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In re 2007 Admin. Of Appropriations of the Niobrara River, 76B N.W.2d 420 (Neb. 2009)

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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

issuing the closing notices was void. The junior appropriators argued that NPPD had abandoned its appropriation rights, or alternatively, that even if NPPD had a valid appropriation right the closing notices were futile because they would not result in any additional water reaching NPPD's hydropower facility.

With the administrative hearing pending, the junior appropriators filed a petition with the county court to condemn NPPD's water rights. Under Nebraska Law, a junior appropriator with a superior preference right may condemn a senior appropriator's water right if it pays just compensation to the senior appropriator. Domestic users have a superior preference over all other users, and agricultural users have a superior preference over manufacturing and power generation users. This policy ensures that, in times of shortage, one with an inferior preference right cannot completely deny water access to one with superior preference right. Because the junior appropriators were agricultural users and NPPD used its water to generate power, the junior appropriators had a superior preference right. Accordingly, the county court ruled that the junior appropriators could use the water to the detriment of NPPD for 20 years and established a compensation award for NPPD.

After the Nebraska Court of Appeals dismissed NPPD's first appeal of the compensation award, the Department determined the junior appropriators lacked standing and dismissed their administrative hearing. The Department held that the junior appropriators had no legally protected interest in the controversy that would benefit from their requested relief because they exercised their condemnation right and were no longer subject to an NPPD closing notice for 20 years. The junior appropriators appealed to the Nebraska Supreme Court ("court"). On appeal, NPPD filed a motion to dismiss claiming that the condemnation proceeding had mooted the junior appropriator's appropriation controversy, or alternatively, that the junior appropriators were seeking a double recovery and were therefore barred under the election of remedies doctrine.

The court first clarified that mootness, not standing, was the issue in the case. The court noted that the junior appropriators could not lose standing so long as they had a personal stake in the outcome of the dispute when they commenced the litigation. Because the Department has jurisdiction over water appropriation disputes and no one alleged that the junior appropriators lacked a personal stake in the dispute at the time they filed their petition, the court ruled that standing was not at issue and went on to analyze the issue of mootness.

Mootness, the court noted, refers to events occurring after the commencement of the litigation that eradicate a party's personal stake in the outcome of the dispute. Although the junior appropriators successfully condemned NPPD's water rights, the Department still required them to compensate NPPD for any water they diverted. Because the junior appropriators could stop reimbursing NPPD if the Department determined that NPPD had abandoned its 1942 appropriation, the court reasoned that the junior appropriators still had

a legally cognizable interest in the outcome of the dispute. Therefore, the court held that the case was not moot.

The court next addressed NPPD's election of remedies argument. The election of remedies doctrine aims to prevent a plaintiff from receiving double recovery by asserting several claims or seeking inconsistent remedies. However, the court noted that the junior appropriators were not seeking inconsistent remedies or double recovery but merely enforcing separate rights by invoking their senior preference right and challenging the validity of NPPD's appropriation status. Nothing in the condemnations proceedings precludes a junior appropriator who is invoking its senior preference right from also challenging the validity of the senior appropriation right. Were it otherwise, the court reasoned, junior appropriators would have to relinquish their constitutional preference rights to challenge the validity of a senior appropriation right. The court reasoned NPPD's election of remedies argument called for a result inconsistent with the Nebraska Constitution and was without merit.

Because the junior appropriators still had a legally cognizable interest in the administrative hearing and were not seeking double recovery but enforcing separate rights, the court remanded the case to the Department for further proceedings.

Michael Eden

OREGON

Gienger v. Dep't of State Lands, 214 P.3d 75 (Or. App. 2009) (holding that a creek is a "water of the state" and that unpermitted removal of material from the bed and banks of the creek is a violation of section 196.810 of the Oregon Revised Statutes).

Lenhart Gienger ("Gienger"), a dairy farmer, owns land through which Golf Course Creek ("creek") runs. In January 2004, Gienger removed fifty cubic yards of material from the bed and banks of the creek. The Department of Fish and Wildlife ("department") investigated the excavation site and observed several hundred cubic yards of material removed from the banks of the creek. The department issued Gienger a cease and desist order, and, in a proposed order, fined him for unpermitted removal of material from the creek. In a contested case hearing, the administrative law judge ("ALJ") issued a proposed order finding that, although the creek was a "water of the state" under section 196.810 of the Oregon Revised Statutes, the creek was exempt from the permit requirement pursuant to section 196.905(3), (4), and (6). The department disagreed, issued a final order in which it added an additional finding of fact, and concluded that no exemption from the permit requirement applied. Gienger sought judicial review of the final order before the Court of Appeals of Oregon ("court").

Gienger raised five assignments of error to the department's final order. First, he contended that the department's additional factual finding (that although the creek has been channelized and relocated