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Buckskin Hunting Club v. Bayard, 868 So. 2d 266 (La. Ct. App. 2004)

Matthew Sarles

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Next, the court reversed the district court's determination of negligence by finding no ambiguity in the plain language of the easement and no unreasonable activity by the Project. The court held the 1979 judgment contained no ambiguity given the plain language of the easement that allowed the Project to raise the water level for any activity supporting the irrigation of fields. Since the Project did not raise the water level above 2,771 feet and their purpose supported irrigation, the Project's activities did not violate the plain language of the easement. Additionally, the court noted McKay planted his crop below the 2,771-foot level at his own risk. The court also held McKay lacked standing to assert wasteful use of water as a violation of an alleged duty owed to him, because the statutes relied upon by McKay only allowed negligence claims by other users of the water, the State, or a servient estate to an easement only if the waste directly caused the harm. McKay did not qualify as one of these categories. Therefore, McKay could not recover under a theory of waste; the Project could not act negligently if it did not owe McKay a duty to act reasonably in regards to waste.

Finally, the court addressed the Project's claim of immunity. The court held that only discretionary functions carried out by a governmental entity and its employees retain immunity from tort claims. The court considered routine matters, such as the decision of the Project to raise the reservoir water level for irrigation purposes, operational in nature and not subject to immunity.

In conclusion, the court reversed the permanent injunction, vacated the lower court's damage award, and remanded for further proceedings.

David B. Oakley

LOUISIANA

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(affirming the grant of a permanent injunction prohibiting hunters from entering private land because: (1) no public access right existed to private land subject to intermittent flooding, (2) no public use right existed to private waterways merely because the waterway was navigable, and (3) public use right to banks of navigable public waterways did not include right to hunt).

The Buckskin Hunting Club ("Club") filed suit in the 16th Judicial District Court, Parish of Iberia, seeking an injunction to prohibit further trespassing by a group of hunters who had entered land leased by the Club without permission. The hunters claimed in defense that navigable public and private man-made waterways through the land, as well as intermittent flooding, both created a public right to use the land surrounding the waterways. The district court, after considering

multiple issues, granted the permanent injunction. The hunters appealed.

In affirming the district court in full, the Court of Appeal of Louisiana for the Third Circuit quoted extensively from the district court's findings and conclusions. First, the court affirmed the district court's holding that while banks of a navigable public waterway through private land were subject to public use, intermittent flooding of the surrounding land did not convert such land to "banks" that were therefore available for public use.

Next, the court affirmed the district court's holding that no public use right existed in the Club's private waterways. The hunters alleged four reasons for finding that a public use right does exist: (1) the private waterways on the Club's land negatively affected the navigability of other local public waterways; (2) state funds had been used to clean the banks of the private waterways; (3) mere navigability in fact created a public use right; and (4) because the Army Corps of Engineers ("Corps") could seek regulatory control over the private waterways, a public use right arose.

The court affirmed the district court's holdings that: (1) the hunters failed to provide adequate factual support for the contention that the private waterways had decreased or eliminated the navigability of local public waterways; (2) use of state funds on private property did not create a public use right unless the government contracted for those rights; (3) a public use right did not arise merely because a river could be used for navigation; and (4) whether the Corps could seek regulatory control over a waterway did not affect the issue of public use of that waterway.

Finally, the court addressed the hunters' contention that even if there was no public use right to private waterways, there was a public use right to the banks of navigable public waterways. The hunters argued the district court should not have granted the Club an injunction denying the hunters the right to hunt on the banks of the public waterways. The court agreed there was a public use right to the banks of navigable public waterways. However, that public use right did not allow the entire spectrum of possible public use. The use right that arose was limited solely to those purposes incidental to the use of the stream's navigational properties. These incidental uses included emergency use during shipwrecks, drying of fishing nets, and resting from the waters. Because the court found no error in any of the district court's determinations, the court affirmed the decision of the district court to grant the Club an injunction.

Matthew Sarles

Rizzo v. Nichols, 867 So. 2d 73 (La. Ct. App. 2004) (affirming award of damages to landowners whose property flooded because their