49. *See* notes 82-95 *infra* and accompanying text.

50. Although Justice Coyte, in his dissenting opinion, relied on *Dixon* to reach a completely different result, the majority did not even mention the case. 41 Colo App. at 400, 591 P.2d at 1328.

51. 41 Colo. App. at 398, 591 P.2d at 1327.

52. *Id.*

been specifically applied to them.[53]

This interpretation would severely limit judicial review of administrative action. Although licensing and adjudicatory proceedings might not be excluded because they usually pertain to a specific party, most rulemaking proceedings would be excluded, since, under the APA, a rule can only be challenged within thirty days of its effective date.[54] This would generally preclude review, since the aggrieved party would have to await enforcement before a challenge could be initiated. According to the Colorado Supreme Court, this was definitely not the intent of the judicial review provisions of the APA.[55]

The supreme court's interpretation was in accord with the intent of the Colorado General Assembly, which, in response to the court of appeals' interpretation of ripeness in *CF&I Steel* and *Colorado Ute*, passed two amendments to the APA.[56] The first added a definition of "aggrieved" which included the concept of *potential* loss or injury.[57] This eliminated the need to await enforcement before achieving the status of "aggrieved party." The second amendment[58] made it clear that once a rule becomes effective it is final agency action for purposes of judicial review. This defeated the court of appeals' holding that promulgation of a rule is not final agency action until it has actually been applied to a specific person.[59]

The court of appeals' opinion in *Colorado Ute* implied that an "aggrieved or adversely affected" party is one whose rights, privileges, or duties are directly and adversely affected by the action.[60] For this proposition, *Board of County Commissioners (Otero) v. State Board of Social Services*[61] was cited. The Colorado Supreme Court distinguished this case on the grounds that the issue in *Otero* was whether the county commissioners were a party, not whether they were adversely affected or aggrieved.[62]

The Attorney General, representing the Commission, agreed with CF&I that it had standing to seek a declaratory judgment, but disagreed that it had standing to seek judicial review under the APA.[63] This disagreement was based not on the appellate court's decision that CF&I was not adversely affected or aggrieved, but rather on the Attorney General's argument that

53. *Id.*

54. COLO. REV. STAT. § 24-4-106(4) (Supp. 1979).

55. 610 P.2d at 91.

56. *Hearings on S.B. 491 Before the Colo. Senate Comm. on the Judiciary*, 52d Gen. Assembly, 1st Sess., March 21, 1979.

57. The amendment reads: " 'Aggrieved,' for the purpose of judicial review of rule making, means having suffered actual loss or injury or being exposed to potential loss or injury to legitimate interests including, but not limited to, business, economic, aesthetic, governmental, recreational, or conservational interests." COLO. REV. STAT. § 24-4-102(3.5) (Supp. 1979).

58. The amendment reads: "Once a rule becomes effective, the rule-making process shall be deemed to have become final agency action for judicial review purposes." COLO. REV. STAT. § 24-4-103(5) (Supp. 1979).

59. 41 Colo. App. at 397, 591 P.2d at 1327.

60. *Id.*

61. 186 Colo. 435, 528 P.2d 244 (1974). For an interesting discussion of this case, see Comment, *Standing of State Political Subdivisions to Challenge State Agency Rulings Under the Colorado Administrative Procedure Act*, 53 DEN. L.J. 437 (1976).

62. 610 P.2d at 91.

63. *Id.*

CF&I was not a "party" under the APA.[64] Since CF&I had never been admitted as a party[65] to the Department of Health's hearing on fugitive dust, according to the Attorney General, it was thereby precluded from judicial review of a regulation resulting from those proceedings.[66] In support of this contention that standing under the APA required party status at the agency proceedings, *Otero* was cited.[67]

In responding to this argument, the court implied that the APA should be read in its entirety and given the broadest interpretation possible to facilitate prompt judicial review of agency action.[68] The court viewed the Attorney General's definition of "party" as requiring too heavy a burden on persons seeking to preserve their rights to judicial review.[69] In particular, it noted that one would be required to have filed an alternative proposal to preserve the right to judicial review, even though not disagreeing with the proposed regulation. The court concluded that such could not have been the intent of the legislature.[70]

Another issue before the court concerned the appropriateness of a declaratory judgment procedure as a means to seek review of a regulation.[71] The court of appeals concluded that Colorado Ute sought declaratory relief only for a *conjectural* conflict since it had not sought and been denied a permit under the air quality standards set forth in regulation No. 3.[72] Also, the court found CF&I to be only a *potential* violator of the fugitive dust regulation.[73] Thus, as the court of appeals viewed the cases, both Colorado Ute and CF&I sought only advisory opinions in regard to the effect of the regulations on possible future plans.[74] Since the Uniform Declaratory Judgments Act may not be used to obtain advisory opinions, its use would have been inappropriate in these cases.[75]

The court of appeals also maintained that neither the imminent prospect of enforcement of a regulation nor the promulgation of regulations constituted a proper basis for a declaratory judgment.[76] In support of this position it relied on a rule, originally announced in *Heron v. City of Denver*[77]

64. COLO. REV. STAT. § 24-4-102(11) (1973), defines party as "any person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any court or agency proceeding subject to provisions of this article."

