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Frick Farm Props. v. Kan. Dep't of Agric., 216 P.3d 170 (Kan. 2009)

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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

found that the decision to produce non-irrigated crops did not constitute due and sufficient cause because such a decision did not prevent irrigation.

During the second period, from 1995 to 2002, Frick Farm contended that non-irrigated crops were produced and that irrigation was unnecessary because of adequate rainfall. Once again, the chief engineer found that adequate moisture to produce a crop that is not normally irrigated was not considered due and sufficient cause. The chief engineer reasoned that rainfall did not prevent irrigation or render it unnecessary because the crops would not have required irrigation under ordinary circumstances.

On appeal, Frick Farm argued that the DWR had failed to make a prima facie case for abandonment, and that the court therefore improperly shifted the burden of proof to Frick Farm. The court disagreed, holding that the DWR's verified report established the three elements necessary for a prima facie case: (1) Frick Farm's nonuse; (2) for five successive years; and (3) without due and sufficient cause. Consequently, the court found that the agency properly shifted the burden to Frick Farm to rebut the presumption that there was nonuse without due and sufficient cause.

In arguing that the DWR failed to provide sufficient evidence to terminate the water right, Frick Farm claimed that the DWR improperly relied upon county-wide data as evidence of specific crop irrigation. However, the court found that county-wide data was relevant and that Frick Farm had the opportunity to rebut the evidence but failed to do so.

Next, Frick Farm contended there was not sufficient evidence to demonstrate nonuse without due and sufficient cause in 1995. Frick Farm conceded that no irrigation was used in 1995, but justified the nonuse by arguing that there was adequate rainfall to support the crops without irrigation. The court affirmed the engineer's decision and held that under Kansas Administrative Regulations section 5-7-1(b), adequate rainfall did not constitute due and sufficient cause because the rainfall did not render irrigation unnecessary for crops that would not ordinarily require irrigation.

Frick Farm also claimed that the agency did not have sufficient evidence to prove nonuse without due and sufficient cause in 1990. Although the previous owner reported no usage that year, Frick Farm once again defended the nonuse on the grounds of adequate rainfall. Again, the court affirmed the engineer's finding that this did not constitute due and sufficient cause. Moreover, the court found that consistent failure to justify nonuse on annual reports should be considered in establishing the absence of due and sufficient cause. Therefore, Debes's failure to maintain proper documentation with the DWR was properly considered in terminating Frick Farm's water rights.

Accordingly, the court affirmed the decisions of the court of appeals and the agency.

Tara Buchalter