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2003 Cal. App. Unpub. LEXIS 1130 (Cal. Ct. App. Jan. 31, 2003)**

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N. Kern Water Storage Dist. v. Kern Delta Water Dist., F033370, 2003 Cal. App. Unpub. LEXIS 1130 (Cal. Ct. App. Jan. 31, 2003)

N. Kern Water Storage Dist. v. Kern Delta Water Dist., F033370, 2003 Cal. App. Unpub. LEXIS 1130 (Cal. Ct. App. Jan. 31, 2003) (holding there is no uniform rule regarding the use or nonuse of water applicable to all cases, and therefore the question of whether a holder of water rights forfeited those rights is one of fact, based upon measurements taken during a specific period of time and a consideration of all other relevant factors disclosed by the evidence).

North Kern Water Storage District ("North Kern") filed an action against Kern Delta Water District ("Kern Delta") in the Superior Court of Tulare County. North Kern alleged that Kern Delta forfeited a portion of its rights to Kern River water, and that those rights passed to North Kern. Kern Delta filed a cross-complaint seeking a declaration that it lost none of its rights to Kern River water. In its cross-complaint, Kern Delta named North Kern and the City of Bakersfield ("Bakersfield") as cross-defendants. Bakersfield filed a cross-complaint seeking a determination that North Kern and Kern Delta both forfeited a portion of their Kern River water rights.

After a bench trial, the court held Kern Delta forfeited a substantial portion of its historical Kern River water rights by nonuse. It also held that the forfeited water reverted to unappropriated status, and was therefore subject to jurisdiction of the State Water Resources Control Board ("SWRCB"). It rejected all other claims, and the parties both appealed to the Court of Appeal of California, Fifth Appellate District. In its appeal, North Kern argued the trial court erred in holding the water Kern Delta forfeited reverted to unappropriated status, while Kern Delta argued the trial court erred in holding Kern Delta forfeited its water rights by nonuse.

The Kern River is a natural waterway originating in the Sierra Nevada mountain range and draining into the San Joaquin Valley a few miles northeast of Bakersfield. Since the early 1860s, a series of canals diverted Kern River water for agricultural use. Current Kern River water rights date back to the 1860s. Kern Island Irrigation and Canal Company ("Kern Island") filed a notice of appropriation in 1870. Under the Miller-Haggin Agreement ("MHA"), Kern Island had a first priority right to three hundred cubic feet per second ("cfs") of Kern River water daily. The remaining water rights holders could apportion Kern River water only after Kern Island satisfied its needs. A few years after MHA execution, insufficient availability of Kern River water caused a dispute among upstream users ("First Point Users"), who sought an injunction against Kern Island's diversions. In the ensuing litigation in 1901, Judge Lucien Shaw issued a decree ("Shaw Decree") that "reaffirmed the MHA, set a maximum flow available for diversion an appropriation by each First Point User, and established an order of priority for diversions among them, including Kern Island." In addition to listing the specific quantity of water entitled to each right holder, the Shaw Decree awarded Kern Island an additional fifty-six cfs.

Subsequently, Kern Delta administered Kern Island's appropriations. Per the MHA and the Shaw Decree, Kern Delta, which held Kern Island's entitlement, had a first priority right to Kern River water. The amount of Kern River water available to all other water rights holders depended on Kern Delta's usage.

In 1964, the SWRCB declared the waters of the Kern River fully appropriated. Therefore, the SWRCB refused to consider applications for appropriative rights to Kern River waters, unless a study showing available unappropriated waters accompanied the application. Anticipating the trial court would revert water forfeited by Kern Delta to unappropriated status, the parties petitioned the SWRCB "for the appropriation of any such forfeited water." The SWRCB postponed ruling on these petitions until completion of litigation.

