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Portage County Bd. of Comm'rs v. City of Akron, 846 N.E.2d 478 (Ohio 2006)

Christian Troncoso

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The court also reviewed the district court's determination that if the Herringtons did place the proposed well downstream of the original point of determination, then the Templeton doctrine could not apply because all downstream wells result in a new appropriation. After reviewing the facts, and noting that the Templeton well itself was a downstream well, the court determined that while a downstream location may be an indicator of whether the new well draws from a new source, it is not an absolute determination. Therefore, an upstream requirement cannot be a universal requirement and must instead be case specific.

In addition to reviewing Herrington's Templeton doctrine claim, the court reviewed the issue of statutory transfer. The court of appeals concluded that statutory transfers must meet the Templeton requirement, and thus Herrington did not qualify. Both Herrington and the state engineer sought reversal of this decision because the right to change the point of diversion is a right that was previously determined to be one of the incidents of ownership as long as the proposed transfer only allows the applicant to draw from the same hydrologic unit. Ensuring that a transfer occurs within the same hydrologic unit is different than applying the narrow Templeton same source requirement, as statutory transfers may apply for new uses for the water over significant distances. The court therefore rejected the Templeton doctrine in statutory transfers, as it would make transfer requirements too specific, curtail the state engineer's discretion, and threaten sound water policy.

After clarifying specific aspects of the Templeton doctrine, the court reversed the court of appeals decision and remanded to the district court for further proceedings.

Carrie Stanley

OHIO

Portage County Bd. of Comm'rs v. City of Akron, 846 N.E.2d 478 (Ohio 2006) (holding Akron's use and sale of water from Cuyahoga River reasonable insofar as it maintains a release of between 8.1 and 9.5 million gallons per day ("MGD") to protect downstream riparian rights).

After a devastating fire in 1909, the City of Akron ("Akron") sought to develop a new source of water, ultimately deciding to construct a large water reservoir. In 1911, the legislature passed a statute conferring a right to divert the Cuyahoga River, and the Governor deeded a right of use to Akron. The deed purported to convey Akron all water rights to the Cuyahoga not used by the state for the maintenance of the Ohio Canal. Shortly thereafter, Akron began construction of the reservoir in Portage County, now known as Lake Rockwell, along the

Cuyahoga River. Seeking to expand its water rights in the Cuyahoga River, Akron began annexing land from townships in exchange for a commitment to provide them with water. Concerned that supplying water to the annexed towns constituted an interbasin water use, Akron entered a lease with the Ohio Department of Natural Resources (“ODNR”) in which it pledged to release 3.5 MGD from Lake Rockwell in exchange for an ODNR determination that Akron did not need a permit for interbasin water use.

The Portage County Board of Commissioners, along with the cities of Kent, Cuyahoga Falls, and Munroe Falls, and the village of Silver Lake (collectively, “the County”) brought suit against Akron, following Akron’s lease with the ODNR, in the United States District Court for the Northern District of Ohio, claiming unreasonable use of water and seeking declaratory judgments, injunctions, and damages. The suit stemmed from the County’s fear that Akron’s water lease with the ODNR as well as its sale of water to other towns would result in water quality problems. The County contended that the 1911 grant only entitled Akron to a right to use water from the Cuyahoga, not to sell it, and that the sales constituted an unreasonable use. The trial court entered summary judgment in favor of the County regarding its interpretation of the rights transferred in the 1911 deed, but conducted a bench trial to evaluate the County’s claims of unreasonable use. The trial court ruled that riparian rights belong only to those who own land along a river, and because Ohio owned no land along the Cuyahoga, it could not transfer any riparian rights to Akron in the 1911 deed. However, the trial court found Akron’s taking from the Cuyahoga to be reasonable in light of its subsequent land purchases along the Cuyahoga, and its 5.0 MGD intentional and 3.1 to 4.5 MGD incidental releases from Lake Rockwell. The trial court denied Akron’s petition for an injunction.

The Court of Appeals of Ohio, Eleventh District, Portage County, affirmed, reasoning that although Akron failed to prove Ohio had any riparian rights along the river, its purchase of Lake Rockwell entitled it to sell water. However, the court remanded the case for a determination of how much water the doctrine of reasonable use required Akron to release from Lake Rockwell so as to not injure any downstream riparians.

Both Akron and the County filed appeals. The Ohio Supreme Court granted review to assess the effect of the 1911 grant, to evaluate Akron’s rights to the water, and to address what obligation, if any, Akron owed to the County to release water from Lake Rockwell. Akron contended that the appellate court misinterpreted the deed, and that it granted them water rights that the state owned as well as those based on the state’s inchoate ability to seize water for public use. Akron argued the deed rightfully entitled them to all of the water in the Cuyahoga beyond that necessary to maintain the Ohio canal. Ohio law in-

corporates traditional riparian principles, under which water rights are derived from ownership of waterfront property, based on use not possession, protected from injury from other users, and obtained by the state solely through eminent domain. The court, therefore, interpreted the grant as having conveyed only the right to use the water utilized by the state to supply the canal, and incapable of transferring riparian rights necessary for subsequent sales. However, Akron's subsequent land acquisitions, including Lake Rockwell, vested it with riparian rights, and the ability to sell water to other towns.

The court next reviewed the reasonableness of Akron's use of the Cuyahoga, balancing the effect of the Akron's sales of water to other towns and its releases to the river from Lake Rockwell. The County presented evidence regarding the discharges necessary for preservation of the river's aquatic life and maintaining EPA water standards, and sought a declaration forcing Akron to release 8.5 to 10.9 MGD. Akron argued that the changing and competing nature of riparian rights made any declaration merely hypothetical, and that the appellate court erred in remanding for a declaratory judgment. In reviewing the record, the court noted that Akron's 1998 lease with ODNR stipulated that it release 3.5 MGD but that it regularly exceeded the obligation and released 5.0 MGD. Moreover, the County presented expert testimony estimating the aggregate flow to be 8.1 to 9.5 MGD, resulting from a 3.1 to 4.5 MGD unintentional release.

The Supreme Court of Ohio held that Ohio conveyed only the right to use the water it held title to at the time of the transfer, and that Ohio had no rights in the Cuyahoga at the time of the 1911 deed. Therefore, Akron's water rights in the Cuyahoga were limited to rights gained through its subsequent purchases of riparian lands. Furthermore, the court affirmed and modified the court of appeals decision to remand for issuance of a declaratory judgment regarding Akron's reasonable use of the Cuyahoga River. On remand, the court ordered the trial court to issue a declaratory statement holding Akron's use of the Cuyahoga to be reasonable insofar as it maintains an aggregate release flow from Lake Rockwell between 8.1 and 9.5 MGD.

Christian Troncoso

SOUTH DAKOTA

Apland v. Butte County, 716 N.W.2d 787 (S.D. 2006) (holding Butte County Director of Equalization's methodology for assessing the value of rangeland was clearly erroneous when it failed to consider the value of appurtenant and nontransferable water rights).

John Apland and other Butte County landowners (collectively "Apland") appealed the Butte County Board of Equalization's decision regarding Apland's rangeland property assessments for the 2002 and