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Hoery v. United States, 64 P.3d 214 (Colo. 2003)

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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

of trichlorethylene ("TCE") and other toxic chemicals from the Lowry Air Force Base into the ground which caused contamination of his nearby property. While the United States ceased all use of TCE at Lowry in 1994, TCE still remained on Hoery's property and continued to enter his land and groundwater daily. The court dismissed the case because the release of TCE ended in 1994, and determined the nuisance and trespass on Hoery's land was limited to the actual release of TCE and was, therefore, not continuous. Hoery appealed to the United States Court of Appeals for the Tenth Circuit. Because of lacking controlling precedent, the Tenth Circuit certified to the Colorado Supreme Court the question of whether the continued migration and ongoing presence of toxic chemicals on Hoery's property caused by releases made by the United States constituted a continuing trespass and nuisance under Colorado law. The court held that continuous migration and presence of toxic chemicals on Hoery's land, due to the United States' failure to abate or remove the chemicals, constituted a continuous trespass and nuisance under Colorado law.

In 1993 Hoery acquired a residence served by a groundwater well in a Denver neighborhood. Hoery's well was located seven blocks north of Lowry Air Force Base. The United States operated Lowry as an active military base beginning in the 1940s and ceased operations in September 1994. During its operation, the United States dumped TCE and other chemicals at Lowry. These releases created plumes of toxic pollution extending many miles north of Lowry. In 1997, testing conducted by the United States showed that TCE contaminated Hoery's well.

The Colorado Supreme Court first determined that the harm caused by the release of TCE by the United States constituted a continuous tort rather than a permanent tort under Colorado law. The importance of making this distinction related to when the statute of limitation began to run—a permanent tort claim accrues at the time the harm took place, conversely, a continuous tort claim only accrues once the harmful condition is removed. The court found that Colorado law recognizes continuing trespass and nuisance for invasions of property where the egregious party fails to stop or remove a wrongfully placed invasion on the property. The only exception to this rule applies to irrigation ditches or a railway line, classified as permanent torts.

The court determined that the contamination constituted a continuing trespass and nuisance even though the condition causing the contamination had ceased. Because this was an issue of first impression, the court applied the reasoning from the Ninth Circuit case, *Arcade Water Dist. v. United States*, which stated that the most important factor to consider is presence of continued contamination on the property, not whether the contamination source ceased to pollute. TCE remained on Hoery's property regardless of the fact that the use of TCE ceased. Therefore, because the United States failed to remove the TCE, a continuous invasion remained. In addition, the

court reasoned that the TCE continued to migrate onto Hoery's property, and the failure to prevent the pollution plume also constituted a continuing property invasion. So long as these continuing property invasions remained, the court stated that it was immaterial whether the United States continued to release TCE. The court thus affirmatively certified that migration and ongoing presence of toxic chemicals, regardless of whether the pollution has ceased, constitutes a continuing trespass or nuisance under Colorado law.

Karen L. Golan

CONNECTICUT

Agnello v. Urbano, No. CV000273689S, 2002 Conn. Super. LEXIS 3421 (Conn. Super. Ct. Oct. 24, 2002) (holding that abutters cannot divert surface water onto the adjacent landowner's property; that abutters cannot interfere with an express, implied, or prescriptive easement; and that interference with an easement reasonably necessary for the use and normal enjoyment of property is trespass).

Joseph and Sharon Agnello filed a six-count complaint against Armando and Maria Urbano, the adjacent property owner, in the Superior Court of Connecticut at New Haven. The complaint addressed three main issues: (1) whether Urbano diverted surface water onto Agnello's property; (2) which owner possessed title to a triangular area of land; and (3) Agnello's easement rights. Urbano filed a counterclaim, which sought to quiet title and alleged Agnello trespassed on his property. The court found in favor of Agnello on all counts.

Agnello and Urbano owned adjacent properties. A twenty-five foot right-of-way provided access to Agnello's property. In 1999, Urbano removed a split rail fence located on the adjacent property and constructed a new fence. In addition, Urbano placed materials in the right-of-way, which deprived Agnello of access and constructed a cinder block wall in order to divert surface water onto Agnello's land. Agnello requested and received a temporary restraining order before trial. The order prevented Urbano from diverting the water onto Agnello's land and from interfering with the right-of-way access. Urbano violated the order by building various barriers and limiting the right-of-way.

First, the court addressed whether Urbano wrongfully diverted surface water. The court applied the test formulated in *Tide Water Oil Sales Corp. v. Shimelman*, which states, "the landowner, in dealing with surface water, is entitled to take only such steps as are reasonable." Accordingly, the court held Urbano improved his land and caused the water to impermissibly flow on to Agnello's land. The court further