

402-471-2900

IN THE DISTRICT COURT OF MORRILL COUNTY, NEBRASKA

SPEAR T RANCH, INC., a Nebraska Corporation,

Plaintiff,

vs.

MELVIN G. KNAUB, et al.,

Defendants.

Case No. CI03-16

JOURNAL ENTRY

NOW ON THIS 10<sup>th</sup> day of June, 2003, this matter came to the Court's attention upon the Rule 12 Motions filed by all Defendants. Plaintiff was represented by Thomas D. Oliver. Counsel for the following Defendants were present in court: Harriet M. Hageman, counsel for George A. Davis and Loretta L. Davis; Michael J. Javoronok, counsel for Melvin G. Knaub, Melvin G. Knaub Farms, Inc., Knaub, Inc., Melvin G. Knaub Grand Kids Limited Partnership, and Special K., Inc.; John F. Simmons, counsel for John Gifford and Roger Gifford; James L. Zimmerman, counsel for Max Olsen; James M. Mathis, counsel for Leeray and Beverly Edens; and Robert M. Brenner, counsel for Darnall Ranch, Inc.

*and Max Olsen*

By permission of the Court, the following Defendants' counsel appeared by way of a conference telephone connection: Albert M. Engles, counsel for Donahue & Rutledge, Inc.; Daniel L. Lindstrom, counsel for XL Farms, LLC; Daniel M. Placzek, counsel for Olsen Ranches, Inc.; Philip M. Kelly, counsel for Richard Van Pelt and Margaret Van Pelt; Paul E. Hofmeister, counsel for Hoehn Farms, Mark Hoehn, Krista Hoehn and Allison Hoehn; and John H. Skavdahl, counsel for Gifford Circle Diamond Ranch, Inc.

Kevin Colleran, attorney at law, also participated by telephone conference.

The matter was argued. The Court, being fully advised, finds that this Court lacks jurisdiction of the subject matter of the action, that the Complaint fails to state a claim upon which relief can be granted, and that the Complaint fails to join necessary and indispensable parties. The Defendants' motions are sustained on those grounds. The Court overrules the Defendants' contention that the

Complaint is so vague or ambiguous that the Defendants cannot reasonably be required to frame a responsive pleading.

The Court finds that there is no reasonable possibility that the Plaintiff could amend the Complaint in such fashion as to cure the defects which the Court has found. The Complaint therefore stands dismissed as to all parties and all causes of action. The Court expressly directs the entry of judgment in favor of the Defendants.

BY THE COURT

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District Judge

Prepared and Submitted by:

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IN THE SUPREME COURT OF THE STATE OF NEBRASKA

Spear T Ranch, Inc., )  
 )  
Appellant, ) Case No. S-03-789.  
 )  
v. )  
 ) ORDER  
 )  
Melvin G. Knaub, et al., )  
 )  
Appellees. )

**FILED**

APR 21 2004

CLERK  
NEBRASKA SUPREME COURT  
COURT OF APPEALS

The appellees have filed a motion seeking additional briefing and/or argument on the issue of primary jurisdiction. The appellant has objected. In addition, there were legal arguments raised at oral argument that were not addressed in the parties' briefs.

The court desires additional briefs and argument on the following issues:

- (1) The doctrine of primary jurisdiction.
- (2) Primary jurisdiction in light of the Groundwater Management Protection Act and the recent adoption of LB 962.
- (3) The effect, if any, of the adoption of LB 962 on this appeal.
- (4) Whether the Nebraska Groundwater Management Protection Act or LB 962 have abrogated any common law remedies that the appellant might have, or provides an adequate remedy at law.

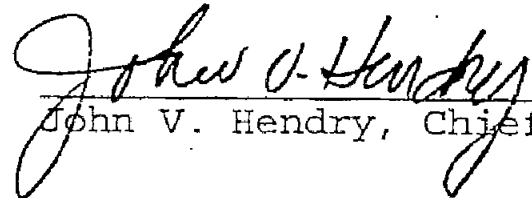
IT IS THEREFORE ORDERED:

That the appellees' motion for additional briefing and oral argument is granted. Appellant's brief, not to exceed 50 pages, due June 1 2004; appellees' consolidated brief, not to exceed 50 pages,

due July 15, 2004; appellant's reply brief due July 29, 2004. Amici curiae previously granted leave may file supplemental briefs, if desired, by July 29, 2004. No extension will be granted.

DATED this 21 day of April, 2004.

BY THE COURT:

  
\_\_\_\_\_  
John V. Hendry, Chief Justice

5-6-04  
3:10 PM

IN THE DISTRICT COURT OF MORRILL COUNTY, NEBRASKA

SPEAR T RANCH, INC.,

Case No. CI 02-40

Plaintiff,

COPY

v.

ORDER  
GRANTING DEFENDANT'S  
MOTION FOR SUMMARY JUDGMENT

NEBRASKA DEPARTMENT OF  
NATURAL RESOURCES,

Defendant.

FILED April 28 2004 1:32 PM  
Marilyn Wimmer  
Clerk District Court - Morrill County, NE

THIS MATTER came on for hearing upon Defendant's Motion for Summary Judgment. A hearing was held on April 19, 2004, at which time various exhibits were offered by the parties and received into evidence without objection by either party.