65. The Air Pollution Control Act of 1970, COLO. REV. STAT. § 25-7-109 (1973), requires a person opposed to a proposed regulation to file an alternative proposal in order to cross-examine witnesses at the rulemaking proceedings. CF&I did not propose an alternative and thus was not a "party," according to the Attorney General.

66. Answer Brief of Respondents to CF&I at 9, CF&I Steel Corp. v. Colorado Air Pollution Control Comm'n, 610 P.2d 85 (Colo. 1980).

67. *Id.*

68. 610 P.2d at 91.

69. *Id.*

70. *Id.* at 92.

71. *Id.*

72. 41 Colo. App. at 399, 591 P.2d at 1328.

73. 606 P.2d at 1307.

74. 41 Colo. App. at 399, 591 P.2d at 1328.

75. *Id.*; *accord*, Farmers Elevator Co. v. First Nat'l Bank, 176 Colo. 168, 489 P.2d 318 (1971); American Fed'n of Labor v. Reilly, 113 Colo. 90, 155 P.2d 145 (1944); Gabriel v. Board of Regents, 83 Colo. 582, 267 P. 407 (1928).

76. 41 Colo. App. at 399, 591 P.2d at 1328.

77. 159 Colo. 314, 411 P.2d 314 (1966).

and followed in *Cimarron Corp. v. Board of County Commissioners*,[78] which suggested that there must be evidence that the challenged regulation has been applied against the plaintiff before a declaratory judgment would be appropriate.[79]

The Colorado Supreme Court dismissed the "advisory opinion" argument by merely applying the Uniform Declaratory Judgments Act[80] and by reiterating the *Dixon* principle that one need not risk violating a statute before seeking a declaratory judgment concerning its validity.[81] This perfunctory treatment was deserved, but the argument supported by *Heron* and *Cimarron* should have been given a more extensive analysis.

V. CONFUSING CASES

In *Heron*, a professional engineer sought a declaratory judgment on the validity of an ordinance requiring certain drawings to have an architect's seal.[82] Since the engineer had not actually submitted drawings without such a seal, the Colorado Supreme Court determined that there was no justiciable issue and held that a declaratory judgment was inappropriate in those circumstances.[83]

Insofar as *Heron* suggests that a declaratory judgment is inappropriate for pre-enforcement challenge of a regulation, it was overruled by *Dixon*.[84] In *Cimarron*, however, which was decided after *Dixon*, *Heron* was cited by the court for the very proposition for which it was supposedly overruled.[85] As was noted by CF&I, *Heron* was only used by the *Cimarron* court to dispose of some minor issues,[86] and its use cannot be seen as an intentional derogation of the *Dixon* principle.[87] Nevertheless, if the appellate court was confused on the state of the law, the carelessness displayed in *Cimarron* may explain why.

Another case that the court of appeals apparently misunderstood is *Wimberly v. Ettenberg*.[88] A group of bail bondsmen sought relief for pecuniary injuries that they alleged had resulted from a pre-trial release program allowing defendants to deposit ten percent of their bail as a condition to re-

78. 193 Colo. 164, 563 P.2d 946 (1977).

79. *Id.* at 169, 563 P.2d at 949; 159 Colo. at 318, 411 P.2d at 315.

80. COLO. REV. STAT. §§ 13-51-101 to -115 (1973). The pertinent part is quoted, *supra* note 43.

81. 610 P.2d at 92.

82. 159 Colo. at 316, 411 P.2d at 315.

83. *Id.*

84. 165 Colo. at 494, 440 P.2d at 290. *Dixon* expressly overruled *Rico* and any cases following it. Although *Heron* did not cite *Rico*, it did cite Corliss v. City of Westminister, 153 Colo. 551, 487 P.2d 272 (1963), which relied on *Rico*.

85. 193 Colo. at 169, 563 P.2d at 949.

86. The *Cimarron* court stated:

> Appellants attack several other county regulations as inconsistent with section 30-28-133(4)(a) or violative of due process. The record, however, contains no evidence that the challenged portions of these regulations have ever been applied against appellants or the class they represent. On such facts, a declaratory judgment is inappropriate. *Heron v. Denver*, 159 Colo. 314, 411 P.2d 314.

id.

87. Brief of Petitioner CF&I at 20-21, CF&I Steel Corp. v. Colorado Air Pollution Control Comm'n, 610 P.2d 85 (Colo. 1980).

