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Scheufler v. General Host Corp., 126 F.3d 1261 (10th Cir. 1997)

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Plaintiffs argued that the Secretary's failure to prevent commercial fishing in the Park derogated the Organic Act's purpose of conservation and therefore violated an express statutory directive.

The Ninth Circuit Court of Appeals rejected this argument as well as the Fishermen's argument that commercial fishing was permitted throughout the entire Park. The Court stated that the question is not which interpretation it prefers, but whether the Park Service's interpretation is reasonable. The Court stated that "[n]o statute expressly prohibits commercial fishing in the Park's non-wilderness areas or demonstrates clear congressional intent to restrict the Park Service's discretion to permit commercial fishing." Having found neither an express statutory directive nor compelling evidence of clear congressional intent contradicting the Park Service's interpretation, the appellate court affirmed the judgment of the lower court and allowed fishing in non-wilderness areas.

Matt Dillman

TENTH CIRCUIT

Scheufler v. General Host Corp., 126 F.3d 1261 (10th Cir. 1997) (holding that a person need not appropriate water rights to state a claim for nuisance caused by contamination of groundwater resulting in inability to cultivate crops).

Since 1908, the American Salt Company, a subsidiary of General Host, owned and operated a salt manufacturing plant near Lyons, Kansas. In 1977, owners of land upstream from the plaintiffs sued General Host claiming contamination of the fresh water aquifer running under their land, resulting in land unfit for the production of irrigated crops. The landowners prevailed and the court awarded \$3,060,000 in damages for actual crop loss and \$10,000,000 in punitive damages.

Fourteen years after the initial case against General Host, plaintiffs brought suit alleging that the defendant's salt plant posed a nuisance rendering the plaintiffs' farms unfit for production of irrigated crops, and interfering with their rights to use and enjoy their land. At the time the suit was filed, none of the plaintiffs had applied for or received a water permit from the Kansas Department of Water Resources. Two years after plaintiffs filed suit, they applied for such permits. At the date of trial, none of the permits had been acted upon by the state.

A jury returned a verdict in plaintiffs' favor, and held that failure to appropriate water rights did not bar a nuisance claim. The district court also held that plaintiffs' inability to obtain irrigation permits from the state did not cause plaintiffs' inability to irrigate. The court

awarded actual as well as punitive damages in the amount of \$550,000. The court awarded punitive damages because the defendant continued to pollute the aquifer during the years following the previous law suit.

General Host appealed, alleging: 1) the plaintiffs' failure to appropriate water rights or obtain irrigation permits barred their nuisance claim because plaintiffs sustained no actual damages; and (2) the punitive damages award was unfairly repetitious.

The court affirmed the district court's ruling on both the validity of the nuisance claim and the appropriateness of the punitive damages award. The court reversed the district court's ruling that plaintiffs' failure to obtain appropriated water rights did not cause the plaintiffs' inability to produce irrigated crops on their land.

Defendants asserted that plaintiffs did not have any water appropriation rights in the aquifer because they never received a permit. The court determined that an appropriated right was not necessary to claim nuisance. The court further determined that a finding of nuisance was not predicated on a finding of actual interference with use of one's property. Since the defendants' contamination of the aquifer would frustrate the potential future reasonable use of plaintiffs' property as irrigated land, plaintiffs were entitled to proceed with a nuisance claim.

The lack of water appropriation rights was not wholly irrelevant. The district court correctly concluded that the failure to obtain appropriated water rights was a potential intervening cause for the plaintiffs' inability to grow irrigated crops on their land, rather than a complete bar to their nuisance claim.

The Court upheld the punitive damages award for the reasons given by the district court — that the defendant had failed to stop polluting the aquifer following the original suit.

Heidi A. Anderson

COLORADO

Dallas Creek Water Co. v. Huey, 933 P.2d 27 (Colo. 1997) (holding that an application for reasonable diligence was timely filed by a "user under claim of right within the applicable statutory requirements," and that such filing properly conferred subject matter jurisdiction on the water court).

Dallas Creek appealed from an order of the Water Court for Water Division No. 4 canceling its conditional water right for failure to timely file an application for a finding of reasonable diligence. The Colorado Supreme Court considered the circumstances under which amending