

9-1-2002

Bufford v. Williams, No. 00-6055, 2002 U.S. App. LEXIS 13235 (10th Cir. July 2, 2002)

Robert Lykos

Follow this and additional works at: <https://digitalcommons.du.edu/wlr>



Part of the [Law Commons](#)

Custom Citation

Robert Lykos, Court Report, Bufford v. Williams, No. 00-6055, 2002 U.S. App. LEXIS 13235 (10th Cir. July 2, 2002), 6 U. Denv. Water L. Rev. 169 (2002).

This Court Report is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Water Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

course of conduct was not sufficient to prevent a showing of injury. The Ninth Circuit found that because the individuals alleged a sufficient injury-in-fact to confer standing, the State Agencies also had standing since their members could sue in their own right.

The Ninth Circuit also addressed the BOR's second argument that claim and issue preclusion resulting from previous administrative and judicial proceedings regarding the New Melones Unit management barred the action. The Ninth Circuit stated claim preclusion applies where: (1) prior litigation involved the same parties or parties in privity; (2) prior litigation involved the same claim or cause of action; and (3) a final judgment on the merits terminated the prior litigation. Applying this rule, the Ninth Circuit found claim preclusion did not bar the current action because courts will narrowly construe the scope of the prior litigation to the "same transactional nucleus of facts." Since the prior actions challenged BOR releases under different New Melones plans, and not under the New Melones plan as adjusted to comply with the Act, the Ninth Circuit held claim preclusion did not bar the action.

The Ninth Circuit then addressed the BOR's claim that issue preclusion barred the action. The Ninth Circuit noted issue preclusion applies where: (1) a judgment on the merits resolved the issue in question in a prior suit; (2) the second action involves the same parties or parties in privity; and (3) the second action is based on the same cause of action. The Ninth Circuit held issue preclusion did not bar the action, stating the "same cause of action" requires "identical" and not "merely similar" issues litigated. Because the Ninth Circuit found the prior action here was only similar because it challenged BOR operations from 1995 to 1997, and the current action challenged BOR operations under a different management plan in 1999, issue preclusion also did not bar the action.

Jared B. Briant

TENTH CIRCUIT

Bufford v. Williams, No. 00-6055, 2002 U.S. App. LEXIS 13235 (10th Cir. July 2, 2002) (holding that failure to establish a pollutant's point source is insufficient grounds to prove a Clean Water Act violation).

Norman and Zula Bufford ("Buffords") sought to prevent wastewater allegedly originating at Crescent Wastewater Facility, operated by Williams, from leaching onto their property, located adjacent to the facility. The Buffords claimed that the facility's groundwater interceptor trench was a pollutant point source damaging their property. The parties filed simultaneous summary judgment motions in the District Court for the Western District of

Oklahoma. The court held for Williams, because the Buffords failed to establish that Williams' alleged pollutant discharge violated the Clean Water Act. The Buffords appealed to the Tenth Circuit Court of Appeals, which affirmed the judgment for Williams because the Buffords failed to show a causal connection between the facility and pollutants found on their property.

The wastewater treatment facility contained a three-tiered retention lagoon and a land applicator. As water flowed through the lagoons, its waste was broken down, and upon reaching lagoon No. three, the water was suitable for, and was subsequently used for the facility's irrigation. Its high quality water required no Oklahoma Pollutant Discharge Elimination System ("OPDES") permit. The lagoons were "no discharge" ponds, evidently without leakage. Oklahoma law required irrigation rates to not exceed the crop's ability to absorb the wastewater's nutrients, therefore the application maximized evaporation and crop uptake and minimized water pooling on the application field. Because soil also filtered wastewater, the probability for groundwater contamination was "minimal." Cracks in the sewer lines in 1994, and a 1999 tornado both required direct discharges from lagoon No. three to the application field, yet tests revealed the water's high quality was no threat to livestock or agriculture, because it was of higher quality than discharge from many facilities working under OPDES permits.

In 1998, the Buffords hired an expert to perform a Limited Environmental Site Investigation on their property. The Buffords raised cattle and used their land for grazing. Elevated fecal coliform, total organic carbon, and chemical oxygen demand levels indicated the presence of biodegradable organic materials. However, fecal coliform existed in both human and cattle waste, and it was impossible to differentiate their source. The expert admitted he: (1) did not observe the wastewater facility's water enter the Buffords property; (2) did not enter the wastewater facility; (3) did not sample water from the interceptor trench or treatment lagoons; (4) did not know details concerning the land application system, or whether it was operating when he took samples; and (5) did not know the facility's groundwater level. Yet, nevertheless he assumed that the facility was the sampled water's source.

The court found that Buffords' expert affidavits failed to provide evidence that the trench was a point source, or that fecal coliform originated at the facility. Damage to the Buffords' property was unlikely due to the fact that the wastewater lagoons held water longer than necessary to destroy fecal coliform, and it was also quickly destroyed in the environment. Williams provided evidence that the trench was an outlet for naturally occurring groundwater, however, not at outlet for the lagoon or irrigation system's discharge. The court found that the test evidence "reveal[ed] nothing" about the pollutants' source, thus, the Buffords failed to establish that the interceptor trench was a point source violating the Clean Water Act. Further, area

surface elevations reflected that eliminating the interceptor trench would not have decreased flow to the Buffords' property. Therefore, the appellate court affirmed the lower court's denial because the Buffords did not meet their burden of proof.

Robert Lykos

United States v. City of Las Cruces, 289 F.3d 1170 (10th Cir. 2002)
(holding that section 8 of the Reclamation Act and federal compact and treaty obligations not directly implicating interstate equitable apportionment issues do not create federal question jurisdiction).

In 1986, Elephant Butte Irrigation District ("EBID") filed suit against the United States and other parties in the New Mexico state district court, claiming senior appropriative rights on the Rio Grande River from Elephant Butte Dam to the Texas state line. EBID sought a stream adjudication and an injunction preventing the New Mexico State Engineer from allowing appropriation of Rio Grande River water until completion of the adjudication. Following three unsuccessful attempts to have EBID's suit dismissed, the United States and Texas ("United States") filed a declaratory judgment action in the United States District Court for the District of New Mexico to quiet title to Rio Grande Reclamation Project ("Project") water. The district court found it had discretion to dismiss the United States' suit under the *Colorado River* doctrine based on substantial similarities between the state and federal court actions. Alternatively, the *Brillhart* doctrine gave the district court discretion to grant declaratory relief to the United States' where similar claims were at issue in parallel state court proceedings. The district court dismissed the suit. The United States appealed to the Tenth Circuit Court of Appeals.

The Project runs through New Mexico and Texas, beginning in northern New Mexico at Elephant Butte Reservoir. A 1906 treaty obligated the United States to provide Project water from the Rio Grande River totaling 60,000 acre feet per year to Mexico. The United States argued the quiet title action involved Project water used to meet delivery obligations under the Rio Grande Compact ("Compact") and the 1906 treaty with Mexico. Both the Compact and the Project involved equitable apportionment of interstate waters pursuant to federal law. Because the United States' claims involved a federal question, requiring the district court to assert jurisdiction, the appellate court improperly dismissed the suit on five counts.

First, the United States asserted *Brillhart* discretion applied only to declaratory judgments, not quiet title actions. Thus, the district court lacked discretion to dismiss the United States' claims. The Tenth Circuit Court of Appeals concluded that the Quiet Title Act was the exclusive means for challenging the United States' title to real property. The court held that although the United States sued under