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Shipe V. Pub. Wholesale Water Supply Dist. No. 25, 210 P.3d 105 (Kan. 2009)

**Shipe v. Pub. Wholesale Water Supply Dist. No. 25, 210 P.3d 105 (Kan. 2009)** (holding: (1) only owners of a water right have standing to object to an eminent domain taking of that water right, and (2) the temporary status of an easement prevents the issue from being ripe).

In accordance with a request to obtain appropriate groundwater rights in the Kansas River Basin, Public Wholesale Water Supply District No. 25 ("District 25") requested access to tracts of land to drill test wells to evaluate the quality and quantity of the water supply. District 25 intended to use information gathered from the test wells to determine a final well location. Gregory Shipe and Charlee Shipe (the "Shipes") owned a tract of land that District 25 wanted to use as a point of diversion. The Shipes opposed District 25's request for a temporary easement on their land to drill a test well. District 25 filed a petition for eminent domain in the Douglas County District Court and sought temporary access on the Shipes' property for 120 days to drill and operate test wells. The district court granted District 25 "Drilling Easements" and "temporary Access Easements" for 120 days. The Shipes then filed an action to enjoin the temporary easement granted to District 25. The Shipes separately filed a motion for a temporary injunction in the eminent domain proceeding. The Shipes argued that District 25 lacked the power to acquire water rights by eminent domain, and therefore, the court should enjoin District 25 from exercising a temporary easement on their property for purposes of locating a diversion point for a water right that District 25 could not ultimately acquire. Finding that the Shipes failed to establish the elements necessary for a temporary injunction, the district court denied the injunction and granted District 25's subsequent motion to dismiss. In reviewing the Shipes' motion to enjoin the temporary easement granted to District 25, the district court focused on whether District 25 had an ultimate right to condemn the related water rights to the Shipes' property reasoning that District 25 needs a temporary easement on the Shipes' property for test drilling only if District 25 has the right to condemn the related water rights. Concluding that District 25 has the power to condemn water rights, the district court denied the Shipes' request to enjoin the temporary easement on their land. The Shipes appealed the denial of the injunction arguing again that District 25 lacks the power to acquire water rights by eminent domain. Based on this claim, the Shipes further argued on appeal that since District 25 lacks the ability to obtain the water rights ultimately sought, the court should enjoin District 25 from exercising temporary access and drilling easements on their land.

On appeal, the Supreme Court of Kansas noted that the district court erred in framing the relevant issue. The court conceded that if District 25's petition for eminent domain included only the associated water rights, then the Shipes, not having an ownership interest in the water rights, would lack standing to object to the condemnation. The court noted, however, that District 25 sought a temporary easement on the Shipes' land to drill test wells. Consequently, the court determined that the Shipes, as owners of the land, undoubtedly had standing to object to

an easement on their land. The court noted that a request for injunctive relief must satisfy the actual case or controversy requirement. The court emphasized that the Shipes sought injunction from a temporary easement as opposed to a permanent easement on their land. The court next analyzed whether the grant of a temporary easement satisfies the actual case or controversy requirement.

In order to meet the case or controversy requirement, an issue must be ripe - not contingent on future action. The court reasoned that District 25's future decision to request a permanent easement on the Shipes' property is contingent on several factors. The court discussed the following contingent factors: (1) whether District 25 will conclude that the Shipes' property provides a more ample supply of water in comparison to the other two test drill locations; (2) whether the Division of Water Resources will approve District 25's application; (3) whether District 25 will be able to obtain water rights in the water related to the Shipes' property; and, if obtained; (4) whether the Shipes will still own the land. The court concluded that the unpredictability of these factors prevents the issues raised from being ripe, and therefore, does not satisfy the case-or-controversy requirement. Accordingly, the court affirmed the district court's decision to grant District 25's motion to dismiss, but on the grounds that the district court lacked jurisdiction because the Shipes lacked standing and the issues were not ripe.

*Crystal Lay*

## NEBRASKA

***In re 2007 Admin. of Appropriations of the Waters of the Niobrara River, 768 N.W.2d 420 (Neb. 2009)*** (holding that a junior appropriator's successful condemnation proceeding regarding a senior appropriator's water rights does not render litigation challenging the validity of a senior appropriator moot).

In 2006, Jack Bond and Joe McClaren Ranch ("junior appropriators") acquired surface water appropriation rights on the Niobrara River to use for agricultural purposes. In the spring of 2007, a senior appropriator the Nebraska Public Power District ("NPPD"), claimed that the Niobrara River lacked sufficient water to satisfy its appropriation rights for a downstream hydropower facility. Claiming that it has held surface water appropriations for the hydropower facility since 1942, NPPD requested that the Department of Natural Resources ("Department") administer the river to ensure that NPPD's senior appropriations rights were satisfied.

On May 1, 2007, the Department issued closing notices to approximately 400 upstream appropriators, including the junior appropriators Jack Bond and Joe McClaren Ranch. The closing notices required the junior appropriators to cease water diversion so that NPPD could satisfy its senior appropriation right. On May 11, 2007, the junior appropriators contested the closing notices by filing an administrative hearing request with the Department alleging that the justification for