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McNamara v. City of Rittman, 838 N.E. 2d 640 (Ohio 2005)

## OHIO

**McNamara v. City of Rittman, 838 N.E. 2d 640 (Ohio 2005)** (holding that Ohio landowners have a property interest in the groundwater underlying their land and that governmental interference with that right could constitute an unconstitutional taking).

This suit stems from two separate lawsuits involving the impact of the local government on individual homeowners' water supplies. In one suit, the City of Rittman ("the City") purchased land near the McNamara's land and drilled three wells in order to provide water to the City. McNamara sought damages and injunctive relief but the court granted summary judgment to the City. McNamara filed suit again in 2000, claiming a violation of due process and taking without just compensation. The United States District Court for the Northern District of Ohio granted summary judgment in favor of the City, holding the statute of limitations had run.

In the second suit, the City of Columbus ("Columbus") dewatered the Hensley's well by pumping the aquifer below their property in order to prevent flooding in nearby trenches. After losing to the government in a suit seeking damages, the Hensleys filed a complaint alleging a federal takings claim and procedural and substantive due process claims. The United States District Court for the Southern District of Ohio granted summary judgment to Columbus, holding that Ohio does not recognize a property interest in groundwater. Both the McNamaras and the Hensleys appealed to the Sixth Circuit Court of Appeals. The Supreme Court of Ohio then agreed to certify the question common to both cases of whether the Ohio landowners have a property right in the groundwater beneath their property.

The court looked to past decisions to determine 1) whether groundwater was subject to property rights; and 2) whether the rights are protected from government invasion. In analyzing whether landowners have a property right in the groundwater beneath their property, the court first looked to *Frazier v. Brown*. *Frazier* established that Ohio recognized an absolute ownership standard for groundwater because property owners could use all the groundwater they wanted. The court then looked to *Cline v. American Aggregates Corporation* to determine the more modern approach to property rights with respect to groundwater. The court in *Cline* adopted the reasonable use doctrine allowing property owners to use as much groundwater as they can put to beneficial use. The *Cline* court also mentioned protecting a property owner's groundwater property rights. Based on these cases, the court held that property owners could protect their property rights with regard to groundwater against other property owners who unreasonably diminish the shared water supply.

The court then determined that water rights are appurtenant to title in real property. As such, the government may not invade these rights. It held that property owners were not required to hold separate title to their groundwater. The court relied on numerous holdings from diverse jurisdictions to find that landowners' rights to groundwater protect them from government interference. It further stated that the welfare of Ohio homeowners, the security of Ohio's economy, and the reliability of real estate transfers demand the safeguarding of groundwater rights. The court answered the certified question holding that Ohio landowners have a property interest in the groundwater underlying their land and that government interference with that right can constitute an unconstitutional taking.

*Jacki Lopez*

**City of Salem v. Koncelik, 843 N.E.2d 799 (Ohio Ct. App. 2005)** (holding the Ohio Code required the Environmental Review Appeals Commission to consider biological criteria regulation when seeking to impose permit discharge limitations).

The City of Salem ("Salem") appealed from a renewal permit issued by the Ohio Environmental Protection Agency ("OEPA") imposing more stringent limits on the amount of phosphorus and total dissolved solids a municipal wastewater treatment plant ("WWTP") could discharge into a creek. The discharge allowed by the creek's biological water quality standards exceeded the permit limits. The Environmental Review Appeals Commission ("ERAC") affirmed the renewal permit and found OEPA's action comported with the legal authority pursuant to the Ohio Code. Further, ERAC found the Ohio Code legally required OEPA to impose limits "necessary and appropriate" to achieve and maintain the applicable standards of water quality.

Salem appealed ERAC's order to the Ohio Court of Appeals. First, Salem asserted ERAC's ruling that the Ohio Code provides legal authority for the imposition of the phosphorus limits was not in accordance with law. Salem reasoned the limits were not in accordance with the law because the Ohio Code required OEPA to comply with additional standards of biological criteria regulation when seeking to impose permit discharge limitations.

Second, Salem asserted reliable, probative and substantial evidence did not support ERAC's failure to find additional limitations in the Ohio Code precluded OEPA's action. Finally, Salem asserted ERAC's finding that the specific numeric limits for phosphorus included in the renewal permit were "necessary and appropriate" to achieve water quality standards was not supported by reliable, probative and substantial evidence and was not in accordance with law.