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Long v. IVC Indust. Coatings, Inc., 908 N.E.2d 697 (Ind. Ct. App. 2009)

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held title to the storage water rights. The court then examined the findings of fact of the 1936 decree. In the findings of fact, the decree assigned the same dollar value per acre-foot of storage water in the reservoir for each subdivision of land, regardless of its distance from the reservoir, implied the use of the universal shrink method. The findings of fact also addressed the issue of deducting conveyance loss, but did not provide a required method for dividing those losses. Therefore, the court found that the findings of fact and the 1936 decree more likely pointed to the use of the universal shrink method of apportioning conveyance losses.

Further, the court held that the universal shrink method of apportioning conveyance losses was lawful. In doing so, the court found that Rule 40.03.b, requiring the Idaho Department of Water Resources' watermaster to apportion conveyance losses according to water reach, only applied to appropriators of water. The court also examined previous cases and determined that the implementation of the universal shrink method was in accordance with existing case law. The court emphasized that the legislature intended irrigation districts to benefit all landowners equally, and that assessments placed on the landowners by an irrigation district cannot vary according to river reach.

Accordingly, the court affirmed the judgment of the district court.

Francis Yi

INDIANA

Long v. IVC Indust. Coatings, Inc., 908 N.E.2d 697 (Ind. Ct. App. 2009) (holding that (1) whether water travelling through ditches was surface water and (2) whether water containing mud ceased to be surface water were genuine issues of material fact which preclude summary judgment).

David and Connie Long ("Longs") and IVC Industrial Coatings, Inc. ("IVC") owned property on opposite sides of a county road. The Longs constructed two farm ponds between 10 and 20 feet deep at various parts on the property, which the Longs stocked with fish. Before 2001, IVC's property was a field. Rain falling on the field would drain through an established course and eventually move to a culvert travelling under the road between the properties and into the Long's farm ponds. Beginning in 2001, IVC began improving its property and hired contractors to begin construction on a manufacturing facility, including a significant amount of earthwork resulting in a "rather large mound of earth" on the side of the property nearest the road.

During that time and continuing into 2002, rain caused mud, silt, and sediment to run off the mound, to the culvert, and eventually into the Long's ponds, causing deposits that made the ponds muddy and unfishable, and significantly decreasing their depth. In January 2002, Dale Walker, an employee of the Indiana State Department of Agriculture, issued an evaluation report indicating there was evidence

that sedimentation from IVC's construction was leaving the site and that sediment control was not in compliance with Ind. Admin. Code 15-5. This section of the code governs construction related storm water runoff.

At the beginning of 2003, the Longs filed a complaint against IVC and its contractors claiming negligence and that the sediment runoff constituted a nuisance and trespass. IVC and the contractors filed motions for summary judgment, which the Clay Superior Court granted. In its order, the trial court found that the common enemy doctrine of water diversion applied to this case and that the Longs had no cause of action because there was no genuine factual issue for submission to a jury regarding whether the water depositing mud on their property was surface water or water in a natural watercourse. The Longs appealed to the Indiana Court of Appeals, arguing that the trial court erred in granting summary judgment to IVC/Contractors and in applying the common enemy doctrine.

On appeal, the Longs first argued that the water was not surface water, but rather followed a natural watercourse. Additionally, the Longs claimed that the common enemy doctrine did not apply because the water contained mud, silt, and sediment. The court began its analysis by restating the definition of surface water as water "following no defined course or channel." Under the common enemy doctrine, a landowner can divert or contain surface water as he or she sees fit, even if the method of control affects an adjacent property. In addition, the court noted that the application of the common enemy doctrine precludes a plaintiff's action regardless of whether the plaintiff asserts the claim as negligence, trespass or a nuisance.

The doctrine does not apply, however, to water running in a natural watercourse. Water establishes a natural watercourse when it begins to flow in a definite and specific course. Several factors are essential to designating a watercourse including substantial existence, regularity, and dependability of water flow along a specific course. The court recalled that the constant water flow is not necessary and the size of the watercourse does not matter in making a watercourse determination. Therefore, the court concluded there was a possibility that a jury could determine that the flow of water from IVC's property to the Longs' property followed a natural watercourse, making summary judgment on the issue inappropriate.

The Longs also argued that the common enemy doctrine did not apply because the water contained mud, silt, and sediment. The court determined that mud and sediment in the water does not preclude the application of the common enemy doctrine. The court reasserted that application of the common enemy doctrine relies on determining whether the water is surface water or water following a natural watercourse. However, the court did conclude that the point at which water ceases to be surface water and becomes a pollutant due to its concentration of mud and sediment is a question of fact. Therefore, the court concluded that summary judgment was not appropriate on this issue either.

Accordingly, the Indiana Court of Appeals reversed the trial court's grant of summary judgment finding that there were genuine issues of material fact the trial court needed to determine. Thus, the court remanded the case for further proceedings.

Matt Brodahl

NEW MEXICO

Lion's Gate Water v. D'Antonio, No. 31279, 2009 WL 5124536 (N.M. Dec. 2, 2009) (holding that *de novo* review of a State Engineer's decision that water is unavailable to appropriate limits a district court's review to that sole, dispositive issue and that the statutory provision requiring the State Engineer to order notice publication applies only when water is available for appropriation).

In February 2003, Lion's Gate Water ("Lion's Gate") applied for a permit with the Water Rights Division of the Office of the State Engineer ("Water Rights Division") to appropriate new water from the Gila River located in southwestern New Mexico. The Water Rights Division summarily rejected Lion's Gate's application, concluding that there was no water available for appropriation. Finding no water available, the Water Rights Division did not answer the ancillary questions of whether the proposed appropriation was contrary to the conservation of water or whether the appropriation would be detrimental to the public welfare. Lion's Gate subsequently filed seven additional applications; the Water Rights Division rejected all of them. Despite the rejected applications, Lion's Gate twice attempted, though only once succeeded, to publish notice of its application for a permit. According to New Mexico law, the State Engineer issues all permits. Because of the statutory hearing prerequisite to an appeal, Lion's Gate demanded an administrative hearing to review the State Engineer's decision to reject Lion's Gate's amended applications. Before the required hearing, however, Lion's Gate appealed its all of its initial and subsequent rejected applications to the Sixth Judicial District Court (the "district court").

The district court dismissed Lion's Gate's appeals for failure to exhaust administrative remedies because the hearing required by statute was still pending. A year later, the State Engineer ordered a hearing on the sole issue of whether water was available for appropriation. Lion's Gate then filed an additional appeal in the district court arguing that a limited hearing denied Lion's Gate the constitutional right to fair and unbiased treatment. The district court once again found no statutory basis for appeal before completion of the required hearing. In August 2007, the hearing examiner granted the Water Rights Division's motion for summary judgment because no water was available to appropriate. Lion's Gate appealed the State Engineer's summary judgment to the district court and requested confirmation that the district court would hear the appeal as an original case, including the issues the State Engineer did not consider. The