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State ex rel. Dept. of Parks & Recreation v. Schoendorf, No. H022039, 2002 WL 972147 (Cal. Ct. App. May 10, 2002)

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designations under the WCVP. The reasons included: the facility would not create a land use problem, the site had adequate circulation, water distribution, sewage collection and utility service, and the location would not jeopardize public health, safety and welfare or the facility was necessary to ensure public safety and welfare. The project satisfied all the requirements under the WCVP, therefore the court held it was consistent with the WCVP.

The court affirmed the District's decision and concluded the EIR adequately described the project's environmental setting and scope, adequately analyzed the project's impacts on groundwater quality and reasonable alternatives, and Milliken failed to show the project was inconsistent with zoning or land use laws.

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State *ex rel.* Dept. of Parks & Recreation v. Schoendorf, No. H022039, 2002 WL 972147 (Cal. Ct. App. May 10, 2002) (holding: (1) a claim of adverse use cannot be supported where a water right was used with implied permission that was never expressly disclaimed; and (2) a property owner may only rely on an overlying water right to extract water from the ground beneath the owner's property, not to divert surface flow to which the owner has no riparian right).

The Schoendorfs appealed an action alleging they illegally diverted surface flow of a spring from land owned by the State of California. Schoendorf claimed prescriptive and overlying rights to the spring. On summary adjudication, the Monterey County Superior Court ruled in the state's favor. Schoendorf appealed, alleging the trial court erred in failing to infer adverse use and improperly adjudicating their overlying right claim. The California Court of Appeal for the Sixth District affirmed the trial court's ruling.

The surface flow of the spring arose on the state's land and only reached Schoendorf's property by means of a springbox and pipeline. From 1944 to 1954, Schoendorf's predecessor in interest used this diversion to supply their property with water. The state gained title to the waters of the spring and surrounding land in 1962. In 1996, Schoendorf installed a new springbox and pipeline on the state's land after acquiring neighboring property.

In 1999, the state brought an action against Schoendorf alleging they were illegally diverting water from the spring. The state also claimed sole riparian rights to the spring because without the diversion, no water from the spring would reach Schoendorf's property. The state sought removal of the diversion and restoration of its property, as well as a declaration that Schoendorf's diversion was illegal. Schoendorf filed a cross-complaint seeking declaratory relief. They alleged a prescriptive right to the spring based on adverse use by

their predecessor in interest. Additionally, they claimed an overlying right to the spring because their property overlaid the water that is the spring's source. The state moved for summary judgment, claiming Schoendorf asserted no defenses to the state's causes of action, and their claims of prescriptive and overlying rights to the spring were without merit. In opposing the motion, Schoendorf argued the state did not establish Schoendorf's use of the spring was permissive. Although claiming an overlying right, Schoendorf did not allege this right provided a defense to the state's claims or constituted an independent ground for their own causes of action. The trial court granted the state's motion and subsequently entered judgment declaring that Schoendorf had no right to the spring. The judgment also prohibited Schoendorf from diverting water from the spring.

In their appeal, Schoendorf claimed the trial court erroneously failed to infer adverse use of the spring by long term occupants of the property ("Lopez family"). They argued even if evidence suggested the owners knew the Lopez family used the spring, the use was adverse because it occurred without the owner's express permission. In affirming the trial court's ruling, the court relied upon well-established principles of California law. A party claiming title by prescription bears the burden of proving the use was open, notorious, continuous, adverse, and uninterrupted for a period of five years. If property is used with express or implied permission of the owner, the use is not adverse. Schoendorf only presented evidence suggesting the Lopez family used the spring without express permission, not that this use was adverse. Undisputed evidence established that the state's predecessor in interest ("Brown") was aware the Lopez family used the springbox and pipeline to divert spring water to their property. At one time, Brown employed members of the Lopez family, and even had them maintain the Browns' pipelines, including the pipeline in question. Brown also directed Mr. Lopez to dismantle other pipelines carrying water elsewhere. The court considered these facts strong evidence to support the trial court's inference that Brown permitted the Lopez family to use the spring.

Schoendorf also claimed that even if permissive use was established between 1944 and 1954, the state did not prove permissive use at any other time. Rejecting this argument, the court again relied on a well-established principle of state law: "Where a use is initially permissive, it remains so unless its permissive character is expressly disclaimed." Schoendorf offered no evidence the Browns ever disclaimed permissive use of the spring. The state established that use of the spring was permissive at least as early as 1944, and remained so until the state acquired the land in 1962.

Also at issue on appeal was whether the trial court erred in summarily adjudicating Schoendorf's counterclaim asserting an overlying right to the spring water. Schoendorf argued the state never expressly sought adjudication of Schoendorf's overlying rights claim and this claim was relevant to the relief sought by the state. In

affirming the trial court's ruling, the court briefly noted that in its summary judgment motion, the state asserted there was no merit to Schoendorf's causes of action. The court also concluded the trial court was not required to resolve the overlying rights claim because it was not a matter of controversy and immaterial to both parties' causes of action and relief sought.

A landowner possesses exclusive riparian rights to a spring if the natural flow of the spring does not cross the boundaries of the land on which it is located. Similar to a riparian right, an overlying water right is appurtenant to land; however, an overlying right only confers the right to extract water from the ground underneath the owner's land. The court stated that an overlying right does not permit a landowner to trespass onto a neighbor's land to divert water from a spring to which the landowner has no riparian right. Therefore, the court reasoned if Schoendorf did possess an overlying right to extract water from underneath their own land, that right would not entitle them to divert that water from the state's property. Neither would this right allow Schoendorf to avoid an action to remediate a wrongful diversion. Hence, the overlying rights claim was immaterial to the state's causes of action. Further, Schoendorf only alleged the overlying rights claim entitled them to extract groundwater, not that this right entitled them to install the springbox and pipeline. The state never challenged Schoendorf's right to extract groundwater from underneath the state's property; therefore, this claim was not a matter of controversy. Thus, the court also concluded the overlying rights claim did not provide a basis for Schoendorf's causes of action and declaratory relief sought.

In sum, the court affirmed the lower court's determination that Schoendorf did not have a prescriptive right to the state's spring, because under California law, using property with implied permission is not considered adverse use, and permissive use remains so until expressly disclaimed. The court also held the trial court properly adjudicated Schoendorf's overlying right claim. In doing so, the court reaffirmed prior California decisions holding that a property owner may only rely on an overlying water right to extract water from the ground beneath the owner's property, not to divert surface flow to which the owner has no riparian right.

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