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Messer-Bowers Co. v. State, 8 P.3d 877 (Okla. 2000)

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of Site contamination, it was not aware of governmental regulatory action until much later. In addition, Ormet saw no need to notify Insurers of any problems until after CERCLA's enactment. In rejecting this argument, the court determined both that awareness of regulatory action did not pertain to the notice of an "occurrence" and water pollution laws existed in Ohio prior to the passage of CERCLA.

Ormet next argued a genuine issue of material fact existed as to whether or not Ormet provided notice "as soon as practicable" after an accident or suit. The court considered a 1989 memo from Ormet's insurance administrator to Ormet's vice-president. The memo acknowledged the vice-president's awareness of Site contamination and his subsequent discussion of the problem with Ormet's insurance broker. The court concluded that no material fact existed because Ormet's insurance administrator sent the memo three years before Ormet's first notice of potential claims.

Finally, Ormet argued it handled the remediation in the most efficient and cost-effective manner possible. Therefore, its insurers were not prejudiced by a notification delay. The court concluded Insurers were actually prejudiced by the notification delay as several potential witnesses had died, and, as a result, Insurers had no opportunity to question them. Moreover, potential witnesses' memories had faded and documents were lost.

The court concluded reasonable minds could not differ. Ormet had failed to provide timely notice in violation of its insurance policies, and Insurers were therefore entitled to summary judgment.

Sarah E. McCutcheon

OKLAHOMA

Messer-Bowers Co. v. State, 8 P.3d 877 (Okla. 2000) (holding that, in a groundwater use permit proceeding, the Oklahoma Resources Water Board must look at the ultimate use of the groundwater to determine whether waste by pollution will occur).

In 1996, Kronseder Farms, Inc. ("Kronseder") applied to the Oklahoma Water Resources Board ("Water Board") for a groundwater use permit for land on which Kronseder planned to construct a concentrated swine feeding operation. Surrounding landowners ("Landowners") opposed the application. They asserted Kronseder's use of the requested groundwater would diminish and contaminate their supply of groundwater from wells and springs. The Water Board approved the application in 1996. The District Court on review remanded the matter to the Water Board. In 1997, the Water Board again approved the application. The district court upheld the order and the court of appeals affirmed.

On appeal, Landowners first challenged the Water Board's decision to conduct the permit proceeding under groundwater statutes. Landowners argued stream water use statutes applied to the proceeding because natural springs existed in the area. The court found the Water Board had correctly determined that Kronseder sought the permit to drill several new wells and to use existing wells to drain water directly from the groundwater basin, and thus, the groundwater statutes applied.

Landowners also challenged the Water Board's determination that Kronseder met the permit requirements. First, Landowners argued Kronseder's withdrawal of the groundwater was for an unreasonable use. The court found the Water Board had sufficiently addressed this issue by limiting the number of wells that could operate at one time and that no statutory limitation of reasonable use regarding removal of groundwater existed. Secondly, Landowners claimed Kronseder's operation would cause waste by depletion. The court concluded the Water Board's finding, that Kronseder's evidence demonstrating that no depletion would occur, was more credible, and thus upheld its decision. Lastly, Landowners argued the Water Board incorrectly limited its waste by pollution inquiry to the construction and operation of Kronseder's wells and water distribution system. Landowners claimed the Water Board was required to look at the ultimate use of the groundwater to determine if waste by pollution would occur. Landowners argued irrigation of crops with an effluent of manure mixed with fresh groundwater would result in groundwater pollution.

Kronseder claimed the Water Board correctly determined that the Department of Agriculture had exclusive jurisdiction over the disposal of animal waste effluent on agricultural corps under the Oklahoma Environmental Quality Act (the "Act"). Thus, the Water Board inquiry was limited to the construction and operation of the water distribution system. Kronseder also argued the Water Board correctly held that the Act superceded the requirement that a groundwater permit applicant present evidence concerning the effect of what it adds to fresh groundwater and whether the additives will filter back and contaminate the groundwater formation.

The court found the intent of the Act was to give the Department of Agriculture and the Water Board concurrent environmental jurisdiction over livestock facilities that require water permits. The court held the pollution requirement must be determined by looking at the ultimate use of the groundwater. The court remanded the case to the Water Board to receive evidence and make findings of fact to determine whether waste by pollution will occur through all uses of groundwater at the Kronseder swine facilities.

Karen McTavish