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Long v. Great Spring Waters of Am., Inc., No. E030817, 2002 Cal. App. Unpub. LEXIS 11584 (Cal. Ct. App. Dec. 16, 2002)

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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.

On appeal, the court first considered Long's unfair competition claim. Long alleged Great Spring engaged in unfair business practices by extracting water under a special use permit not conferring that right; extracting water without paying fees; violating the conditions of its special use permit; not securing water rights under the Water Code; and gaining an unfair competitive advantage by selling water at the expense of resources held in public trust. The court found the only allegation stating a valid unfair competition action was the claim that Great Spring violated the terms of its special use permit. The taking of the water itself, and the effect of this violation, excessive water extraction or resource depletion, was not actionable under this statute.

Specifically, Long claimed Great Spring illegally increased its extraction capacity by laying pipe, excavating trenches, and developing wells greatly exceeding the dimensions specified in its permit. To support a valid unfair competition claim, one must show a defendant's business practices were "unlawful, unfair, or fraudulent." In its analysis, the court relied on *Hewlett v. Squaw Valley Ski Corp.*, where that court ruled noncompliance with the terms of a county conditional use permit was "unlawful" under the unfair competition law. The court noted that the Forest Service issues special use permits pursuant to federal law, and that violating the terms of a permit, or conducting activities requiring a permit without obtaining one, are federal criminal offenses. Hence, it reasoned violating the terms of a special use permit is "unlawful" within the meaning of the unfair competition law. As Long only needed to state one possible cause of action, the court reversed the dismissal of his unfair competition claim.

Although finding Long's remaining allegations insufficient to support an unfair competition action, fearing confusion at remand, the court addressed each to clarify the scope of the permissible claim. The allegation that Great Spring's special use permit did not grant a right to extract water did not establish the extraction was "unlawful, unfair, or fraudulent." Because state law governs the appropriation of water on federal lands, and Long did not allege any facts indicating Great Spring's appropriation was contrary to state law, the court found this allegation insufficient to show the extraction was "unlawful." Under this statute, conduct is "unfair" if a victim's suffered harm outweighs the conduct's utility. Long did not show this extraction was "unfair" because he did not allege Great Spring's actions harmed anyone. Additionally, while claiming Great Spring's actions were misleading, Long did not demonstrate these actions were likely to deceive the public, as required to find "fraudulent" conduct under this statute.

The allegation that Great Spring did not pay an extraction fee also failed to support an unfair competition claim. No state or federal authority requires a water appropriator to pay a fee, or permits the state to charge a fee, for appropriating water from public land. Similarly, Long's allegation that Great Spring failed to secure its rights under the Water Code was also deficient. The Water Code requires a permit for appropriations of surface water, or subterranean streams

flowing in defined channels, initiated after 1914. As Long did not specify when Great Spring initiated the appropriation, he did not demonstrate the necessity of a permit.

In the court's view, Long improperly invoked the public trust doctrine as a basis for his unfair competition claim. The public trust doctrine protects specific public interests in navigable waters and nonnavigable waters (to the extent any diversion affects navigable waters). However, Long never alleged Great Spring's extraction affected navigable waters or any interest protected by the public trust doctrine.

Long also claimed Great Spring's extraction of water held in the public trust violated the California Constitution's reasonable use doctrine, which mandates the prevention of waste and unreasonable use of water. Under the doctrine, a use is considered unreasonable if it injures a competing use. Despite claiming Great Spring's extraction depleted a scarce public resource, Long's claim was deficient because he did not allege that the use harmed competing users.

Last, the court addressed Long's claims the SWRCB breached its duties by allowing Great Spring's unreasonable use of water, thereby wasting taxpayer funds. Long sought a court order declaring the SWRCB's actions unlawful and directing it to enjoin Great Spring, conduct an investigation, and make conclusions of facts and law. He also sought the return of any funds due to the SWRCB for the use of the water. Long based these claims on Civil Procedure Code section 526(a), which permits taxpayer suits against state officials to prevent waste or illegal use of state funds or property. However, these taxpayer suits may not be employed to compel discretionary agency action. Relying on the plain language of the Water Code, the court concluded Long was seeking to order the SWRCB to undertake discretionary action. For this reason, Long's taxpayer suit did not state permissible claims against the SWRCB. Thus, the court upheld the dismissal of Long's claims against the SWRCB.

Arthur R. Kleven

COLORADO

Hoery v. United States, 64 P.3d 214 (Colo. 2003) (certifying that continued migration and ongoing presence of toxic pollution on a landowner's property constituted a continuing trespass and nuisance for as long as the pollution existed without removal or abatement by the egregious party, even if the condition causing the pollution has ceased).

Robert Hoery brought suit against the United States in the United States District Court for the District of Colorado under the Federal Torts Claim Act for continued trespass and nuisance caused by release