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Dallas Creek Water Co. v. Huey, 933 P.2d 27 (Colo. 1997)

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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

an application for a conditional water right, previously filed by the statutory deadline, renders that application void, thereby depriving the water court of subject matter jurisdiction over the application.

In 1974, the water court granted a conditional decree for 10 cfs of water for the Long Hill Pumping Plant at a specified point of diversion on Dallas Creek. After transfer by the original owner, the decree was continuously renewed and held by WRIKO, Inc. until 1993. In April 1993, the court notified WRIKO's owner that the decree was again up for renewal. Plaintiff's non-lawyer agent timely filed the renewal application under the name of WRIKO in spite of the fact that the Dallas Creek Company had taken possession of the Long Hill Pumping Plant.

In July 1993, the water court published public notice of the reasonable diligence application, and land owners in the Dallas Creek basin filed numerous statements of opposition. In September 1993, Dallas Creek entered an appearance. The water court allowed Dallas Creek to participate for more than two years in discovery, motions, and preparation for trial. Shortly before trial in January 1996, Dallas Creek filed a formal motion to substitute Dallas Creek Company for WRIKO as the real party in interest. The water court denied this motion holding that the application was untimely. The objectors moved to dismiss the diligence application altogether alleging that WRIKO had been dissolved in 1988 and, therefore, no real party in interest appeared as an applicant within the diligence period. The water court agreed, holding that the party on an application cannot be amended after the filing deadline has passed. Therefore, because no real party in interest had timely filed an application, the water court dismissed the case for lack of subject matter jurisdiction.

Dallas Creek appealed, urging that as the user of the water right it was entitled to proceed with the application as the real party in interest. The Colorado Supreme Court agreed, holding that the water court abused its discretion in denying substitution of Dallas Creek as the real party in interest. The court stated that the filing of a diligence application, and subsequent public notice of that filing, "confers subject matter jurisdiction on the water court to proceed with a determination of reasonable diligence."

The court found the water court's strict construction of the submission requirements for diligence applications untenable, stating, "we do not view party identification as an unalterable jurisdictional feature of an application." The court based its opinion on two factors. First, the statutes state that "any person" desiring a finding of reasonable diligence may file an application. Second, Colorado Rule of Civil Procedure 17(a) requires that actions be prosecuted by real parties in interest. In the court's opinion, Dallas Creek qualified as a real party in interest because it was the actual user of the water right through its ownership of the Long Hill Pumping Plant.

The court cited several reasons for its conclusion. First, the agent who filed the diligence application for Dallas Creek was not a lawyer. He filed the application under WRIKO because he thought he had to

do so since the water court previously granted the decree under that name. The application stated that Dallas Creek was the actual user of the water right. The court found the law recognizes that "water rights are decreed to structures and points of diversion," and that "the owners and users of such rights may change from time to time." Because the agent would have listed Dallas Creek as the applicant had he known he could do so, because Dallas Creek was the actual user of the water right and owner of the point of diversion (the Long Hill Pumping Plant), and because courts expect that owners and users may change, the court found Dallas Creek could be substituted for the original applicant.

Second, the court found that the motion for substitution of applicants "neither misled nor substantially prejudiced" the objectors. The applicant gave proper public notice, and that notice contained clarification that Dallas Creek was the actual user of the water. In addition, Dallas Creek's lawyer appeared on its behalf, and worked on the case for over two years. The court noted that, when justice so requires, courts have allowed applicants for water rights to amend applications.

Finally, the court found that, under Colorado Rule of Civil Procedure 15, "a substituted party benefits from the filing date of the original pleading" if adversely affected parties had sufficient notice to avoid any prejudice. The objectors were aware that Dallas Creek was the user of the water right, and that Dallas Creek's attorney represented them in the diligence proceedings. The supreme court determined, therefore, that Dallas Creek's substitution was effective as of the date the agent filed the original diligence application.

The court remanded the case to the water court for determination of whether Dallas Creek met the requirements for a finding of reasonable diligence and granting of a conditional decree.

Debbie Eiland

Left Hand Ditch Co. v. Hill, 933 P.2d 1 (Colo. 1997) (holding that shareholders in a mutual ditch company have a common law right to inspect the company's shareholder list).

The Hills held shares in the Left Hand Ditch Company, a non-profit corporation that provides water to its shareholders in the Niwot region of Boulder County. In 1993, the Hills requested a copy of the mutual ditch company's shareholder list. The Hills explained that they wanted to inspect the shareholder list in order to sell or rent their shares, to better understand Left Hand's future, and to better communicate with other shareholders.

Left Hand denied the Hills' request. Left Hand explained that it wished to keep the list confidential and that it had alternate methods available for assisting the Hills in renting or selling their shares.

The Hills filed suit in the Boulder County District Court seeking an