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## Shirola v. Turkey Caion Ranch Ltd. Liab. Co., 937 P.2d 739 (Colo. 1997)

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order to compel the release of Left Hand's shareholder list. The court dismissed the action finding that Colorado Revised Statutes section 7-5-117 of the Colorado Corporation Code, which grants a right of inspection to corporate shareholders of the shareholder list, does not apply to mutual ditch companies as they are not "for profit" enterprises. Further, the court held that any common law right of inspection was superseded by the Corporation Code. The court of appeals reversed the trial court's decision and held that section 7-5-117 does apply to mutual ditch companies.

The Colorado Supreme Court addressed the issue of whether mutual ditch company shareholders have either a statutory or common law right to inspect the company's shareholder list. The court found that although the Corporation Code does not apply to mutual ditch companies, shareholders in ditch companies do have a common law right to inspect such companies' shareholder lists.

The court cited its previous case law which indicated that because the "stock" owned by mutual ditch company shareholders is water, which they may apply to a beneficial use, such "stock" is real property. However, traditional corporate stock is considered personal property. Thus, mutual ditch companies are not "true" corporations in a legal sense. The court concluded, therefore, that mutual ditch companies are special purpose corporations which are not governed by the Colorado Corporation Code.

Further, the court determined that no other statutes confer upon mutual ditch company shareholders the right to inspect the company's shareholder list. However, the court cited its previous holdings that indicated shareholders have a "fundamental" common law right to inspect nonprofit water corporation shareholder lists. Relying on the court's ruling in *Dines v. Harris*, the court found this right should be "zealously guarded."

The court did not attempt to determine the level of propriety necessary for inspection under the common law right. It did conclude, however, that the Hills' reasons for inspection did meet the "proper purpose" standard for inspection of a shareholder list as delineated in section 7-5-117(2).

*David A. Laird*

**Shirola v. Turkey Cañon Ranch Ltd. Liab. Co., 937 P.2d 739 (Colo. 1997)** (holding that owners of unadjudicated statutorily exempt wells have vested water rights and have standing to assert injury to those rights upon the filing of an application for adjudication of those rights with the water court).

Turkey Cañon Ranch planned to develop a subdivision on 323 acres of land in El Paso County, Colorado. Turkey Cañon sought to provide water to the subdivision by drilling two wells into the fractured

Manitou Limestone Formation underlying portions of Turkey Cañon's land. Withdrawal from the wells would deplete surface water from both the Turkey Creek and Red Creek drainages. Both drainages are tributary to the Arkansas River.

On February 24, 1994, Turkey Cañon applied to the water court and requested approval of a conditional water right and an accompanying plan of augmentation relating to the two wells. Several parties objected to the application. The objectors consisted primarily of forty small domestic well owners. Their wells are defined by Colorado Revised Statutes section 37-92-602 (1990) as "602 wells". Such "602 wells" are exempt from adjudication as they are entitled to a presumption that they will not materially injure the water rights of others. However, the owners of exempt wells may file for and obtain adjudication.

In July 1995, Turkey Cañon filed applications with the State Engineer for well permits. The State Engineer denied the applications because all of the relevant water sources were over-appropriated.

On September 8, 1995, the water court entered a decree approving Turkey Cañon's conditional right and plan of augmentation. The water court found that all of the exempt well owners, except those who had adjudicated their rights, lacked standing to assert injury to their water rights because they had failed to adjudicate those rights.

The primary issue the Colorado Supreme Court faced was whether owners of unadjudicated exempt wells have "vested water rights," as defined in Colorado Revised Statutes section 37-92-305(3) (1990), and therefore have standing to assert injury to their rights in water court. The court held that owners of exempt wells have "vested water rights" and may assert injury to these rights *after* they have filed for adjudication of their water rights.

The court reasoned that although an exempt well owner has a "vested water right" before adjudication, the priority of that right is not legally enforceable until the owner files an application for adjudication with the water court. Upon application, the "owner has a statutorily guaranteed expectation of the original priority date of the well" as the well's priority relates back to the first date of appropriation upon adjudication pursuant to section 37-92-602(4). Therefore, an exempt well owner's water right, which is already vested, becomes legally enforceable upon filing an application for adjudication, thus allowing the owner to assert injury to that right. From a practical standpoint, the court was concerned that to hold otherwise would result in a flood of applications from exempt well owners who wished to ensure standing if and when their water rights were injured.

The court finished its opinion with several factual and legal conclusions. First, the State Engineer, upon receipt of a permit application for a nonexempt well, must determine whether that well will cause material injury to the vested water rights of others, including injury to exempt wells, adjudicated or not. Although the State Engineer in this case did not inspect the objectors' exempt wells for injury, the court concluded that this was not an issue because the State Engineer de-

nied Turkey Cañon's applications due to insufficient amounts of unappropriated water.

Second, the objecting well owners who were denied standing in the water court sought a new trial. The court refused a trial *de novo* because certain findings of the water court were unrelated to the exempt well owners' assertions. However, the court did remand the case to the water court to address those issues for which the objectors could present a *prima facie* showing of injury.

Third, the court instructed that on remand the water court must determine whether Turkey Cañon's application for conditional rights, along with its plan of augmentation, would materially injure the objectors' water rights. The water court must also consider, pursuant to the court's holding in *City of Colorado Springs v. Bender*, whether the objectors were exercising their rights efficiently and if Turkey Cañon could take measures to prevent injury to those rights.

Finally, the court stated that those objectors who had filed for adjudication prior to the date of trial had standing to assert injury to their vested rights. Further, those objectors who opposed Turkey Cañon's applications in a timely manner must be granted a reasonable period of time to file applications to adjudicate their "602 wells" in order to have standing in the water court against Turkey Cañon.

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**Williams v. Midway Ranches Property Owners Ass'n, Inc., 938 P.2d 515 (Colo. 1997)** (holding that *res judicata* bars an objector opposing augmentation plan from litigating claims which could have been brought when historical usage was previously at issue and actually determined).

Midway Ranches proposed to utilize shares of the Fountain Valley Mutual Irrigation Company ("FMIC") to replace depletions from an out-of-priority diversion and use of water by a tributary well in connection with a central water supply system for a new subdivision development. Williams, trustee for Greenview Trust, opposed Midway's plan of augmentation. The State Engineer denied the well permit in the absence of an approved augmentation plan, and Midway Ranches appealed.

The issues the court considered on appeal were: 1) whether historic usage is the appropriate measure of a matured appropriation for change and augmentation plan purposes; and 2) whether prior judicial determinations of historic usage are subject to redetermination.

In analyzing the first issue, the court reiterated that water rights in Colorado arise by appropriation and beneficial use of unappropriated water. An absolute decree confirms that an appropriation has vested as a property right and entitles subsequent use of that water through its decreed point of diversion. Over time, a pattern of historic diversions and use will mature and become the measure of that right for