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## Grundy v. Brack Family Trust, 213 P.3d 619 (Wash. Ct. App. 2009)

John McKee

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over the past 150 years, it has retained its character as a natural waterway beginning in the foothills and flowing into the Wilson River) improperly contradicts the ALJ's findings. The court concluded, however, that a preponderance of the evidence supported the factual finding. In response to Gienger's contention that the department improperly rejected and modified the ALJ's factual findings in concluding the creek was not a drainage ditch, the court stated that the question of whether the creek was a drainage ditch under administrative rules and section 196.905(6) is a legal issue as opposed to a factual issue. Thus, any modification on that issue was not a modification of ALJ's findings of historical fact. The court clarified that its function is to review the agency's conclusions for errors of law.

In his second and third assignments of error, Gienger argued that the department's final order contradicted section 196.905(6) (which exempts structures such as drainage ditches from permit requirements) as well as the department's handbook on regulations relating to drainage ditches. Pursuant to the plain meaning of the statute and the definition of "structure" in the administrative rule, however, the court affirmed that the channelized stream is a natural waterway and not a drainage ditch. In order to be a drainage ditch under the section 196.905(6) exemption, the creek must result from manual excavation with a design to remove water, instead of resulting from natural causes. The court found the department's application of the administrative rules plausible and consistent with the wording of the rules and section 196.905(6).

Lastly, in his fourth and fifth assignments of error, Gienger asserted that the department wrongly concluded that neither of the exemptions in sections 196.905(3) or (4) applied to his removal of material from the creek. The court, nevertheless, agreed with the department that these exemptions are inapplicable. Although Gienger's property is a "converted wetland" under section 196.905(3) and a "prior converted cropland" under section 196.905(4), the court determined that the exemptions did not apply to removing material from the banks of a stream itself.

Accordingly, the Oregon Court of Appeals affirmed the department's final order.

*Todd Likman*

## WASHINGTON

**Grundy v. Brack Family Trust, 213 P.3d 619 (Wash. Ct. App. 2009)** (holding that (1) the "common enemy" doctrine exempting property owners from liability for property damage due to surface water diversions does not apply to seawater; and (2) damage from seawater trespass is a cause of action for a civil tort of intentional or negligent trespass).

This case involves next-door neighbors Calvin and Joyce Brack ("Brack") and Evelyn Grundy ("Grundy"), shoreline property owners

with estates abutting the seawaters of the Puget Sound. Both properties include bulkheads to help control waterfront wave forces. In 1999, Grundy brought a nuisance claim in the Thurston Superior Court after Brack raised his bulkhead from 18 to 21 inches. Grundy complained that increased wave splash and sea spray caused by the taller bulkhead deposited debris and yellowed the grass on a portion of Grundy's property. The trial court dismissed the action on summary judgment, but ignored the "common enemy" doctrine, ruling that although Brack had a duty to avoid injury to Grundy, the damage was too minor to survive summary judgment.

The common enemy doctrine developed in England in 1828 as a response to seawater flooding, and supported the right to protect one's property from the "common enemy" of excess surface water. In its strictest form, the doctrine allows property owners to divert or dispose of surface waters from their property without any liability for damages to their neighbors. In 1896, the Supreme Court of Washington adopted this doctrine in *Cass v. Dicks*, and for over one hundred years the case law silently encompassed the strict doctrine, protecting property owners from liability to neighbors for property damage caused by surface water and seawater diversions. During the twentieth century, the doctrine fell out of favor in most states. Although Washington now recognizes a "due care" exception to the common enemy doctrine, it remains one of only twelve states still applying the doctrine in some form.

In 2003, the Court of Appeals of Washington, Division Two affirmed the superior court decision in part, but held that the trial court erred because the common enemy doctrine immunized Brack from liability from protecting his land from seawater trespass. The Washington Supreme Court then reversed the appellate decision in 2005, ruling that while the common enemy doctrine still applied to tributary surface waters, it did not apply to seawater. The supreme court based this decision on a definition of surface water as "a source characterized by an inability to maintain its identity and existence as a body of water." The ruling distinguished seawater from surface stream diversions. The supreme court reversal removed Brack's common enemy doctrine protection, allowing common law seawater nuisance torts for the first time in Washington state history.

On remand, Grundy responded by adding trespass by water and illegal diversion claims. In 2007, the trial court determined that Brack had made an illegal diversion without considering consequences to Grundy. However, because of the de minimus damages, the trial court declined to weigh intentional trespass factors to determine whether Brack knew or should have known that raising their bulkhead would cause damage to Grundy's property. Instead, the trial court equated the water trespass with a nuisance claim, ruling that Brack committed a harmless negligent trespass.

On appeal from the second trial, the court of appeals disagreed with the trial court's analysis that Brack committed negligent trespass. Holding that the trial court erred in characterizing the trespass as a

nuisance claim, the court of appeals went on to apply intentional trespass tort factors from Washington state common law, agreeing with the trial court that Brack did not intentionally or wrongfully cause damage to Grundy's property, but reversing the trial court's trespass conclusion. The court of appeals ruled that Brack's bulkhead diversion was not intentional trespass because the intrusion did not cause significant injury or harm to a neighbor's property. The decision required remand to reflect that Brack did not commit an intentional trespass, but left open the future question of how to analyze duty of care for the newly created tort of negligent seawater trespass.

*John McKee*

## WYOMING

**William F. West Ranch, LLC v. Tyrrell, 706 P.3d 722, (Wyo. 2009)** (refusing to grant a declaratory judgment to property owners who attacked state administration of coal bed methane water because plaintiffs failed to connect specific damage to state practice and could have pursued administrative remedies).

The plaintiffs, William F. West Ranch, LLC ("West") and the Turner family ("Turner"), are property owners in the Powder River Basin. They sought a declaratory judgment against the State Engineer and the Board of Control ("State") challenging the administration of underground water produced and stored to extract coal bed methane ("CBM"). West and Turner claimed the State was not regulating CBM water production in conjunction with state law and that their land had been damaged by CBM water. The District Court of Laramie County dismissed the action holding it was not justiciable. West and Turner appealed, and the Wyoming Supreme Court affirmed. The dispositive issue was whether the plaintiffs sufficiently articulated a justiciable claim.

The court characterized the claims of the property owners as four distinct categories. First, West and Turner contend the State violated Wyoming's Constitution by (1) not considering the public's interest in its management of CBM water, and (2) not providing notice to neighboring landowners when issuing permits. Second, West and Turner contend the State management of CBM water violated state statutes. Specifically, by not employing the concepts of beneficial use and prevention of waste, the State did not act in the public's interest when granting permits to CBM lease holders. Third, in what the court terms a 'restatement' of the first claim, West and Turner claimed that the State violated their due process rights. The court inferred that this referred to the fact that neighboring landowners did not receive notice and were not given an opportunity to be heard when the State considered the permits. Fourth, West and Turner claimed that the State violated the Wyoming Administrative Procedures Act by not promulgating rules specific to CBM wells and reservoirs.

The court looked to the Uniform Declaratory Judgments Act to determine whether it had jurisdiction. Subsequently, it used its own