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In re Application of Osage Water Co., 51 S.W.3d 58 (Mo. App. 2001)

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Minn. Stat. § 103E.715(4)(a) for the proposition that repairs should not be made if the cost of repair exceeds the total benefits the landowners received. Citizens estimated present day repair costs at \$400,000 to \$500,000, which greatly exceeds the 1909 determination that the benefits to the landowners were \$34,053. Citizens acknowledge that if the benefits were redetermined to reflect modern day values, the repairs would probably be a feasible remedy. The court determined, however, that Citizens were erroneous in their reliance on § 103E.715(4)(a) because the cap on the price of the repair project only applies when 26 percent of the landowners affected sign a petition for repairs. An alternative provision authorizes repair regardless of cost when the drainage authority determines that the repairs are necessary for the best interests of the affected property owners, thus the remedy is available to Citizens.

Citizens further contend that it would be futile for them to petition for repair of the ditch because respondents will not issue the necessary wetlands replacement and public water permits. However, the court disagreed, noting that respondents have not made a final decision on the matter. Additionally, Citizens sought a determination that the ditch repair was exempt from certain wetlands replacement requirements and public water mitigation costs, and sought determination of the applicability of various other water management related rules. Citizens argued that the district court erred in declining to address the issue, but the court ruled that issues of this type should be determined through the administrative process of a petition for repair. Thus Citizens failed to exhaust their administrative remedies, or show that doing so would be futile.

Makayla A. Shannon

MISSOURI

In re Application of Osage Water Co., 51 S.W.3d 58 (Mo. App. 2001)
(holding because the city failed to give notice to Osage Water Company of its petition for judicial review of Public Service Commission's decision to permit water company to provide water to subdivision, the trial court lacked jurisdiction to hear the cause).

This appeal arose out of a dispute over Osage Water Company ("Water Company") supplying water to the Parkview Bay Subdivision ("Parkview") in the city of Osage Beach, Missouri ("Osage"). Osage had earlier approved a plan allowing the Water Company to supply water to Parkview providing that the Water Company met certain design standards set forth in the Code of Ordinances. A few months later, Osage withdrew its approval stating that the water company had failed to meet the design standards for the water franchise ordinance.

In response, the water company filed an application for a "certificate of public convenience and necessity" with the Public

Service Commission (“Commission”) to provide public utility water service to Parkview. The commission decided the water company was not required to obtain the city’s franchise or consent to provide water to Parkview because the water company was not going to use public rights of way to provide its service. Osage had chosen not to intervene in the Commission hearings but later filed an application for rehearing with the Commission. That application was denied and Osage then filed a petition for writ of review in the circuit court. Osage served a summons and copy of the petition to the Commission, but not to the Water Company.

The circuit court awarded judgment to Osage. Thereafter, the Water Company filed an application to intervene in the proceeding, a motion to set aside the judgment, a motion to dismiss the petition for review, or in the alternative, a motion for rehearing, based on the fact they were not given notice of the action as an interested and effected party under Rule 100.01, Mo. Ann. Stat. § 386.510 (West 2000).

The Court of Appeals of Missouri, Western District held the statutory provision governing judicial review of the Public Service Commission’s orders or decisions was inadequate and constitutionally defective as to the notice requirement, and had to be supplemented by statute requiring notice to be served on all parties. The court therefore quashed the order of the circuit court for lack of jurisdiction.

Sarah A. Hubbard

MONTANA

Collins v. Swinger, No. 01-157, 2001 MT 265N (Mont. Dec. 17, 2001) (affirming district court’s decision that an easement by implication was created where there was (1) separation of title; (2) a long-standing, obvious use before the separation, which shows that the use was meant to be permanent; and (3) necessity of the easement for the beneficial enjoyment of the land granted or retained).

Keith and Marie Swinger (“Swingers”) appealed a decision of the district court for the Fourth Judicial District in Missoula County, Montana, granting Gary Collins’ (“Collins”) request for injunctive relief, damages, and attorney’s fees. The district court had ordered injunctive relief to allow Collins access to his water rights to Hayes Creek on the Swingers’ property, by right of easement by implication. The Supreme Court of Montana affirmed that decision.

In the appeal, the Swingers and Collins disputed two issues. First, the parties disagreed over who owned water rights from Hayes Creek, a tributary of the Bitterroot River in Missoula County. The second dispute hinged on whether the Swingers interfered with Collins’ ditch easement from Hayes Creek and his secondary easement to reach the ditch diversion point on the Swingers’ property. The Montana