88. 194 Colo. 163, 570 P.2d 535 (1977).

lease.[89] The court held that standing required injury in fact resulting directly from the violation of a legal right.[90] What this meant, as was later explained, is that an injury alleged to have *already* occurred must be an injury in fact resulting directly from the violation of a legal right. If the injury has not already occurred, then it need only be a *threat* of injury in fact.[91]

The *Colorado Ute* court found, in the loose language of *Wimberly*, support for its holding that a mere threat of a future permit denial is not sufficient to give Colorado Ute standing, since it had not yet suffered injury in fact.[92] Of course, this interpretation completely ignores the present injury to Colorado Ute resulting from the uncertainty of its position.[93] As was pointed out by *Colorado Ute* petitioners, substantial sums of money are expended on a project for planning, engineering, land acquisition, and other items before a permit application is ever submitted.[94] Some of this pre-application expense would be unnecessary if the regulation later were found invalid. Thus, the uncertainty of Colorado Ute's pre-enforcement position did cause actual, not just threatened, injury, and that the appellate court chose to ignore this injury suggests that something other than the misleading language of *Wimberly* caused the misinterpretation of the law.

Furthermore, if the court of appeals thought *Wimberly* represented a pulling away from the *Dixon* principle, it did not need to look far to discover that this was a mistaken view. In *Johnson v. District Court*,[95] the *Dixon* principle was reaffirmed, indicating that the court had no intention of retreating from the rule announced in *Dixon*.

As the preceding analysis may suggest, the truly interesting question raised by the instant case is why the court of appeals ruled as it did. Even allowing for a certain degree of ambiguity in the relevant case law, one cannot help but wonder why a case such as *Dixon* was not even mentioned in the appellate court's opinion.[96] Also, one wonders why, when neither the trial court nor the respondents recognized a standing problem, the court of appeals decided, after only brief questioning at oral arguments, that petitioners lacked standing without even requesting briefs on the issue.[97]

Colorado Ute respondents suggested the key to the appellate court's error might be due to a misperception that it was being asked to review the reasonableness of state ambient air quality standards, whereas in fact the issue for review was the validity of the regulation requiring adherence to those standards.[98] Petitioners created this misperception, according to respon-

89. *Id.* at 165, 570 P.2d at 537.
90. *Id.* at 168, 570 P.2d at 539.
91. 610 P.2d at 92.
92. 41 Colo. App. at 398, 591 P.2d at 1327.
93. Vining, *supra* note 20, at 1446, suggests that those affected by a regulation may be indifferent to the outcome of their challenge, simply desiring certainty so they can plan.
94. Opening Brief of Petitioners Colorado Ute at 11-12, CF&I Steel Corp. v. Colorado Air Pollution Control Comm'n, 610 P.2d 85 (Colo. 1980).
95. 195 Colo. 169, 576 P.2d 167 (1978).
96. *See* note 50 *supra*.
97. Answer Brief of Respondents to Colorado Ute at 5, CF&I Steel Corp. v. Colorado Air Pollution Control Comm'n, 610 P.2d 85 (Colo. 1980).
98. *Id.* at 9.

dents, by arguing extensively regarding the reasonableness of certain air quality standards to support their contention that the Commission was exceeding its authority in requiring adherence to state standards that were more strict than corresponding federal standards.[99] In reply, petitioners vehemently denied having ever challenged the air quality standards, but they did not refute the suggestion that they may have misled the court.[100]

Whatever the explanation for the appellate court's ruling, it is interesting to note that it soon found it necessary to clarify and limit the rule announced in *Colorado Ute*. In *Augustin v. Barnes*,[101] it explained that the regulations at issue in *Colorado Ute* were only broad general guidelines as to criteria for determining whether permits would be granted, and, as such, did not impose a specific standard of conduct, nor were they directed at a specific individual.[102] The regulation in *Augustin*, in contrast, had immediate, specific, and readily ascertainable effects, and, under these conditions, pre-enforcement judicial review was appropriate.[103] Although this distinction may make the *Colorado Ute* decision seem a bit more logical, it does not make it any more acceptable.

CONCLUSION

The mystery which permeates this case does not cloud the Colorado Supreme Court's holding. If there was ever any reason to be confused about the court's position on pre-enforcement judicial review, the instant case should remove such reason. One adversely affected by an agency action, including promulgation of regulations, may seek judicial review of that action without risking penalties for violating it, and the APA judicial review provisions are to be broadly interpreted to provide prompt access to the courts.

As the presence and impact of regulatory actions have become more and more widely felt in recent years, the pressure on the legal system to permit pre-enforcement judicial review has increased.[104] The court's response to this pressure is laudable and should expedite the administrative rulemaking process for the benefit of all.

Michael Pennington

99. *Id.* at 10.
100. Reply Brief of Petitioners Colorado Ute at 2, CF&I Steel Corp. v. Colorado Air Pollution Control Comm'n, 610 P.2d 85 (Colo. 1980).
101. 41 Colo App. 433, 592 P.2d 9 (1978).
102. *Id.* at 434-35, 592 P.2d at 10.
103. *Id.* at 435, 592 P.2d at 10.
104. Vining, *supra* note 20, at 1452.