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Douville v. Pembina County Water Res. Dist., 612 N.W.2d 270 (N.D. 2000)

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necessary and denied the City's claim to recover the costs of supplying water under the stipulation agreement. The City appealed the order to the Supreme Court of New York, Appellate Division.

The appellate court stated the UWNR and the Village petition to review the DEP determination should have been dismissed outright because the City continued to operate the aqueduct and chlorination facility during the stipulation agreement period. Further, the appellate court concluded the City's counterclaim for a declaration that they had a right to shut down based on the DEP determination should have been dismissed because continued operation under the stipulation agreement ended the immediate controversy. Lastly, the appellate court upheld the lower court's dismissal of the City's claims for the costs of providing water under the stipulation agreement on different grounds. Based on its interpretation of the City issued permits, the lower court ruled the City was under no obligation to provide water to UWNR and the Village. The appellate court held that, regardless of the permit terms, the City was bound by the stipulation agreement to provide water unless the parties entered into the agreement under fraud, collusion, mistake, or accident. The appellate court found no evidence to support such a claim. Furthermore, the appellate court found no language within the stipulation agreement that obligated either UNWR or the Village to pay the City for any costs associated with providing water.

Matthew J. Costinett

NORTH DAKOTA

Douville v. Pembina County Water Res. Dist., 612 N.W.2d 270 (N.D. 2000) (holding a county water resource district did not misinterpret the law regarding the removal of unauthorized dikes and did not misapply the law regarding prescriptive easements when it ordered the removal of the landowners' dikes).

Thomas Douville and other landowners ("landowners") appealed the Pembina County Water Resource District's ("District") decision to remove dikes from their land. From 1969 to 1974, these landowners built dikes on their land to control flooding from the Pembina River without obtaining permits. In later, high run-off years, these dikes caused flooding of land downstream. In 1996, downstream landowners filed suit with the District. The relevant statute stated no dams, water conservation devices, or flood control regulation devices, be built within any water management district except as stated in the provisions of the chapter. The District found the dikes were illegal and ordered them removed. The district court affirmed. The main issues the district court addressed were whether the District

misinterpreted the laws regarding removal of unauthorized dikes and whether the District misapplied the law regarding prescriptive easements, thus arbitrarily, capriciously, and unreasonably ordering the removal of the dikes.

The court found the District neither misinterpreted the laws regarding removal of unauthorized dikes nor misapplied the law regarding prescriptive easements. Thus, the District's order to remove the dikes was not arbitrary, capricious, or unreasonable. The court looked at the legislative intent of the relevant statute. The court found the legislature intended the statute cover "dikes." The landowners argued the statute's specific mention of dams, but not dikes, indicated the legislature's intent that the law not cover dikes. The court disagreed and found "dikes" to be defined as flood control regulation devices, thus making the statute applicable.

The landowners next argued that, because the dikes were not illegal when they were built under the pre-1979 version of the statute, the District could not order removal under the current version of the statute. The court found the history of the 1979 amendment clearly included dikes in the pre-1979 version of the statute as well. The court found it unnecessary to look beyond the statutory language or consider legislative history because the law was clear and unambiguous. The court determined that even though the dikes were not specifically mentioned in the pre-1979 statute, the legislature clearly intended their inclusion.

The landowners also argued the legislature does not perform idle acts. Therefore, the addition of the word "dike" in the 1979 amendment must have meant dikes were not previously included. The court determined the addition of the word "dike" was only a clarification and did not mean the statute did not previously cover dikes. The court found, despite the presumption that legislative amendments are intended to change existing law, the 1979 amendment's purpose was merely to clarify the law. The court determined the 1979 amendment's clarification did not indicate that the statute did not previously cover the issue.

The landowners also argued the statute did not cover dikes because dikes do not "retain" water and the statute only dealt with structures capable of "retaining" water. Under the plain and ordinary meaning of the statute, the court decided a dike is capable of "retaining" water. The court interpreted "retain" based on its plain, ordinary, and commonly understood meaning. "Retain" is defined as keeping or holding in a fixed state or condition. The court determined, because the main purpose of a dike is to keep or hold water in a certain place or position, a dike is capable of "retaining" water. Thus, the court found the statute covered dikes.

Finally, the landowners argued the dikes should not be removed because the District erred when it failed to find they had acquired a prescriptive easement to flood land downstream. The court found the

landowners sought relief beyond a mere flowage easement upon the downstream landowners. Rather, the landowners asserted the right to keep dikes constructed in violation of the law in place. The court concluded the landowners could not acquire a prescriptive right to stop the state from regulating and controlling the use of public waters for public benefit. The court found prescriptive rights cannot be acquired to public nuisances or interests that violate state law. Because the landowners' construction of dikes violated state law, the court determined they could not acquire prescriptive easements to use such dikes.

Willow Morrow

OHIO

Ormet Primary Aluminum Corp. v. Employers Ins. of Wausau, 725 N.E.2d 646 (Ohio 2000) (holding aluminum manufacturing corporation failed to provide insurance carriers with timely notice of groundwater contamination).

Ormet Primary Aluminum Corporation ("Ormet") owned and operated an aluminum manufacturing facility ("Site"). The Site included two wells that provided drinking and processing water. Ormet dumped its manufacturing wastes into ponds located at the Site. In 1956, a hydrogeological study of the Site warned of potential groundwater contamination from the disposal ponds. The study suggested sealing the ponds' bottoms and installing an interceptor well to pump out contaminated groundwater before it contaminated the drinking water wells. Ormet did not institute either remedial measure.

In 1966, Ormet became aware that liquid waste leakage, specifically fluorides and cyanides, from the unlined disposal pond bottoms had contaminated the Site's well water. Ormet constructed an interceptor well in 1972, but did not treat the inceptor well water. Instead, Ormet funneled the water into the Ohio River. Ormet obtained a National Pollution Discharge Elimination System permit ("NPDES permit") in 1975 for the contaminated interceptor well water discharge.

A May 1977 report confirmed underground aquifer contamination continued at the Site. In July 1977, a groundwater consultant hired by Ormet found impermissibly high cyanide and fluoride levels in the Site's groundwater due to disposal pond runoff. The groundwater consultant also suggested Ormet cover the disposal ponds with clay lids and recommended general cleanup. Ormet followed neither of these suggestions.

In 1980, due to a classification of the Site as a "major discharger" into the Ohio River under the Clean Water Act ("CWA"), an independent laboratory tested Ormet's wastewater discharges. The laboratory issued a report revealing that Ormet was discharging high