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Gannon v. Rumbaugh, 2009 WL 1913668 (Iowa Ct. App. 2009)

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court, citing *United States v. Oregon*, explained that the federal government retained title to non-navigable waters. However, courts use the relevant state law to interpret grants by the federal government for lands bounding on non-navigable waters if the grants lack a reservation or restriction of terms.

Since the meander lines encircled the Lake, the court held that the federal government did not expressly grant the Lake; as a result, the court held that the federal government impliedly conveyed the lakebed to the abutting landowners. After revisiting the court's previous decisions in *Stroup v. Matthews*, *Johnson v. Hurst*, and *Ulbright v. Baslington*, the court held that owners of land abutting a non-navigable lake also take title to the land between the ends of the meander line and the water, as well as part of the lakebed.

Since the federal government originally surveyed the land surrounding the Lake, and nothing indicated the federal government had reserved an interest in the Lake, the court concluded that the grant to the Mesenbrinks' predecessor included land along and under the Lake. The court explained that the boundary lines ran from the ends of the meander lines to the middle of the Lake, and that the ordinary high water mark is irrelevant when determining the ownership of land underlying non-navigable waters. Additionally, the court ruled the public trust doctrine inapplicable because the Lake was non-navigable.

Accordingly the Idaho Supreme Court vacated and remanded the case to the district court for proceedings in accordance with the opinion.

Andrew Reitman

IOWA

Gannon v. Rumbaugh, 2009 WL 1913668 (Iowa Ct. App. 2009) (holding that (1) neither the holder of a dominant or servient estate may obstruct the natural flow of water running from the dominant estate onto the servient estate; (2) holders of the dominant estate may not substantially increase water flow over servient landowner's estate or interfere with the natural watercourse; and (3) drainage improvements are not "authorized by law" if the drainage district that created the improvements no longer exists).

The plaintiffs' (Gannons and Steenhoeks) farmlands adjoin the defendants' (Rumbaugh's) estate. The Steenhoeks' estate is uphill from the Rumbaugh's, making the Steenhoeks' land the dominant estate and the Rumbaugh's the servient estate. The Gannons' estate is downhill from the Rumbaugh's land, making the Rumbaugh's estate the dominant estate and the Gannons' estate the servient estate. The Gannons and Steenhoeks sued the Rumbaugh's after heavy rains flooded their farmlands. They argued that the Rumbaugh's caused the flooding when they lowered a levee on their property and filled a roadside ditch. The District Court of Jasper County found that: (1) the Rumbaugh's negligently increased the flow of water onto the Gannons' property and negligently prevented water from flowing from the Steenhoeks' lands;

and (2) the drainage improvements the Rumbaughs removed were "authorized by law." The Rumbaughs appealed.

The Iowa Court of Appeals affirmed the district court's finding that the Rumbaughs' negligently filled the roadside ditch. The court held that water from a dominant estate must be allowed to flow its natural course onto a servient estate. Neither the dominant estate holder, nor the servient estate holder may obstruct the flow of water from the dominant estate. The district court heard testimony that water from the Steenhoeks' estate flowed onto the Rumbaughs' servient estate and that, by filling in the roadside ditch, the Rumbaughs caused surface water to accumulate and remain on the Steenhoeks' property. According to the court, changes in the ditch obstructed the flow of water from the Steenhoeks' estate, caused the Steenhoeks' land to flood, and thereby interfered with the Steenhoeks' free use of their property.

Although the court affirmed that the Rumbaughs acted negligently by filling the roadside ditch, the court held that the Rumbaughs did not act negligently when they lowered the levee on their property. According to the court, the owner of the dominant estate is entitled to all the natural advantages of the location and contour of his land. However, the holder of a dominant estate cannot substantially increase the amount of water flowing onto a servient estate or substantially change a natural watercourse. Here, the court determined that there was no evidence indicating that the Rumbaughs substantially increased the amount of water flowing onto the Gannons' property.

Furthermore, the court rejected the Gannons' argument that the Rumbaughs substantially diverted a natural watercourse by removing the levee. The court distinguished between the surface waters that damaged the Gannons' lands and waters from creeks, rivers, and lakes. Whereas waters from creeks, rivers, and lakes are substantial and definite, surface waters are temporary in nature, spread at random, occupy lands normally used for other purposes, and follow no definite course. However, if the surface water uniformly or habitually flows over a given course, this constitutes a watercourse. The court determined that, even if a watercourse existed on the Gannon's land prior to the removal of the levee, the surface water did not follow a natural watercourse because the man-made levee directed the flow of the water.

The court also found that the Rumbaughs did not violate an Iowa statute providing that any person who breaks a levee or obstructs a ditch "authorized by law" may be liable to pay injured plaintiffs double damages. The district court concluded that the Gannons and Steenhoeks were entitled to double damages because the levee system, when constructed, was "authorized by law." The Rumbaughs argued that the levee was not "authorized by law" because the drainage district that established the levee had since disbanded. The court, finding no evidence that a drainage district still existed, held that neither the levee, nor the ditch was "authorized by law."

Accordingly, the court affirmed the district court's decision that filling the roadside ditch constituted a negligent act, vacated the district

court's determination that the Rumbaughs acted negligently when they removed the levee, and vacated the district court's determination that the levee and roadside ditch were "authorized by law."

Ellen Michaels

KANSAS

Frick Farm Props. v. Kan. Dep't of Agric., 216 P.3d 170 (Kan. 2009) (holding that a water right holder's unexcused nonuse of a beneficial water right for five consecutive years coupled with the failure to maintain annual water use documentation was sufficient to establish a prima facie case for termination of the water right).

Frick Farm Properties ("Frick Farm") challenged an administrative order by the Department of Agriculture, Division of Water Resources that terminated their water rights. The District Court of Pawnee County and the Kansas Court of Appeals affirmed the agency's termination based upon Frick Farm's nonuse for five successive years without due and sufficient cause. Frick Farm appealed to the Kansas Supreme Court on two issues: (1) whether the agency impermissibly shifted the burden of proof to Frick Farm; and (2) whether there was sufficient evidence to establish two periods of nonuse without due and sufficient cause.

According to section 82(a)-718(a) of the Kansas Statutes, once a water appropriation right is created, it is subject to loss or forfeiture if an owner fails to use the water right for a period of five successive years without due and sufficient cause. Under section 5-7-1(b) of the Kansas Administrative Regulations, in order to constitute due and sufficient cause, the reason purporting to justify nonuse must have in fact prevented, or made unnecessary, the authorized beneficial use of water. The owner of a water right must also file an annual water use report with the chief engineer of the division of water resources specifying whether the owner used their water rights, and if not, the reason for nonuse. Furthermore, section 82-718(a) of the Kansas Statutes states that the verified report of the chief engineer shall be prima facie evidence of the abandonment and termination of a water right.

In 2002, Frick Farm acquired their property and appurtenant water rights from Bernard Debes ("Debes"). In 2003, Frick Farm considered transferring the property to a third party and discovered Debes's inadequate documentation of the water right.

In 2006, the chief engineer of the Division of Water Resources (DWR) concluded that there were two periods of nonuse without due and sufficient cause and therefore deemed the water right abandoned and terminated. During the first period, from 1985 to 1991, Debes reported irrigation only for 1985, but reported no use for the other six years. He provided a justification for nonuse only for 1989, claiming that his wheat crops froze. Frick Farm contended that from 1986-1988, Debes produced crops that did not require irrigation. Although the DWR could not ascertain what crops Debes planted in 1990, they determined that he planted a non-irrigated crop in 1991. The DWR