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Ellsworth v. Tuttle, No. 03-4253, 2005 U.s. App. LEXIS 11897 (10th Cir. June 20, 2005)

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TENTH CIRCUIT

Ellsworth v. Tuttle, No. 03-4253, 2005 U.S. App. LEXIS 11897 (10th Cir. June 20, 2005) (affirming the district court's findings in an action involving sellers' misrepresentation of legally irrigated land acreage to buyers, (1) that a certificate of appropriation constitutes a final and justiciable statement of a water user's rights; (2) that expert testimony regarding the nature of the appropriation certificates and land is permissible; and (3) that the buyers' duty to mitigate does not extend to challenging the certificate of appropriation).

In 1998, William and Charlene Tuttle, and their son and daughter-in-law Kenton and Lori Tuttle (collectively "Tuttle") decided to sell their farms. In the real estate listing for the property, Tuttle represented that 1,559 acres of the total 1,740 acres consisted of legally irrigated land. In October 1998, Grant and Fern Ellsworth (collectively "Ellsworth") offered to purchase the entire acreage. When Ellsworth toured the property, Tuttle assured Ellsworth the farm had "plenty of water" and provided Ellsworth with state-issued, certificates of appropriation. Tuttle failed to disclose any potential issues with the onsite diesel irrigation well. After the sale of the land, the Assistant State Engineer informed Ellsworth that the certificates of appropriation only provided water rights to 932.6 acres of the land, rather than 1,559 acres as Tuttle stated. The Assistant State Engineer's letter also stated the diesel irrigation well was not a legal point of diversion.

Ellsworth sued Tuttle for fraudulent misrepresentation, breach of warranty, breach of contract and conversion in the United States District Court for the District of Utah. The jury trial returned verdicts in favor of Ellsworth on all counts. Tuttle appealed each claim, along with the amount of the judgment award, to the United States Court of Appeals for the Tenth Circuit.

On appeal, Tuttle asserted that Ellsworth's claims lacked ripeness, because Ellsworth did not validate the certificates of appropriation with the State Engineer before bringing suit. Tuttle argued that, without a judicial or administrative declaration, the certificates were legally insufficient to define Ellsworth's water rights. The court held that the certificates of appropriation constituted the State Engineer's final statement and therefore, no other adjudication was necessary. The certificates defined Ellsworth's real property rights with sufficient certainty to render Ellsworth's claims justiciable.

Tuttle also claimed the court should not have admitted Ellsworth's expert witnesses' testimony. Ellsworth's first expert witness explained the certificates, specifying the number of acres that could be irrigated pursuant to each certificate. Ellsworth's second expert testified as to the difference in the value of the land with appurtenant water rights compared to the land without water rights. Tuttle's expert agreed with

Ellsworth's expert regarding the number of acres that could be legally irrigated under the certificates. Ellsworth's expert employed different terminology in his oral testimony than his prior report; during his oral testimony, he referred to acreage with a water right as "sole-supply acreage" and acreage with no water right as "supplemental supply acreage." The court found that the altered terminology did not amount to a material change from the expert report and could not have reasonably surprised Tuttle. In holding that the expert testimony did not prejudice the jury, the court noted that Tuttle had the opportunity to challenge Ellsworth's experts at trial. The court held any error in admitted the expert testimony was harmless.

Tuttle further argued the trial court erred by excluding Tuttle's evidence regarding Ellsworth's failure to mitigate damages. Tuttle claimed Ellsworth had a duty to challenge the State Engineer's determination of water rights under the appropriation certificates, either through an appeal or an equitable estoppel claim. Ellsworth responded that an equitable estoppel claim would be unlikely to succeed and that Ellsworth should not be required to pay for frivolous and expensive litigation, after already paying a substantial amount for the land. The court held Tuttle's mitigation theory was too speculative to impose a duty upon on Ellsworth, and therefore, the district court's exclusion of these issues was proper.

The court upheld the district court rulings on all counts, finding Tuttle fraudulently misrepresented the appurtenant water rights to the acreage bought by Ellsworth. Consequently, the court held Tuttle also breached the warranty, breached the contract, and was liable for the tort of conversion.

Amy M. Petri

UNITED STATES COURT OF FEDERAL CLAIMS

Klamath Irrigation Dist. v. United States, 67 Fed. Cl. 504 (Fed. Cl. 2005) (holding that landowners' and districts' claims were contract issues, not takings, and that their claims are subject to the terms of their contract, including limitations imposed by the Endangered Species Act).

The Department of Interior's Bureau of Reclamation ("Bureau") operates the Klamath Project, which provides water to 240,000 acres of irrigable land and several national wildlife refuges in the semi-arid Klamath River Basin of northern California and southern Oregon. In operating the Klamath Project, the Bureau must comply with the Endangered Species Act ("ESA") and ensure that its project operations are not likely to jeopardize the continued existence of any endangered species. In 2001, water levels in the basin were so low that they threat-