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Baumbach v. Hauxwell, No. A-03-549, 2004 Neb. App. LEXIS 247

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new appropriation. As such, the court refused to consider the application amendments as refinements to the Siebels' original applications.

The court also rejected the Siebels' argument that water appropriation applications needed only to indicate the applicant's interest in acquiring water and did not need to specify water amounts, water uses, or means and places of diversion. The court recognized such an application was acceptable prior to passage of the 1973 Montana Water Use Act ("Act"). However, the Act fundamentally changed the appropriation process, thereby requiring specificity and completeness in appropriation applications.

The court thus affirmed the district court's decision to deny the Siebels' application for water appropriation.

Kyle K. Chang

NEBRASKA

Baumbach v. Hauxwell, No. A-03-549, 2004 Neb. App. LEXIS 247 (Neb. Ct. App. Sept. 21, 2004) (holding the trial court erred in granting adverse possession claim where disputed boundary was the thread of an old river bed, the river was moved by an act of avulsion, and there was no showing of continuous possession or claim of ownership).

In a quiet title action, Bill Baumbach ("Baumbach"), Patrick and Cecily Bolte ("the Boltes") claimed adverse possession against Bryan, Doug, and Ami Hauxwell ("the Hauxwells"), and John Doe in the District Court for Red Willow County, Nebraska. The district court quieted title in favor of the Boltes, and the Hauxwells appealed. After reviewing the facts de novo, the Nebraska Court of Appeals reversed.

The Boltes purchased riparian land on the south side of the Republican River from Baumbach in January 2000. Prior to 1935, the Republican River served as a boundary line for several lots to the south of the land the Boltes purchased. The boundary of riparian lands extended to the thread, or center, of the river channel. In 1935 a flood caused the Republican River to shift its course to the north. This was a sudden act of avulsion and, as a result, the boundary line did not shift with the river as it would during a slow process of accretion. For land to be riparian, it must have water flowing over it or along its border. Because the sudden avulsion in 1935 moved the flow of the river without moving boundary lines, the lands south of the old Republican River no longer bordered water and, therefore, lost their riparian rights. When the Boltes purchased their land in 2000, the deed granted them riparian land starting from the thread of the current Republican River, then going south to where the thread of the Republican River existed prior to 1935. However, a fence existed to the south of the old river thread on land the Hauxwells owned in 2000. The Boltes claimed they owned the Hauxwell property south of the old river thread, to the fence, through adverse possession.

On appeal, the court first noted, to acquire title by adverse possession, a claimant must show actual, continuous, exclusive, notorious, and adverse possession under a claim of ownership for a period of ten years. Moreover, each element must be both continuous and uninterrupted for the entire ten-year period. The court determined the Boltes' use was not continuous, because the land was suitable for year-round use, and the Boltes only used it intermittently. Next, the court rejected the Boltes' claim that the use of the fence as a boundary line sufficiently established adverse possession. The court reasoned the fence was insufficient because this use lacked a claim of ownership of a nature sufficient to put the real property owner on notice. In conclusion, the court held the Boltes did not establish continuous use, exclusive use, or the claim of ownership necessary for an adverse possession claim and, accordingly, the court reversed the trial court ruling and remanded the case.

Jonathan Long

Spear T Ranch, Inc. v. Knaub, 691 N.W.2d 116 (Neb. 2005) (adopting the Restatement (Second) of Torts rules for disputes between users of hydrologically connected ground and surface water; holding that although Spear T did not precisely state a claim under the Restatement, Nebraska's pleading rules require the district court to allow amended claims, and determining that the Nebraska Ground Water Management and Protection Act does not abrogate any common-law claims).

Spear T Ranch, Inc. ("Spear T") alleged in the District Court for Morrill County, Nebraska, that Knaub's irrigation wells drained water from Pumpkin Creek, depriving Spear T of its surface water appropriation. Knaub moved to dismiss for failure to state a claim upon which the court could grant relief.

On appeal to the Nebraska Supreme Court, Spear T argued it stated a claim for conversion, trespass, or injunction. Knaub made two arguments in the alternative. First, the Nebraska Ground Water Management and Protection Act ("GWMPA") abrogated any common-law claims, and second, under the primary jurisdiction doctrine, the North Platte Natural Resources District ("NRD") possessed jurisdiction to determine the issues.

The court considered Spear T's prior appropriation claim and rejected it for three reasons. First, Nebraska law maintains a legal fiction to the effect that the over-pumping of groundwater cannot harm a user of surface water. Second, neither Nebraska's statutes, nor extant case law, developed a system or doctrine to address conflicts between users of surface and groundwater. Finally, if the court adopted Spear T's rule, first-in-time surface water appropriators would have a superior right to all later groundwater users. The court stated that this could shut down all the wells in areas where ground and surface water are