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Mojave Water Agency v. Vernola, No. E032749, 2005 Cal. App. Unpub. LEXIS 9866, (Ct. App. Cal., Oct. 27, 2005)

First, Cucamonga contended that the Regional Board failed to consider economic factors when implementing the 2002 permit based on a California Supreme Court holding in *City of Burbank v. State Water Resources Control Bd.* that when a regional board is considering whether to make the pollutant restrictions in a wastewater discharge permit more stringent than federal law requires, California law allows the board to take into account economic factors, including wastewater discharger's cost of compliance. This argument failed because Cucamonga provided no evidence that the 2002 permit exceeded federal requirements, and there was evidence that the Regional Board took into account economic factors when implementing the 2002 permit.

Secondly, Cucamonga asserted that the 2002 permit violated § 402(k) of the Clean Water Act. This assertion stated that the 2002 permit does not include "safe harbor" language. "Safe harbor" language would provide that if Cucamonga was in full compliance with the permit conditions, it could not be found in violation of Clean Water Act. The trial court held that there was no statutory right to a "safe harbor" provision to be included as a term of the permit, and this court affirmed.

The court affirmed the decision of the trial court, holding that the 2002 permit's conditions and requirements were appropriate and properly adopted.

Michael S. Samelson

Mojave Water Agency v. Vernola, No. E032749, 2005 Cal. App. Unpub. LEXIS 9866, (Ct. App. Cal., Oct. 27, 2005) (affirming the Superior Court's denial of a motion to vacate as void an earlier judgment imposing a physical solution to an over-drafted basin on overlying pumpers who defaulted by failing to prove their water rights during the litigation).

In 1990 the City of Barstow and the Southern California Water Company (collectively "Barstow") filed an action against the City of Adelanto, the Mojave Water Agency ("MWA") and other upstream producers regarding the overdraft of the Mojave River Basin and its damaging impact on Barstow's water supply. MWA filed an amended cross-complaint naming water producers within the Basin as cross-defendants and requesting that the court apportion water rights among them. During a stay in the litigation, attorneys and engineers for water producers throughout the basin met and negotiated a proposed physical solution to the overdraft problem. Most of the parties stipulated to a judgment incorporating the physical solution and imposing the solution on non-stipulating parties. The Vernolas were part of a group of cross-defendants who did not stipulate to the proposed judgment and physical solution ("Cardozo Group").

The trial court granted MWA's motion to issue and impose the physical solution on stipulating and non-stipulating parties, set a trial date, and notified all parties that each defaulting party would be subject to the terms of the stipulated judgment. Counsel for the Cardozo Group informed the Vernolas of the trial court's actions. Two months before the trial, the Vernolas withdrew from the Cardozo Group. Shortly after, the trial court issued a statement indicating that it would issue a decision as to water rights of those parties who offered evidence at trial. The trial court found that the Cardozo Group, of which the Vernolas were no longer a member, did not prove their water rights. The Vernolas did not present any evidence of their water rights at the trial. The trial court entered a final judgment on January 10, 1996, which held the Vernolas to be a defaulting party subject to the stipulated judgment.

In 1997, the Vernolas moved to modify the judgment to increase their base annual production allowance, claiming a violation of due process because they had not been present to challenge evidence at trial. The court denied the motion and the Vernolas did not appeal. In 1998, the Court of Appeal of California reversed the 1996 judgment as to the Cardozo Group. In 2000, the Supreme Court upheld the decision and in 2002, the Vernolas moved to vacate the 1996 judgment. The court denied the motion.

The Vernolas filed their notice of appeal to the California Court of Appeal, Fourth Appellate District, Division Two in November 2002, contending that the California Supreme Court decision in 2000 compelled a holding that the judgment entered against the Vernolas in 1996 was reversed and void. Alternatively, the Vernolas argued that, if valid, the judgment should be modified to conform to the Supreme Court ruling in favor of the Cardozo Group. The court rejected both arguments and affirmed the trial court's order denying the Vernolas' motion to vacate.

The court held the 1996 judgment to be valid and final as to all parties, whether they stipulated to the judgment or objected and appealed, since those appeals were now completed and final or defaulted. The court clarified that while the trial court's determination regarding the Cardozo Group was a legal error, the judgment was valid because it was not based on any fraud or lack of jurisdiction. The court also held that the trial court's imposition of a physical solution on non-stipulating parties to achieve an equitable remedy to the Mojave River Basin's overdraft was not an act in excess of its jurisdiction or power and therefore valid.

The Vernolas also contended that the judgment was void because they did not need to do anything more than pump water for reasonable beneficial use on their land to preserve their overlying rights. The Vernolas went on to argue that the overlying rights they failed to defend equitably trump reasons for enforcing the judgment against

them, and that the court should modify the judgment to treat them in the same manner as the parties who timely appealed. The court held that this argument failed to address whether an overlying pumper in an over-drafted basin should be required to defend an action to adjudicate groundwater rights. The court provided that the trial court's mistake as to whether the Cardozo appellants had water rights of the type justifying a physical solution did not excuse the Vernolas from defending the litigation. The court further noted that the parties to the litigation were entitled to rely on the finality of a judgment that survived timely filed post-trial motions and appeals. The court established that although no time limit is placed on a motion to vacate the judgment as void, and the judgment was not final as to the parties who appealed, the judgment did become final in July 1996 as to all of the defaulting parties, which included the Vernolas, for purposes of appeal and most post-trial motions. The court affirmed the holding of the Superior court denying the motion to vacate as void the judgment imposing the physical solution.

Robert Stevens

COLORADO

Tatum v. People *ex rel.* Simpson, 122 P.3d 997 (Colo. 2005) (holding the water court did not err in enjoining an irrigation ditch user from violating a statute by failing to maintain a river headgate sufficient to control the inflow of water at the point of diversion).

On July 2, 2003, the Office of the State Engineer ("State Engineer") inspected the headgate to an irrigation ditch called Dolores Duran Ditch ("Ditch") at its point of diversion from the Middle Fork of the Purgatoire River. The State Engineer found that the river headgate was not controlling the water in the Ditch, which permitted Jim Tatum ("Tatum") to divert water in excess of his decreed amount. The State Engineer determined that Tatum was violating a Colorado statute that required him to maintain a suitable and proper headgate sufficient to control the inflow of water into the Ditch at all ordinary stages. Consequently, the State Engineer ordered Tatum to comply by installing a controllable and lockable headgate at the decreed point of diversion or a wastegate and waste ditch above the existing measuring flume. In January 2004, the State Engineer returned to inspect the Ditch and discovered Tatum had failed to comply with the July order.

The State Engineer filed a complaint in the District Court, Water Division Two seeking an injunction to prevent Tatum from continuing to violate the statute. The water court held an evidentiary hearing in which the water commissioner, the division engineer, and the assistant division engineer testified that the headgate was unsuitable for control-