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Gienger v. Dep't of State Lands, 214 P.3d 75 (Or. App. 2009)

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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

over the past 150 years, it has retained its character as a natural waterway beginning in the foothills and flowing into the Wilson River) improperly contradicts the ALJ's findings. The court concluded, however, that a preponderance of the evidence supported the factual finding. In response to Gienger's contention that the department improperly rejected and modified the ALJ's factual findings in concluding the creek was not a drainage ditch, the court stated that the question of whether the creek was a drainage ditch under administrative rules and section 196.905(6) is a legal issue as opposed to a factual issue. Thus, any modification on that issue was not a modification of ALJ's findings of historical fact. The court clarified that its function is to review the agency's conclusions for errors of law.

In his second and third assignments of error, Gienger argued that the department's final order contradicted section 196.905(6) (which exempts structures such as drainage ditches from permit requirements) as well as the department's handbook on regulations relating to drainage ditches. Pursuant to the plain meaning of the statute and the definition of "structure" in the administrative rule, however, the court affirmed that the channelized stream is a natural waterway and not a drainage ditch. In order to be a drainage ditch under the section 196.905(6) exemption, the creek must result from manual excavation with a design to remove water, instead of resulting from natural causes. The court found the department's application of the administrative rules plausible and consistent with the wording of the rules and section 196.905(6).

Lastly, in his fourth and fifth assignments of error, Gienger asserted that the department wrongly concluded that neither of the exemptions in sections 196.905(3) or (4) applied to his removal of material from the creek. The court, nevertheless, agreed with the department that these exemptions are inapplicable. Although Gienger's property is a "converted wetland" under section 196.905(3) and a "prior converted cropland" under section 196.905(4), the court determined that the exemptions did not apply to removing material from the banks of a stream itself.

Accordingly, the Oregon Court of Appeals affirmed the department's final order.

Todd Likman

WASHINGTON

Grundy v. Brack Family Trust, 213 P.3d 619 (Wash. Ct. App. 2009) (holding that (1) the "common enemy" doctrine exempting property owners from liability for property damage due to surface water diversions does not apply to seawater; and (2) damage from seawater trespass is a cause of action for a civil tort of intentional or negligent trespass).

This case involves next-door neighbors Calvin and Joyce Brack ("Brack") and Evelyn Grundy ("Grundy"), shoreline property owners