Kern Delta appealed the trial court's finding that it forfeited its appropriative rights. The appellate court held that use of water determined water rights. No one could hold water rights in perpetuity without putting the water to beneficial use. The appellate court found no language in either the MHA or the Shaw Decree that made Kern Delta's right to three hundred cfs daily inviolate, thereby precluding claims by North Kern and Bakersfield. Even if such language existed, it would violate public policy, as water is too precious a commodity to waste, and effectively voided both the MHA and the Shaw Decree.

Kern Delta argued the trial court incorrectly rejected its laches defense; specifically that North Kern and Bakersfield filed their forfeiture actions after unreasonably waiting "more than one hundred years after Kern Delta commenced" releasing surplus Kern River water. The appellate court held that North Kern and Bakersfield did not have claims prior to 1976, as water use by junior appropriators was permissive and contingent upon surplus released by Kern Delta. Kern Delta's water usage did not threaten North Kern or Bakersfield "until 1976, at the earliest, when Kern Delta sought to increase its own use beyond historical amounts." Thus, the court found that North Kern's and Bakersfield's claims originated approximately thirty years prior to litigation.

Kern Delta also argued that releasing its own unused water to junior appropriators constituted a beneficial use that precluded forfeiture. With respect to this claim, the appellate court held that the terms of the MHA and the Shaw Decree merely acknowledged the practice of releasing water as customary among the parties. The custom itself did not establish independent rights or duties. Furthermore, because the doctrine of beneficial use required the release of excess water to junior appropriators, Kern River water users retained only enough water to meet their own needs, and no more. As such, Kern Delta's practice of releasing its own unused water was required pursuant to the beneficial use doctrine, and therefore was not a "beneficial use."

The appellate court disagreed with the trial court in two respects. First, the trial court failed to consider the statutorily imposed five-year period for measuring statutory forfeiture. The appellate court held

that due process required the trial court to identify a specific five-year period over which to measure whether forfeiture actually occurred. Second, the appellate court held that the trial court incorrectly premised its holding upon Kern Delta's use of water rather than its nonuse. Because water rights were contingent upon beneficial usage of the water, an assessment of nonuse rather than use should determine forfeiture. The appellate court held that the measurement needed to include the quantity of water not used over the statutorily imposed period of time because both time and quantity help govern the "law of the river." The appellate court declared that because measuring water usage for irrigation purposes "involves factors not subject to precise human control," there was not a uniform rule with respect to use or nonuse applicable to all cases. The facts of the individual case determine whether a water right holder forfeited those rights through nonuse.

As such, the appellate court reversed the judgment of the trial court, and remanded for retrial the issue of whether Kern Delta forfeited any of its MHA entitlement by nonuse, based upon a measurement taken over a specific time period imposed by statute. The appellate court also remanded for retrial the parties' other issues not specifically resolved on appeal, waived, or abandoned.

Kyle K. Chang

Long v. Great Spring Waters of Am., Inc., No. E030817, 2002 Cal. App. Unpub. LEXIS 11584 (Cal. Ct. App. Dec. 16, 2002) (holding violating the terms of a United States Forest Service special use permit is "unlawful" conduct under California's unfair competition law; and taxpayer suits against state officials under Civil Procedure Code section 526(a) are not permissible means of compelling discretionary actions of the State Water Resources Control Board).

Under a United States Forest Service special use permit, Great Spring Waters of America, Inc. ("Great Spring") extracted water from within the San Bernardino National Forest for public sale. In February 2000, Russell Long ("Long") filed suit in the Superior Court of San Bernardino County, alleging Great Spring violated California's unfair competition law (Section 17200 of the Business and Professions Code). Long also sued the State Water Resources Control Board ("SWRCB"), claiming it breached its duty to prevent waste or unreasonable use of water by allowing Great Spring's extraction. The trial court sustained, without leave to amend, Great Spring's and the SWRCB's demurrers to all of Long's seven claims for relief. Long appealed to the California Court of Appeal, Fourth District, Division Two, seeking to overturn demurrers to one claim for relief against Great Spring and two claims against the SWCRB.