The Court, having heard the arguments of counsel, read the briefs of the parties, reviewed the evidence as well as its file herein, and being otherwise fully advised in the premises, finds as follows:

I.

Summary judgment is appropriate when the pleadings and the evidence admitted at the hearing disclose that there is no genuine issue as to any material fact, or as to the ultimate inferences that may be drawn from those facts, and that the moving party is entitled to judgment as a matter of law. *Zannini v. Ameritrade Holding Corp.*, 266 Neb. 492, 497, 667 N.W.2d 222, 228 (2003); *Hamilton v. Nestor*, 265 Neb. 757, 659 N.W.2d 321 (2003). The purpose of summary judgment is to:

pierce the allegations made in the pleadings and show conclusively that the controlling facts are other than as pled, and thus resolve, without the expense and

delay of trial, those cases where there exists no genuine issue as to a material fact or as to the ultimate inferences to be drawn therefrom, and where the moving party is entitled to judgment as a matter of law.

*Zannini*, 266 Neb. at 499, 667 N.W.2d at 229.

## II.

Plaintiff Spear T Ranch ("Plaintiff") brought suit pursuant to the provisions of the State Tort Claims Act, Neb. Rev. Stat. §§ 81-8,209 through 81-8,235 (1996 and Cum. Supp. 2000) against the Nebraska Department of Natural Resources ("Defendant"). The basis for the Plaintiff's suit is the alleged negligence of the Defendant in failing to protect Plaintiff's surface water appropriations from Pumpkin Creek by allowing uncontrolled ground water irrigation to deplete Pumpkin Creek. Plaintiff further contends the Defendant was negligent in failing to follow statutorily-proscribed provisions for determining priority rights for the use of water in the Pumpkin Creek basin. Plaintiff's final cause of action is for inverse condemnation. The Plaintiff is seeking recovery of damages for lost crops, loss of aesthetic value, loss of surface water appropriation, and an overall decrease in the value of the land.

## III.

The Defendant has filed a Motion for Summary Judgment asserting four grounds. First, that the Plaintiff's claim is barred by the statute of limitations pursuant to Neb. Rev. Stat. § 81-8,227(1). Second, that Nebraska law does not place a duty on the Defendant to protect surface water appropriators from the effects of ground water irrigation. Third, that even if the Court were to find that the Defendant had a duty to protect surface water appropriators from the effects of ground water irrigation, such claims are not appropriate under the State Tort Claims Act because any action or inaction on the part of the Defendant was the result of the exercise or failure to exercise a discretionary function or was based on the Defendant's issuance or failure to

deny water right permits. And finally, that summary judgment is appropriate because the Plaintiff has failed to exhaust available administrative remedies, prior to seeking judicial review, and therefore the Court lacks subject matter jurisdiction.

The Defendant also sought an Order from the Court that the Plaintiff's Third Cause of Action for inverse condemnation, in the First Amended Petition, has been previously, and still is, dismissed by reason that the Court sustained the Defendant's Demurrer as to the Third Cause of Action on the original Petition filed by the Plaintiff.

#### IV.

Defendant's Motion for Summary Judgment is **denied** as to the Defendant's first claim, that the Plaintiff's claim is barred by the statute of limitations pursuant to Neb. Rev. Stat. § 81-8,227(1).

Defendant's Motion for Summary Judgment is **granted** as to the Defendant's second claim, that Nebraska law does not place a duty on the Defendant to protect surface water appropriators from the effects of ground water irrigation.

Defendant's Motion for Summary Judgment is **denied** as to the Defendant's third claim, that even if the Court were to find that the Defendant had a duty to protect surface water appropriators from the effects of ground water irrigation, such claims are not appropriate under the State Tort Claims Act because any action or inaction on the part of the Defendant was the result of the exercise or failure to exercise a discretionary function or was based on the Defendant's issuance or failure to deny water right permits.

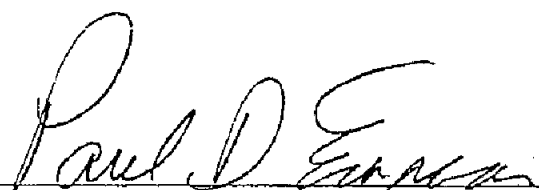
Defendant's Motion for Summary Judgment is **denied** as to the Defendant's fourth claim, that the Plaintiff has failed to exhaust available administrative remedies, prior to seeking judicial review, and therefore the Court lacks subject matter jurisdiction.

Finally, the Defendant's Motion for an Order dismissing the Plaintiff's Third Cause of Action for inverse condemnation, in the First Amended Petition, is **granted**.

IT IS THEREFORE, ORDERED, ADJUDGED, AND DECREED that the Defendant's Motion for Summary Judgment ought to be and hereby is **granted**. The Plaintiff's First Amended Petition is dismissed with prejudice.

DATED this 27<sup>th</sup> day of April, 2004.

BY THE COURT:

  
\_\_\_\_\_  
Honorable Paul D. Empson  
District Court Judge



# Pumpkin Creek Watershed Groundwater Development vs. Surface Water Supply

